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National Veterans Law Moot Court Competition Finds Success in Mixed Online/In-Person Format

by Kenneth Meador

Maybe it's just me, but I do so love to hear a good, "Oyez, Oyez, Oyez." On November 13, 2021, at the U.S. Court of Appeals for Veterans Claims (CAVC) in Washington, D.C., the participants for the final round of arguments in the 2021 National Veterans Law Moot Court Competition (NVLMCC) got to hear the Clerk of the Court call out those words as the curtains drew back and former CAVC Chief Judge Robert N. Davis, current Chief Judge Margaret Bartley, and the CAVC's next Chief, Judge Michael Allen, stepped forward to take their seats at the bench.

Judge Davis led the proceedings, acting as the Moot Court's Supreme Court Justice, stating, "Good afternoon. I am Chief Justice Robert Davis, Former Chief Judge Davis . . . to my right is current chief Judge Bartley, and to my left is next Chief Judge Allen. So, you are appearing before three Chief Judges."

If the law student litigant-finalists were intimidated, they did their level best not showing it. For the next hour, they argued their positions professionally, competently, and, most importantly, in person before Judges Davis, Bartley, and Allen, after a 2020 filled with lockdowns and a 2020 moot court competition that was entirely virtual.

This year's NVLMCC participants were asked to put their legal minds to task analyzing not only the complexities of VA's dependent benefits system for children of veterans with spina bifida, but also the CAVC's evolving rules and case law surrounding class action litigation. They were presented with an interesting legal scenario where a veteran who had been exposed to the herbicide Agent Orange in Vietnam then participated in a sperm donation study while attending medical school. According to the hypothetical problem, the veteran potentially was the biological father of up to 20 VA claimants seeking health care, vocational rehabilitation, and monetary allowances under various statutes and regulations providing allowances for children of veterans exposed to Agent Orange born with spinal bifida. After claims and litigation at the lower adjudicatory levels, the case was before the U.S. Supreme Court. NVLMCC participants were asked to address two legal questions: first, whether the evidence of record (23AndMe DNA test results and lay testimony) was sufficient to establish biological father-child relationships for the purposes of obtaining benefits under statutes and VA regulations, and, second, whether a class action in

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this case would be "superior" to a precedential decision or a consolidated action.

In the end, Nancy Eriksen and Benjamin Laing from Stetson University College of Law won the competition overall, with Reid Carillo and Seth Toups from South Texas College of Law Houston coming in as runners-up. Alexandra Adams from New York Law School took first place for Best Oral Advocate and Brianna Callagy from University of California Hastings College of the Law and Devon Potts from Widener University Delaware Law School tied for second. First place for Best Brief (Petitioner) went to Katherine Pence and Alisa Simons from University of Wisconsin Law School; the second-place title went to Eriksen and Laing from Stetson University College of Law. First place for Best Brief (Respondent) went to Gavin O'Brien and Jose Pablo Salas from South Texas College of Law Houston; there was a tie for second place between Callagy and Aaron Lau from University of California, Hastings College of Law, and Kelly Baker and Marsha Seidel from University of Illinois Chicago School of Law.

Semi-final rounds were judged by Mary Flynn, Chief Counsel, VA OGC CAVC Litigation Group; Greg Block, Clerk of Court, U.S. Court of Appeals for Veterans Claims; and Jenna Zellmer, President, CAVC Bar Association.

Twenty-six teams registered to compete in the Moot Court competition from eighteen schools all over the nation. The preliminary and quarterfinals rounds were held virtually and four teams advanced to semifinals and final rounds which were held in person at the CAVC in Washington, D.C.

Over the Thanksgiving break, I caught up with Dilwyn Pilner, a second-year law student at the University of Richmond School of Law who is headed into the Army Judge Advocate General's Corps after law school. Dilwyn told me that he really enjoyed having the chance to participate in NVLMCC this year and even though it was a heavy lift to get his brief finished while also completing his course work, he was glad he participated. He got to meet practitioners on both sides of the Bar and one of the things that struck him about the experience was the collegiality and professionalism across the Bar. He was surprised at the sometimes-aligned goals of doing the right thing for veterans, though the opposing sides of the Bar may have differing views on what the right thing for veterans is or how to best to get there. Dilwyn made it to the quarterfinals and he was glad he participated in the NVLMCC. He said that he definitely felt like he walked away from the experience with a broader familiarization of the regulations and statutes that govern veterans' benefits.

Overall, the 2021 NVLMCC was a great success. As a member of the CAVC Bar Association Board of Governors, please let me extend a hearty congratulations to this year's winners and all the participants of this year's competition! It can be difficult to take time out of a heavy load of law school coursework to participate in an event like this. I hope that the experience these students gained will serve them well in their promising legal careers.

Kenneth L. Meador is an appellate attorney with the National Veterans Legal Services Program.

Bar Association Annual Meeting Honors Outgoing Board Members and Founding Members, Inducts New Board Members

by Jillian Berner

Newly-installed President Jenna Zellmer presented Immediate Past President Jason Johns with a plaque thanking him for his service.

The CAVC Bar Association Annual Meeting was held in a hybrid virtual and in-person format in Washington, D.C., on September 29, 2021.

At the Annual Meeting, Bar Association members had the opportunity to observe a panel discussion of founding Bar Association members, who provided their thoughts on the history of the Bar Association and the progress made since their formation of the group.

Immediate Past President Jason Johns presented outgoing Board of Governors member Stacy Tromble with a commemorative plaque.

Additionally, the Bar Association Board of Governors honored and closed out the service of departing members Jenny J. Tang, Bryan Andersen, and Stacy Tromble, all of whom completed their respective terms on the Board. The Board also welcomed new members Emma Peterson, Kimberly Parke, James Drysdale, and Meghan Gentile. The Board of Governors announced the election of President Jenna Zellmer, President-Elect Jillian Berner, Secretary Freda Carmack, and Treasurer Thomas Susco. Finally, Jason Johns became Immediate Past President and Jenna Zellmer took the reins as President.

Jillian Berner is Senior Staff Attorney at the University of Illinois at Chicago School of Law Veterans Legal Clinic.

Virtual Administrative Law Jobs Panel Informs Students, Practitioners about Career Prospects

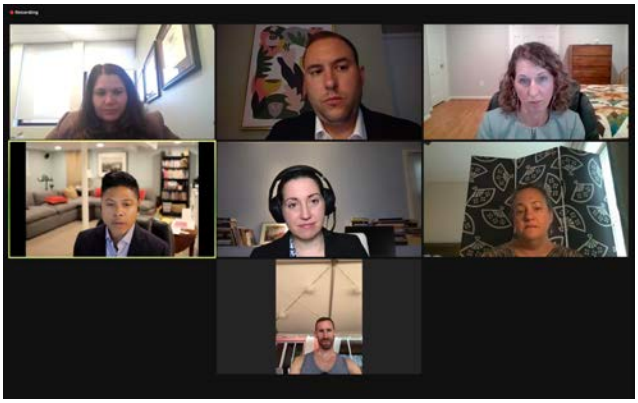
by Kimberly Parke

On October 6, 2021, the Court of Appeals for Veterans Claims Bar Association held a virtual administrative law jobs panel via Zoom. The event was well-attended by law students and practitioners alike.

The distinguished panel was composed of five attorneys working in a variety of roles practicing administrative law. Jeff Bozman currently serves as counsel to Chairman Adam Smith for the U.S. House Armed Services Committee. Tiffany Dawson was appointed in March 2020 by the Secretary of VA, and approved by the President of the United States, as a Veterans Law Judge for the Board of Veterans' Appeals in the United States Department of Veterans Affairs. Blair Thompson was Director and Assistant Clinical Professor of the Robert W. Entenmann Veterans Law Clinic at Hofstra University School of Law from January 2019 until August 2021. Mark Villapando is an associate with King & Spalding's Special Matters and Government Investigations and Government Contracts practices. Charles DiNunzio moderated the panel and was (at the time of the panel) a Judicial Law Clerk to the Senior Judges of the U.S. Court of Appeals for

Veterans Claims (Court) and formerly Senior Law Clerk to Judge Mary J. Schoelen.

The panelists shared the various ways in which they have each practiced administrative law throughout their careers from the state level to the federal executive branch to the federal legislative branch. They offered tips to law students and professionals who may seek to practice administrative law. They provided practical suggestions for successful career advancement and answered questions from law students regarding best practices to obtain a job in administrative law.



President Jenna Zellmer offered her thoughts on the ways in which membership in the Bar Association could assist the law students with job opportunities and networking. Many of the law students attending expressed their thanks to the panelists and the bar association for providing the program.

Kimberly Parke is a Senior Appellate Attorney at National Veterans Legal Services Program.

Former Chief Judges Share Insight, History in Jointly-Sponsored Panel from Bar Association and Historical Society

by Kenneth L. Meador

On October 21, 2021, the U.S. Court of Appeals for Veterans Claims Historical Society and CAVC Bar Association came together to host a joint virtual event featuring the Chief Judges from the second generation of the Court, Judges William P. Green, Lawrence B. Hagel, and Robert N. Davis.

Judge Allen moderated the discussion, first asking the former Chief Judges to share a bit about their paths to becoming judges on the CAVC. Former Chief Judge Greene shared his story first, explaining his path to nomination and appointment to the CAVC in 1997 after a long and distinguished military career as an Army JAG officer which took him all over the globe, as well as his civilian career as a trial immigration judge. Interestingly, Judge Greene explained that he had to staff his office from the ground up when he took his position at the Court. Judge Greene also explained that when he was appointed to the Court, the position of Chief Judge was appointed by the president, rather than granted by seniority. There was some speculation that Judge Green might have been appointed to the Chief Judge position very early in his Judgeship. But the Senate Veterans Affairs Committee changed the rules to their current posture, with the Chief Judgeship now going to judges based on seniority. Judge Greene was grateful for the chance to not take on that position so soon and instead saw what challenges he would face when he took over in the position as Chief Judge. He also took a brief moment to joke that he was "in prison" when he was offered the job, because he was there working as an immigration judge.

Former Chief Judge Hagel, who joined the video conference wearing a Brooklyn Dodgers baseball cap (not to be mistaken for a Boston Red Sox baseball cap!), explained that he became involved with the CAVC after leaving the Marine Corps, where he served as an infantry commander, including completing a combat tour in the Republic of Vietnam. After his service in the Marines, he took a position with the Paralyzed Veterans of America, but did not really want to serve on the Court. After two demurrals when the White House asked if he might be interested in having his name put forward for nomination, Judge Hagel was nominated to the CAVC in 2004 and became Chief Judge at the CAVC in August 2015.

Next, former Chief Judge Davis explained his path to the judgeship in 2004. Judge Davis served in the

Navy as an intelligence officer and also has extensive arbitration experience and worked as a tenured professor at Stetson University College of Law professor. Judge Davis first told the attendees that he was very proud to see the historical society, one of his initiatives as Chief Judge, putting together the joint panel with the CAVC Bar Association. He then explained that, unlike his colleagues, when he got the call probing whether he might be interested in serving at the CAVC from the White House, he wasn't familiar with the CAVC at all. Thinking that he would be last on a long list of more qualified nominees, he said he suddenly found himself bringing his memorable bowties to the bench in December 2004. Later, Judge Davis explains, even the decision to become Chief Judge was one that he had to wrestle with, but in the end, he was glad that he decided to take on the role of Chief Judge.

Judge Allen then asked the judges to talk about the unique challenges they faced when they took on the position of Chief Judge. Judge Green talked about facing the possibility of staffing shortages, potentially being the only judge left on the Court if other judges left before new judges were appointed (which thankfully didn't happen), broadening the CAVC Bar association, and the advent of electronic filing (something I think we can all appreciate). Judge Hagel tried to focus on staffing the CAVC and wanted to expand the availability of oral arguments, but not just in Washington D.C. Judge Hagel said he had hoped to broaden exposure of the CAVC among federal courts and law schools around the country and felt that he'd achieved some success in that goal. He also hoped to support efforts to find a stand-alone building for the CAVC. Judge Davis informed the viewers that during his tenure as chief he'd focused on fostering a strong CAVC staff environment, supporting the CAVC Bar Association, and law school outreach. Judge Davis also echoed Judge Hagel's sentiments that the CAVC needs a stand-alone building, though with remote work, he feels that perhaps those efforts may be a bit less relevant today.

Judge Allen, who is slated to become the next Chief Judge of the CAVC and served as a law professor at Stetson University College of Law before coming to the Court, asked what advice the former Chiefs would offer to a hypothetical incoming chief if they had the chance to offer some advice.

Judge Davis spoke first, quoting President John F. Kennedy: "Change is the law of life. And those who look only to the past or the present are certain to miss the future." He suggested that the job is demanding and also noted that he was surprised when he came to the Court by how much he drew on his experience as an arbitrator in resolving conflict. Judge Hagel said that it was important for a Chief Judge to foster consensus among their fellow judges. He also stressed that Chief Judges must be cognizant about the posture of the Chief's crucial role of advising Congress and the Congressional staff about the importance of the CAVC and its independence from the legislature as a judicial entity. Judge Greene encouraged the next Chief to take advantage of the tremendous talent of the Board of Judges. He advised the next Chief to embrace them and get them involved in the participative management of the CAVC.

