VETERANS LAW JOURNAL

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Message from the Chief Judge

Summer greetings, colleagues,

Well, FY 2024 is shaping up to be one of the busiest in the Court's history. In May 2024, we received the second highest number of monthly appeals ever—832 (and possibly a few additional appeals postmarked in May will be received sometime in June). In April 2024, we received more appeals than any other April in the Court's history. In fact, this fiscal year we've received more appeals each month than were filed in corresponding months the last three years. And with the Board setting a record-high production goal of 111,000 decisions for FY 2024, the trend of increased CAVC appeals numbers isn't likely to slow soon. As you may recall, in anticipation of rising appeals numbers, the Court requested and Congress approved appropriations for additional judgeships. We continue to work with Congress on that authorization request, and we remain optimistic.

In other news, the 2023 Bar & Bench Conference Committee—consisting of Jillian Berner, Glenda Herl, David Quinn, Jenna Zellmer and Judges Allen and Falvey—recently issued the conference after-action report. Outstanding job, and a thank you to committee members, especially Glenda Herl, who worked especially hard to pull together and organize large amounts of material for the report. If you haven't already, go ahead and consume the report, which is available on the Bar Association website, http://cavcbarassociation.org. There are summaries of attendees' recommendations for improving Court practice and a transcript of the AMA session, including the panel discussion and questions-and-answers, among other things.

In addition to issuing more be-prepared-to-discuss orders ahead of oral argument, the Board of Judges has resolved to include more parentheticals describing cited documents so that VA adjudicators and Board members and attorneys can more easily identify those documents on remand. We've referred some conference suggestions to Court-related groups, such as the Rules Advisory Committee (RAC) and the Judicial Advisory Committee (JAC) for further investigation and development. For example, we've asked the RAC and the JAC to work on improvements to the Court's substitution process and possible clarifications and

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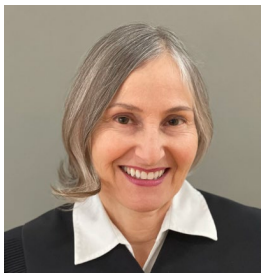
amendments to Practice & Procedure Rule 27.1, Motion for Initial Review by Panel. Other administrative matters, including issues with scheduling Rule 33 conferences and the process for joint motions for remand, have been referred to Clerk of Court Tiffany Wagner and the Court's Central Legal Staff. We'll keep you posted as we consider and implement (or reject) the panoply of Bar & Bench Conference recommendations. Thanks again to the conference committee and all volunteers and attendees for working together and sharing thoughtful ideas.

One other event of note occurred this past spring. In April, the Court's Judges attended a judicial retreat in Charlottesville, Virginia. Led by Professor Chad Oldfather of Marquette University Law School, the Judges participated in excellent sessions about judging and theories of judicial decision-making. Judges then presented on topics such as collegiality, Bar & Bench Conference items for quick action, hybrid work, chambers operations, accommodating appeal fluctuations, judicial autonomy, and future-of-the Court ideas. Judge Toth chaired the retreat planning committee, consisting of Judge Falvey, Judge Schoelen, Counsel to the Board of Judges Alice Kerns, Judge Toth's Confidential Assistant Isabel Armstrong, and I—and a fruitful time was had by all attendees.

A last reminder—the Court's 2024 Judicial Conference and Gavel Passing is fast approaching—early registration opens mid-July. The Conference will be held at the National Press Club, September 19-20, 2024. Looking to see you there, if not before.

Best,

Meg



Message from the CAVC Bar Association President

Dear colleagues,

Another quarter has flown by! As we gear up for the summer months, here are some events from your Bar Association Board of Governors: on June 30th, the Bar Association will be cleaning the Korean War Memorial in Washington, D.C., which commemorates Korean War veterans who fought against North Korea's invasion of South Korea in 1950. Details will be emailed soon, if they are not already out by the time this volume is published. We hope you can join us for this meaningful act of service.

The next program will be July 25th, and will be a follow-up to our February program on bringing more finality to Board decisions. After the February panel, there was significant interest in hearing more about this topic, so we hope to delve deeper into how the goal of finality is playing out at the CAVC and the Board. Details for a post-panel happy hour are TBD.

Our final programming events of the fiscal membership year will be part of the CAVC's 16th Judicial Conference in Washington, D.C., on September 19 and 20. The Bar Association is honored to be hosting the reception that will take place after the first day of the conference. We will also be recognizing our incoming and outgoing officers and facilitating the conference's 2-hour ethics session.

I want to take a moment and thank the incredibly hard-working Board of Governors for all that they do to make this organization successful. We strive to provide high-quality programming for our members, and it would not be possible without the efforts of our governing team. They are also responsible for behind-the-scenes administrative work, such as updating the bylaws and maintaining our non-profit status certifications. I am truly honored to serve

alongside everyone on the Board of Governors: Jillian Berner, James Drysdale, Tom Susco, Christopher Casey, Caitlin Biggins, Meghan Gentile, John Juergensen, Keith Krom, Morgan MacIsaac-Bykowski, Andrea McDonald, Emma Peterson, Renee Reasoner, and Chris Wysokinski.

Last, elections for our Board of Governors and officers will be occurring later this summer. If you are interested in running for office, I encourage you to express your interest when we put out the call for nominations via email. Please don't hesitate to reach out with any questions about the different positions.

Best Regards,

Ashley Varga
President, CAVC Bar Association

Summary of the Seventh Annual VA Update Program

By James Drysdale

On April 24, 2024, the CAVC Bar Association held its seventh annual "VA Update" program. This program has become a fixture of the bar association's annual programming calendar, and it is always eagerly anticipated and well attended. The panel discussion allowed members of the bar to hear directly from VA leaders about a broad range of issues affecting the various program offices and components of the Department of Veterans Affairs.

This year, the program was held in a hybrid format, reinstating an in-person component after having been held as a completely virtual event for the past several years. Special thanks to the VA Office of General Counsel, Court of Appeals Litigation Group (CALG), for hosting the in-person program and providing technical assistance for successful livestreaming and recording. Over 200 people participated in real time, either by attending in-person or by livestreaming the event as it occurred. The panel was able to take all questions asked from both the in-person audience and online participants. If you were unable to attend in person or livestream this informative panel discussion, the recording is available to view any time at the CAVC Bar Association's website: cavcbarassociation.org/seventh-annual-va-update-program.

The distinguished panelists included:

- David Barrans, Chief Counsel, VA Office of General Counsel, Benefits Law Group (BLG)
- Susan Blauert, Chief Counsel, VA Office of General Counsel, Health Care Law Group (HCLG)
- Michael Edsall, Assistant Director of Operations, Veterans Benefits Administration (VBA)
- Mary A. Flynn, Chief Counsel, VA Office of General Counsel, Court of Appeals Law Group (CALG)
- Richard J. Hipolit, Acting General Counsel, Department of Veterans Affairs
- John Z. Jones, Veterans Law Judge, Acting Chief Counsel, Board of Veterans' Appeals (BVA)

James Drysdale moderated the panel discussion. Over the course of the approximately 75-minute program, the panelists covered wide range of topics, including the following:

- Acting General Counsel's Update: VA continues efforts to fulfill the Secretary's priority to expand benefits for veterans and build trust in VA among veterans. VA has undertaken strategic outreach efforts to Iraq and Afghanistan Veterans about recent changes in the law and to offer transition assistance. VA has also undertaken strategic outreach efforts to Native American veterans regarding potential benefits eligibility and options for representation in VA claims and appeals. OGC budget constraints for fiscal year (FY) 2025 will not allow additional hiring, which imposes while attempting to expand benefits and increase Veteran enrollment in VA healthcare. OGC continues to monitor the potential effects of pending litigation in the Federal district and appellate

courts, and in the Supreme Court of the United States, regarding character of discharge determinations, expansion of gender-affirming care, expansion of in vitro fertilization services for veterans, racial equity in claims adjudication, payment for ambulance services, VA-guaranteed home loans and the new VA Special Purchase (VASP) program to avoid foreclosures, National Association of Realtors litigation and how that may affect VA regulations, Emergency Medical treatment and Labor Act (EMTALA) and how challenges to the supremacy of federal law may affect VA's provision of abortion services, the potential overruling of *Chevron*, and litigation regarding homelessness.

- CALG Update – Personnel is now at 163 full-time equivalent (FTE) employees, which includes 23 supervisors, 110 staff attorneys, and 30 support staff. CALG is seeing an increase in AMA cases, including issues of first impression, coming before the Court. CALG has an internal AMA workgroup and participates in an intra-agency AMA workgroup to assess and improve the AMA appeals process.

- BLG Update: BLG has been working with VBA on regulations to implement the PACT Act and working with VBA and VHA to set up processes for ongoing review of new presumptive conditions under Title II of PACT Act. Productivity in processing accreditation applications has improved, but the volume of applications has also continued to increase (between 3,000 and 3,500 applications processed last year). There are currently about 14,000 total VA accredited representatives. In FY23, BLG reviewed 296 attorney fee matters and returned 2.3 million in unreasonable fees to claimants and received approximately 600 new attorney fee matters. BLG proposed new default rules in December 2023 for division of fees where multiple representatives are involved. In FY23, BLG received 65 complaints about representative with 31 about unaccredited representatives. BLG participated in Congressional oversight hearing about unaccredited representatives and issued 19 cease-and-desist letters. However, enforcement relies on outside entities such as DOJ and state law enforcement. BLG has been engaged in outreach to Native American communities to increase opportunities for representation in VA claims and appeals. The Tribal Representation Expansion Project has presented to tribal governments and tribal consortiums and, so far, VA has recognized 2 tribal VSOs. BLG is also prioritizing IT improvements for accreditation to allow for online filing of initial applications and updating information, etc.

- HCLG Update: HCLG has recently been involved in several cases regarding the CAVC's jurisdiction. In *Beaudette*, the Federal Circuit recently held that CAVC has statutory authority to review procedural eligibility determinations only but not medical determinations under the Program of Comprehensive Assistance for Family Caregivers (Caregiver Program). HCLG also administers the Supportive Services for Veteran Families (SSVF) grants that were at issue in the *Purpose Built Families Foundation, Inc.,* case that was decided by CAVC. Overall, HCLG has been working to expand eligibility to healthcare where statutory authorities exist to do so, and it has done so with regard to in vitro fertilization and PACT Act expansions of eligibility for healthcare. HCLG continues to monitor pending litigation outside VA for potential impacts on the Department.

- BVA Update: The Board is commemorating 90th Anniversary this year. In FY23, BVA adjudicated and dispatched 103,245 claims. The goal for FY24 is 111,000 claims. Personnel for FY23 is at an all-time high of 1,374 FTE, which includes 132 Veterans Law Judges and 983 staff attorneys. This is an approximate 12% increase in personnel, which has allowed increased

production. The goal is to have 8 attorney per judge, so continued growth and hiring is anticipated. Retention has also improved, which helps quality and productivity. In FY23, the Board's inventory went from 25% AMA appeals to 42% AMA appeals, and it is currently at 49% appeals. Of pending appeals 39% are in the direct review lane, 19% are in the evidence submission lane, and 42% are in the Board hearing lane. The Board and VBA's Office of Administrative Review (OAR) hosted AMA summit to discuss lessons learned about AMA. The results show AMA cases have 20% fewer Board remands and 10% higher grant rates as compared to Legacy appeals. Priorities for the Board are to improve communications by examining Board letters to ensure that they are Veteran friendly and understandable. The Board is also working to respond to a GAO report about implementing quality review recommendations.

- OAR Update: In the last quarter of FY23, OAR closed 2 Inspector General reports, one on ensuring complex appeals are decided by appropriate staff and one regarding a systems error that affected establishment of claims. OAR also provided a Government Accountability Office (GAO) report that compared AMA to Legacy, statistics, and which clearly showed the advantages of the AMA system. Legacy appeals inventory currently stands at just under 45,000 appeals. OAR is seeing increased use of the higher-level review option (HLR). So far in FY24, OAR production is up 35% as compared to FY23. V-signal surveys through the VA Veteran's Experience Office show customer satisfaction is high when using the HLR informal conference process. Improvements are underway to develop a system to allow self-scheduling of informal hearing conferences with a DRO. Increasing efforts are also being made to better communicate statistics to veterans so they can understand where they stand within the larger VA process. Hiring continues through authorizations made through the PACT Act. OAE added 17 new FTE for data analytics and forecasting to ensure resource allocation and training are responsive to and can address trends identified.

With the wealth of information provided by VA leaders about the issues affecting programs and decision making at the Department of Veterans Affairs, it is easy to understand why the "VA Update" program has become a fixture of the bar association's annual programming calendar and is always eagerly anticipated and well attended. Again, if you were unable to attend or watch the livestream of this program, a recording is available for viewing at the CAVC Bar Association's website. The CAVC Bar Association sincerely thanks the panelists for their time and insights and for their support of the CAVC Bar Association.

James Drysdale is a Senior Appellate Counsel for the VA Office of General Counsel, Court of Appeals Litigation Group. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Supreme Court Reverses the Federal Circuit, Expanding Access to Educational Benefits for Post-9/11 Veterans

by Eliot Kersgaard

Reporting on *Rudisill v. McDonough,* 601 U.S. 294 (2024).

In *Rudisill*, the Supreme Court of the United States agreed with two dissenters from the U.S. Court of Appeals for the Federal Circuit and reversed the en banc lower court. *Rudisill v. McDonough*, 601 U.S. 294 (2024). Joined by every Justice but Thomas and Alito, who dissented, Justice Jackson delivered the

opinion holding that a veteran with separate entitlement to educational benefits under both the Montgomery GI Bill and the Post-9/11 GI Bill may receive a full 48 months of educational benefits when they decide to start using their Post-9/11 benefits before their Montgomery benefits are completely used up. Justice Kavanaugh, joined by Justice Barrett, wrote separately to emphasize that the majority opinion did not rely on the "pro-veteran's canon" and to question the propriety of that canon. In his dissent, Justice Thomas defended a different interpretation of the statutes and also criticized the pro-veteran canon.

First enacted in 1984, the Montgomery GI bill provides educational benefits for servicemembers who serve at least three years of continuous active duty and first enter service between July 1, 1985, and September 30, 2030. 38 U.S.C. § 3011. Upon serving three years in active duty, the servicemember is entitled to 36 months of Montgomery benefits. 38 U.S.C. §§ 3013(a)(1), 3013(c)(1). The Post-9/11 GI Bill was enacted in 2008 to provide greater benefits to veterans who served in the post-9/11 era. For entitlement to Post-9/11 benefits, servicemembers must serve three years of active duty starting after 9/11. *Id*. § 3311(b). As with the Montgomery bill, servicemembers entitled to Post-9/11 benefits may receive 36 months of educational benefits. 38 U.S.C. § 3312(a).

As Justice Jackson explains, "Because the Montgomery and Post-9/11 bills cover overlapping service periods, eligibility for benefits under these two bills overlaps as well." The Post-9/11 bill clarifies that a veteran whose service would entitle them to both Montgomery and Post-9/11 benefits can't receive compensation under both at the same time but "shall elect" under which bill to receive benefits. 38 U.S.C. § 3322(a). Because the Post-9/11 bill offers greater benefits, the natural choice for a veteran who served for one three-year period would be to elect to receive benefits under that bill. But as the Post-9/11 bill did not take effect until August 1, 2009, there is an eight-year period when veterans could have earned Post-9/11 benefits, but only been able to use Montgomery benefits. To address this overlap, the Post-9/11 bill also provides that a veteran who has used some Montgomery benefits and whose service would entitle them to both Montgomery and Post-9/11 benefits "may elect" to switch from Montgomery to Post-9/11 benefits. 38 U.S.C. § 3327(a). When such an election is made, the veteran's Post-9/11 benefits are limited to the veteran's unused number of months of Montgomery benefits. 38 U.S.C. § 3327(d)(2).

In addition to the provisions that address overlapping benefits periods, both the Montgomery and the Post-9/11 GI Bills are also subject to Section 3695, which limits the total period that a veteran may receive GI education benefits to 48 months. 38 U.S.C. §§ 3695(a), 3013(a)(1), 3312(a). Section 3695 is implicated when a veteran, through lengthy service, earns two separate entitlements to benefits. For example, a veteran who served from 1996 to 1999 and then from 2002 to 2005 would earn a Montgomery entitlement for the first period, and a Post-9/11 entitlement for the second period. The veteran could not use the full 36 months of benefits from each entitlement but would be capped by Section 3695 at 48 months.

One veteran affected by the overlap between the Montgomery and the Post-9/11 benefits eligibility periods is James Rudisill, who, in three periods of military service, spent eight years in active duty in the U.S. Army. By the end of his second period of service in the early 2000s, Mr. Rudisill was entitled to 36 months of Montgomery benefits. After his second period of service, he used around 25 months of Montgomery benefits to attend college, graduating in 2007. Then, he re-entered service for a third period. By the end of his third enlistment, he was also entitled to 36 months of Post-9/11 benefits.

After his third period of enlistment, he sought to use his Post-9/11 benefits up to the 48-month cap provided under Section 3695. This would give him roughly 23 months of Post-9/11 benefits, which he wanted to use for graduate school. VA indicated that he would be limited to around 11 months of benefits under Section 3327(d)(2), the provision providing that a veteran who wants to switch from one benefit to the other "may elect" to use Post-9/11 benefits instead of Montgomery benefits and caps

the 9/11 benefits at the number of months of unused Montgomery benefits. He responded that 3327(d)(2) was not triggered because he was not using a 3327(a) election to switch from Montgomery to Post-9/11 benefits, but merely seeking to begin using the Post-9/11 benefits that he earned separately from his Montgomery benefits.

The Supreme Court sided with Mr. Rudisill, overturning the 10-2 en banc decision of the Federal Circuit. Under *Rudisill*, a veteran who served for only 36 months after 9/11 is entitled to 36 months of benefits and may choose whether to use Montgomery or Post-9/11 benefits (the Post-9/11 benefits being superior). If such a veteran has already used some Montgomery benefits, they may make a 3327(a) election to switch to Post-9/11 benefits for the remainder of their 36-month eligibility.

On the other hand, a veteran like Mr. Rudisill who served for 72 months after 9/11, including 36 continuous months, may do as Mr. Rudisill did and abandon partially used Montgomery benefits to use their Post-9/11 entitlement, up to the 48-month total cap. Alternatively, such a veteran could use 36 months of Post-9/11 benefits and then use 12 months of Montgomery benefits. The same would be true for a veteran who served 36 continuous months between 1985 and 2001—earning Montgomery benefits—and then another 36 months post-9/11, earning Post-9/11 benefits.

Because the details of the Court's statutory interpretation are unique to the interaction between the Post-9/11 and the Montgomery service period overlaps—an issue the Court has closed—they are not repeated here. Instead, the remainder of this summary addresses comments in the majority's dicta, the concurrence, and the dissent about the pro-veteran canon. The concurrence and the dissent represent four members of the Court eager to admonish lower courts' use of the pro-veteran canon.

The majority held that the statutes were unambiguous. In the second-to-last sentence of the opinion, Justice Jackson added, "If the statute were ambiguous, the pro-veteran canon would favor Rudisill, but the statute is clear, so we resolve this case based on statutory text alone."

Justice Kavanaugh, joined by Justice Barrett, used his three-page concurrence "to note some practical and constitutional questions" that would be presented by using the pro-veteran canon to resolve an ambiguous statute.

The pro-veteran canon is a substantive canon because it directs courts to favor a particular policy outcome. "Under the veterans canon," Justice Kavanaugh writes, "statutes that provide benefits to veterans are to be construed 'in the veteran's favor.'" (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994). He states that the pro-veteran canon, while sometimes mentioned in passing as "icing on a cake already frosted," has "apparently not mattered—in other words, has not affected the result—in any of this Court's past decisions … ." Nevertheless, the Court's "reflexive repetition of the canon" has led lower courts like the Federal Circuit "to rely on the canon in a way that this Court has not." He then described two concerns he has with the canon.

First, because spending is a zero-sum game, a canon that favors one group of spending recipients "creates significant tension" with the process of enacting spending laws. In short, "The spending process in Congress requires hard choices with painful tradeoffs. Judges have no principled way to make those choices or weigh those tradeoffs." And second, in Justice Kavanaugh's view, judges lack constitutional authority.

Justice Thomas, joined by Justice Alito, spent most of his dissent laying out an alternative interpretation of the statutory provisions that would result in a win for the government. Near the end of his lengthy opinion, though, he echoed Justice Kavanaugh's concerns about the veteran's canon, stating that "substantive canons such as the veteran's canon rest on uncertain foundations." He concludes: "I question whether this purported canon should ever have a role in our interpretation."

Eliot Kersgaard is a May 2024 graduate of the University of Florida Levin College of Law. Eliot is now a law clerk in the United States District Court for the Middle District of Florida in Jacksonville, Florida.

Federal Circuit Interprets Regulation to Allow Multiple SMC Increases

by Andrew R. Penman

Reporting on *Barry v. McDonough*, 101 F.4th 1348 (Fed. Cir. 2024).

In a 2-1 decision, the Federal Circuit reversed the Court of Appeals for Veterans Claims (CAVC) regarding the interpretation of a special monthly compensation (SMC) rate-increasing regulation— 38 C.F.R. § 3.350(f)(3).

Section 3.350(f)(3) provides in relevant part: "additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114 . . . ."

The issue on appeal is whether this regulation limits the number of SMC increases that can be provided to a veteran. The Federal Circuit holds that it is a mandatory entitlement that can, subject to a statutory cap, apply multiple times.

Purple Heart-recipient Daniel Barry receives SMC for amputation of his right leg, loss of use of his left foot, and other conditions related to his legs and feet. His SMC was increased once under § 3.350(f)(3), but he does not receive SMC for his PTSD disability rated at 70%, bilateral shoulder arthritis rated at 60% and 50%, a left eye disability rated at 30%, left eye disfigurement rated at 30%, among several other service-connected disabilities. Mr. Barry appealed to the Board for an SMC increase based on his additional uncompensated disabilities. The Board denied the appeal.

The CAVC had held in a split decision that § 3.350(f)(3) provided for only one SMC increase. The majority reasoned this interpretation was correct because: (1) the text of the regulation contemplated only one increase; (2) the text of the statute authorizing the regulation pointed to the same interpretation; (3) comparing the regulation to other SMC provisions indicated only one increase was available; and (4) more than one increase under § 3.350(f)(3) would render § 3.350(f)(4) superfluous.

The Federal Circuit reversed the CAVC decision, holding that 38 C.F.R. §3.350(f)(3) permits multiple-intermediate-rate SMC increases. After agreeing with the CAVC that the plain language of the regulation did not "conclusively resolve" the issue on appeal, the Federal Circuit turned to the "broader statutory and regulatory context" for its holding. It looked at the interplay between 38 U.S.C. § 1114 and 38 C.F.R. §3.350, as well as the fact that the VA knows how to draft benefit limiting regulations. The absence of such a limitation in 38 C.F.R. §3.350(f)(3) confirms that more than one SMC increase is permitted. Therefore, "as long as Mr. Barry is entitled to an intermediate-rate SMC increase under 38 C.F.R. § 3.350(f)(3), he shall receive it, subject to the explicit [statutory] cap."

Andrew Penman is an appellate attorney with the National Veterans Legal Services Program (NVLSP).

Board Jurisdiction over VHA Caregiver Program Appeals

by Karen McKenzie

Reporting on *Beaudette v. McDonough*, 93 F.4th 1361 (Fed. Cir. 2024).

This precedential U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decision affirmed a U.S. Court of Appeals for Veterans Claims (CAVC)

order granting a writ of mandamus allowing Board of Veterans' Appeals (Board) review of adverse decisions by the Veterans Health Administration (VHA) Program of Comprehensive Assistance for Family Caregivers (PCAFC). The Federal Circuit affirmed that veterans and caregivers have an indisputable right to Board and judicial review of PCAFC decisions regarding eligibility determinations. However, this right does not extend to decisions involving "medical determinations" as to a need for or the appropriateness of specific types of medical care or treatment, such as "whether a particular drug should be prescribed," or a "specific type of physiotherapy should be ordered," which are decisions an attending physician might make.

In 2010, Congress established the Program of General Caregiver Support Services as the core of its Caregiver Support Program. *See* Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, Title I, 124 Stat. 1130, 1132-40 (2010) (principally codified at 38 U.S.C.§ 1720G (Caregiver Act). The crux of the program is to allow veterans with serious illness or injury an opportunity to remain in their homes. The program provides family caregivers training, support, counseling, mental health services, beneficiary travel, respite care, medical care, financial planning, legal services, and a monthly stipend if certain threshold criteria are met. The PCAFC offers advanced clinical support and services for eligible veterans with a serious injury or illness requiring in-person care, among other requirements. 38 U.S.C. § 1720G(a)(3)(A). To participate in the program, an eligible veteran and family caregiver file a joint application to VHA's Caregiver Program. 38 U.S.C. § 1720G(a)(4). After initial approval, a veteran and their family caregiver are periodically reassessed to ensure continued eligibility. 38 C.F.R. § 71.30.

Eligibility for the program is divided into criteria which assess a veteran's needs and those which assess family caregiver suitability to provide care. Assessments focus on whether the veteran requires personal care services because of an ability to perform one or more activities of daily living (ADL), or has a need for supervision, protection, or extensive instruction due to a disability. Caregivers are assessed on whether they meet certain eligibility requirements, and thereafter undergo training to provide in-home care.

In 2015, VA issued a final rule implementing the Caregiver Act, explaining that all decisions under the Act were "medical determinations," and thus, beyond Board jurisdiction. *See* Caregivers Program, 80 Fed. Reg. 1357 (Jan. 9, 2015). VA observed that § 1720G(c)(1), titled "Construction," stated that decisions "affecting the furnishing of assistance or support shall be considered a medical determination." VA determined that this indicates that all PCAFC decisions are "considered a medical determination." In support of this, VA noted that "medical determinations" are not subject to Board jurisdiction under 38 U.S.C. § 7104, or pursuant to an implementing regulation and longstanding regulation that restricts Board review of medical determinations. *See* 38 C.F.R. § 20.101(b) (1992). Thus, VA deemed PCAFC decisions as medical determinations; adverse decisions were framed as clinical disputes reviewable only by a Clinical Appeal Review team. *See* Caregivers Program 80 Fed. Reg. at 1366.

In this case, Jeremy Beaudette served in the U.S. Marine Corps from 2002 to 2012, with five combat tours in Iraq and Afghanistan, where he suffered multiple concussions, which caused traumatic brain injury and he became legally blind. He was medically discharged from service with a 100 percent VA disability rating. Subsequently, in March 2013, he and his wife applied for benefits under the Caregiver Program. Initially, they were found eligible due to his inability to perform ADLs and substantial need for supervision and protection. In October 2017, while recovering from a major surgery, he requested a delay in regular reassessment. VHA denied the request and made an eligibility determination based solely on medical records review. In February 2018, VHA determined that the Beaudettes were no longer eligible for PCAFC. They appealed through the VHA Clinical Appeals process but were denied on the first-level review with a Caregiver Program manager, and the second-level review by the Director of the Sierra

Pacific Veterans Integrated Service Network. The decision was considered final and non-appealable. However, in August 2019, the Beaudettes submitted a Notice of Disagreement appeal to the Board. The Board did not issue a decision or dismiss for lack of jurisdiction. In July 2020, the appellants filed a petition with CAVC for a writ of mandamus seeking an order to permit Board review of PCAFC decisions and to certify a class of similarly situated veterans and caregivers. The Secretary contended that the Caregiver Program is excluded from the Veterans' Judicial Review Act (VJRA) because "medical determinations" are explicitly excluded from Board jurisdiction under 38 C.F.R. § 20.104(b). The Beaudettes argued that this interpretation conflicts with the ordinary operation of the VJRA, and that the mere reference of "medical determinations" in 1720G(c)(1) was not enough to nullify the VJRA Board-review mandate.

A majority of a three-judge CAVC panel agreed, granting the petition, and certified the class. The CAVC decision was discussed in an article by Freda J.F. Carmack, entitled *Adverse Determinations under VA Caregiver Program are Appealable to the Board*, which appeared in volume 2 of the 2021 Veterans Law Journal. The CAVC found 1720G(c)(1) does not insulate the Caregiver Program from judicial review because it does not specifically mention jurisdiction, noting that Congress knows how to limit the Board's jurisdiction because it did so when it established the VA Community Care Program. *See* 38 U.S.C. § 1703(f) (noting that decisions under § 1703 (d) and (e) are subject to the Department's clinical appeals process, and such decisions may not be appealed to the Board.). Furthermore, CAVC noted that two rules of statutory construction weigh in favor of Board review. First, there is a strong presumption in favor of judicial review of actions only overcome by "clear and convincing evidence of intent to withhold" judicial review. Second, to displace one law with another, the intent must be clear—as was the case in the Community Care Program.