In the question-and-answer session, Bradley Hennings, a partner with Chisholm Chisholm and Kilpatrick, asked: What did the judges look for in law clerks, and what changes did you see in hiring practices over your time as a judge?

Judge Hagel looked for law students, believing that they would be more current with the changing law. He then looked for experience with publications, in law reviews or moot courts, because he wanted people who were able to read and write. Then he looked for students who graduated high in their class, because that meant they would be ready to quickly take on the high volume of veterans law in chambers. Judge Davis, having come to veterans law with no background in the area, looked for people who were intelligent, but not necessarily based only on GPA or test scores. He also looked for people with diverse, well-rounded backgrounds who had a passion for research and writing. He also kept law clerks for longer because he felt that would help him maintain consistency in chambers as he got up to speed on the current state of veterans law. Judge Greene had the chance to see his chambers evolve from two clerks to four clerks and also integrated the concepts of judges having a senior clerk. He also

noted that he kept his clerks on for longer periods of time, but for him, the process of selecting a clerk was more about finding candidates that he felt would be a good fit with him as an individual judge.

In a closing "lightning speed" round, Judge Allen asked the Chiefs about their funniest moments. Judge Greene shared not a funny, but a "cool" moment where, as Chief, he'd held an offsite event in Williamsburg to orient the new judges in Old Town. Unbeknownst to Judge Greene, one of his clerks had the judges march across the grounds of Old Williamsburg with the drum and fife corps, which he found fitting for the Veterans Court. Judge Hagel shared a moment where, at the same conference, Judge Greene had referred to the oncoming judges as the "new" judges and Judge Lance, who joined the Court in 2004, jokingly said, "Chief Judge Green, you've referred to us as the new judges and, there are four of us, we preferred to be referred to as The New Majority." Judge Hagel laughed and said, "That's as close as you're going to get to a funny incident from me." Judge Allen then reminded him of the time he disrobed at a judicial conference, while still speaking, to the shock of all the attendees, only to reveal a Chicago Cubs uniform beneath his suit. Judge Davis's story was also about Judge Lance, who apparently was quite the personality on the CAVC. When he was asked at a conference what his biggest surprise was when coming to the bench, he had to reply, "Well, Judge Lance was the biggest surprise because of his personality and wit."

The final question, from Judge Allen, was, "What would you want someone to remember about your tenure as Chief?" Judge Davis answered, "Fairness and action." Judge Hagel answered, "That I listened to them. I understood what they were asking the Court to do. That I made a fair judgment and that I explained that to them." Judge Greene said, "Neatly efficient, totally caring for others, and kind."

It was a real honor for me to write this article and a bit of a revelation to realize that I was actually in Iraq serving as a combat medic in 2003, 2005, and 2008 when Judges Greene, Hagel, and Davis were all serving as judges together on the CAVC, making decisions that would directly impact my future as a veteran living and working with service-connected conditions and now helping veterans figure out how to live with theirs. This panel really reminded me how important the day-to-day tasks of this ongoing work is, and it was apparent from the very beginning of the panel that the judges are the kinds of people whose long careers as veterans and attorneys/advocates in their own right informed and shaped their time on the Court. I am incredibly grateful for the hour and a half they took out of their busy schedules to spend with the Historical Association and the CAVC Bar Association.

Kenneth L. Meador is an appellate attorney with the National Veterans Legal Services Program and a U.S. Army Veteran.

Message from the President

It is hard to believe that we've reached the final VLJ volume of the year. As 2021 comes to a close, I hope that you are all staying healthy and well. It was wonderful to see so many of you in person (and more over Zoom) at our annual meeting in September. I want to thank the Founding Members who participated in our panel on the founding of the Bar Association. It was a highly informative and entertaining discussion. Thank you also to Chief Judge Bartley who appeared in person and provided a valuable update on the business of the Court.

We kicked off the new membership year strongly with our two October panels. First, the Law School Outreach committee presented a panel on the many different fields in which an attorney can practice administrative law. It was interesting to hear from some former and current veterans' law practitioners. The committee is doing a great job preparing the future generation of veterans' advocates.

Then we heard from a panel of former Chief Judges who provided their insight about the Court's history and continued evolution. Thank you to Judges Hagel, Davis, and Greene for their willingness to participate and thank you to Judge Allen for moderating the panel.

In November, I had the privilege of judging the semi-final rounds of the National Veterans Law Moot Court Competition. Thank you to all our members who volunteered to judge preliminary rounds or grade briefs. The competition organizers remarked at how well the Bar Association's members responded to their call for volunteers. If you did not volunteer this year, I highly recommend doing so for the 2022 competition.

It is so rewarding to see how successful the Court and the Bar Association's outreach to law students has been. Between the high attendance at the jobs panel and the impressive showing at the moot court competition, the future of veterans' law is in good hands!

December has brought the return of an in-person volunteer opportunity with Wreaths Across America. Next year, we hope to be able to bring back more volunteer opportunities, including memorial washings and honor flights. The Bar Association's programs committee also has some great panels and events planned for 2022, so please stay tuned and keep an eye on your email inbox.

Finally, a reminder that the membership year runs from October to October. If you have not yet renewed your dues for the 2021-2022 year, please do so soon. Your membership helps support our mission to facilitate justice for our nation's veterans and it allows us to continue to provide valuable programming and networking events. You can renew your membership at: cavcbar.net/membership.

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

Jenna Zellmer

President, CAVC Bar Association

Message from the Chief Judge

Greetings members of the Bar,

I hope you are all having a wonderful early-winter season, and I'm glad to have the opportunity to address you once again.

Come January 10, 2022, with our robust telework policy in place, additional Court staff will begin working onsite as we reopen our physical location. We're looking forward to seeing each other in person once more. And although we will certainly still use remote and hybrid oral argument functionality, we will begin to hold in-person arguments as well. Counsel will continue to receive an oral argument scheduling order from the Court, as well as perhaps a phone call from the Clerk of the Court, to discuss the specific plans for their case.

A recent conversation with a member of the Bar made me realize that some of you may not be familiar with the day-to-day work of a law clerk at the Court. So, I wanted to let two experienced Court law clerks, Leanne Zobrist and Emily Mills, share thoughts on what it's like to serve in that capacity. Leanne is a law clerk in my chambers and Emily is the senior law clerk in the recall judges' chambers.

Leanne served a term as a law clerk for Judge Lance and then spent four and a half years as counsel at the Board of Veterans' Appeals. She then returned to the Court, working as a law clerk in the senior judge recall chambers for nearly two years. Leanne joined my chambers as a law clerk in 2019.

Leanne shared: *"The job description on a law clerk's resume might read: review the parties' pleadings, make recommendations to the judge, and prepare*

draft decisions and orders for the judge's review. But what does that mean? A law clerk is entrusted with the privilege and responsibility of reading the appellant's or petitioner's story and understanding why the parties disagree about the Board's decision or disagree about VA's actions. So, the job description means knowing, or quickly becoming familiar with, applicable law and providing your judge with your best assessment of the appropriate outcome and why. It requires balancing an understanding of your judge's judicial philosophy with the confidence to respectfully voice a different perspective for their consideration. It calls for the ability to recognize novel arguments that would require a precedential opinion. In cases where a precedential opinion is needed, law clerks provide their judge with the research and analysis they need for a fruitful oral argument. Law clerks will occasionally fall down rabbit holes that might consist of past versions of the C.F.R. or comments in the Federal Register. The work may involve considering how VA's unique pro-claimant system alters the applicability of principles and case law from other areas of administrative law. The work has many facets, but overall, being a law clerk means being 'in the room where it happens,' and playing a part in the creation of judicial decisions and new precedent. And all this magic happens without the looming pressure of billable hours."

Emily has also served in different capacities at the Court. She served a term as a law clerk for Judge Moorman. She then lived overseas while her spouse was in the Foreign Service with USAID. Emily returned to the Court in 2015 and served almost two years as a law clerk for Judge Pietsch. She then served three years as a law clerk in the senior judges' recall chambers, and was promoted to senior law clerk of that chambers in June 2020, a position she currently holds. Senior judges are those who have completed their 15-year term and who agree to be recalled by the Chief Judge for further service on the Court. Recall judge service generally equates to one-quarter of the workload of an active judge, and is typically performed by a senior judge either intermittently throughout the year or during a 90-day consecutive period. Recalled judges exercise all of the judicial powers and duties of the office of an active judge and the Court employs a team of permanent law clerks, including a senior law clerk, to assist them with deciding appeals. These law clerks may also assist an active judge if needed. Although the role of a senior law clerk varies from chambers to chambers, it typically involves some supervision of the judge's other law clerks and oversight of the judge's docket.

Emily shared: *"One of the most challenging and rewarding aspects of working as a law clerk to senior judges is the requirement to quickly, and with quality, tailor your writing and analysis to fit multiple judges' preferences, styles, and views of the law. Research, writing, and critical thinking are paramount. The day-to-day work of a law clerk in the recalled judges' chambers involves working with those judges to draft memorandum decisions and related orders, identifying and exploring potential panel issues that arise, and preparing panel issue statements for distribution to active judges. I also keep the trains running, so to speak. With senior judges rotating in and out of recall service on various schedules, and active judges at times hiring permanent law clerks from the recalled judge chambers pool of law clerks, my work requires effort to keep the recalled judge chambers staffed with law clerks who can seamlessly support the recalled judges. The benefits of that structure are many, with law clerks learning flexibility and comradery while developing meaningful relationships and receiving mentoring from a variety of experienced senior judges."*

Thanks to Leanne and Emily for sharing your perspectives. The behind-the-scenes legal work that law clerks perform—from researching, to advising, to drafting—is invaluable. Some law clerks follow the traditional path of serving a one or two-year term after graduating law school, and then moving on from the Court. Other law clerks serve at the Court for many years, with the same or different judges and chambers. If the work of a law clerk at the Court interests you, keep an eye on our website and USAJobs for law clerk vacancy announcements at the Court. We have been fortunate to have so many exceptional law clerks like Leanne and Emily, and we'd love for more members of the Bar to consider joining their ranks.

I hope you have a safe and satisfying holiday season and are able to step away from work and enjoy life!

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Court Denies Class Action Certification in Appeal for Entitlement to a Hearing, as Underlying Appealed Issue Became Moot

by R. Brouck Kuczynski

Reporting on *Furtick v. McDonough*, No. 20-4638 (August 25, 2021).

In *Furtick*, the Court of Appeals for Veterans Claims (Court) denied a request for class certification (RCA) and dismissed the appeal of a May 2020 Board of Veterans' Appeals (Board) decision, which had concluded that denial of an Agency of Original Jurisdiction (AOJ) hearing is not an appealable issue.

In May 2019, Mr. Furtick filed a Supplemental Claim, available under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), for service connection for sleep apnea. After the AOJ informed him by letter in July 2019 that a hearing was not warranted at that time, he submitted a VA Form 10182 (Board appeal) for entitlement to a hearing in a pending supplemental claim. The AOJ certified the appeal to the Board and denied the underlying claim for sleep apnea.

The Board dismissed the appeal for entitlement to a hearing in May 2020, holding that the denial of due process does not constitute an appealable decision on the provision of benefits. The Board noted that if Mr. Furtick were to appeal a denial of the underlying benefits sought for service connection, any due process error, such as not receiving a hearing, would then be addressed.

In response, Mr. Furtick appealed the Board's dismissal to the Court and sought to represent a class of all current claimants deprived of a pre-decisional hearing under 38 C.F.R. § 3.103(d)(1). In July 2020, Mr. Furtick had expressed disagreement with the AOJ's denial of service connection for sleep apnea by requesting a Higher-Level Review. During that process, he attended a hearing in March 2021.

The Court held that, because Mr. Furtick had attended a hearing before VA pertaining to his claim for service connection benefits, the appealed issue of entitlement to a hearing became moot. There was no live case or controversy left as to this matter and, thus, there was no appealable determination since he had received the requested relief.

However, an RCA may continue if an exception to mootness applies, which the Court assumed for this case. Explaining that an RCA will be denied if a claimant does not meet one of the five requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure, the Court held Mr. Furtick did not show "that final injunctive or other appropriate relief is appropriate respecting the class as a whole" under U.S. Vet. App. R 23(a)(5). The Court determined that Mr. Furtick and his purported class would not share the same relief, given the Board decision and the definition of the proposed class Mr. Furtick sought to represent.

The Court agreed with the Secretary that the May 2020 Board decision did not address whether claimants are entitled to a pre-decisional hearing, and held that the Secretary raised a valid concern regarding the appellant's request to represent the class he identified. However, the Court did not agree that the RCA should be dismissed because whether claimants are entitled to a pre-decisional hearing is not an issue that an appellant can raise within the context of his/her appeal. The Court instead determined that the remedy was to deny Mr. Furtick's RCA, because he sought relief for a class of claimants based on an issue the Board did not decide in his own appeal. The Court's jurisdiction is premised on and defined by the Board's decision concerning the matter appealed. In this case, because the Board had not rendered a decision whether a claimant is entitled to a pre-decisional hearing, the Court had no jurisdiction to consider it.

Because the Court lacked jurisdiction to address the merits of the matter the Board dismissed, the Court could not address whether claimants are entitled to a pre-decisional hearing, which is the very issue the

Court was requested to address by Mr. Furtick seeking relief for the identified class.

In Mr. Furtick's appeal, the Court would have been limited to deciding whether a claimant has a right to appeal the AOJ's denial of a hearing. Whether a claimant is entitled to a pre-decisional hearing, and thus, the requested class relief, was outside of the Court's jurisdiction. As a result, the Court was prevented from certifying a class with Mr. Furtick as the representative, when his own requested relief would differ from that of the class.

R. Brouck Kuczynski is Counsel at the Board of Veterans' Appeals.

Board Has Jurisdiction over Appeals, Despite Claims Process Deficiencies

by Danielle Ragofsky

Reporting on *Hall v. McDonough*, No. 19-8717 (2021).

In January 2018, the veteran, Mr. Hall, sought service connection for ankle, hip, and foot disorders, which the Regional Office (RO) denied in February 2018. The Veteran was notified that if he sought to appeal the decision, he must file a Notice of Disagreement (NOD) within a year of receipt of the denial.

On February 19, 2019, the Appeals Modernization Act (AMA) went into effect. Any claims addressed prior to that date were deemed "legacy" claims and those addressed after that date were to be "AMA" claims. If a veteran sought to appeal an AMA claim, he was to file a VA Form 10182 NOD, a different form than the NOD required to appeal legacy claims.

On February 19, 2019, although his appeal was still in the legacy system, the veteran submitted a Form 10182, expressing disagreement with the denial of his claims.

In November 2019, the Board dismissed the veteran's claims for lack of jurisdiction, as he had not filed his appeal on the NOD form required to appeal legacy cases. The veteran then appealed to the Court of Appeals for Veterans' Claims (Court).

In its decision, the Court vacated and remanded the Board's dismissal. The Court reasoned that the Supreme Court has differentiated subject matter jurisdiction or "a tribunal's power to hear a case" from that of claims processing provisions. Specifically, the Court noted that subject matter jurisdiction could never be waived whereas claims processing provisions were "forfeited if the party asserting the rule waits too long to raise the point."

The Court also stated that since claims processing provisions do not affect a tribunal's adjudicatory domain, they should not be held to be jurisdictional.

Further, the Court explained that Congress decides what cases an adjudicatory body may consider. Specifically, 38 U.S.C § 511 (a) establishes that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans."

The Court also noted that 38 U.S.C. § 7104(a), which spells out the Board's authority, provided that all matters under 511(a) are "subject to one review on appeal to the Secretary." As there was no dispute that the Veteran's claim fell under these statutes, the Court held that Congress intended that the Secretary and the Board have adjudicatory authority to decide the claim.

In addition, the Court explained that under 38 U.S.C § 7105, appellate review by the Board "will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section."

Taking these provisions together, the Court found that nothing suggested that "Congress intended to limit the Board's jurisdiction whenever a claimant uses the wrong form to file an NOD" and that the Board therefore had jurisdiction over the veteran's claim. Therefore, the Court vacated the November 2019 Board decision and determined that the Board should either hear the Veteran's appeal or "provide a rationale for declining to do so."

Further, the Court stated that if the Board were to accept the veteran's legacy appeal, the Board should ensure that the RO that adjudicated the claim issued the veteran a statement of the case.

Danielle Ragofsky is an Associate Counsel at the Board.

Reduction or Increased Rating: CAVC Clarifies How to Appropriately Rate Residuals of Prostate Cancer

by Elizabeth M. Pesin

Reporting on *Foster v. McDonough,* 19-7742 (October 20, 2021).

In *Foster,* a panel of the Court of Appeals for Veterans Claims (Court) consisting of Chief Judge Bartley, Judge Allen and Judge Falvey addressed the operation of 38 C.F.R. § 4.115b, Diagnostic Code (DC) 7528, under which Mr. Foster's prostate cancer and its residuals were rated. The Court affirmed in part and vacated in part a Board decision that in relevant part determined that the Agency of Original Jurisdiction (AOJ) properly discontinued Mr. Foster's initial 100 percent rating for prostate cancer residuals under DC 7528 and thereafter assigned a 10 percent rating. That decision also discontinued special monthly compensation (SMC), effective the same date as the reduction. The Court held that discontinuance of a total rating is not a traditional rating reduction subject to the regulations governing reductions, including 38 C.F.R. § 3.343(a), and is instead a component of the rating package by which the initial total rating is assigned for prostate cancer.

A September 2014 rating decision granted service connection for prostate cancer and assigned an initial 100 percent rating for active malignancy pursuant to DC 7528. That rating also granted service connection for erectile dysfunction as a residual of prostate cancer and awarded SMC based on housebound criteria and loss of use of creative organ. The AOJ explicitly noted that the assigned evaluation is not considered permanent and is subject to review examination.

Mr. Foster underwent review examinations in October 2015 and October 2016, after which the total rating was continued. A July 2017 VA examination showed that his cancer was in remission and he had completed treatment in 2015. The AOJ proposed to discontinue Mr. Foster's total rating and assign a 10 percent rating based on voiding dysfunction. The AOJ also proposed to end SMC. Both proposed changes were to become effective in January 2019 and were eventually implemented by the agency in the October 2018 rating decision on appeal.

In a September 2019 decision, the Board found that the discontinuance of a 100 percent rating under DC 7528 is not a "rating reduction" as that term is commonly understood. The Board cited *Rossiello v. Principi*, 3 Vet. App. 430 (1992), in holding that DC 7528 contains a "temporal element for continuance of a 100[%] rating for prostate cancer residuals." Next, the Board found no basis for continuance of total rating, because Mr. Foster's treatment for prostate cancer had ceased years ago, and his prostate cancer was in remission. The Board found that Mr. Foster also no longer met the requirements of SMC, because his prostate cancer was no longer rated at 100 percent.

The main point of contention in this case was whether DC 7528 contains a "temporal element" for continuance of a total rating, and the parties addressed a note accompanying DC 7528. In that regard, Mr. Foster argued that he was prejudiced by the claim not being classified as a rating reduction, because he would have benefited from those regulations as the reduction was based on a medical opinion that he contended was "less full and complete" than the ones on which the total rating was based. He also argued that the Board erred by not considering the regulations governing rating reductions, particularly 38 C.F.R. § 3.343(a), and because such were not followed, the rating reduction was void *ab initio*.

The Secretary argued that DC 7528 contains four requirements to discontinuing total rating, including (1) cessation of treatment, (2) VA provided

mandatory six-month examination, (3) VA provided 38 C.F.R. § 3.105(e) notice, and (4) no recurrence or metastasis of prostate cancer. Significantly, the Secretary also distinguished rating reduction from the instant case, when total rating for prostate cancer "ceases to exist," as provided in DC 7528.

The Secretary agreed with another argument advanced by Mr. Foster: that the Board provided an inadequate statement of reasons or bases for finding his statements regarding his voiding dysfunction not credible. The parties also agreed that entitlement to SMC was intertwined with the claim for the residuals of prostate cancer and warranted remand on that basis.

At the outset, the Court discussed the meaning of "reduction" and noted that, regardless of the "common-sense" meaning of reduction, the Court's concern was whether the reduction that occurred in this case was a "rating reduction," which is a legal concept that obligates VA to utilize special procedures that apply to such actions. The Court addressed the language contained in DC 7528 and held that its plain language sets forth step-by-step instructions for how to rate prostate cancer and residuals. The Court found that, under DC 7528, the discontinuance of the appellant's 100 percent disability rating did not constitute a traditional rating reduction but was instead part of the initial rating assigned for the condition. The Court drew attention to the note to DC 7528, which "describes when a 100 percent disability rating will be assigned, the circumstances under which that rating may be discontinued based on procedures set out in the note, and assuming there is an end to the 100 percent disability rating, how residuals will be rated thereafter." The Court highlighted that, unlike rating reductions under 38 C.F.R. § 3.343(a), which require a showing of material improvement under the ordinary conditions of life, DC 7528 defines its own "measure of improvement" for prostate cancer – that is, cessation of treatment and no recurrence or metastasis of cancer based on a mandatory examination. The Court supported its conclusion by stating that, otherwise, that portion of DC 7528 would be redundant as it would require consideration of improvement of prostate cancer under two different standards.

The Court also noted that the interpretation of the temporal component of DC 6819 in *Rossiello* was consistent with the interpretation of the temporal component of DC 7528 in this case.

Interestingly, the Court also found that the Board did have jurisdiction to address the propriety of rating for prostate cancer residuals because the discontinuance of total rating did not constitute a traditional rating reduction but instead was part of the initial rating assigned for that condition. However, regarding Mr. Foster's argument alleging the inadequacy of the July 2017 VA examination on which his prostate cancer rating was reduced, the Court held that his arguments were framed from the perspective that this was a rating reduction issue, which was not the case. The Court then determined that any inadequacy with the examination did not prejudice Mr. Foster, because the discontinuance of total rating was done far beyond six months after his last day of treatment.

Nevertheless, the parties agreed the Board failed to adequately explain why Mr. Foster's statements regarding the use of absorbent materials was not credible and remanded the issue of entitlement to SMC as inextricably intertwined with the rating for his prostate cancer residuals.

Elizabeth M. Pesin is an Associate Counsel at the Board of Veterans' Appeals.

CAVC Clarifies Required Factual Findings for Initial Referral Decisions in Extraschedular TDIU Cases under 38 C.F.R. §4.16(b)

by Megan-Brady Viccellio

Reporting on *Snider v. McDonough*, No. 19-6707 (November 19, 2021).

In *Snider v. McDonough*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (CAVC) held that entitlement to extraschedular total

disability rating based on individual unemployability (TDIU) must be referred to the Director of Compensation Services (Director) when there is "sufficient evidence to substantiate a reasonable possibility that a Veteran is unemployable due to service-connected disabilities," a standard first set forth in *Ray v. Wilkie*, 31 Vet. App. 58, 66 (2019).

In practical terms, this means that when the Board denies referral to the Director under 38 C.F.R. §4.16(b) and entitlement to extraschedular TDIU, the Board must make two factual findings: (a) that the evidence does not establish a "reasonable possibility" that the veteran is unemployable due to service-connected disabilities, and (b) that the veteran is not unemployable due to service-connected disabilities.

Ms. Snider, the veteran's widow, appealed a June 2019 Board of Veterans' Appeals (Board) decision denying her late husband extraschedular TDIU. In a July 2021 memorandum decision, the Court affirmed the Board's denial of TDIU for Mr. Snider. Ms. Snider moved for reconsideration or panel review and the Court granted her motion, withdrawing the single judge decision. A three-judge panel set aside and remanded the Board decision denying TDIU.

At the time of his death, Mr. Snider was in receipt of service connection for hemorrhoids, rated 20 percent; additionally, the June 2019 decision on appeal granted a 30 percent rating for sinusitis. That decision also denied TDIU. He asserted that his sinusitis required him to use a saline solution on a set schedule six times per day and his hemorrhoids necessitated regular application of hemorrhoid cream. These treatments required privacy and frequent bathroom breaks. Mr. Snider explained that this treatment schedule, which did not completely control his symptoms, was incompatible with his return to work in the food service or delivery industry due to hygiene concerns and his need for frequent bathroom access.

In denying TDIU, the Board found that, based on Mr. Snider's prior managerial experience, he could work in occupations other than food service and his symptoms would not preclude all work. The Board did not address whether there was a reasonable possibility that Mr. Snider was unemployable due to his service-connected disabilities.

Section §4.16(b) provides that a Veteran who is unable to secure and follow a substantially gainful occupation will be rated totally disabled, even when their service-connected disabilities do not reach the percentage standards of 38 C.F.R. §4.16(a). Section 4.16(b) requires that rating boards refer these cases to the Director for extraschedular consideration.

In *Ray*, the Court held that the evidentiary threshold for extraschedular referral is "necessarily" lower than that for the decision to award an extraschedular TDIU rating. In *Ray*, the Board referred that veteran's claim for extraschedular TDIU to the Director, finding that that veteran "may not be able to obtain" employment. The Director denied the extraschedular rating and, when the appeal of this decision returned to the Board, the Board also denied the claim. The Court held that the initial referral decision by the Board necessarily was made under a lower standard (reasonable possibility) than the standard for the ultimate decision on entitlement (preponderance of the evidence).

In the July 2021 single-judge decision deciding Mr. Snider's claim, the Court affirmed the Board decision, finding that the Board's failure to discuss whether there was a reasonable possibility that Mr. Snider's service-connected disabilities rendered him unemployable was harmless because the Board's findings reflected that he did not satisfy *Ray's* "reasonable possibility" standard.

Before the three-judge panel in *Snider*, the Secretary argued that *Ray* did not apply to cases where the Board was denying TDIU without referral to the Director, but only applied to situations where the Board had referred the claim to the Director under 38 C.F.R. §4.16(b) and subsequently denied the claim. The Secretary argued that the plain language of 38 C.F.R. §4.16(b) requires referral to the Director only when the Board has determined that the veteran is actually unemployable due to service-connected disabilities.

The Court rejected this argument, finding that *Ray's* interpretation of §4.16(b) applies to all cases where

the Board is considering whether to initially refer an extraschedular TDIU issue to the Director, whether the Board denied the benefit after the referral, or denied the referral and the benefit in the same decision.

As in *Ray*, the Court here analogized the required analysis under §4.16(b) to the more commonly encountered scenario of whether a remand is required to obtain a VA examination, decided by *McLendon v. Nicholson*, 20 Vet. App. 79 (2006). Under *McLendon*, a veteran need only show a current disability or persistent or recurrent symptoms thereof "may be associated with" an in-service event, injury, or disease, a much lower standard than that required to establish service connection on the merits.