Subsequently, the Secretary appealed to the Federal Circuit, arguing that Congress intended that *all* Caregiver Program decisions be exempt from Board review. The Secretary argued that where the statute uses the term "medical determination" it impliedly refers to a regulation precluding Board review of medical determinations, and thus demonstrated Congressional intent to exclude PCAFC decisions from Board review.

The Federal Circuit disagreed and affirmed the CAVC order, noting a strong presumption favoring judicial review of agency decisions. The Federal Circuit found that the Secretary had not met its burden to show that *all* PCAFC decisions were exempt from judicial review. In so doing, the Federal Circuit reviewed the history of judicial review of VA benefit decisions, and statutory language showing Congress was cognizant of how to limit judicial review—including Board jurisdiction—when it passed the Caregiver Act in 2010. The Federal Circuit also determined that the plain language of § 1720G(c)(1) did not express an intent by Congress to prohibit judicial review of all PCAFC decisions. Rather, appellants have a clear and indisputable right to Board review, except as to decisions "affecting the furnishing of assistance and support." The Federal Circuit determined that this language refers only to decisions related to the need for or the appropriateness of specific types of medical care or treatment, such as a "specific type of mental health treatment, or whether a type of respite care for a family caregiver is medically and age appropriate." These decisions would fall under medical determinations which are not subject to Board review. The Federal Circuit noted that many facets of PCAFC decisions do not involve medical determinations, such as preliminary eligibility criteria; VJRA did not preclude judicial review of these issues.

The Federal Circuit noted that VA regulations broadly define decisions that are within the scope of Board review. For example, 38 C.F.R. § 20.101(b)(1992) provides that the Board has jurisdiction over numerous eligibility decisions, such as outpatient treatment, domiciliary care, and other VHA benefits. The Federal Circuit explained that the limiting element of the regulation in effect excluded a narrow type of medical determination which an attending physician may make. Examples provided were of which drug to order, or a type of

physiotherapy, or any other similar medical "judgmental treatment decisions." This is consistent with the fact that the regulation does not designate all PCAFC decisions as medical determinations, only those related to "assistance or support."

The Federal Circuit further explained that 'medical determination' in § 1720(c)(1) is a term of art in VA regulations, and therefore VA is bound by the language in the regulation at the time the Caregiver Act was passed. The Federal Circuit noted that where "Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." At the time the Caregiver Act was passed, the regulation stated that medical determinations are:

> specific types of medical care or treatment for an individual, are not adjudicative matters and are beyond Board jurisdiction. Typical examples of these issues are whether a particular drug should be ordered, and similar judgmental treatment decisions with which an attending physician may be faced.

38 C.F.R. § 20.101(b) (1992).

The regulation was redesignated to § 20.104(b) in 2019, with nearly the same language.

The Secretary argued that Congressional awareness of a prohibition of judicial review of medical determinations translates into an intent to prohibit judicial review. The Beaudettes argued that with awareness of the regulation, Congress limited its application. The Federal Circuit agreed. Because the Caregiver Act includes decisions other than medical determinations, the Federal Circuit found VA's argument inconsistent with the regulation itself. The regulation provides examples of medical determinations, such as which drug or physiotherapy should be "ordered, and similar judgmental decisions with which an attending physician may be faced." The Federal Circuit noted that § 1720G(c)(1) does not indicate that *all* PCAFC decisions are medical determinations. Decisions as to initial eligibility, or family caregiver eligibility decisions are within Board jurisdiction. 38 U.S.C. § 1720G(a)(2), a(4), a(5), a(7). Judicial review of these decisions is not precluded. Procedural issues related to due process are not medical determinations and are within the Board's jurisdiction.

Beyond initial eligibility, PCAFC decisions involve multiple assessments and steps as to whether eligibility criteria for enrollment are met. These decisions involve a mixture of statutory and procedural requirements. The statutory subpart for post-eligibility states that VA "shall only provide support under [the PCAFC] to a family caregiver of an eligible veteran if the Secretary determines it is in the best interest of the veteran to do so." The concept of the 'best interest' of the veteran to participate in the program was not explicitly addressed in the opinion. This implies that part of the topography of the Board's jurisdiction over PCAFC decisions is yet to be filled in. As to the unsettled issues in this area of the law, perhaps future case law will clarify the meets and bounds of the Board's jurisdiction as to such criteria.

The Federal Circuit noted that the Beaudettes were deemed ineligible based, in part, on the fact that Jeremy Beaudette was unavailable for an in-person examination. This is a procedural issue which the Board has authority to review. In sum, the Federal Circuit found that the Board has jurisdiction to review PCAFC decisions that do not relate to a need for or appropriateness of specific types of medical care and treatment.

Karen McKenzie is Counsel at the Board of Veterans Appeals on the Specialty Case Team VHA Medical Group. *She would like to thank Andy Mack, Counsel with Specialty Case Team VHA Medical Group, for helping shape this article.* *The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.*

The Federal Circuit Reviews Jurisdiction and Rating Reduction Remands

by Steven A. Johnston

Reporting on *Chavez v. McDonough*, 98 F.4th 1369 (Fed. Cir. 2024).

In *Chavez v. McDonough*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") addressed the jurisdiction of the Federal Circuit and the authority of the U.S. Court of Appeals for Veterans Claims ("CAVC") to remand a rating reduction claim where judicial review is frustrated by the record.

In September 2007, Benito R. Chavez requested that The Department of Veterans Affairs ("the VA") change his 100 percent rating for posttraumatic stress disorder ("PTSD") from temporary to permanent and total disability. After an additional medical examination, the rating was reduced to 50 percent in a February 2008 rating decision. Mr. Chavez filed a timely Notice of Disagreement and VA subsequently increased his rating to 70 percent; however, the Regional Office also reaffirmed that Mr. Chavez did not suffer from total occupational and social impairment. Mr. Chavez appealed to the Board of Veterans' Appeals ("Board"), which again denied reinstating his 100 percent rating and upheld the rating reduction to 70 percent. The Federal Circuit noted that "the Board discussed not only the information Mr. Chavez submitted to prevent the reduction, but also treatment records postdating the rating reduction."

Mr. Chavez then appealed to the CAVC and requested that the CAVC reverse the Board's decision and reinstate his 100 percent rating. However, the CAVC instead remanded the claim to the Board "to provide an adequate statement of reasons and bases for its finding that Mr. Chavez's PTSD disability materially improved under the ordinary conditions of life and work by the time of his rating decision." Despite the remand order, Mr. Chavez appealed the case, and in response the government argued that the Federal Circuit lacked jurisdiction.

Jurisdiction

The Federal Circuit discussed the "seminal case" of *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002), and that decision's three-part test for when the Federal Circuit has jurisdiction over remand orders. As a general rule, the Federal Circuit's jurisdiction is limited to CAVC final decisions, which usually do not include remands, unless the *Williams* test is met.

The *Williams* test is as follows:

> 1) there must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and, (3) there must be a substantial risk that the decision would not survive a remand, *i.e.*, that the remand proceeding may moot the issue.

275 F.3d 1361, 1364 (Fed. Cir. 2002).

Although the Federal Circuit eventually ruled against Mr. Chavez's argument, the Federal Circuit held that he did present a legal argument – that the CAVC was required to reverse the Board outright and not remand the claim because the Board failed to provide adequate reasons and bases in support of its decision – on which the CAVC gave a "clear and final decision."

The Federal Circuit found that Mr. Chavez met the requirements of the *Williams* test as the CAVC had rejected a legal argument harming Mr. Chavez, and possibly mooting his right to a favorable decision on the merits without a remand. Explaining this

decision, the Federal Circuit cited to *Adams v. Principi*, 256 F.3d at 1321, where jurisdiction was likewise found because the veteran argued that they "had a legal right to a judgement from the Veterans Court without a remand…". The Federal Circuit also cited to *Stevens v. Principi*, 289 F.3d 814 (Fed. Cir. 2002), and *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012) which supported the findings that his right to relief might be lost upon remand and that the Federal Circuit may review a remand order to determine the CAVC's authority to remand the case.

The government relied on *Ebel v. Shinseki*, 673 F.3d 1337, 1342 (Fed. Cir. 2012). The Federal Circuit distinguished that case because the veteran in *Ebel* had "not alleged that 'the remand was for a prohibitive purpose or violated statutory authority.'" *citing Ebel*, 673 F.3d at 1342. Here, Mr. Chavez argued a legal issue, that there was a legal prohibition against remanding a rating reduction where the CAVC finds the Board failed to apply the proper standard, and so the Federal Circuit had jurisdiction over his appeal.

Remand vs. Reversal

The Federal Circuit then turned to the legal issue at hand and began by clarifying the role and authority of the CAVC. The opinion outlined that Congress authorized the CAVC to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate" citing 38 U.S.C. § 7252. The Federal Circuit clarified that the CAVC's authority is aligned with the jurisdiction of the Supreme Court and other federal appellate courts in 28 U.S.C. § 2106. The CAVC's ability to remand claims was explained as occurring when "the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it" citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 728, 744 (1985). The Federal Circuit noted that "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.*

The Federal Circuit decision noted that "reversal and reinstatement are not appropriate where the Board erred only in failing to provide adequate reasons or bases for its decision on the propriety of a reduction." In other words, where the Board's only error is in the reasons and bases of the decision, reversal and reinstatement are not proper, and remand for a new opinion will allow CAVC and the Federal Circuit to appropriately review the claim if appealed again.

The Federal Circuit agreed with the CAVC that the Board's decision was unclear, and its explanation was confusing, preventing effective judicial review. The Federal Circuit's decision in *Chavez* reaffirms and outlines the progeny of cases addressing its jurisdiction over CAVC remands and outlines the powers of the CAVC to remand a rating reduction claim where judicial review is frustrated by the record.

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Federal Circuit Affirms Denial of Fees for Award Based on VA Review of TBI Exams

by Alex A. Hampton

Reporting on *Gumpenberger v. McDonough*, No. 2022-1887 (Fed. Cir. Mar. 25, 2024).

In *Gumpenberger*, a panel of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) comprised of Judges Prost, Stoll, and Stark, affirmed the denial of fee eligibility where the veteran's past-due benefits award was unrelated to the appeal pursued by his representative. This decision is nonprecedential.

Initially, a brief history with respect to restrictions on charging fees for assistance with U.S. Department of Veterans Affairs (VA) benefits claims will be

helpful. Beginning with the Veterans' Judicial Review Act in 1988, fees were permitted only for services provided after the Board had made a final decision "in the case." *See* 38 U.S.C. § 3404(c)(1) (1988). In 2006, Congress shifted the "fee triggering event" from a final Board decision to the filing of a Notice of Disagreement (NOD). *See* 38 U.S.C. § 5904(c)(1) (2006). With the Appeals Modernization Act (AMA), Congress again moved the fee triggering event forward to the point when "a claimant is provided notice of the agency of original jurisdiction's initial decision . . . with respect to the case." *See* 38 U.S.C. § 5904(c)(1) (2017). This evolution represents a "a continuing congressional effort to enlarge the scope of activities for which attorneys can receive compensation for assisting veterans." *Mil.-Veterans Advoc. (MVA) v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1136 (Fed. Cir. 2021).

In 2010, Marine Corps veteran Arturo Valadez hired claims agent Allen Gumpenberger. Mr. Gumpenberger was to receive a 20 percent contingency fee based on any past-due benefits awarded to Mr. Valadez. In an April 2013 rating decision, the VA granted Mr. Valadez's claim for service connection for traumatic brain injury (TBI) residuals and assigned an initial 70 percent disability rating. The same decision denied entitlement to a total disability rating based on individual unemployability (TDIU). In a separate rating decision, the VA denied service connection for an acquired psychiatric disorder. Mr. Gumpenberger then filed an NOD on the issues of service connection for an acquired psychiatric disorder and entitlement to a TDIU, but not the rating for TBI residuals. In December 2015, Mr. Gumpenberger withdrew Mr. Valadez's claim for service connection for an acquired psychiatric disorder, leaving only the claim for a TDIU on appeal.

While the appeal remained pending, the VA began an unrelated review of TBI examinations performed during a multi-year period based on its determination that such examinations may have been conducted by non-specialists. Mr. Valadez elected to undergo a new examination as part of this review. In a September 2016 rating decision, based on the examination results, a 100 percent rating for TBI residuals was granted, along with special monthly compensation based on housebound status. This decision generated a past-due benefits award, but the VA found Mr. Gumpenberger ineligible for a fee based on its determination that the award was not related to any appeal. The Board of Veterans' Appeals (Board) agreed, noting that no NOD had been filed with respect to Mr. Valadez's claim for an increased TBI rating. The U.S. Court of Appeals for Veterans Claims (CAVC) affirmed the Board's decision.

On appeal, the Federal Circuit initially noted that the pre-AMA version of § 5904(c)(1) applied, given the timeline and facts under consideration. Thus, the relevant fee triggering event was the filing of an NOD in "the case." The Federal Circuit considered the only issue before it to be whether CAVC had erred in its interpretation of the "the case" for purposes of the pre-AMA version of 38 U.S.C. § 5904(c)(1).

In assessing this question, the Federal Circuit turned to a review of its own relevant case law, which held that a "case" includes "all potential claims raised by the evidence and applying all relevant law and regulation raised by that evidence regardless of how the claim is identified." *Roberson v. Principi*, 251 F.3d 1378, 1383 (Fed. Cir. 2001). Significant attention was given to *Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009), which applied § 3404(c)(1), the predecessor to § 5904(c)(1), restricting fees prior to issuance of a final Board decision in the case. In *Jackson*, the Board denied the veteran's appeal for higher ratings for two spinal disabilities. The veteran hired Francis M. Jackson. Mr. Jackson appealed to CAVC, which vacated and remanded the Board's decision. While this appeal remained pending with the Board, the veteran filed a claim for service connection for depressive disorder, which was granted. Mr. Jackson then filed a claim for a TDIU, which was granted and resulted in a past-due benefits award. The VA found Mr. Jackson ineligible for a fee, and CAVC and the Federal Circuit affirmed. The Federal Circuit found that while a TDIU may be part of the same "case" as a claim for an increased rating under some circumstances, it was not so where evidence of

unemployability was not raised at the time of the final Board decision in question.