The Court agreed with Ms. Snider's argument that *Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009), was not applicable in these circumstances, explaining that *Thun* focused on referrals from the Regional Office, not the Board, and *Ray* was the controlling authority for extraschedular referrals made by the Board. The Court also rejected the Secretary's argument that *Bowling v. Principi,* 15 Vet. App. 1 (2001), and *Pederson v. McDonald*, 27 Vet. App. 276 (2015), conflicted with the Court's extension of *Ray* to Ms. Snider's case, as neither addressed the legal standard required for referrals and were not precedent on that issue.

Snider makes clear that the "reasonable possibility" standard announced in *Ray* applies to all extraschedular TDIU cases. The Board must first consider whether there is sufficient evidence to substantiate a reasonable possibility that the veteran is unemployable due to service-connected disabilities, and if so, refer the matter to the Director, even if the preponderance of the evidence is against a finding of unemployability due to service-connected disabilities.

Megan-Brady Viccellio is an Attorney-Advisor at the Board of Veterans' Appeals.

Federal Circuit Finds Appellant's Confinement to State Mental Institution Does Not Preclude Entitlement to TDIU

by Jason Massey

Reporting on *Philbrook v. McDonough,* No. 2020-2233 (Oct. 8, 2021).

In *Philbrook,* the United States Court of Appeals for the Federal Circuit (the Federal Circuit) issued a precedential decision written by Judge Hughes that held that the Court of Appeals for Veterans' Claims (the Court) erred in its determination that a federal statute, 38 U.S.C. § 5313(c), barred the assignment of a total disability rating based on individual unemployability due to service-connected disabilities (TDIU).

Mr. Philbrook was awarded service connection for PTSD upon leaving service in 2004. In April 2011, he stipulated to a judgment of "guilty except for insanity" in connection with a felony and was remanded to the custody of the Oregon State Hospital for a period not to exceed 20 years.

While in custody, Mr. Philbrook applied for TDIU and was denied by the RO, finding that his PTSD did not preclude gainful employment. He appealed to the Board, which denied entitlement to TDIU "as a matter of law" under 38 U.S.C. § 5313(c) and VA's corresponding regulation, 38 C.F.R. § 3.341(b), which precludes the award of TDIU for any period "during which the veteran is incarcerated in a Federal, State, local, or other penal institution or correctional facility for conviction of a felony." The Court affirmed the Board's decision and held that stipulation to a judgment of guilty except for insanity and confinement at the Oregon State Hospital qualified as being "incarcerated" in a "correctional facility" under the statutory language. The Court found that the original legislative history regarding 38 U.S.C. § 5313(c) supported its reading of the term "correctional facility" because it suggested that the purpose of the statute was to avoid paying duplicative benefits to individuals already provided for at the taxpayer's expense.

The Federal Circuit reversed the Court's decision and held the plain language of 38 U.S.C. § 5313(c) did not apply to Mr. Philbrook since he was committed to a mental institution, not confined in a penal institution or correctional facility. A "mental institution" was defined by the First Circuit as "a hospital for people with mental and emotional problems." The Federal Circuit found that, unlike "jail" or "prison," there was no necessary criminal element leading to treatment in a mental institution. It also noted that many psychiatric facilities, including the Oregon State Hospital, include both civil and criminal commitment categories. The Federal Circuit rejected the Secretary's argument that a correctional facility is any "place of correction," as this would include all mental hospitals and hospitals in general even as applied to patients unrelated to the criminal justice system: "The term 'correctional facility' cannot encompass a hospital that treats civil patients, and a hospital cannot be a correctional facility for some patients and not others."

Additionally, the Federal Circuit explained that the "correctional facility" language was added to 38 U.S.C. § 5313(c) in 2006 to clarify that a veteran incarcerated in a private prison is not entitled to TDIU. Furthermore, the Federal Circuit found the legislative history of 38 U.S.C. § 5313(c) only suggested that Congress did not intend prisoners to receive disability benefits while "incarcerated in a Federal, State, or local institution," and finding the legislative history to be minimally probative on whether a "mental institution" is a "correctional facility" since the disputed term was not a part of the original statute.

Finally, the Federal Circuit observed that in an analogous rule governing Social Security Administration benefits, 42 U.S.C. § 402(x)(1)(A)(i), Congress unambiguously limited benefits for individuals "confined in a jail, prison, or other penal institution or correctional facility" and also for individuals "confined by court order in an institution at public expense in connection with … a verdict or finding that the individual is guilty but insane, with respect to a criminal offense." The Federal Circuit found that Congress could have used similar language in 38 U.S.C. § 5313(c) if it intended the statute to bar payments to individuals found guilty except for insanity and placed in the custody of a mental institution.

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

Obesity Still Not a Disability. But For How Long?

by David R. Seaton

Reporting on *Larson v. McDonough*, No. 2020-1647 (August 26, 2021).

In *Larson v. McDonough*, the Court of Appeals for the Federal Circuit (Federal Circuit) provided guidance on whether or not the Court of Appeals for Veterans Claims (Veterans Court) had jurisdiction to determine whether or not obesity and dysmetabolic syndrome (DMS) were disabilities for the purposes of service connection claims. The Federal Circuit – without actually ruling on whether obesity and DMS were disabilities one way or another – ultimately held that the Veterans Court did have jurisdiction to make such a determination. Currently, obesity is still not a disability for the purposes of service-connected disability compensation claims. Nevertheless, it is unclear how long this will remain true, and it is unclear how far the definition of a disability for the purposes of service connection claims will be expanded.

A brief bit of back story is required to understand this case. Under 38 U.S.C. § 1110, a condition is considered service-connected if it is a "disability resulting from personal injury suffered or [a] disease contracted in line of duty, or[,] . . . [there is] aggravation of a preexisting injury suffered or disease contracted in line of duty[.]" The Veterans Court has sole jurisdiction to review claims for compensation for service-connected disabilities, but the Veterans Court may not review the substance of the rating schedule itself on a statutory or regulatory basis. The interaction between the statutory definition of a service-connected disability and the

statutorily-prescribed jurisdiction of the Veterans Court were previously considered by the Federal Circuit in *Wanner v. Principi*, 370 F.3d 1124 (Fed. Cir. 2004), *Wingard v. McDonald*, 779 F.3d 1354 (Fed. Cir. 2015), and *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018).

In *Wanner v. Principi*, the Federal Circuit ruled that the Veterans Court did not have jurisdiction to review the provisions of the rating schedule that provided for a non-compensable disability rating for tinnitus. Prior to 1999, a compensable disability rating for tinnitus could only be assigned if the disability was linked to head trauma, concussion, or acoustic trauma. On June 10, 1999, the rating schedule was amended to remove this requirement. Two veterans who had been assigned non-compensable disability ratings prior to the change in the rating schedule filed claims challenging the legality of assigning a non-compensable disability rating for tinnitus. Citing both 38 U.S.C. § 1110 (definition of a disability) and 38 U.S.C. § 7252 (jurisdiction of the Veterans Court), the Federal Circuit held that the Veterans Court did not have jurisdiction to review the claim, because such a "review . . . amount[ed] to a direct review of the content of the rating schedule and is indistinguishable from the review of 'what should be considered a disability.'"

In *Wingard v. McDonald*, the Federal Circuit held that the Veterans Court did not have jurisdiction to review the provisions of the rating schedule that provided for a non-compensable disability rating for an inguinal hernia, because it would constitute a substantive review of the rating schedule on a statutory or regulatory basis. The Federal Circuit also extended the prohibition on such a review to itself.

In *Saunders v. Wilkie*, the Federal Circuit held that pain (even pain that has not been associated with an underlying diagnosis) may be considered a disability if it causes a functional impairment to earning capacity. In making this determination, the Federal Circuit held that both it and the Veterans Court had the authority to interpret the statutory definition of a disability under 38 U.S.C. § 1110.

Turning to the case at bar, Gary Larson had the following periods of service: active duty for training in the United States Navy Reserves from June 1988 to November 1988 and active duty in the United States Navy from February 1989 to February 1993. Mr. Larson gained "a substantial amount of weight before, during, and after his active service." Mr. Larson filed claims for service connection for obesity and DMS in 2009 which were initially denied by a VA Regional Office (RO) in October 2010. Mr. Larson appealed the decision to the Board of Veterans' Appeals (Board).

The Board found that service connection could not be granted for obesity, because "VA's rating schedule does not contemplate a separate disability rating for obesity[;] and there exists no statutory or legal guidance to allow for such a consideration." The Board further found that DMS was "a combination including at least three of the following: abdominal obesity, hypertriglyceridemia, low level of high-density lipoproteins (HDL), hypertension, and high fasting plasma glucose level." The Board ruled out obesity as a basis for service connection for DMS, because, in that very same decision, it had found that obesity was not a disability or disease for the purposes of service connection claims. The Board also rejected low level HDL, high fasting plasma glucose level, and hypertriglyceridemia as a basis for service connection for DMS, because they were merely elevated laboratory test results rather than a disease or a disability. Finally, the Board ruled out hypertension as a basis for service connection for DMS, because, despite the fact that hypertension was a disability for the purposes of service connection claims, the Board found that Mr. Larson did not have hypertension. Mr. Larson appealed to the Veterans Court.

In 2019, the Veterans Court found that it did not have jurisdiction to review whether or not obesity and DMS were disabilities for the purposes of service connection claims, because that would require reviewing the substance of the rating schedule. The Veterans Court explicitly acknowledged that in *Saunders* the Federal Circuit defined what a disability was, but the Veterans Court concluded that *Saunders* "did not, and could not, change the jurisdictional landscape under which [the Veterans]

Court operates." Instead, the Veterans Court pointed out that it had previously held that the argument that obesity is a disease for the purposes of service connection "is nothing more than a backdoor substantive challenge to the content of the rating schedule that [the Veterans] Court may not and will not entertain." Moreover, the Veterans Court explicitly identified *Wanner* and *Wingard* as the basis for this "jurisdiction-centric decision." Mr. Larson appealed to the Federal Circuit.

Initially, the Federal Circuit found that defining a disability under 38 U.S.C. § 1110 did not require reviewing the substance of the rating schedule in violation of 38 U.S.C. § 7252. Thereafter, the Federal Circuit, having found such a review was possible in the abstract, held the facts specific to this case did not require a substantive review of the rating schedule in order to determine whether or not obesity or DMS were disabilities. The Federal Circuit ultimately concluded that the Veterans Court erred when it found that it did not have jurisdiction to review whether obesity or DMS were disabilities for the purposes of service connection claims and remanded the matter back to the Veterans Court for a finding in the first instance.

The Federal Circuit first found that *Wanner* did not stand principally for whether the Veterans Court had jurisdiction to review "what should be considered a disability[,]" because "*Wanner* unambiguously involved a direct challenge to content of the rating schedule[,] . . . [and t]o the extent that *Wanner* involved a challenge to the meaning of 'disability,' it did so in the narrow context of how a ratable disability was defined by" the rating schedule. The Federal Circuit also briefly referenced *Wingard* which it also found referenced "a challenge to the contents of the rating schedule[.]"

The Federal Circuit declined to extend *Wanner* to restrict the Veterans Court's jurisdiction from considering the definition of a disability, because the Federal Circuit found no statutory requirement "that if VA (or the Board or the Veterans Court) determines that a condition not listed on the rating schedule constitutes a disability under § 1110, it must modify the rating schedule." Additionally, the Federal Circuit noted additional benefits that a veteran might be entitled to other than compensation, such as increased access to VA health care and priority in federal hiring. Moreover, the Federal Circuit noted that in *Saunders* the Federal Circuit determined whether or not pain was a disability without substantively reviewing the rating schedule.

Having determined that the Federal Circuit could review the definition of a disability without disturbing the rating schedule in the abstract, the Federal Circuit held that the Veterans Court could specifically consider whether obesity or DMS were disabilities without disturbing the rating schedule. The Federal Circuit noted that, in *Saunders*, pain was not listed as a disability on the rating schedule and neither are obesity or DMS. The Federal Circuit noted that, unlike in *Wanner*, Mr. Larson did not seek to invalidate or modify a portion of the rating schedule. Accordingly, the Federal Circuit found that the Veterans Court erred when it found it lacked jurisdiction to consider this matter and remanded this matter back to the Veterans Court for findings consistent with its opinion.

One issue left unaddressed by the Federal Circuit's decision is whether obesity or DMS actually are disabilities for the purposes of service connection claims. This may seem so obvious as to be a waste of breath, and yet some commentators appear to have missed this distinction. Chris Attig, the attorney who represented the claimant in this case, for example, claimed on his personal blog on "August 26, 2021, my law firm won an appeal by the Federal Circuit which held that the VA can indeed service connect obesity, just like it can service connect any other disability." Chris Attig, "Can You Service Connect Obesity? Yes!" *Veterans Law Blog* https://www. veteranslawblog.org/service-connect-obesity/ (last visited November 27, 2021). It seems clear that Mr. Attig is referring to *Larson*. Regardless, the Federal Circuit clearly stated in *Larson*, "we need not discuss at this juncture whether DMS or obesity are properly considered disabilities for § 1110 purposes[.]" Nevertheless, it seems a safe assumption that Mr. Attig and other attorneys concentrating in veterans law will advocate along just these lines. Two legal sources

that are likely to be implicated in subsequent litigation are Schedule for Rating Disabilities; Endocrine System Disabilities, 61 Fed. Reg. 20,440 (May 7, 1996) and VAOPGCPREC 1-2017 (January 6, 2017).