Although *Roberson*, *Jackson*, and other relevant cases applied the pre-2006 analogue to § 5904(c)(1), the Federal Circuit could find "no reason to depart from our prior interpretation of 'the case.'" Ultimately, the panel found Mr. Gumpenberger's fee eligibility to be controlled by *Jackson*. Specifically, like in *Jackson*, the evidence supporting the decision that resulted in the past-due benefits award in question had not been raised at the time of the fee triggering event. That is, in *Jackson*, unemployability had not been raised at the time of the final Board decision on increased rating issues. Likewise, the VA's decision to review TBI examinations, and the resulting medical evidence which justified Mr. Valadez's increased rating for TBI residuals, were not part of the record at the time Mr. Gumpenberger filed an NOD on separate issues.

Ultimately, the Federal Circuit affirmed on the basis that CAVC's interpretation – that Mr. Valadez's award for an increased TBI rating was not part of the same case as the NOD filed by Mr. Gumpenberger – was consistent with the controlling caselaw.

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The Federal Circuit Restates: No Mandamus If There Is an Alternative Remedy by Appeal

by Margaret A. Costello

Reporting on *Love v. McDonough*, 100 F. 4th 1388 (Fed. Cir. 2024).

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") reaffirmed its position that mandamus relief is not warranted if there is an adequate remedy potentially available by appeal. The Court holds that writs of mandamus to prohibit the reduction of benefits temporarily, while a final decision regarding the validity of the reduction is pending, was not available because the veterans had not invoked their potential remedy by appeal.

In its decision, the Federal Circuit addresses three separate cases, involving four veterans, on appeal from the U.S. Court of Appeals for Veterans Claims ("CAVC"), and affirms the CAVC's dismissal of the veterans' petitions for writs of mandamus for lack of jurisdiction. The issue in these cases is whether a veteran whose rating is reduced is entitled to have the original rating continue until final resolution of the validity of the reduction.

The procedural posture of the four veterans was slightly different, but the issue was the same. Mr. Love's rating for prostate cancer was reduced from 100 percent to 20 percent. After he sought review and the Department of Veterans Affairs ("VA") regional office upheld the reduction, Mr. Love unsuccessfully appealed to the Board of Veterans' Appeals ("Board"), and then to the CAVC, and finally to the Federal Circuit, where it was pending. Mr. Aumiller, the second veteran, was notified that his rating based on individual unemployability ("TDIU"), which also affected his entitlement to special monthly compensation, would be discontinued. The third veteran, Ms. Diez was notified that her rating for a service-connected scar would be decreased from ten percent to a non-compensable rating, which significantly affected her overall rating payment. Both Mr. Aumiller and Ms. Diez filed Notices of Disagreement with the Board, which remained pending.

All three of these veterans filed nearly identical petitions with the CAVC, seeking writs of mandamus to compel the VA to resume their payments in the amount before the reduction, arguing that the VA could not lawfully decrease or discontinue their payments until their appeals challenging the reduction were exhausted. The

Federal Circuit noted that neither Mr. Love, Mr. Aumiller or Ms. Diez had requested that the VA continue their benefits pending resolution of the issue of whether they had been properly reduced.

The fourth veteran, James Lindgren had been notified that the VA planned to reduce his compensation for PTSD and discontinue his entitlement to special monthly compensation. He also filed a Notice of Disagreement with the Board, which remained pending. However, unlike the other three veterans, Mr. Lindgren had submitted a demand to the VA to "immediately cease the unlawful withholding of disability compensation" or to "immediately issue a written, appealable decision regarding its determination to continue its withholding." After he did not receive a response to his request, he petitioned the CAVC, essentially making the same request as the other three veterans.

The CAVC ultimately dismissed all four petitions, holding that, in the first three instances, there was no "basis on which we could issue a writ under the [All Writs Act] in aid of our jurisdiction." With respect to Mr. Lindgren's petition, the CAVC dismissed, in part, his petition requesting that the Court compel the VA to pay his pre-reduction rate of compensation until his appeal of the reduction was exhausted, but ordered the Secretary to respond to the portion of Mr. Lindgren's petition that asserted that the VA had not acted on his request for an appealable decision about the implementation date of his rating reduction. The Secretary responded that the VA did not intend to act on his request until a decision regarding the merits of his rating reduction was rendered. The Secretary asserted that Mr. Lindgren had not shown that the VA had refused to act on his request, only that it had not yet done so. The CAVC then denied the remaining part of the petition, agreeing with the Secretary, and finding that Mr. Lindgren could pursue alternative means for relief by arguing to the VA that it should address his request, and implied that he could request the CAVC to compel the VA to respond. Mr. Lindgren then appealed the denial of mandamus to the Federal Circuit.

On appeal, the Federal Circuit holds that mandamus relief is not available for the veterans under the All Writs Act, citing its prior decision in *Hargrove v. Shinseki*, 629 F. 3d 1377, 1379 (Fed. Cir. 2011) (quoting *Mukand Int'l Ltd. v. United States*, 502 F. 3d 1366, 1369, 220 Fed. Appx. 984 (Fed. Cir. 2007)), in which it stated, "A writ of mandamus is an extraordinary remedy." "[T]he party seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 1379 (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)).

The Federal Circuit decision points out that Mr. Love, Mr. Aumiller, and Ms. Diez had made no claim to the VA or to the Board for entitlement to interim payments. Although Mr. Lindgren had made such a request, he had made no effort to pursue the matter further when the agency failed to respond. The Federal Circuit's opinion noted that "the Board is not the last word. The very purpose of the statutory provisions providing for appeal to the Veterans Court … and to this court… is to correct error by the VA."

The Federal Circuit also notes that any argument that the lack of a final judgment on the underlying disability claim would preclude an appeal from the denial of a request for interim relief (continued payment of benefits pending final judgment) would necessarily fail. Finality is assessed on a claim-by-claim basis, and the question of entitlement to interim payments as a discrete benefit is a separate legal claim from the merits of the underlying rating reduction.

Finally, the Federal Circuit concludes, once again, that where there is a remedy on appeal, mandamus is not available. As this court had previously held in *Wolfe v. McDonough*, "[i]f [appellants in this case] continued to follow the appeals process prescribed in title 38, [they] would have received a Board decision appealable to the Veterans Court." 28 F. 4th 1348, 1358 (Fed. Cir. 2022).

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Federal Circuit Reverses CAVC in Determining Applicable Version of 38 U.S.C. § 5904(c)(1) for Fee Award

by Samantha Greenstein

Reporting on *Perciavalle v. McDonough*, 101 F.4th 829 (Fed. Cir. 2024).

In *Perciavalle v. McDonough*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") addresses whether the pre-June 20, 2007 version or the subsequent version of the attorney fee provision in 38 U.S.C. § 5904(c)(1) applied in determining the contingency fee that could be awarded for representing a veteran.

Under 38 U.S.C. § 5904(c)(1), veterans can retain accredited agents or attorneys to represent them for a fee. Up until 2007, agents and attorneys could not charge fees for "services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case." Under the statutory amendment, which went into effect June 20, 2007, agents and attorneys could charge fees for services from when an appeal to the Board was initiated by the filing of a notice of disagreement; the charging of fees prior to the date of filing of the NOD was prohibited.

In 2006, veteran Robert Fleming filed a claim for disability benefits with the Department of Veterans Affairs ("VA") under 38 U.S.C. § 1110 for PTSD. The VA granted a 30% disability rating in September 2006, and Mr. Fleming filed an NOD in October 2006 to appeal the PTSD rating decision. While the PTSD appeal was pending, Mr. Fleming requested a total disability rating based on individual unemployability (TDIU) in November 2008, noting PTSD as one of his service-connected disabilities preventing him from securing substantially gainful employment. In March 2009, the VA issued a decision denying entitlement to a TDIU, among other things. In May 2009, Mr. Fleming filed an NOD with the March 2009 decision, arguing that he qualifies for a 70% PTSD evaluation and that individual unemployability was met. In January 2013, the Board of Veterans' Appeals ("Board") remanded all of Mr. Fleming's claims to the VA. While these claims were pending, Mr. Perciavalle entered into a contingency fee agreement with Mr. Fleming on May 9, 2016, providing Mr. Perciavalle with 20% of any "arrearages" awarded as a result of his representation of Mr. Fleming before the VA. On March 2, 2017, the VA increased Mr. Fleming's PTSD disability rating to 100% and granted entitlement to special monthly compensation ("SMC") under 38 U.S.C. § 1114(s) due to his housebound status. Since Mr. Fleming was given a 100% rating for PTSD, Mr. Perciavalle withdrew the TDIU appeal.

On March 13, 2017, the VA granted fees to Mr. Perciavalle for 20% of the SMC award. The VA reasoned that the entitlement to SMC was "a downstream issue to both the NOD filed on October 31, 2006, and the NOD filed on May 12, 2009." The VA concluded that the May 2009 NOD filed after June 20, 2007, was sufficient to apply the subsequent version of 38 U.S.C. § 5904(c)(1) to the SMC portion of the fee request. However, the VA denied Mr. Perciavalle any fees based on the increased PTSD rating, concluding that the pre-June 20, 2007 version of 38 U.S.C. § 5904(c)(1) applied because the NOD was filed on October 31, 2006 (before June 20, 2007), and there had been no final Board decision.

On March 14, 2017, Mr. Perciavalle filed an NOD for the denial of fees based on the increased PTSD rating. The Board agreed with the VA's denial and issued a decision in April 2020 determining that the May 2009 NOD did not trigger his eligibility to receive fees based on Mr. Fleming's TDIU claim since the issue of entitlement to TDIU was "already before the Board for consideration pursuant to *Rice v. Shinseki*, 22 Vet. App. 447 (2009)."

Mr. Perciavalle appealed the Board's decision to the U.S. Court of Appeals for Veterans Claims ("CAVC").

In July 2022, the CAVC affirmed the Board's decision, finding that the subsequent version of 38 U.S.C. § 5904(c)(1) only applies to cases where the NOD was filed after June 19, 2007. The CAVC found no clear error in the Board's determination that the October 2006 NOD "initiated the claim stream that led to the March 2017 grant of benefits" for PTSD, and therefore, the pre-June 20, 2007 version of 38 U.S.C. § 5904(c)(1) applies. The CAVC further noted there was no other evidence that could be interpreted as an NOD contesting the PTSD rating.

In its decision on appeal, the Federal Circuit holds that the CAVC erred by relying on an incorrect legal standard in determining which version of 38 U.S.C. § 5904(c)(1) applies in a case. The Federal Circuit holds that the requirement for the subsequent version of the statute to apply (an NOD filed on or after June 20, 2007) was not qualified according to whether another NOD was also filed in the same case before June 20, 2007. The Federal Circuit maintained the broad view of the definition of "case" conveyed in *Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009), stating that it includes "all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled." Therefore, the Federal Circuit concludes here that "as long as a notice of disagreement was filed on or after June 20, 2007, in the same 'case' in which counsel is seeking fees as the term is defined in *Jackson*, the post-[June 20, 2007] version of 38 U.S.C. § 5904(c)(1) applies."

The Federal Circuit notes that the CAVC held that the subsequent version of 38 U.S.C. § 5904(c)(1) applies to cases where *the* NOD was filed on or after June 20, 2007 (emphasis added). However, the Federal Circuit held this interpretation was incorrect, as the subsequent version "simply asks if there was *any* (cognizable) notice of disagreement filed on or after June 20, 2007, in the case for which the veteran's agent or attorney seeks fees," and if so, then the subsequent version of 38 U.S.C. § 5904(c)(1) applies.

The Federal Circuit decision finds that the NOD Mr. Fleming filed in May 2009, after June 20, 2007, cannot be disregarded merely because it was determined that it did not lead to the award of benefits for PTSD or was unnecessary to put issues related to PTSD before the Board. There was no dispute that the May 2009 NOD was part of the "case" for which fees were sought under its meaning in *Jackson*, and government counsel conceded at oral argument that TDIU was properly considered part of the same "case" as the PTSD claim.

Consequently, the Federal Circuit rules that the CAVC erred in finding the subsequent version of 38 U.S.C. § 5904(c)(1) does not apply to Mr. Perciavalle's fee entitlement claim, as the May 2009 NOD was part of the "case" for which the fees at issue were sought. The Federal Circuit thus reverses the CAVC decision, remands the matter for further proceedings, and awards costs to Mr. Perciavalle.

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Federal Circuit Affirms that CUE-Based Revision of a Board Decision Requires an Error that Clearly Changed the Merits Outcome of the Claim

by John Butcher

Reporting on *Smith v. McDonough*, No. 2022-2169 (Fed. Cir. May 20, 2024).

In *Smith v. McDonough*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") upheld a decision of the United States Court of Appeals for Veterans Claims ("CAVC") that affirmed a 2020 Board of Veterans' Appeals ("Board") decision denying Mr. Smith's motion to revise a 1996 Board decision based on clear and unmistakable error ("CUE").

In 1996, the Board determined that Mr. Smith's service connection claim for deep vein thrombosis ("DVT") was not "well-grounded" because he had

not submitted medical evidence showing that he currently had DVT (Congress removed the well-grounded claim requirement from 38 U.S.C. § 5107(a) in 2000). The Board denied the claim, Mr. Smith did not appeal, and the 1996 Board decision became final.

In 2012, Mr. Smith filed a new claim of entitlement to service connection for DVT. The claim was granted in 2013, with an effective date of October 31, 2012.

In 2016, Mr. Smith sought revision of the 1996 Board decision based on CUE. A veteran may establish CUE when the following conditions are met: (1) either (a) the correct facts in the record were not before the adjudicator, or (b) the statutory or regulatory provisions in existence at the time were incorrectly applied; (2) the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated"; and (3) the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the time that decision was rendered. *Evans v. McDonald*, 27 Vet. App. 180, 185 (2014), *aff'd*, 642 Fed. Appx. 982 (Fed. Cir. 2016). Mr. Smith argued that, in 1996, he submitted sufficient evidence showing that he had DVT to satisfy the well-grounded claim requirement.

In its 2020 decision, the Board agreed with Mr. Smith that the 1996 dismissal of his DVT claim as not well grounded was erroneous as he had presented some evidence that he had DVT. However, the Board found that the error was insufficient to support CUE. According to the Board, given the presence of evidence for and against Mr. Smith's diagnosis with DVT, the Board could not conclude with absolute clarity that but for the error Mr. Smith would have prevailed on the merits of his service connection claim.

On appeal, the CAVC affirmed the Board's denial of CUE. The CAVC agreed with the Board that that the error in the 1996 decision did not constitute CUE as it was not manifestly clear from the then-existing record that Mr. Smith had DVT. Citing *King v. Shinseki*, 26 Vet. App. 433 (2014), the Court held that because Mr. Smith could not show that correcting the error would have resulted in a grant of service connection, he failed to establish CUE.

Before the Federal Circuit, Mr. Smith argued that 38 C.F.R § 20.1403 covers not only a change in the outcome of claim but also a change in the course of proceedings, i.e., a procedural change that potentially could change the ultimate outcome of the claim. On Mr. Smith's reading, triggering VA's duty to assist and allowing a veteran's claim to proceed to the merits constitutes a sufficient change in outcome for purposes of section 20.1403.

The Federal Circuit rejected Mr. Smith's argument and held that revision or reversal based on CUE requires an error that, once corrected, alters with absolute clarity the merits outcome of a veteran's claim. In other words, section 20.1403's "manifestly different" outcome standard cannot be met by correcting an error that leads only to continued litigation with an uncertain result on the merits.

The Federal Circuit provided three reasons to support its holding. First, the Federal Circuit characterized as "strained" Mr. Smith's interpretation of the "manifestly changed the outcome" language in section 20.1403 to cover a situation in which the procedural path changed but the final determination itself could stay the same. Second, the Federal Circuit cited *Bustos v. West*, 179 F.3d 1378 (Fed. Cir. 1999), a case involving CUE at the AOJ level in which the Federal Circuit considered arguments similar to those put forward by Mr. Smith. The veteran in *Bustos* argued that CUE only requires a veteran to show that an AOJ error seriously affects the fairness or integrity of the proceeding and might possibly change the outcome. The *Bustos* Court rejected this reading, holding that CUE must be outcome determinative, i.e., the error must have a dispositive impact on the ultimate outcome of the veteran's claim. According to the Federal Circuit, Mr. Smith did not attempt to distinguish the regulations governing CUE at the Board level from the regulations governing CUE at the AOJ level and therefore failed to distinguish the holding in *Bustos* from the instant proceeding.

Finally, the Federal Circuit noted that section 20.1403 expressly excludes VA's failure to fulfill its duty to assist from the types of errors that constitute CUE. The Federal Circuit concluded that if the failure to fulfill the duty to assist does not constitute an outcome determinative error, then neither does a failure to trigger the duty to assist.

John Butcher is an Attorney-Advisor with the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Federal Circuit Holds that CAVC Exceeded its Statutory Authority by Finding Facts and Weighing Evidence in the First Instance

by Christina S. Dalton

Reporting on *Stinson v. McDonough*, 92 F.4th 1355 (Fed. Cir. 2024).

In *Stinson v. McDonough*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that the U.S. Court of Appeals for Veterans Claims ("CAVC") exceeded its statutory authority by improperly finding facts and weighing the evidence in the first instance.

Robert L. Stinson ("Mr. Stinson"), a U.S. Army veteran, developed and received treatment for various symptoms and conditions ("in-service symptoms") while deployed to Germany in the 1960s. These in-service symptoms began when a rash presented on the back of his neck in 1964. In the early 2000s, decades after his discharge from the Army, Mr. Stinson developed additional symptoms and conditions, including a low white blood cell count and a low platelet count ("2002 symptoms").

In 2012, after receiving his diagnosis, Mr. Stinson submitted a claim to the U.S. Department of Veterans Affairs ("the VA") seeking service connection for blastic plasmacytoid dendritic cell neoplasm ("BPDCN"), a rare and aggressive form of cancer. To support his claim, Mr. Stinson provided the VA with a letter from a private oncology nurse practitioner suggesting that there was a possible link between his alleged exposure to carcinogens while deployed and his cancer.

After examining Mr. Stinson, a VA examiner issued a medical opinion ("2019 VA medical opinion"), which concluded that his BPDCN was less likely than not caused by his service in Germany. Specifically, the VA examiner opined that no evidence in the record supported a finding that Mr. Stinson's medical issues, his BPDCN, manifested before 2011.

In 2020, the Board of Veterans' Appeals ("Board") denied Mr. Stinson's claim, determining that the preponderance of the evidence was against concluding that his BPDCN began during or was otherwise related to his service. Notably, the nurse practitioner letter, the 2019 VA medical opinion, and the Board decision all refrained from explicitly addressing Mr. Stinson's in-service symptoms, his 2002 symptoms, and the location of the lesion giving rise to the BPDCN diagnosis ("BPDCN lesion").

After the Board's decision, Mr. Stinson appealed to the CAVC. On appeal, he raised a new argument that the 2019 VA medical opinion and the Board decision were inadequate because they both failed to address his in-service symptoms and his 2002 symptoms. Mr. Stinson argued that his BPDCN lesion presented in the same spot as the rash that he experienced in 1964 and that his 2002 symptoms preceded his BPDCN diagnosis in 2012. Accordingly, Mr. Stinson urged the Court to find his in-service symptoms and 2002 symptoms as relevant evidence that cut against the conclusions of the 2019 VA medical opinion and the Board decision.

Despite this new argument, CAVC affirmed the Board's denial of service connection. In its opinion, the Court stated that Mr. Stinson failed to demonstrate that his in-service symptoms and 2002 symptoms were relevant to his BPDCN diagnosis. Specifically, the Court held that the record failed to support Mr. Stinson's argument that his BPDCN

lesion presented in the same location as his 1964 rash. Additionally, the Court went on to find that the 1964 rash was located on the back of Mr. Stinson's neck, while the BPDCN lesion presented on his shoulder. Following CAVC's decision, Mr. Stinson appealed to the Federal Circuit, arguing that CAVC exceeded its statutory authority when it found facts in the first instance.

In this case, the Federal Circuit agreed with Mr. Stinson, holding that CAVC impermissibly engaged in de novo factfinding concerning its conclusions regarding the locations of the 1964 rash and the BPDCN lesion. In its opinion, CAVC found that the BPDCN lesion presented on Mr. Stinson's shoulder. However, the Federal Circuit concluded that the record is unclear about whether that lesion appeared on his shoulder or upper back. The Federal Circuit reasoned that a lesion appearing on the upper back may overlap with the back of the neck, which is the location where the 1964 rash manifested. As a result, the Federal Circuit held that because the location of the BPDCN lesion is subject to debate, CAVC's finding that the lesion presented on the shoulder constituted an impermissible finding of fact in the first instance. Because CAVC retains no statutory authority to engage in factfinding in the first instant, the Federal Circuit held that CAVC exceeded its statutory authority.

Moreover, the Federal Circuit held that CAVC exceeded its statutory authority by weighing evidence in the first instance. The Federal Circuit reiterated that CAVC must review the Board's weighing of evidence instead of improperly weighing evidence itself. In its opinion, CAVC concluded that the location of Mr. Stinson's in-service symptoms, particularly the 1964 rash, provided little support for his argument for service connection for BPDCN. However, the Federal Circuit noted that the nurse practitioner letter, the 2019 VA medical opinion, and the Board decision all failed to explicitly address the relevance of Mr. Stinson's in-service symptoms. Because the relevance of that evidence has not been considered by medical experts nor weighed by the Board, the Federal Circuit ruled that CAVC improperly weighed the evidence in the first instance.

Additionally, the Federal Circuit noted that CAVC's conclusion about the relevance of Mr. Stinson's in-service symptoms is especially problematic because it was based on the Court's factfinding. The Federal Circuit explained that when CAVC acts as a factfinder, it not only exceeds its statutory authority but also frustrates one of the paramount goals of the VA claims system: to provide the claimant with a veteran-friendly process. Such an action denies the veteran the opportunity to present evidence to the body with the appropriate expertise and responsibility to determine factual issues.

Because CAVC exceeded its statutory authority when it found facts and weighed the evidence in the first instance, the Federal Circuit vacated CAVC's decision and remanded the case. On remand, the Federal Circuit instructed CAVC to remand the case to the Board for additional factual development, including consideration of Mr. Stinson's in-service symptoms and whether they support a finding that his BPDCN manifested before 2011.

Christina S. Dalton is a May 2024 graduate of the University of Florida Levin College of Law.

Federal Circuit Clarifies Scope of Legal Standard Regarding All Material Issues of Fact and Law

By Joseph T. Leonard

Reporting on *Thomas v. McDonough,* 97 F.4th 850 (Fed. Cir. 2024).

In *Thomas v. McDonough*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") issued a precedential opinion written by Judge Reyna, which ruled in favor of Veteran Orville K. Thomas and held that the Board of Veterans' Appeals ("Board") must consider and address all "potentially applicable" regulations raised in the record as set out in 38 U.S.C. § 7104(d)(1).

Mr. Thomas served active duty in the Navy from 1957 to 1964, during which time he was an airman. In January 1961, he was in a plane crash that killed nine people. Mr. Thomas was honorably discharged as unsuitable for service after being diagnosed with an emotionally unstable personality.

Mr. Thomas filed an initial claim for service connection for a mental health disorder, characterized as depressive mania, in January 1971. The U.S. Department of Veterans Affairs ("VA") reviewed Mr. Thomas' medical records, and though it acknowledging Mr. Tomas' treatment for emotional problems, it denied his claim for service connection, concluding that an emotionally unstable personality was not a disability under the law.

On June 16, 2014, Mr. Thomas filed an application to reopen the previously denied 1971 claim. Here, Mr. Thomas submitted service department records that were not previously before the VA in 1971, including information about the January 1961 plane crash and changes to his personality before and after the crash. In November 2014, the VA granted service connection for post-traumatic stress disorder ("PTSD"), with an effective date of June 16, 2014. Thereafter, Mr. Thomas initiated proceedings seeking an earlier effective date. The VA denied the claim, finding that the newly submitted service records did not dispute the lack of a diagnosable disability for VA compensation purposes.

Mr. Thomas appealed to the Board, specifically arguing that under 38 C.F.R. § 3.156(c), the VA is required to reconsider previously denied claims after receiving "relevant official service department records" that existed but were not in the file at the time of the prior denial. The Board denied entitlement to an earlier effective date for the grant of service connection for PTSD. In doing so, the Board did not address Mr. Thomas' arguments regarding 38 C.F.R. § 3.156(c) or his newly submitted service department records.

Thereafter, Mr. Thomas appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court). The Court affirmed the Board's decision, finding that the Board did not err in failing to discuss 38 C.F.R. § 3.156(c) or the newly submitted service department records because the regulation only applied to "relevant" service records and Mr. Thomas did not offer any arguments that the service records were relevant to the prior denial.

The Federal Circuit vacated the Court's decision. Citing *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991), the Federal Circuit explained that 38 U.S.C. § 7104 requires the Board to address in its findings and conclusions all regulations that are made "potentially applicable through the assertions and issues raised in the record." In this case, there was no dispute whether Mr. Thomas raised an argument under 38 C.F.R. § 3.156(c) before the Board. Turning to the language of the statute, as 38 U.S.C. § 7104(d) notes the Board's decision "shall include" a "written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, *on all material issues of fact and law presented on the record,*" the Federal Circuit held that the Board must address all regulations that are "*made potentially applicable* through the assertions and issues raised in the record." Moreover, the Federal Circuit found that the Court erred in placing the burden on the veteran to argue the relevance of C.F.R. § 3.156(c) or his service department records, effectively creating a more stringent standard than required. Returning to *Schafrath*, the Federal Circuit explained the "potentially applicable" standard requires the Board to address all "potentially applicable" regulations raised in the record, not only those shown by the veteran to be relevant or favorable.

As the Board did not provide written address of 38 C.F.R. § 3.156(c) or Mr. Thomas' service department records, favorably or unfavorably, the Federal Circuit remanded the matter for the Board to provide an adequate statement of reasons and bases.

In sum, the Federal Circuit reiterated the Board's obligation to address all theories of entitlement raised by an appellant.

Joseph T. Leonard is Counsel at the Board of Veterans' Appeals. The views and opinions provided

are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Fair Process Doctrine Supplements, Rather Than Supplants, VA Procedural Rules and Statues

by Gerline R. Fleury Johnson

Reporting on *Brack v. McDonough*, No. 22-3957 (Vet. App. April 24, 2024).

In *Brack v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") considered whether there is a timeframe during which a claimant has the right to submit argument to the Board of Veterans' Appeals ("Board") under the Direct Review Docket of the Appeals Modernization Act (AMA). The Court held there is no such time frame.

In July 2021, regional office (RO) of the Department of Veterans Affairs ("VA") denied Mr. Brack's claim for an earlier effective date for the grant of service connection for coronary artery disease. In August 2021, Mr. Brack's representative filed VA Form 3288, "Request for and Consent to Release of Information from Individual's Records," which sought a copy of his "entire VA claims file" under the Privacy Act. On this form, the representative wrote, "I am requesting these documents so that I may have the benefit of a complete file review for presentation and prosecution of his current and future requests." In the attached cover letter, the representative requested a 90-day extension from the date that the Privacy Act request was completed to submit additional supporting evidence regarding any issues pending Board review. In October 2021, Mr. Brack filed VA Form 10182, Notice of Disagreement (NOD), with the July 2021 decision, and requested "Direct Review" by a Board member. In March 2022, the Board, before the requested 90 days had elapsed, issued its decision denying Mr. Brack's claim for an earlier effective date.

On appeal to the Court, Mr. Brack contended that the Board was required to construe his August 2021 submissions together in a liberal manner so as to recognize that his representative was seeking a 90-day period in which to submit argument as well as evidence in support of his claim pursuant to *Bryant v. Wilkie*, 33 Vet. App. 43 (2020). He argued that the Board's failure to delay its decision until the 90 days expired or he submitted argument violated the fair process doctrine.

In arriving at its precedential decision, the Court considered and discussed the principles of the fair process doctrine that was created in *Thurber v. Brown*, 5 Vet. App. 119 (1993), the pre-AMA legacy system that had been addressed by *Bryant*, the relevant changes in appellate procedure effectuated by the AMA, and the circumstances of Mr. Brack's case.

The Court noted that the fair process doctrine was a non-constitutional right that supplements VA's procedural rules as embodied in statues and regulations. When those rules are validly altered or amended, the fair process doctrine must adapt to those changes and cannot supplant the amended rules.