The Board explicitly cited Schedule for Rating Disabilities: Endocrine System Disabilities, 61 Fed. Reg. 20,440 (May 7, 1996) (the endocrine rating schedule), when it found low level HDL, high fasting plasma glucose level, and hypertriglyceridemia were merely elevated laboratory test results and thus could not be used to establish DMS as a disability for the purposes of a service connection claim. No. 12-03 657, 8 (BVA December 8, 2016). In the endocrine rating schedule, the promulgating authority indicated that "hyperlipidemia, elevated triglycerides, and elevated cholesterol . . . are actually laboratory test results, and are not, in and of themselves, disabilities." This language does not constitute binding precedent on either the courts or VA, but VA often relies on this language for the general principle that elevated laboratory findings cannot be considered a disability for the purposes of a service connection claim, as well as limiting the definition of what is considered a disability more broadly. As discussed below, for example, the VA Office of General Counsel (OGC) relied on this reasoning in concluding that obesity could not be considered a disability. VAOPGCPREC 1-2017 (January 6, 2017) (the OGC Opinion). Additionally, Board decisions repeatedly cite this language to deny service connection for disabilities established primarily by elevated laboratory findings, such as high cholesterol. If, therefore, the reasoning of the endocrine rating schedule does not hold up on appeal, then the sky is potentially the limit on what could be considered a disability for the purposes of service connection in the future, because any irregular laboratory result, regardless of what bodily system it impacted, could in theory be considered a disability for the purposes of service connection.

The OGC Opinion held that obesity is not a disability for the purposes of service connection claims. The Board is required to abide by this opinion when promulgating its decisions. In addition to relying on the endocrine rating schedule, the OGC pointed to a variety of medical sources suggesting that obesity is not a disability and also relied on the absence of obesity in the endocrine rating schedule. The litigation in this case, as well as the prior litigation in *Saunders*, would tend to suggest that relying on the absence of obesity from the endocrine rating schedule would be a shaky leg to stand on. OGC's reliance on medical sources might also be misplaced, as it is well-established that VA authorities that do not have established medical expertise, such as OGC, may not promulgate medical opinions in the guise of legal opinions. Thus, leaving the endocrine rating schedule as the last leg of the three-legged stool does not constitute binding precedent. Although service connection for obesity is still precluded as a matter of law as of the date of this writing (November 27, 2021), it is unclear how long this will continue.

There is, of course, one huge caveat to the speculation that obesity *might* eventually be considered a disability for the purposes of service connection—a veteran would still ostensibly have to demonstrate that the obesity caused some level of functional impairment to their earning capacity. Even as the Federal Circuit held that pain could be considered a possibility in *Saunders*, that holding was still based on the theory that the pain in question limited the Veteran's ability to work. "We do not hold that a veteran could demonstrate service connection simply by asserting subjective pain[.] . . . [A] veteran will need to show that her pain reaches the level of a functional impairment of earning capacity." Thus to the extent that the courts continue hold that the "policy underlying veterans compensation [is] to compensate veterans whose ability to earn a living is impaired as a result of their military service," any claim for service connection for obesity would necessarily include a similar requirement.

In *Larson*, the Federal Circuit stopped short of actually holding that service connection may be granted for obesity. Regardless, the Federal Circuit has clearly opened the door to the possibility that service connection may be granted for obesity. In light of the rationale that VA has traditionally relied upon to conclude service connection may not be granted for obesity, it is certainly possible that the

courts *might* very well find obesity is a disability for the purposes of service connection claims, and that service connection may be granted the same way it is granted for any other disability. On the other hand, service connection for obesity might be limited by a requirement that the obesity limits a veteran's ability to work, at least to some degree. Either way, the far more reaching alternative is that this line of jurisprudence might erode the doctrine that service connection cannot be granted for elevated laboratory findings. If this comes to pass, then the sky is the limit on what could potentially be considered a disability for the purposes of a service connection claim.

David R. Seaton is Counsel with the Board of Veterans' Appeals.

CAVC Holds Secondary Service Connection Is Not Available Without Actual Causation

by Sarah "Sally" Battaile

Reporting on *Spicer v. McDonough*, No. 18-4489 (Sept. 14, 2021).

In *Spicer*, a majority panel of judges at the U.S. Court of Appeals for Veterans Claims (Court) majority affirmed a decision by the Board of Veterans' Appeals (Board) that denied service connection for a bilateral leg disability as secondary to his service-connected leukemia.

By way of background, Mr. Spicer was awarded service connection for chronic myeloid leukemia (CML) in an April 2013 rating decision and was assigned a 100 percent rating. In 2017, he filed a claim for bilateral leg weakness and instability as secondary to service-connected CML. A VA examiner gave a negative nexus opinion, citing medical literature to support that arthritis is not a known symptom of leukemia, and the RO denied the claim shortly thereafter.

Mr. Spicer disagreed and contended that he essentially lost the use of his legs and could not undergo corrective surgery because of his CML. He later clarified that a scheduled 2013 bilateral knee replacement surgery was canceled because he was undergoing chemotherapy at the time.

In the April 2018 decision at issue, the Board found that the Veteran's knee arthritis was not proximately due to, or the result of, his CML, and that the record did not reflect any proximate aggravation or worsening beyond natural progression of his knee arthritis by CML. The Board determined that the Veteran's inability to undergo corrective knee surgery because he was undergoing chemotherapy at the time for his service-connected CML does not fall within the meaning of secondary service connection.

Mr. Spicer appealed, arguing that portions of 38 U.S.C. § 3.310 are invalid because they make implementing regulation more restrictive than its authorizing statute, 38 U.S.C. § 1110.

While secondary service connection is not statutorily authorized, § 3.310(b) provides for the award of service connection for any increase in severity of a nonservice-connected disability proximately due to or the result of a service-connected disability.

Mr. Spicer argued that § 1110 only requires a worsening of functionality, whether through an inability to treat, or a more "etiologically" direct cause. He argued that the plain language of § 1110 supports a cause-less relationship, and asserted that the chemotherapy for his service-connected leukemia worsened the functional impairment caused by his bilateral knee arthritis by preventing arthroplasty treatment, which he maintained is sufficient for the award of service connection for the worsening of his lower leg disabilities.

While Mr. Spicer focused on a broad interpretation of the word "disability" to encompass any worsening in functional impairment from knee arthritis manifesting in ways such as a decreased ability to walk and an increased incidence of falls, the Court's majority, composed of Judges Pietsch and Toth, focused on § 1110's phrase "disability resulting from," and in particular, "resulting from." The Court

discussed how the meaning of "to result" from something has not materially changed since the period when Congress was enacting and reenacting the basic entitlement statutes in 1933 and 1957 to the present. The Court quoted language from *Burrage v. U.S.*, 571 U.S. 204, 210-14 (2014), stating that "results from" imposes a requirement of actual causality, and that one of the traditional background principles against which Congress legislates is that a phrase such as "results from" imposes a requirement of but-for causation.

The Court concluded that "resulting from" does not support concepts of disability that include the natural progression of a condition not actually caused or aggravated by a service-connected disability, but that nonetheless might have been less severe were it not for such disability; rather, this language requires actual causality.

The Court discussed two notable effects under Mr. Spicer's theory if secondary service connection were available for disabilities that are prevented from improvement by a service connected disability, where the service-connected disability did not cause or aggravate that disability.

The first effect of Mr. Spicer's interpretation would be that VA would have to resort to conjecture because, for example, it would be entirely speculative to assume Mr. Spicer's overall level of knee impairment after surgery in order to determine the difference between the current state of his knees and the state of his knees post-surgery.

The second effect is that it would compensate for the natural progression of disabilities that arose independent of a veteran's service. In this regard, the Court addressed Mr. Spicer's contention that § 3.310(b) contradicts § 1110 by making any increase in severity due to the natural progress of non-service-connected disability ineligible for compensation and establishing that a baseline level of severity must be established before aggravation of a nonservice-connected disability is accepted. The Court, citing *Ollis v. Shulkin*, 857 F.3d 1338, 1343 (Fed. Cir. 2017), explained that, by expressly excluding any increase in severity due to the natural progression of a nonservice-connected disability, the regulation makes explicit that an increase in severity of a disability (*i.e.*, aggravation) caused by another disability differs from the natural worsening of that disability on its own. The Court found no legal infirmity in § 3.310(b), noting this interpretation coincides with the language Congress used in 38 U.S.C. § 1153, describing aggravation of a preexisting disability.

Judge Allen dissented, and would find that § 3.310(b) improperly limits § 1110. Judge Allen would interpret "resulting from" more broadly to merely require that one thing flow from another. Judge Allen reasoned that Congress imposed no other limitations in connection with establishing service connection beyond this broad, causation-based principle that one thing be a consequence of another. Judge Allen wrote that he would reverse the Board's denial because the treatment Mr. Spicer receives for service-connected CML is the reason Mr. Spicer cannot make his nonservice-connected bilateral knee disability better, or stop it from getting worse. Judge Allen concluded that the majority's narrow construction of causation for veterans, a most favored class of citizens, does not comport with the way Congress has historically legislated veterans law.

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

Court Denies Petition for RAMP Claimant Seeking Original Position on Legacy Docket

by Mariah N. Sim

Reporting on *Dolbin v. McDonough*, No. 21-2890 (August 26, 2021).

In *Dolbin v. McDonough*, a panel of the United States Court of Appeals for Veterans Claims (Court) comprised of Judges Toth, Falvey, and Jaquith considered the petition of Mr. Timothy Dolbin to the Court for a writ of mandamus directing the

Board return his appeal to its original position on the legacy docket and seeking certification of a class of similarly positioned claimants.

Mr. Dolbin's pending appeal for VA disability compensation was remanded by the Board in a 2017 decision to the Regional Office (RO) for further development. Following the remand, VA initiated the voluntary Rapid Appeals Modernization Program (RAMP) and offered Mr. Dolbin the opportunity to participate. In April 2018, Mr. Dolbin opted into RAMP, and chose to proceed in the supplemental claim lane. Notably, the correspondence sent to Mr. Dolbin indicated that RAMP was a voluntary program, and opting in would require that his pending legacy appeals would be withdrawn.

Mr. Dolbin's RAMP opt-in was accepted, and his legacy appeals were withdrawn. Thereafter, a February 2019 RAMP rating decision was issued denying his claims. Mr. Dolbin appealed the claims to the Board. The Board docketed his appeal in January 2020, within the "new process" docket outlined in the Veterans Appeals Improvement and Modernization Act of 2017 (VAIMA).

I. Docketing Order

Mr. Dolbin sought docketing of his appeal on the legacy docket and in his original position and also filed a motion to advance his appeal. The Board denied his motion, finding that the criteria for advancement was not fulfilled as required by 38 U.S.C. § 7107(a). The Board found that appeals in RAMP are docketed in the order they are received on that particular docket under Pub. L. No. 115-55, § 4(b)(3)(B)(i)(II), 131 Stat. 1105, 1121, which is separate from the legacy docket. Mr. Dolbin appealed the denial of the claims to the Court. In its decision, the Court found that the RAMP docket operates independently of the existing "legacy" appeal system, and such was dictated by Congress under VAIMA. In this regard, the Court noted the Act clearly set out a "first-come, first-served" docketing system under RAMP and required the Board to "maintain fully developed appeals on a separate docket than standard appeals," and such appeals are to be decided in the order they are received.

Next, the Court noted that Mr. Dolbin completed the RAMP opt-in form that fully informed him of his withdrawal from the legacy system, and proceeded under VAIMA. Additionally, there was no indication that Mr. Dolbin's appeal was unduly delayed by the Board in any way, and that the Board was not required to allow Mr. Dolbin to "jump the line," nor to disregard Congress's express intentions to process appeals in the order they were received. Accordingly, the Court found the Board docketed Mr. Dolbin's RAMP appeal appropriately within the new docketing system.

I. Class Certification

Mr. Dolbin also filed a motion for class certification for all "claimants with active appeals that have been adjudicated by the Board of Veterans' Appeals in the Legacy appeals system and returned to the Board in the VAIMA system," and not returned to their original places within the docket nor advanced on the docket by the Board. The Court found that class certification was not warranted and dismissed Mr. Dolbin's petition based on a finding that his argument failed as a matter of law. Specifically, the Court found that Mr. Dolbin's characterization for potential class members would include every member currently awaiting adjudication in the docketing system for RAMP appeals, and that because RAMP docketing procedure was prescribed by Congress, his argument failed as a matter of law. In sum, the Court found that 38 C.F.R. § 20.902 did not apply to RAMP appeals, the Veteran knowingly and voluntarily withdrew from the legacy appeal system when opting into RAMP, docketing procedures were prescribed by Congress and a separate docket requiring adjudication in order of receipt by the Board, and class certification was not warranted.

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

Federal Circuit Holds 38 U.S.C. § 7107 Does Not Unambiguously Require Veterans to be Present at a Board Hearing

by Debbie Chu

Reporting on *Atilano v. McDonough,* No. 2020-1579 (Fed. Cir. September 14, 2021).

In *Atilano v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) vacated the Court of Appeals for Veterans Claims (CAVC) decision which had affirmed a Board of Veterans' Appeals (Board) decision that found it was not required to conduct a hearing for a veteran's representative and witness to testify, when the veteran himself was absent. The Federal Circuit held that 38 U.S.C. § 7107 does not unambiguously require that an appellant be present at a Board hearing.

Mr. Atilano served on active duty in the Army from 1964 through 1966, including in Vietnam. He was granted service connection for post-traumatic disorder (PTSD), rated as 70 percent disabling, and entitlement to total disability individual unemployability (TDIU) benefits. He disagreed with the disability rating and the effective dates assigned. In hopes of increasing his rating and establishing earlier effective dates, he requested a Board hearing to present medical expert testimony regarding his PTSD. The veteran's attorney and expert were present at the hearing, but he did not attend due to his severe disabilities. Since the veteran failed to appear, the Veterans Law Judge (VLJ) refused to hear the expert testimony.

The Board subsequently denied the veteran's claims for entitlement to an increased disability rating for his evaluation of PTSD and earlier effective dates for PTSD and TDIU. The Board applied 38 U.S.C. § 20.702(d) to the present case and treated Mr. Atilano's absence from the hearing as a withdrawal of his hearing request. The Board stated that the purpose of the hearing is to take testimony from the appellant and that "allowing an expert witness to provide testimony before a VLJ without the appellant subverts the purpose of a Board hearing, expends limited resources, and prevents another veteran from having a timely hearing and adjudication." The Board also explained that, under 38 U.S.C. § 20.702(d), the presiding VLJ can allow the veteran's witnesses to testify, if the veteran, either on his own or by way of his attorney, provide good cause for his failure to attend the hearing. Here, the Board found that the veteran did not satisfy the good cause requirement, and hence his expert testimony should not be heard.

CAVC affirmed the Board's decision, concluding that the language of 38 U.S.C. § 7107 unambiguously requires the appellant's participation at his hearing. In determining that it was compulsory for the veteran to appear at the hearing, CAVC emphasized that, under § 7107(b), "the Board shall decide any appeal only after affording the appellant an opportunity for a hearing." It relied on the two-step framework analysis for statutory interpretation delineated in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Under the first step, if Congress has directly spoken to the precise question at issue and its intent is clear, the court and the agency "must give effect to the unambiguously expressed intent of Congress." CAVC ruled that the statute unambiguously requires the veteran's personal presence at the hearing. To bolster its position, CAVC cited § 7107(e)(2), stating that any virtual hearing "shall be conducted in the same manner as, and shall be considered the equivalent of, a personal hearing." It explained that "[f]or such hearings to be conducted in the same way and considered equivalent to in-person hearings, they must require the participation of the appellant." CAVC also determined that VA's regulations interpreting § 7107 satisfy *Chevron* step two, as they reflect a permissible construction of the statute. It found that 38 C.F.R. § 20.700 and 20.702 "do not allow an appellant to refuse to participate in a hearing." CAVC held that those regulations unambiguously demand the appellant's presence at the hearing.

The Federal Circuit rejected CAVC's ruling, noting that nothing in the language of 38 U.S.C. § 7107

speaks to whether an appellant must personally attend his hearing or forfeit his right to that hearing. § 7107(b) merely allows an appellant the "opportunity for a hearing;" it, by no means, demands the appellant's presence when the appellant is represented by an agent or counsel. The statute is at best silent on requiring the appellant's presence at the hearing.

The Federal Circuit delved into the legislative history of 38 U.S.C. § 7107 to further support its conclusion that the statute does not unambiguously establish that a veteran must be present at his hearing to present expert testimony. The claimant's right to a personal hearing before the Board dates back to World War II, when the Board's Rules of Practice allowed a hearing if the claimant or his representative so desired. This rule was published in the 1964 Code of Federal Regulations and subsequently codified by Congress in 1988. The accompanying Senate Veterans' Affairs Committee report explained that the right to a hearing is so fundamental to fair proceedings that it deserved a statutory guarantee. Since § 7107 was intended to codify a long-standing rule allowing a request for a hearing by the claimant or the claimant's representative, the Federal Circuit reasoned that the legislative history supports Mr. Atilano's interpretation of the statute to allow a veteran's representative to participate on the claimant's behalf by presenting witness testimony at a Board hearing when the veteran is too disabled to attend. At the very least, the history of the statute does not unambiguously deprive the veterans of their fundamental right to a hearing if their disability is so severe that it precludes their presence at the hearing.

Concluding that nothing in the plain meaning of 38 U.S.C. § 7107 or in its legislative history unambiguously demands a veteran's attendance at his hearing in order for his witness to present testimony before the Board, the Federal Circuit vacated CAVC's decision and remanded the case for reconsideration of the regulation and whether *Chevron* deference applies.

Note: The regulations discussed in this report apply only to appeals under the Legacy system. They were revised under the Appeals Modernization Act.

Debbie Chu is Associate Counsel at the Board of Veterans' Appeals.

CAVC Addresses Provision Governing Reinstatement of VA Benefits Eligibility When a Deceased Veteran's Spouse Remarries and is Later Divorced

by Hilary S. Styer

Reporting on *Ventris v. McDonough*, No. 19-1860 (August 31, 2021).

In *Ventris v. McDonough,* the United States Court of Appeals for Veterans Claims (Court) addressed the proper interpretation of the language "on or after January 1, 1971," as used in 38 C.F.R. § 3.55(a)(2)(ii), a provision governing reinstatement of VA benefits eligibility when a deceased veteran's spouse remarries and is subsequently divorced.

The appellant, Sylvia A. Ventris, appealed a November 2018 Board of Veterans' Appeals (Board) decision that denied her recognition as the surviving spouse of a deceased veteran and consequently denied her claims for entitlement to Dependency and Indemnity Compensation (DIC), death pension, and accrued benefits. She argued that the January 1, 1971, date included in 38 C.F.R. § 3.55(a)(2) marks the date from which VA has authority to grant benefits to surviving spouses whose remarriages are terminated by the means under 38 C.F.R. § 3.55(a)(2).

As background, the veteran married Ms. Ventris in May 1956. He died in January 1957, and his death certificate listed his marital status as "married." In April 1958, Ms. Ventris remarried, and that marriage was dissolved by divorce decree in July 1962. In May

1970, Ms. Ventris remarried again, and that marriage was dissolved by divorce decree in October 1973.

In the November 2018 Board decision, the Board concluded that the Ms. Ventris's April 1958 remarriage terminated her eligibility as the veteran's surviving spouse for DIC, accrued benefits, and death pension purposes. Citing to 38 C.F.R. § 3.55(a)(2)(ii), the Board held that before January 1, 1971, the only exception permitting restoration of Ms. Ventris's eligibility as surviving spouse was if the marriage was void or annulled. Specifically, the Board found that, although the April 1958 remarriage was terminated by divorce, this remarriage and divorce occurred prior to January 1, 1971, thus ending Ms. Ventris's eligibility for benefits as the veteran's surviving spouse. Essentially, the Board determined that January 1, 1971, relates to the date of the surviving spouse's remarriage.

In reviewing the matter *de novo*, the Court noted that, as a general rule, a surviving spouse is a person (1) validly married to the veteran at the time of the veteran's death, (2) "who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse)," and (3) "who has not remarried or...lived with another person and held himself or herself out openly to the public to be the spouse of such other person."

The Court provided a history of the statutory scheme and regulation regarding survivor death benefits as the surviving spouse's eligibility for benefits has evolved over time. The current version of the regulation, and the one at issue in Ms. Ventris's case, states, "On or after January 1, 1971, remarriage of a surviving spouse terminated prior to November 1, 1990, or terminated by legal proceedings commenced prior to November 1, 1990, by an individual who, but for the remarriage, would be considered the surviving spouse, shall not bar the furnishing of benefits to such surviving spouse provided that the marriage . . . [h]as been dissolved by a court with basic authority to render divorce decrees[.]"

The current statute addressing remarriage of surviving spouses and benefits eligibility contains no temporal reference related to the date of marriage: "The remarriage of the surviving spouse of a veteran shall not bar the furnishing of benefits specified in paragraph (5) [(including DIC benefits)] to such person as the surviving spouse of the veteran if the remarriage has been terminated by death or divorce..."

The Court held that it is clear that the January 1, 1971, date mentioned in 38 C.F.R. § 3.55(a)(2) corresponds to the effective date of statutory changes regarding benefits eligibility upon termination of marriage. The temporal reference incorporated into this regulation unambiguously relates to the effective date of the statutory change, not the date of remarriage. The statutory and regulatory history reveal that each of the dates referenced in the regulation reflects the date of a statutory change regarding benefits eligibility upon termination of remarriage, and the effective date for the award of benefits subsequent to changes in benefits eligibility. Thus, the dates can only be interpreted to correspond to the date of a claim for survivor benefits.

As Ms. Ventris's remarriages were terminated by divorce prior to November 1, 1990, and she filed her claim for VA death benefits after January 1, 1971, her remarriages did not bar her eligibility to benefits under 38 C.F.R. § 3.55(a)(2).

Therefore, the Court concluded that the Board erred in denying Ms. Ventris recognition as the veteran's surviving spouse for purposes of entitlement to certain VA death benefits. The Court set aside those portions of the Board decision that denied entitlement to DIC and accrued benefits and remanded the matter to the Board for further development.

The Court affirmed the portion of the Board decision that denied entitlement to death benefits, finding that there are no exceptions to the remarriage bar for VA death pension benefits. Therefore, there was no clear error in the Board's determination that Ms. Ventris, by virtue of her remarriage, did not qualify as a surviving spouse for

VA death pension purposes. 38 U.S.C. § 103(d)(2)(A), (d)(5).

Hilary S. Styer is Associate Counsel at the Board of Veterans' Appeals.

Divided Court Addresses CUE Based on Post-Decisional Interpretation of Law

by Dan Brook

Reporting on *Perciavalle v. McDonough*, No. 17-3766 (December 3, 2021).

Mr. Perciavalle, a veteran, appealed a September 2017 Board of Veterans' Appeals (Board) decision, which denied a motion for clear and unmistakable error (CUE) in a July 1971 rating decision. The appellant's CUE motion sought separate compensable evaluations for limitation of motion and instability of the knee. He argued that his motion was not based on a change in law after the 1971 decision but on misapplication of the existing law at the time of the decision. The Board denied the motion as a matter of law, concluding that a later interpretation of an existing regulation cannot constitute CUE.

In a September 2019 panel decision, the Court reversed and vacated the Board decision and remanded the matter for further adjudication. In response, VA moved for reconsideration or full court review and the Court reconsidered the case en banc.

In the en banc decision, the Court vacated the September 2019 panel decision and affirmed the September 2017 Board decision. A majority of six judges determined that the Board erred in denying the appeal as a matter of law. A different majority of six judges held that the appropriate disposition was to affirm the Board decision. This majority consisted of three judges who found that the Board error was not prejudicial and three judges who found that the Board did not err in denying the CUE motion as a matter of law.

Judges Laurer and Jaquith announced the judgment of the Court and delivered opinions pertaining to the presence of Board error and lack of prejudice. Judge Toth issued a concurrence regarding the lack of prejudicial error. Judges Allen, Meredith, and Falvey concurred in the judgment, but found the Board's denial of CUE as a matter of law was not erroneous. In dissent, Judges Bartley, Pietsch, and Greenberg agreed with the determination that the Board's denial as a matter of law was erroneous but disagreed that the error was not prejudicial.

As part of the background information provided, Judges Laurer and Jaquith cited controlling legal authority pertaining to CUE and assigning separate ratings for a knee disability. Regarding CUE, an important subset of this legal authority includes 38 C.F.R. § 3.105(a)(1)(iv) and 38 C.F.R. § 20.1403(d)(e) (CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation"). Regarding assigning separate ratings for knee disability, an important subset of this authority includes 38 C.F.R. § 4.14 (the avoidance of pyramiding); 38 C.F.R. § 4.25 ("Except as otherwise provided . . . , disabilities arising from a single disease entity . . . are to be rated separately as are all other disabling conditions, if any"); *Esteban v. Brown*, 6 Vet. App. 259, 262 (1994) (separate ratings were warranted for facial symptomatology that was non-duplicative and non-overlapping); and VA General Counsel Precedential Opinion (GC opinion) 23-97 (July 1, 1997) (arthritis and instability of the knee may be rated separately under diagnostic codes 5003 and 5257).

Judges Laurer and Jaquith identified five errors in the Board decision: misstating the appellant's CUE motion; failing to sympathetically construe the motion; failing to adjudicate the appellant's challenge to the application of law in place in 1971; incorrectly barring the appellant's motion based on it constituting a later change in interpretation of the law; and misunderstanding the law applicable to rating separate disabilities distinctly.