In *Bryant*, the Court had held that under the fair process doctrine, when a claimant stated an intention to submit argument, the Board was prohibited from issuing a decision prior to the expiration of that 90-day period, unless the claimant submitted the argument earlier. The *Brack* Court noted, however, that the holding in *Bryant* applied to the legacy system, which existed prior to passage of the AMA. The AMA overhauled VA's appellate procedures and introduced multiple appeal dockets that a claimant could choose, with differing process, scopes, and timeframes for Board review: direct review, evidence submission, and Board hearing.

In Mr. Brack's case, he chose the direct review docket under the AMA for his appeal, which the Court noted had been designed to be the most efficient way to reach a comprehensive and speedy decision. Even assuming that the Board should have understood Mr. Brack as having requested a 90-day

delay in issuing a decision in the direct review docket so that he could submit argument, the Court was not persuaded that Mr. Brack had been denied fair process in this case.

Unlike the Board hearing and evidence submission review dockets, each of which designate 90-day submission periods during which additional evidence may be submitted (and therefore during which the Board cannot issue a decision), the direct review docket provides the briefest period for submitting argument and claimants have no reasonable expectation that Board decisions will not issue prior to a specific date. The Court noted that Mr. Brack could have taken advantage of the appeal deadlines and alternative review dockets provided by the AMA, which would have afforded him the reasonable opportunity for his representative to obtain and review the claims file and submit argument. The Court noted that the 90-day delay that Mr. Brack sought was unmoored from any procedural standard applicable to the direct review docket and was inconsistent with the expeditious process it was designed to provide. Thus, the fair process doctrine did not entitle Mr. Brack to a 90-day period to submit argument to the Board in support of his appeal under the direct review docket of the AMA.

Judge Jaquith concurred in the Court's judgment only, contending that fair process was required in both legacy and AMA cases, *Bryant* should have been applied to this case, and the Board erred in denying Mr. Brack's request for a 90-day delay. Judge Jaquith concluded, however, that as Mr. Brack's counsel did not identify what he would have argued had the decision been delayed, the Board's error was not prejudicial.

Gerline R. Fleury Johnson is Counsel with the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Court Denies as Moot a Request to Enjoin the Secretary from Applying an Education Benefits Regulation That is Inconsistent with Statute

by Jeffrey Price

Reporting on *Hambidge v. McDonough*, No. 23-2589 (Vet. App. Mar. 13, 2024).

In *Hambidge v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") denied the petition for extraordinary relief for continued education benefits.

Mr. Hambidge sought an order enjoining the Secretary from applying 38 C.F.R. § 21.4020, which limited his continued entitlement to education benefits while he pursued an administrative appeal on the merits. Mr. Hambidge argued the regulation is flatly inconsistent with 38 U.S.C. § 3695(c) and that he would suffer irreparable harm if the entitlement to education benefits was not resolved before the fall 2023 semester. The Court denied the petition because appealing a future adverse agency decision to the Court is an adequate form of relief and the alleged irreparable harm had been lifted due to a corrected calculation of benefits that continued his eligibility for education benefits before the fall 2023 semester began.

In 2011, Mr. Hambidge graduated with an undergraduate degree from The Citadel, the Military College of South Carolina. He paid for his education, he used Survivors' and Dependents' Educational Assistance (chapter 35 benefits), to which he was entitled due to his father's military service. He then served as an officer in the Army, including deployments in Afghanistan. After his military service, he was accepted into a graduate program and he applied for education benefits based on his years of service. He was notified that he was entitled to the benefits under the Post-9/11 GI Bill (chapter 33), but was informed he could only receive seven months of those benefits. The VA regional

office asserted that, pursuant to 38 C.F.R. § 21.4020, the aggregate period for which any person may receive education benefits under any combination of VA education programs is no more than 48 months. And he had already used 41 months of benefits for his undergraduate education.

Mr. Hambidge filed a direct Board appeal and requested advancement on the Board's docket, noting that otherwise his benefits would expire in the middle of the fall 2023 semester. In May 2023, Mr. Hambidge filed his petition for extraordinary relief asking that the Court to enjoin the Secretary from applying the regulation limiting his education benefits while the appeal to the Board is pending. Later that same month, the regional office issued a new decision, notifying Mr. Hambidge that it had re-evaluated its calculation and that he actually had 33 months of full-time chapter 33 education benefits remaining.

The Secretary then argued, and the Court agreed, that because the requested benefit had been provided in-full, the case is now moot. The Court rejected Mr. Hambidge's argument that the threat of irreparable harm persists because there is a chance the VA could, in the future, likely misapply the regulation in his case. In addition, the Court addressed the standard for extraordinary relief and noted that Mr. Hambidge did not argue that his administrative appeal to the Board was being unreasonably delayed or that VA was refusing to proceed with it. And absent such impediments, the normal appeal process serves as an adequate means of relief.

In sum, the Court denied the petition because it concluded Mr. Hambidge has an adequate alternative remedy for the relief he seeks and he is no longer threatened by irreparable harm. Although the Court did not grant the petition for Mr. Hambidge, it stated it "is troubled by VA's inaction on this issue" and its "ongoing failure for more than a decade to revise § 21.4020," which is "flatly inconsistent with the statute." The Court further stated that "[n]onfeasance is not too harsh a word to use in this context [and] strongly urges the Secretary to take corrective steps so that other veterans like Mr. Hambidge are not wrongly penalized by § 21.4020."

In his dissenting opinion, Judge Jaquith agreed that VA should take corrective steps so other veterans are not wrongly penalized, but also went further in making the argument that a preliminary junction is warranted because Mr. Hambidge has shown he has met the standards for one and it would be in the public interest to do so.

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No Access to VBMS for Self-Represented Litigants – But Maybe Someday . . .

by Margaret A. Costello

Reporting on *Lechliter v. McDonough*, No. 23-2587 (Vet. App. May 3, 2024).

A panel of the U.S. Court of Appeals for Veterans Claims ("CAVC" or "Court") denies Mr. Lechliter's petition for a writ of mandamus. The Court holds that the veteran had not established that his petition for an order that the Department of Veterans Affairs ("VA") show cause why its policy of precluding self-represented claimants from having remote, read-only access to the Veterans Benefits Management System ("VBMS") was in aid of the Court's statutorily defined subject matter jurisdiction pursuant to 28 U.S.C. § 1651(a).

Mr. Lechliter, an 81-year-old veteran, was pursuing his claim for disability compensation for prostate cancer without representation or assistance from an attorney, claims agent or veterans service organization ("VSO"). In response to his request for a copy of his VA claims file, he received a compact disc, which contained over 10,000 pages of documents, not in chronological order and without a table of contents; he also noted that the search function was unreliable. Additionally, it was a four-

hour roundtrip drive to a VA regional office to review his VBMS records. He contended that accessing his files in VBMS would be advantageous because the entries are tabbed and organized chronologically, and the Notes section contains claims status information. He further contended that omission of self-represented claimants from remote VBMS access is discriminatory, unreasonable, and inequitable, and violates veterans' due process rights. He argued that the Court had jurisdiction, as it previously determined that "decisions regarding access to claims files are rendered pursuant to a law affecting the provision [of] veterans' benefits" (quoting *Chisolm v. McDonald*, 28 Vet. App. 240, 243 (2016) (per curiam order)).

The Secretary's response to the issue of the Court's subject matter jurisdiction was that a veteran's right to access his VA file is premised on the Privacy Act, which mandates that the VA provide individuals with access to their records maintained by the agency, but does not require the format in which such access must be granted. The VA contends that the access to its own internal system, including VBMS, is purely discretionary.

In its decision denying Mr. Lechliter's petition, the Court addresses the All Writs Act ("AWA") and the Privacy Act, as well as changes made to the VA's regulations (38 C.F.R. §§ 1.600 through 1.603 and § 14.629), effective July 2022. In analyzing the request for a petition under the AWA, the Court states that its jurisdiction depends on whether the grant of the petition could lead to a Board of Veterans' Appeals ("Board") decision over which the Court would have jurisdiction. The Court notes that the VA's regulations indicate that records disclosures are made pursuant to the Privacy Act (5 U.S.C. § 552a), and denials of records requests may be appealed to the VA Office of General Counsel, who will render the final Agency decision in such appeals. 38 C.F.R. § 1.580(b),(c).

The Court provides a history of its past review of the issue of remote access to VA records systems, specifically automated claims records, such as VBMS, which historically had been controlled by 38 C.F.R. §§1.600 through 1.603 and §14.629. The Court discusses its 2015 holding that it had authority to issue a writ because any action by the VA authorizing or denying such access would be taken under 38 C.F.R. §14.629 as it existed in 2016, promulgated pursuant to 38 U.S.C. § 5904, which governs "[r]ecognition of agents and attorneys" for purposes of representing claimants before VA and which the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held "is a law that affects the provision of benefits." *Chisholm v. McDonald*, 28 Vet. App. 240, 242 (2016) (per curiam order). The Court held in that decision that "the denial of access by the Secretary would be subject to review by the Board, and consequently the refusal by the Board to issue a Statement of the Case . . . would be grounds for issuing a writ in aid of our jurisdiction." *Id.*

The Court then discusses that it had previously determined it had jurisdiction where an attorney not accredited by the VA who was representing an appellant before the Court sought remote VBMS access in order to review the Record Before the Agency (RBA), in accordance with Rule 10 of the Court's Rules of Practice and Procedure. *Green v. McDonald*, 28 Vet. App. 281, 283 (2016) (per curiam order). However, the Court also determined that VBMS is not among the automated systems governed by §§ 1.600 through 1.603. Ultimately, the Court held in *Green* that, for purposes of Rule 10, the VA's policy of allowing an unaccredited attorney to view an appellant's records at the VA General Counsel's office or at a VA regional office, rather than providing remote VBMS access, was reasonable. *Id.* at 295.

The Court then discusses its holding in *Carpenter v. McDonough*, 34 Vet. App. 261, 264 (2021). In that case, two accredited attorneys appealed Board decisions denying read-only remote VBMS access to their unaccredited paralegals and staff. The Court held that the *Green* holding was applicable, *i.e.*, that automated claims records, as noted in § 1.600, do not include VBMS, no matter who is accessing them. *Id.* at 269.

The Court decision then notes that, effective in July 2022, VA amended §§ 1.600 through 1.603. *See* 87

Fed. Reg. 37,744. Under the amended regulations, the VA may grant remote access to accredited attorneys, agents, and representatives of a VA-recognized service organization, as well as affiliated support-staff personnel and individuals authorized by the VA General Counsel under § 14.630. *See* 28 C.F.R. § 1.600(a)(1), 1.601(a)(1).

Returning to the case before it, the Court holds that Mr. Lechliter had not carried his burden of establishing that the Court has jurisdiction to grant a writ directing VA to issue an appealable decision on his request for remote, read-only VBMS access. The Court notes that the amended regulations §§ 1.600 through 1.603 do not include non-accredited, self-represented claimants as persons who are eligible for such access.

The Court construed Mr. Lechliter's position regarding its jurisdiction, pursuant to 38 U.S.C. §§ 511, 5701, and 7261, and the *Chisholm*, *Green* and *Carpenter* cases, as the manner in which the VA provides claimants with access to their records entails a law affecting the provision of VA benefits. However, the Court decision points out that, although in *Chisholm* it had determined that "decisions regarding access to claims files are rendered pursuant to a law affecting the provision of veterans' benefits," the VA's denial of remote records access to paralegal support staff would have been made pursuant to the pre-July 2022 version of the regulations. Additionally, the law affecting the provision of benefits pertained to agents and attorneys, not to non-accredited self-represented claimants like Mr. Lechliter.

It should be noted that the Court emphasized that its holding in this case was not that the Court definitively lacks jurisdiction to compel the VA to issue an appealable decision on his request for VBMS access. The CAVC held only that, in this case, Mr. Lechliter – "who has not fully grappled with the complex jurisdictional questions implicated by his petition – has not sufficiently connected the jurisdictional dots." The Court further notes that its decision highlights gaps in Mr. Lechliter's arguments "which the Court will not itself fill."

Thus, the CAVC leaves open the possibility that arguments can be made to support its subject matter jurisdiction to compel the VA to issue a decision regarding VBMS access for non-accredited self-represented litigants.

In his concurrence, Judge Falvey emphasizes that, to establish subject matter jurisdiction of the Court, a litigant must demonstrate that some statute or regulation requires the VA to provide the relief he is seeking. Thus, Mr. Lechliter would have had to show that he has a clear and undisputable right to have the VA issue a decision about his VBMS access, *i.e.*, a "clear and indisputable right to issuance of the writ under the relevant substantive law" (*Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004)).

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Voided Enlistments Not an Automatic Bar to Veterans Benefits

by Max C. Davis

Reporting on *Lile v. McDonough*, 37 Vet. App. 140 (2024).

In *Lile v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") held that voided enlistments do not automatically bar veterans benefits. Rather, the Department of Veterans Affairs ("the VA") must independently consider the facts of a claimant's voided enlistment under 38 C.F.R. § 3.14 to determine eligibility.

The appellant, Mr. Lile, enlisted in the Army. The enlistment forms asked him whether he had "ever been arrested, charged, cited, (including traffic violations) or held by any law enforcement . . . regardless of whether the citation or charge was dropped or dismissed or you were found not guilty."

Mr. Lile answered "No," but a background check the following month revealed prior convictions of larceny and breaching the peace. Shortly after that discovery, the Army released Mr. Lile from its custody and control for fraudulent entry. It issued him a DD-214 (Certificate of Release or Discharge from Active Duty) that listed his discharge as "uncharacterized."

Mr. Lile later filed claims for disability compensation with the VA. Following a first denial by the VA regional office, Mr. Lile appealed to the Board of Veterans' Appeals ("Board"). There he testified that his convictions were for misdemeanors, that he informed his recruiter of his criminal history, and that he simply followed his recruiter's instructions when he did not list the convictions on his enlistment forms. The Board, though, concluded that Mr. Lile was discharged for "conceal[ing] a conviction by a civil court that would have prevented his enlistment" if it had been made known, and so "his service is essentially rendered void, and thus the equivalent of a dishonorable discharge," barring VA benefits "as a matter of law."

Mr. Lile appealed to the Court, which found the Board's analysis unclear and set aside the Board's decision. It took the opportunity to address what "neither [the] Court nor the United States Court of Appeals for the Federal Circuit has had occasion to explore" before in a precedential decision.