Regarding misstatement of the appellant's position, the Board concluded that the appellant's CUE motion was limited to employing a post-1971 interpretation of the existing regulations governing assignment of separate evaluations for knee disability to justify revision of the 1971 decision. However, the judges emphasized that the appellant had actually argued that the law had always permitted separate evaluations for different manifestations of knee disability. They also found that the Board completely failed to sympathetically construe the CUE motion filed by the appellant's non-attorney representative. The judges noted a threshold problem with the Board decision (also noted by the dissent): the appellant's only reference to retroactive application of law was in his representative's letter to the Board—it was not presented to the RO as part of the CUE motion and thus should not have been considered by the Board. Also, even if the Board could have appropriately considered this reference, it "was not free to liberally construe the veteran's pleadings unsympathetically by subsuming a valid CUE theory (that the law had always permitted separate evaluations for different manifestations of knee disability) into an invalid one (that post-1971 interpretation of the existing regulations governing assignment of separate knee disability evaluations warranted revision of the 1971 decision)." Additionally, the judges specifically faulted the Board's ultimate means of denying CUE, noting that "by neither dismissing the motion without prejudice nor adjudicating it on its merits, the Board improperly imposed the worst possible outcome on the veteran—a preclusive denial 'as a matter of law.'"

The judges emphasized that the "sympathetic reading requirement" was informed by controlling case law, requiring VA to "fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her specific dispute of error with the underlying decision" and potentially requiring VA to make "clarifying modifications." Also, controlling case law, specifically *Berger v. Brown*, 10 Vet. App. 166 (1997), and *Lamb v. Peake*, 22 Vet. App. 227 (2008), "did not sanction the summary action taken by the Board" but rather required consideration on the merits.

The judges indicated that when read sympathetically, the appellant's motion echoed the CUE theory addressed on the merits in *Berger*—that the RO's interpretation of the existing law at the time of the decision in question constituted CUE. They also noted that in *Lamb,* the Court required adjudication on the merits of a CUE motion alleging VA failed to properly apply regulations in place at the time of the decision in question. The judges emphasized that the appellant in *Lamb* did not present any authority existing at the time of the challenged rating decision or current authority demonstrating that the controlling regulation should have been applied as he asserted. Nevertheless, the *Lamb* Court concluded the motion was "pled with sufficient specificity so that, assuming its truth and legal viability, it would satisfy the three elements required to find that the challenged final decision constituted CUE."

Concerning what constitutes a later change in interpretation of the law, the judges noted that the statutes and regulations governing CUE do not define "change in interpretation." Thus, the judges considered the words' ordinary meaning found in general dictionaries. From this analysis, the opinion concluded that "change in interpretation necessarily requires the existence of a prior interpretation that was made different . . . ; it cannot be the first commentary on a regulation or statute as there exists no prior interpretation that the latter modifies, alters or replaces."

The judges noted that the VA Office of General Counsel Opinion (OGC Opinion) acknowledged that its analysis of the propriety of assigning separate knee ratings was the first agency interpretation on the subject. They also noted that the OGC Opinion was clearly an interpretation of the plain terms of the regulatory provisions governing knee ratings (which were in effect in 1971). Additionally, the judges did not consider *Esteban* a change in interpretation, as the case did not cite any formal interpretation by VA, only factual findings, regulatory language, and earlier court cases.

The judges found that pertinent findings in *Berger* and *Lamb,* and in other more recent cases, including *George v. McDonough (George II)*, 991 F.3d 1227 (Fed.

Cir. 2021), *George v. Wilkie (George I)*, 30 Vet. App. 364 (2019), and *Steele v. McDonough,* 856 F. App'x 878 (Fed. Cir. 2021), involved CUE motions that were distinguishable from the appellant's because his motion asserted misapplication of existing law not retroactive application of a changed legal interpretation. They emphasized that "it would be nonsensical—and antithetical to the CUE regulations—for the later validation of the rating rules to foreclose accountability for undebatable error in previously applying them."

Concerning misunderstanding of rating separate disabilities or manifestations stemming from a single injury, VA had argued that 38 C.F.R. § 4.14, as it was understood in 1971, precluded the ability to award separate evaluations for the Veteran's knee disability, indicating that the 1994 *Esteban* decision and the 1997 OGC Opinion changed this interpretation. However, the judges determined that in 1971(and currently), separate ratings for different disabilities or different manifestations were contemplated by § 4.25 and that this principle undergirded the appellant's motion.

The judges also noted the Board's conclusion that the appellant had not "provided any evidence that in 1971, VA interpreted the rating schedule to allow for separate ratings for limitation of motion and instability of the same knee." However, the judges found that *Lyles v. Shulkin*, 29 Vet. App. 107 (2017), authorized this position ("Since 1921, the the rating schedule has always included separate provisions for evaluating knee instability, limitation of leg extension, and meniscal problems" . . . without "express prohibition on separate evaluation of those manifestations of disability, despite numerous amendments"). The judges also re-emphasized the OGC Opinion's finding that prior to 1997, there was no prior formal VA position on the propriety of such separate ratings.

The judges also considered case law cited by the concurrence in support of an initial interpretation concerning the propriety of assigning separate ratings for knee disability present at the time of the 1971 decision, including *Fanning v. Brown*, 4 Vet. App. 225 (1993); *Sweeney v. West*, 16 Vet. App. 403 (1999) (table) (order), 1999 WL 184869; and *Sanders v. Principi*, 3 Vet. App. 334 (1992). However, the judges distinguished these cases and, more broadly, found their invocation unfaithful to the nature of the CUE analysis because they were issued 20 years after the 1971 decision. Additionally, they found them distinguishable from *Lyles,* which, although issued decades after 1971, specifically referenced application of the regulations pertaining to assigning separate ratings for knee disability during the time period prior to and including 1971.

Moreover, the judges pointed out that the Secretary argued that the plain meaning of the regulation was the only guidance available, when asked at oral argument whether there was evidence of its interpretation of the knee rating regulations in 1971. Although the Secretary mentioned a few Board decisions invoking the anti-pyramiding rule to deny separate ratings, he did not cite or provide any specific examples. The judges emphasized that "the RO is presumed to have considered all applicable law absent some showing that it did not," and that the Secretary had not rebutted this presumption. The judges concluded, "Consequently, any implication by the Board and [VA] that the [Regional Office (RO)] adjudicator in 1971 concluded that separate ratings would be pyramiding is completely unsupported."

In conclusion, the judges found that "separate ratings for different knee disabilities were permissible in 1971 and the Board erred in suggesting otherwise;" the Board erred in characterizing "a later interpretation of an existing regulation" as "the only basis on which the Veteran asserted CUE;" and the Board ultimately erred in denying the CUE motion as a matter of law. The judges also found that the appellant's motion alleged CUE in how the RO applied the regulations in 1971, and the parties had agreed that "the measure of whether there was CUE was those regulations' plain language." Thus, the judges concluded that the appellant was entitled to a decision on the merits.

After concluding discussion of the Board errors, the judges analyzed whether these errors were prejudicial, noting that controlling legal authority required the Court to determine whether the Board's ultimate conclusion that the 1971 decision contained

no CUE could have been different had its error not occurred. Thus, the Court was required to determine whether the Board could find CUE in the 1971 decision—specifically, whether the record in 1971 "compelled the conclusion that VA would have awarded a separate evaluation for a left knee disability." The judges held that the evidence in 1971 did not compel the conclusion that VA clearly and unmistakably erred in not awarding a separate evaluation for left knee arthritis.

The appellant had referenced a July 1971 radiology report showing "questionably narrowed" joint space, "slight blunting" of the tibial spines and "a question of nodular irregularity" as undebatable evidence of arthritis. However, the judges indicated that "notation of questionable joint irregularities in an X-ray report is not an arthritis diagnosis." Thus, without confirmed evidence of arthritis, the appellant was not able to show that the evidence undebatably established that a separate 10 percent rating for arthritis was warranted at the time of the 1971 decision. The judges also emphasized that even if the Court or the Board (had either of them served as adjudicators of the 1971 decision) may have rendered a different decision than the RO, for the appellant's CUE motion to prevail, the evidence had to be absolutely clear that VA erred in not granting a separate rating, which was not the case. Accordingly, the Board's ultimate determination that there was no CUE was the only possible outcome in the appellant's case.

The judges also found that the Board error did not have the "natural effect" of harming the appellant's "substantial rights" by having an "unquantifiable" effect on the outcome of the proceeding. They noted that he had a meaningful opportunity to participate in his claim and appeal and to meet his burden to show CUE, including by participating in an informal hearing, being represented by counsel, and presenting argument to the Board. Moreover, they found that VA provided the appellant with all required notice pertaining to the CUE adjudication.

The judges emphasized that CUE adjudications involve no VA duty to assist, are limited to assessment of the record at the time of the decision being challenged, and do not include factfinding or reweighing of the evidence. Thus, the Court had "everything required to determine whether appellant was harmed by the Board's ultimate conclusion that the 1971 RO dd not commit CUE in its rating decision." Consequently, the Court's prejudicial error analysis cured the Board's lack of full analysis of CUE.

The judges also noted that the appellant presented only legal challenges to the Board's decision and did not argue prejudice. This left the Court "to divine argument for an appellant represented by experienced counsel." The Court declined to "fill in the blanks and identify possible prejudice in a Board decision . . . when it is the responsibility of counsel to do so." Accordingly, given their analysis and the lack or argument presented by the appellant, the judges found "no prejudice in the Board's erroneous finding."

In his concurrence, Judge Toth agreed that the Board's denial of CUE as a matter of law was erroneous. He also agreed that the error was harmless, finding that the reasoning in *George and Steele* precluded the appellant's motion from prevailing. He emphasized that these cases require that for CUE to be present, "the error must be undebatable at the time of the disputed decision; otherwise, establishing it could only be accomplished through retroactive application of later legal authority, which is impermissible." Also, he read *George and Steele* as "effecting the broader point that an alleged error cannot satisfy the second CUE element—that the error is 'undebatable'—where it has yet to be identified as erroneous by a court decision or VA publication." Thus, it was irrelevant whether an interpretation was a change from any prior ones; the underlying question was simply "whether the claimed legal error was known at the time of the disputed underlying decision." He also emphasized that this approach avoids speculation about whether subsequent legal authority addressing the matter at issue in the disputed decision constitutes a change in the law or whether legal error can be established without consideration of that subsequent legal authority.

Judges Allen, Meredith, and Falvey concurred in the judgment but concluded that affirmance was

warranted because the Board denial of CUE as a matter of law was not erroneous. They noted that under *Berger,* the RO's clear and unmistakable misapplication of the law existing at the time of the disputed decision could form the basis for a CUE motion and referred to this as a "*Berger* CUE motion." However, they found that the appellant did not assert a *Berger* CUE motion because he failed to allege "how the RO could not have plausibly interpreted the rating schedule and anti-pyramiding regulations in his case to preclude the separate ratings (he) sought." The concurring judges identified two ways that the appellant could have asserted a minimally adequate *Berger* CUE motion: either by attempting to analyze the plain language of the regulations to demonstrate how the RO's interpretation was clearly and unmistakably wrong or by identifying and presenting an interpretation contemporaneous to 1971 that reconciled the regulations in his favor. However, the concurring judges concluded that he did neither of these.

The concurring judges also held that the appellant's motion constituted retroactive application of the law "in all but name." They determined that the Board had accurately found that the CUE motion "depended on the retroactive application of a 'later-in time' interpretation, as evidenced by either *Esteban* or the VA GC opinion." They also determined that under controlling case law, including *George, Steele, Lamb*, *Berger*, and *Jordan v. Nicholson,* 401 F.3d 1296 (Fed. Cir. 2005), for CUE purposes, it does not matter whether one characterizes a post-decisional interpretation of the law in question as initial or changed, it still constitutes a retroactive application of legal authority, which is an impermissible basis for a CUE motion.

Finally, the concurring judges found that while they would affirm the denial as a matter of law, the Board's limited analysis "led to an extensive legal debate in the Court, which yielded a holding that opened the floodgates to what we believe to be an entirely new class of CUE motions." Thus, while recognizing that "the majority opened the CUE floodgates," it found that "the Board unnecessarily and avoidably unlocked them."

In their dissent, Judges Bartley, Pietsch, and Greenberg agreed that the Board erred by denying the motion for CUE as a matter of law but held that this error prejudiced the appellant. They pointed out that the appellant did not make any argument concerning retroactivity to the RO. Also, the appellant did not subsequently base his argument on retroactivity, but rather emphasized that he was not arguing on this basis; under controlling legal authority, a CUE claimant is not permitted to make a new CUE argument when challenging an RO decision at the Board. Thus, the dissenting judges found that the Board erred in characterizing the appellant's motion as based on retroactivity. They also emphasized that the actual CUE motion filed with the RO was done so without assistance of counsel. Thus, requiring it to include specific detail and "minute specificity," including "why the regulations were susceptible of only a single interpretation, failing to explain why reasonable minds could not differ as to their correct interpretation, and failing to proffer a contemporaneous interpretation that reconciled the regulations in the appellant's favor," was "antithetical to VA's duty to sympathetically read pro se pleadings."

The dissenting judges also pointed out that regardless of the purported insufficiency of the CUE motion, the Board did not dismiss it as insufficiently pled but "recharacterized it as predicated on a legally nonviable basis and then denied [it] as a matter of law." In so doing, the Board did not comport with "VA's duty to sympathetically read a veteran's pro se CUE motion to discern all potential claims" when "any ambiguity was resolved in a manner unfavorable to the appellant, and in a manner that precluded adjudication on the merits."

Additionally, the dissenting judges found that "reading a CUE motion expansively and recharacterizing it to suit RO and Board purposes is dangerous, including by running the risk of creating a broad res judicata effect that would hinder a further attempt at revising a purportedly erroneous decision. They found that this type of risk was realized in the appellant's case, as his CUE contention was not heard and adjudicated.