The Court held that a voided enlistment does not categorically bar eligibility for veterans benefits. Under 38 C.F.R. § 3.14, "service is valid unless enlistment is voided by the service department"—but then the regulation goes on in its subsections to carve out scenarios in which service under a voided enlistment might nevertheless still qualify for benefits. Thus, "§ 3.14 has one purpose: to permit VA to award benefits in certain situations despite an enlistment being voided by the service department." The VA may be bound by certain service department findings (such as the dates of entrance and voidance or the fact that the enlistment was voided), but how those findings affect a claimant's eligibility for benefits is a determination for the VA to independently make.

Within § 3.14, subsections (a) and (b) in particular "make clear that voided enlistments can fall into one of two categories." Subsection (b) addresses voided enlistments for reasons that bar eligibility (like a felony conviction, desertion, or legal incapacity to contract for reason of insanity). Subsection (a) addresses voided enlistments for reasons "other than those stated in [subsection] (b)" and instead validates the period of service so long as the discharge is under conditions other than dishonorable.

So, § 3.14 has a "clear order of operations" for considering voided enlistments. First, the VA must determine whether the facts leading to the voided enlistment fall within subsection (a) or (b). If the facts fall within subsection (b), the case ends because the reason for the voided enlistment also bars benefits. If the facts leading to the voided enlistment do not fall under subsection (b) and therefore fall under subsection (a), then the VA must move on to the next step of determining whether the character of service was under conditions other than dishonorable, "which would likely require VA to consider the applicable provisions of 38 C.F.R. § 3.12."

The Court remanded the case to the Board to consider the effect of Mr. Lile's voided enlistment on his eligibility for benefits. In closing remarks, the Court highlighted additional facts for the Board: "neither § 3.14(a) nor § 3.14(b) discusses convictions of a crime generally," and, "importantly, subsection (b) refers only to a conviction for a felony. And here, it appears that appellant's convictions were treated as misdemeanors."

Max Davis is Counsel at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

On Board Remand, Silence on Some Claims are Nonreviewable on Appeal without Jurisdictional Hook

by Robert H. Willis III

Reporting on *Stiles v. McDonough*, No. 20-3523 (Vet. App. May 15, 2024).

In *Stiles*, the Court of Appeals for Veterans Claims (Court) issued an order written by Chief Judge Bartley dismissing an appeal due to lack of jurisdiction because a Board of Veterans' Appeals (Board) remand that is silent to unadjudicated claims is not considered an implicit decision regarding the Board's jurisdiction of those claims or an implicit decision on the merits.

The Appellant, Mark Stiles, served in the United States Air Force from 1992 until 1999. While in service (1997), he was diagnosed with sleep apnea and experienced nasal sinus septoplasty. In 2006, he filed a claim for service connection for his sinus septoplasty.

In 2007, the agency of original jurisdiction (AOJ) denied the claim, and Mr. Stiles appealed. In 2008, the VA acknowledged his claim for service connection for his sinus condition and vertigo, and noted that service connection for vertigo had not been addressed because vertigo is a symptom, not a disability.

In 2013, the AOJ awarded service connection for chronic sinusitis and allergic rhinitis but did not reference vertigo. Mr. Stiles appealed the award for sinusitis, requesting an increased rating due to his discomfort and its effect on his sleep.

In 2019, counsel for Mr. Stiles submitted a written argument to the Board stating that the vertigo and sleep apnea claims were still unadjudicated and should be referred to the AOJ for an initial decision. About two months later, the Board remanded the claim for an increased initial rating for chronic sinusitis, but did not address the claims for sleep apnea or vertigo.

In 2020, Mr. Stiles filed a motion for reconsideration, requesting that the Board address the issues raised in his 2019 written argument regarding his sleep apnea and vertigo claims and whether they remained pending. The Board dismissed his motion on the grounds that the 2019 remand was not a final decision on the merits, and Mr. Stiles appealed.

The Secretary filed a motion to dismiss for lack of jurisdiction, claiming that the Court did not have jurisdiction because the Board remand was not a final decision, and filed a motion to stay proceedings pending the Court's response to the motion to dismiss.

Mr. Stiles opposed the Secretary's motion to dismiss and argued that the Court has jurisdiction to review the Board's failure to address expressly raised claims, such as his sleep apnea and vertigo claims raised in his 2019 written argument.

In March 2021, the Court granted the Secretary's motion to dismiss and Mr. Stiles filed a motion for reconsideration, or in the alternative, panel consideration. The Court convened a panel.

Before the panel, the Secretary argued that the 2019 Board remand was not a final decision that granted the Court jurisdiction, citing 38 U.S.C. § 7208(a), which provides that the Court has jurisdiction over a final decision of the Board if it adversely affects the claimant. The Secretary further argued that under 38 C.F.R. § 20.1100(b), a Board remand is more like a preliminary order than a final decision. Because the remand was not a final decision, and the veteran still had administrative remedies such as continuing to pursue the claims at the AOJ, the appeal should be dismissed.

Mr. Stiles argued that the Board has a duty to refer unadjudicated claims to the AOJ under 38 C.F.R. § 20.904(b) and that failure to do so is a legal error, granting the Court jurisdiction. Further, he argued that the Board's refusal to acknowledge his claims

was either an appealable jurisdictional decision or a denial of the claims on the merits. He advanced that although the Board may not have had jurisdiction to decide the sleep apnea and vertigo claims, its failure to refer those claims to AOJ was an implied adverse decision, which resulted in Court jurisdiction.

The Court explained that the Board cannot have jurisdiction over a claim that was never adjudicated by a VA Regional Office, and its jurisdiction is limited to review final adverse Board decisions. The Court looked to *Maggitt*, *Kirkpatrick,* and *Howard* for guidance. *Maggitt* held that a final decision by the Board is one in which a benefit is either granted or denied. *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000). *Kirkpatrick* provided that a Board remand is not a final decision because it neither grants nor denies relief. *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005). In *Howard*, the Federal Circuit affirmed the Court's dismissal of a Board appeal that failed to address one claim but remanded another claim to a VA regional office. *Howard v. Gober*, 220 F.3d 1341, 1343-44 (Fed. Cir. 2000)

The Court then looked to whether the Board's silence as to the argument that claims were left unadjudicated should be considered a rejection of that argument or an implicit denial of jurisdiction, thereby granting the Court jurisdiction. The Court relied on the Federal Circuit's decisions in *Howard* and *Kirkpatrick* and determined that together, these cases instruct that the Board's silence regarding a claim in a remand order is not an implicit denial of the claims and does not speak to the issue of jurisdiction either.

The Court further looked to the Federal Circuit's recent decision in *Bean*, which suggests that once the Board makes a final decision on appeal as to one matter, the claimant may appeal an associated claim that was presented but not addressed by the Board. *Bean v. McDonough*, 66 F.4th 979, 988 (Fed. Cir. 2023). The Court makes a distinction from *Bean* in that for Mr. Stiles, no final decision was made.

The Court gave three reasons why Mr. Stiles' arguments failed. First, it held that that the Board's failure to address a claim or argument presented is not reviewable by the Court without a final decision on a claim. Second, the Court determined that it does not have jurisdiction on separate claims "that were not both adjudicated by the AOJ *and* appealed to the Board." Third, this case lacked the necessary jurisdictional hook because the sleep apnea and vertigo claims were not part of the claims that were appealed to the Board.

Finally, the Court determined that the claimant could seek other administrative remedies by raising the claims before the Regional Office and later requesting an earlier effective date.

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Documents Submitted to the Court Were Constructively Before the VA

by Kenneth L. Meador

Reporting on *Varad v. McDonough*, No. 21-4616 (Vet. App. May 15, 2024).

In *Varad*, the Court of Appeals for Veterans Claims ("Court") readdresses and reaffirms the legal precedent regarding the Board of Veterans' Appeals' ("Board's") actual and constructive possession when making a decision on a claim.

Self-represented appellant Christine Varad filed a September 2015 claim of entitlement to Dependency and Indemnity Compensation ("DIC") benefits based on her status as the dependent child of a veteran who died in 1975. In February 2019, the Board first denied her claim. She appealed to the Court. In June 2019, Ms. Varad submitted documents and medical evidence of a physical examination with a description of her prior workplace injury and a medical opinion regarding her overall impairment level. In a May 2020 decision, the Court remanded

the matter, finding that the Board had failed to support its February 2019 decision with an adequate statement of reasons or bases. *Varad v. Wilkie*, No. 19-1376, 2020 WL 2516551 (Vet. App. May 18, 2020) ("*Varad* I").

Following the Board's denial of her claim in December 15, 2020, Ms. Varad appealed the Board's decision to the Court. Throughout her pleadings, she consistently argued that the Board's denial of her entitlement to DIC benefits should be overturned due to the Board's failure to consider the April 2019 medical evidence she had submitted during *Varad* I, which she believed was relevant to her case.

In its l decision, the Court sets aside the Board's December 2020 decision and remands the matter of entitlement to DIC for readjudication, holding that remand was necessary because the April 2019 medical record was constructively before the Board but was not considered by the Board in its decision.

The Court's decision first discusses the cases on constructive possession, noting that the doctrine was meant to safeguard that documents "reasonably expected" to be part of a claimant's claim are included in the administrative record. *Euzebio*, 989 F.3d at 1325–26. The Court notes that the elements of constructive possession are that the evidence must: (1) pre-date the Board decision; (2) be within the Secretary's control; and (3) be relevant and reasonably connected to the claim. *Bell v. Derwinski*, 2 Vet. App. 611, 612–13 (1992).

Regarding the first element—whether the April 2019 medical evidence pre-dated the Board decision on appeal—the Court noted that there was no debate that the April 2019 medical report pre-dated the Board's decision, but that because the January 2021 submission did not exist at the time of the decision on appeal, it did not qualify for constructive possession.

Regarding the second element—whether the April 2019 medical evidence was within the Secretary's control— the Court explains that under the Court's rules, the notice of docket activity meant that service of the April 2019 evidence was sent to the Secretary's counsel and therefore was within the Secretary's control. In so holding, the Court rejected arguments that non-VA evidence must be presented to a VA adjudicator rather than the VA more generally. The Court also rejected arguments that the VA's Office of General Counsel was distinct from the Veterans Benefits Administration (VBA) or the Board for constructive possession purposes, reasoning that its jurisprudence and that of the Federal Circuit recognizes VA as a single entity for pleading purposes.

The Court then addresses whether a filing error rendered the April 2019 medical evidence ineligible from being reviewed and considered. The Court discusses a line of cases allowing for the consideration of documents that had been misfiled as long as the claimant's intent was clear. Based on the precedent, the Court concludes that "as long as the claimant's intent is clear with respect to a particular filing, the precise location within VA does not matter." Here, the evidence was within the Secretary's control, and the second element of constructive possession was satisfied because the Secretary received notice of the evidence, and it was clear from the evidence that Ms. Varad intended that evidence to be considered in her claim of entitlement to DIC benefits.

Finally, in addressing the third element of constructive possession — whether the April 2019 medical evidence was relevant *and* reasonably connected to the claim— the Court reiterates that relevance and reasonableness are two distinct inquiries, and relevance alone is not sufficient to establish the "reasonable connection" element of the inquiry.

The Court notes that the Secretary's arguments that pleadings filed with the Court are not required to become part of the record, contradicted the Board's practice of inserting Court documents into the administrative record when the Court remands a case. Specifically, in *Varad* I, the Board advised Ms. Varad that copies of the Court's order, "other pertinent pleadings," and the briefs from her case would be "associated with [her VA] claims file for

review and consideration by the assigned Veterans Law Judge."

The Court states that the proper inquiry into relevance and reasonableness here is "whether it was reasonable for the Board to have included the April 2019 medical evidence as part of the administrative record." The Court holds that because the Board had an established practice of advising appellants that it would consider their relevant pleadings filed with the Court during the pendency of their appeal, "it was reasonable to expect the Board to have included Ms. Varad's June 2019 correspondence wherein she submitted the April 2019 medical evidence."

In summary, the Court holds that because the April 2019 medical evidence predated the Board's decision, was within the Secretary's control, was relevant and reasonably connected to Ms. Varad's DIC claim, they were constructively before the Board. Remand was therefore required for the Board to consider those records.

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Book Review: *The Women* by Kristin Hannah

by Jillian Berner

Kristin Hannah's *The Women* isn't your typical wartime novel. Centered around the experiences of Frankie McGrath, a young, well-to-do woman who volunteers to be a nurse on the frontlines of the Vietnam War, some familiar themes of Vietnam era veterans' stories emerge: the rough welcome home many received, the delayed and often sudden processing of traumatic memories, the lack of compassion and understanding from families and civilians. But the centering of a woman veteran's story from this conflict is admittedly unique for me. Over 11,000 women served in Vietnam during the war. *The Vietnam Women's Memorial: Representations of Women in the Nation's Public Memory*, Unfolding History: Manuscripts at the Library of Congress, Library of Congress Blogs (https://blogs.loc.gov/manuscripts/2022/11/the-vietnam-womens-memorial-representations-of-women-in-the-nations-public-memory/). Eight of those women are included in the Wall of the Vietnam Veterans Memorial. *Id.* About 300 feet away is the Vietnam Women's Memorial, inspired by a nurse who, like Frankie, served in Vietnam. *Commemorating the 30th Anniversary of the Vietnam Women's Memorial*, Katie Lange, U.S. Department of Defense (https://www.defense.gov/News/Feature-Stories/Story/Article/3582809/commemorating-the-30th-anniversary-of-the-vietnam-womens-memorial/).

The Women works beautifully in some ways. Frankie's loss of innocence as she is exposed to the horrors and incompetencies of war mirrors the way the public tide turned against the Vietnam War. Frankie's post-war struggles cover well-trodden ground — gritting through, learning about triggers, self-medicating, and eventually hitting rock bottom. The specter of Agent Orange exposure and the dawning realization of its legacy in the bodies of the returning veterans. Frankie's VA experiences echo those of many combat vets, women, and others who simply don't feel the VA cushion beneath them when they need it. (Assuredly and unfortunately, that group was likely even larger in the post-Vietnam years.)

Some parts of the book resonated less for me. Frankie's naïve idealism before the war and hasty decision to enlist, sight unseen, to follow her brother was questionable. The romantic tropes could be heavy-handed and overly dramatic. Frankie's return home, ensuing difficulties, and poor decision making were (perhaps realistically) frustrating after 300+ pages.

Hannah is a popular novelist whose other books are historical fiction and romance-based. But interviews show that *The Women* was a particularly personal story for Hannah, as she grew up in the shadow of

the Vietnam War and was deeply affected by the traumas suffered by her friends' fathers who served.

And Hannah's decision to center this novel on a female wartime veteran is commendable. Personally, I had zero experience or knowledge with women who served in Vietnam (who were mostly, per my research, nurses, but encompassed other roles as well). After reading *The Women*, I have been inspired to learn more about these veterans. And any work of popular fiction that brings their stories to light for a broader population is worthwhile.

Jillian Berner is a judicial law clerk for the U.S. Court of Appeals for Veterans Claims.

Taking Mental Disabilities of VA Debtors Seriously: Is It Time to Say Goodbye to the Unequal Equality of *Barger v. Principi*?

by Anna Kapellan

The Lord will afflict you with madness and blindness and confusion of heart.
– Deuteronomy 28:28

Gather around, gentle readers, to be told a truly Kafkaesque fairytale. It goes like this: once upon a time, there was a prosperous and fair kingdom. But, watching over the kingdom's gates, there was a dragon with a face being of a Magritte'ish faceless bureaucrat so heartless that, when wounded warriors knocked on the kingdom's gates, the dragon would only put chains and locks on these gates and cover its ears so that it would not hear the wounded warriors' groans and pleas, and no tear of compassion ever wetted the dragon's bureaucratic eyes. From time to time, a passing-by brave knight (who, but of course, was head-to-toe in shining armor since, after all, it is a fairytale!) would swiftly storm, like lightning, to the kingdom's gates and briefly punch a hole through the gate big enough to allow a warrior or two to slip in. But the dragon was quick to patch up every such hole as there was no law in that fair kingdom to stop the dragon from shutting down the gates.

That is a fairytale. Now, the reality: some estimate that VA denies about 30 percent of claims filed by claimants seeking VA benefits. *See, e.g.,* https://www.hillandponton.com/top-six-reasons-va-denied-my-claim. That, in turn, means that 70 percent of claims are granted. And, of the 30 percent of denied claims, about 30 percent are granted on appeal to the Board, meaning that, assuming that all VA denials are appealed, about 79 percent of claims are granted by either the Board or VA. *See* https://www.bva.va.gov/decision-wait-times.asp. Of the remaining 21 percent, less than one-fifth are appealed to the Court, *i.e.*, only about 4 percent of all claims are appealed after Board review. *See id.* And, of this 4 percent, eventually many are granted since the Court often corrects various errors, reminding the Board and VA of the cornerstone of VA jurisprudence, *i.e.*, the inherently paternalistic nature of VA law that tilts even an approximately equal scale in favor of a veteran in many scenarios, including in those cases where adjudicators assign and review assignments of the ratings of the severity of manifestations of veterans' service-connected mental disorders.

By now, it has become axiomatic that such reviews should be holistic, and as such even one or two manifestations of a mental disorder, *e.g.,* suicidal ideations, may render a neatly groomed, coherent, oriented-times-four, eloquent, and never-physically-violent veteran qualified for a 70 percent disability rating based on a service-connected psychiatric disability. Moreover, the veteran might even be entitled to a TDIU rating, as the Court explained in *Bankhead v. Shulkin*, 29 Vet. App 10, 20 (2017), and its progeny. In fact, such a veteran is entitled to these ratings and payments even if suicidal ideations do not include a plan to act. That is, even if they are just fleeting. And if they were only in the past: since a recurrence of fleeting suicidal ideations without a plan might still render a veteran unable to secure or maintain a gainful occupation in a nonprotective environment. This is

the law of the land even if the rest of the population earns their paychecks while thinking of suicide as a way out when problems of health, money, career, relationships, and so on and on, choke their throats. Simply put, veterans' circumstances are not meant to be compared to those who have not served.

This is so because the point of VA paternalistic law is to take all veterans' disabilities, including mental health disorders, with utmost seriousness, without making comparisons to external circumstances since VA law is meant to express our national gratitude to veterans who were willing to make the ultimate sacrifice and, having paid with their health for the safety and prosperity of our nation, deserve unique standards of fairness not only for themselves but also for their families. This is also why a veteran who has experienced only fleeting suicidal ideations in the past might still be entitled to a TDIU rating payable at the same rate as that paid to a veteran who actually experiences a gross impairment in thought processes, has persistent delusions and hallucinations, engages in grossly inappropriate acts, presents a persistent danger of self-harm or hurting others, is intermittently unable to perform daily living activities, disoriented as to time and place, has memory loss of the names of close relatives, their occupation, and even their own name. In other words, this equality of a TDIU and a 100 percent monetary entitlement reflects the magnitude of the unique paternalism of VA law, which unambiguously intends to err on the side of granting, rather than denying, veterans' claims, always. Well, almost always.

Indeed, one sub-area of VA law has not evolved in sync with the rest of the above-noted by-now-axiomatic principles of VA law. Rather, that sub-area of VA law froze in a 15-year-old time warp. Therefore, while scores of veterans daily benefit from the holding of *Bankhead*, the rule is not the same when it comes to the claims of the veterans or their survivors who seek waivers of the recoupments of their debts to VA since, at this particular point, VA law all of a sudden stops being paternalistic and transforms into a Kafkaesque deaf and heartless bureaucratic dragon.

This is so because, under *Barger v. Principi*, 16 Vet. App. 132 (2002), the 180-day period to seek a waiver of VA's recoupment of overpayment debts is not equitably tollable when the debtors' mental disabilities prevents the debtors' comprehension of the VA Debt Management Center (DMC) demand letters, *i.e.*, the notices informing these debtors of the amounts of their debts and of their right to seek a waiver (which is a polite paraphrasing of the fact that their debts would necessarily be recouped unless VA receives the debtors' claims seeking waivers of the recoupments of their overpayments within 180 days from the dates of the issuance of the DMC demand letters). Lost in the boilerplate language of these notices as to the debtors' right to seek a waiver is the fact that the only equitable tolling recognized by *Barger* is the one based on the debtors' showing that the DMC demand letter was not received at all or was received with a substantial delay due to the circumstances deemed as falling outside the debtors' control, such as a non-delivery of the DMC demand letter by the USPS. In contrast, debtors' mental disorders do not qualify as circumstances warranting equitable tolling of the 180-day period; this rule, hence, results in a rather odd presumption that VA debtors have meaningful control over whether they do or don't experience mental disorders, or as if they have any control over the degree of severity of these disorders.

Notably, *Barger* remains not only good law but the controlling precedent. Therefore, under *Barger*, an overpaid veteran or the overpaid surviving spouse who is experiencing a mental disability simply cannot rely on mental disability as a valid basis for an equitable tolling even if the veteran or surviving spouse experiences constant suicidal ideations, depression, gross impairment in thought and communication processes, persistent delusions and hallucinations, is disoriented as to time and place, has no memory of names of close relatives or even their own name. In other words, such a veteran might be entirely unable to earn a single dollar in wages due to the severity of the mental disorder, but nevertheless is: (a) presumed fully able to understand the portion of the DMC demand letter addressing the 180-day limitations period; (b) expected to actually produce a waiver request

(and VA intentionally has no waiver form to encourage all lay statements that could reasonably be construed as requesting a waiver, but – to many VA beneficiaries who got used to the idea of communicating with VA by filing only specific forms, such a lack of a specific VA form is highly confusing, especially if the beneficiary is experiencing a mental disorder); and, to top it all off (c) such a VA debtor is also expected to remember to send a signed waiver claim in time for VA to receive this claim within the debtor's 180-day window, *i.e.*, debtors are expected to carefully calculate all these days while disoriented as to time and unable to remember names.

Meanwhile, under *Bankhead*, a debt-free veteran having just a faint memory of fleeting suicidal ideations without a plan might be deemed unable to make a living. This is a baffling inconsistency of VA law. It is time to admit that VA law has matured during the 15 years that passed from *Barger* to *Bankhead*, but the law of equitable tolling as to waiver claim somehow failed to progress in the direction envisioned by its drafters.

Perhaps a good way to gauge the harm sown by this inconsistency is by assessing its law-and-economics effect on the segment of VA beneficiaries affected most frequently by this double standard. At the heart of the law-and-economics side of this analysis lies the so-called "loss aversion" principle establishing that "the disutility of giving up an object is greater than the utility associated with acquiring it." The key to this principle is the psychological "endowment effect," which manifests by the fact "that people often demand much more to give up an object than they would be willing to pay to acquire it." Indeed, by now, it has been well established that the psychological value of – *i.e.*, the dismay experienced due to – a dollar lost is two and a half times greater than the psychological value of – *i.e.*, the joy experienced due to – a dollar found. This psychological valuation discrepancy is easily understandable because people tend to budget and plan their financial needs; therefore, the joy of a sudden windfall gain, while certainly a very pleasant development, is never really expected and, therefore, it fades away quickly, but the bitter sting of a loss, *i.e.*, the loss of the funds that have already been allocated to cover certain needs or to be saved to provide a safety cushion, this sting keeps burning much longer.

Therefore, a VA debtor, that is, an overpaid veteran or a surviving spouse, feels a markedly more severe financial pinch and emotional devastation (due to the DMC's recoupment of the amount equal to the usually-already-long-ago-spent overpaid funds since such a debt is recouped through withholdings from the debtor's relied-upon stream of VA income in the form of recurrent VA benefits, or by garnishment of wages, SSA benefits, IRS refunds, 401K plans, non-VA retirement pension, etc.) from the implications of a debt than the joy a veteran or a surviving spouse might have derived from a receipt of additional VA funds as a result of having claim for VA benefits granted. Indeed, in the majority of VA households, recurrent VA benefits or wages, SSA or SSI benefits, IRS refunds, etc., have already long been budgeted to cover the costs of upcoming grocery purchases, rent payments, Medicare copays, kids' needs, etc. Therefore, if VA law's paternalistic leniency is desperately needed by a certain segment of VA beneficiaries, this leniency is likely needed the most by those seeking waivers of the recoupments of their overpayment-based debts.

Moreover, it appears that often, way too often, these indebted beneficiaries are feeble elderly pensioners who are Vietnam War, Korean Conflict, and post-WWII veterans and their surviving spouses. The high share of such debtors is, unfortunately, as predictable a fact as it is understandable: many veterans who are Vietnam War and Korean Conflict beneficiaries did not know, often for decades, that VA benefits might be paid to veterans who did not lose a limb in combat. This is why many of them, by now old, frail, and counting every cent, belatedly realized that it might be very hard to establish service connection for the bulk of their disabilities, but VA might pay them nonservice-connected pensions even without granting claims for service connection. However, many such elderly VA pensioners have a panoply of mental disorders and are often confused about the intricacy of pension calculations. Therefore, many such pensioners often get overpaid in a whole array of scenarios, *e.g.,* when

such a pensioner becomes widowed or receives a tiny bump in SSA benefits, or simply moves from a more expensive "senior adult" facility to a cheaper nursing home, these pensioners way too often become overpaid due to their lack of understanding of the dire financial consequences of their continuous receipts of the same amount of VA pensions regardless of these subtle changes in their income, marital, or residency-related circumstances. As these financial consequences, expressed in dollars and cents, keep adding up, month after month, they often end up morphing into debts that are perceived by pensioners as terrifyingly high by the time VA finally learns of these financial discrepancies and charges the suddenly outed debtors with overpayments that, if recouped, can easily threaten to put many of these debtors literally on the streets.

Therefore, such debtors are relatively often able to establish at least a viable basis for a waiver claim, but many of them do not file their waiver claims timely due to the limitations of their mental acuity. Once such a failure to seek a waiver happens, the recoupment process begins, meaning that these veterans or their surviving spouses often end up having their very tiny wages, SSA and SSI benefits, non-VA pensions and remainders of 401K savings garnished, and even their houses could end up being placed in foreclosure.

Not surprisingly, once the garnishment process commences, such debtors, often unable to remember the passage of days or count time, finally execute their waiver claims in heart-breaking missives filled with shaky handwriting with slews of corrections reflecting their nonservice-connected Parkinson's and Alzheimer's (that, alas, are just as severe as the service-connected counterparts since diseases strike people with equal severity without any regard for the legal labels that might be affixed by legal provisions or adjudicators). However, these pensioners' waiver claims – being *de facto* desperate pleas for help – get denied as untimely without any consideration on the merits. And then, when appellate adjudicators of all levels, following the rigid holding of *Barger*, affirm these denials, these hapless souls have no one to turn to for help: because there is no precedent that would play the role of a brave knight in shining armor who could fight for their equitable tolling. Therefore, the only face of VA law that these debtors get to see is that of the Kafkaesque dragon.

However, this face is not the true face of VA law or, at the very least, it is not what this face should be, and the fairytale should end with the gates being shut. Perhaps it is time to craft a more thoughtful analysis (correlating *Bankhead* and the letter and spirit of VA law to the reality of overpayments and waivers) in a precedential opinion redefining the circumstances that fall outside VA debtors' control. Otherwise, the Board's Administrative Judges, as well as the Article I and Article III Judges of the appellate Courts have their hands either tied and, at most, can shift the focus from the debtor's mental disorder to additional circumstances that should not be required in order to avail the debtor to a waiver analysis on the merits. *See, e.g.*, *Zakrzewski v. McDonough*, No. 21-3352, 2023 U.S. App. Vet. Claims LEXIS 129 (Jan. 30, 2023) (remanding the issue of whether a denial of a waiver claim as untimely was proper in a case where the joint effect of the veteran's homelessness, transient housing and mental disability might have warranted an equitable tolling, but emphasizing the veteran's homelessness and transient housing at roadside motels that prevented delivery of VA's overpayment notices, thus suggesting that even a severe mental disability of a debtor having a stable housing would still likely be insufficient to secure an equitable tolling in light of the chokehold created by *Barger*).

In sum, the time has come to say goodbye to *Barger*. After all, VA debtors with mental disorders, especially those disorders the severity of which increases with age, are not getting any younger and cannot afford to wait much longer. In other words, if the adjudicators of VA law would not take to heart the words of Ralph Waldo Emerson, "you cannot do a kindness too soon, for you never know how soon it will be too late," VA law of equitable tolling governing waivers of overpayment debts could transition from an already blood-curling Kafkaesque fairytale to a truly surreal Orwellian reality where all

mentally disabled litigants are equal, but the solvent ones are more equal than others.

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

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