The dissenting judges further cited Federal Circuit authority and wrote that it was inappropriate to find harmless error in not adjudicating the appellant's CUE motion on the merits, given that the Board did not make factual findings to support the Court's affirmance: "'The rule of harmless error cannot be invoked to allow the [Court] to decide a matter that is assigned by statute to the [VA] for the initial determination'...[N]or can the rule be invoked to support an affirmance that 'may [] have required it to make improper de novo findings of fact.'" *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021) (quoting *Winters v. Gober*, 219 F.3d 1375, 1380 (Fed. Cir. 2000)).

Finally, the dissenting judges emphasized that veterans have a statutory right to decisions on the claims they file and a right to one review on appeal to the Secretary. They held that the RO and Board mischaracterization of the appellant's motion deprived him of these rights and noted that he had yet to receive the adjudication of his CUE motion to which he was entitled. They wrote that wrongly foreclosing this review amounted to an error that deprived the veteran of a meaningful opportunity to participate and be heard in the adjudication process, an error that affects essential fairness and automatically prejudiced him. Thus, they found the proper disposition was to remand to the Board to properly adjudicate the appellant's CUE motion.

Dan Brook is Counsel with the Board of Veterans' Appeals.

A Shipwreck at a Utopian Bay of VA Laws Addressing Overpayment Debts of Incarcerated Beneficiaries

by Anna Kapellan

> *The island of Utopia is . . . not unlike a crescent. . . . Between its horns, the sea comes . . . into a great bay . . . . But . . . the channel is known only to the natives; so that if any stranger should enter into the bay . . . , he would run a great danger of shipwreck.*
>
> Sir Thomas More, Utopia

"Nothing is more fairly distributed than common sense: no one thinks he needs more of it than he already has," noted René Descartes, a philosopher as brilliant as he was a mathematician. Alas, many exercises in philosophy, occasionally styled to mimic legal wisdoms, lack awareness of the oddity of their mathematical consequences, leaving the victims of such wisdoms to wonder about the philosophers' common sense. The mathematical reality of *Snyder v. Nicholson*, 489 F.3d. 1213 (Fed. Cir. 2007), is one such example of legal philosophy gone astray.

Snyder looked at the interplay between 38 U.S.C. §§ 5313 and 5904. The latter addresses contingent attorney's fees paid by VA to private representatives of prevailing beneficiaries, regardless of whether these beneficiaries are incarcerated or not during their periods on appeal. Meanwhile, § 5313 governs the amounts of compensations actually disbursed to incarcerated veterans (or to veterans' incarcerated surviving beneficiaries entitled to Dependency and Indemnity Compensation (DIC)). Under § 5313, the amount of VA benefits due to a beneficiary incarcerated based on his/her felony conviction are reduced during the period running from the 61st day of incarceration to the date of his/her release (or placement in a halfway house).

Specifically, under § 5313(a)(1)(A), an incarcerated veteran who had a 20 percent or higher combined disability rating receives the amount equal to that payable for a "10 percent rating" during the aforesaid period. Therefore, the phrase "a 10 percent rating" is used as a financial measuring unit, rather than an assigned rating. In contrast, under § 5313(a)(1)(B), a veteran with an assigned rating of only 10 percent (or a DIC beneficiary) is entitled only to the amount equal to half of this "10 percent" measuring unit. Further, under 38 U.S.C. § 1505, a statute analogous to § 5313, no pension at all is paid to a VA pensioner during the same period, even if his/her incarceration is based on a misdemeanor conviction. Critically, §§ 1505 and 5313 apply to VA benefits disbursed both in real time and as lump sums that are paid as past-due benefits accrued during a period on appeal.

Sections 5904 and 5313 (and §§ 1505 and 5313) are interrelated because a VA beneficiary, incarcerated or not, may elect to litigate a claim *pro se* or through legal counsel, *i.e.*, a Veterans Service Organization (VSO) or a private representative. While a VSO's legal services are free, fees may be charged by private representatives. If such a representative is retained on a contingent basis, (s)he could collect his/her compensation from the client, or (s)he could be compensated through VA if a valid fee agreement executed by the client and the representative was filed with VA, and the agreed-upon fee does not exceed 20 percent of the past-due benefits ensuing from the VA award. In such a scenario, VA deducts the fees (typically, 20 percent, the maximum percentage allowed under the law) from the past-due lump sum prior to disbursing the remaining 80 percent of this lump sum to the prevailing beneficiary. Such a payment method, called "direct pay," is often used by private representatives since prospective clients rarely have means to prepay a fee, and private representatives are usually reluctant to endure the risk of collection.

In the event VA fails to withhold a direct-pay fee from a past-due lump sum prior to disbursing the award to a prevailing beneficiary, VA is required to pay the fee from VA's own funds supplied by the U.S. Treasury, *i.e.*, the taxpayers. Upon making such a payment, VA charges the beneficiary with an overpayment equal to the fee paid from VA's own funds, since the beneficiary has been paid more than what (s)he was entitled to under the fee agreement. VA then attempts to recoup the resulting overpayment debt from the overpaid beneficiary's income or assets.

But what if VA cannot withhold the fee that VA is required to deduct from past-due benefits and pay to the prevailing beneficiary's private representative because the past-due benefits, in their 100 percent entirety, are insufficient to cover such a 20 percent fee? While this question reads like a mathematical oxymoron (since 20 percent of a "whole" cannot be larger than 100 percent of the "whole"), such a basic mathematical common sense applies only if the "whole" is the same for the purposes of calculating both 20 and 100 percent. If a comparison is drawn between 100 percent of one "whole," e.g., $10, and 20 percent of another "whole," e.g., $100 (20 percent of which is $20), then 20 percent of a larger "whole" could easily exceed 100 percent of a smaller "whole." And yet, such an apples-to-oranges comparison is, alas, very real: it simply means that you have entered the utopian *Snyder* bay of VA laws of overpayment.

Indeed, to be mathematically congruent, §§ 5313 and 5904 (or §§ 1505 and 5904) must use the same base amount to calculate a direct-pay fee (*i.e.*, 20 percent of a back-pay lump sum) and remaining 80 percent disbursed to the beneficiary who was incarcerated during the period on appeal. If the base amounts differ, then 80 percent of a smaller variable may be less than 20 percent of a larger one, and deduction of the latter from the former would yield a debt. (Further, if the smaller variable is zero, a debt equal to 20 percent of the larger variable is guaranteed.) Therefore, VA would be required to pay the debt from its own funds and then charge the prevailing beneficiary with a so-called overpayment "debt" for the monies that (s)he has *never received* in actuality.

The U.S. Court of Appeals for Veterans Claims (Court), mindful of this concern, sought to cure the incongruence by reading the requirements of § 5313 (and, implicitly, § 1505) into § 5904 in *Snyder*. Under the Court-suggested scheme, a representative was entitled only to 20 percent of the past-due benefits actually paid to a beneficiary. Thus, if the actual payment of past-due benefits was $0, the fee was also $0. Moreover, if past-due benefits were reduced by § 5313 but not zero, then a client was allowed to 80 percent of this sum, and the representative was given only 20 percent of the same. (For reasons not immediately apparent, the Court failed to consider a scheme where the fee would be equal to the entire past-due benefits, provided that the fee would not exceed what the representative would be entitled to had his/her client not been incarcerated.) Defining this camouflaged mathematical conflict between §§ 5313 and 5904, the Court analogized the statutes to "two ships passing in the night."

However, concerned with private representatives' lack of incentive to litigate claims of incarcerated clients, the Federal Circuit reversed, crafting a rule of the type defined by Virgil as *aegrescit medendo*

("the disease worsens with treatment"). Without any mathematical analysis, the Federal Circuit used the Court's "two ship" analogy, only to declare that there was no basis for a conclusion that the ships would be "forced to collide" if the amount of a direct-pay fee would be calculated by using, as a base amount, hypothetical past-due benefits that an incarcerated beneficiary would have received had (s)he not been incarcerated, *i.e.*, as if § 5313 had not affected the actual amount of past-due benefits.

Not surprisingly, the proverbial collision happened right upon this holding. A few calculations illustrate this fact. Section 5313 allows for three calculative scenarios. One scenario is of a veteran who enters prison without a compensable service-connected disability and becomes entitled to a compensable disability with past-due benefits accrued during his/her incarceration. The second scenario is of a veteran with a service-connected disability rated at 10 percent prior to incarceration, who then becomes entitled to past-due benefits based on an increased-rating claim accrued during his/her incarceration. And the third scenario differs from the second one to the extent that a veteran's pre-incarceration disability is rated at 20 percent or higher, rather than at 10 percent. (A DIC beneficiary awarded past-due benefits that accrued during incarceration experiences a scenario legally identical to the first scenario, while a VA pensioner awarded past-due benefits accrued during incarceration experiences a scenario legally identical to the third scenario, since the difference would only be limited to the amount of dollars and cents.)

To appreciate these scenarios in dollars and cents, the actual VA compensation and pension amounts are used as to the period running from December 1, 2017, to November 30, 2021. This period, presumed to be running from the 61st day of a prevailing VA beneficiary's incarceration to the date of his/her release, is chosen because a 50-month imprisonment is commonly imposed upon a felony conviction, and VA's new rates take effect every year on December 1. Further, a hypothetical beneficiary without any dependents was selected to simplify calculations.

If an incarcerated veteran with no compensable service-connected disability is entitled to past-due benefits based on a new combined rating of 20 percent or higher, his/her past-due benefits are affected by § 5313(a)(1)(A). Thus, the actual amount of his/her past-due benefits, which is payable for "a 10 percent rating," is $6,752.64. If his/her past-due benefits are for a disability rated at 10 percent, then the actual past-due benefits, under § 5313(a)(1)(B), are equal to half of the above-calculated amount ($3,376.32).

However, under *Snyder*, the amounts of attorney's fees for such victories are one-fifth of the past-due benefits that would have been paid to the veteran had (s)he not been incarcerated at all; for example, the fee for a 10 percent rating is $1,350.53, while, for a 40 percent rating, it is $6,067.22. Moreover, the amount of fee rises to $8,618.98 for a 50 percent rating and then reaches $24,848.21 for a 100 percent rating. (All calculations for 20, 30, 60, 70, 80, and 90 percent ratings are omitted as less depictive.)

It follows that if a veteran is awarded a 10 percent rating, his/her post-fee past-due benefits would be $2,025.79, but they would decrease to $685.42 if (s)he is awarded a 40 percent rating, meaning that his/her private representative would get $4,716.69 *more* for a 40 percent victory than for a 10 percent victory, while the veteran would get $1,340.37 *less* in past-due benefits in the same situation, even though VA held that his/her disabilities are *more* severe. In sum, an attorney's fee remains in direct correlation to the magnitude of the legal victory, but an incarcerated veteran's past-due benefits become inversely correlated to the magnitude of the victory, *i.e.*, (s)he is better off if (s)he wins less, not more.

And, if a veteran is awarded a 50 percent combined rating, his/her legal *victory* yields a *debt* in terms of past-due benefits. Because his/her actual past-due benefits would be $1,866.34 *less* than the attorney's fees calculated under *Snyder*, which means that VA would be required to pay a portion of the fee from VA's own funds, charge the veteran with a "debt," and then recoup this "debt." Moreover, if a veteran is awarded a 100 percent rating, his/her legal victory would yield a $18,095.57 debt. If the disabled veteran is privately represented, the more (s)he is punished financially if (s)he prevails on his/her claims pending during a period of incarceration.

Therefore, *Snyder* not only turned VA laws on their head, it also allowed § 5904 to operate as a rule imposing a *de facto* penal restitution on incarcerated veterans without any blush of criminal adjudication.

The circumstances get even more dire for a privately-represented veteran who was service-connected for a disability rated at 10 percent prior to incarceration, since, during his/her imprisonment, (s)he was already disbursed VA benefits equal to one-half of the amount payable for a 10 percent rating. That veteran is entitled to past-due benefits equal only to the other half of this amount. Yet, under *Snyder*, his/her attorney's fee obligation is 20 percent of the difference between the past-due benefits that would have been payable had (s)he not been incarcerated and those payable for a 10 percent rating. Accordingly, if the veteran's rating increased from 10 to 40 percent, then his/her actual § 5313 past-due benefits are $3,376.32, while the attorney's fee is $4,716.70, which means that a 40 percent legal victory would already generate a $1,340.38 debt. The only victory that would not generate a debt would be a 20 or 30 percent rating. Therefore, a privately represented veteran with a pre-incarceration service-connected disability rated at 10 percent is financially worse off, in terms of past-due benefits, than a veteran who became imprisoned with no compensable service-connected disability, since the former begins to incur a debt at a 40 percent victory, while the latter begins to incur a debt only at a 50 percent victory. Plus, the amount of the debt for an identical end-rating is also higher for a veteran with a pre-incarceration disability rated at 10 percent, e.g., his/her debt would be $24,753.43 if his/her rating is increased from 10 to 100 percent, meaning that (s)he would be $6,657.86 worse off than a veteran who achieved a 100 percent rating without having any pre-incarceration compensable service-connected disability. Thus, *Snyder* expressly targets and penalizes those veterans who are *more* disabled and/or disabled for a *longer* period of time.

And, if the foregoing has not been appalling enough, a veteran who undergoes this process after being service-connected for a disability rated at 20 percent or higher before incarceration fares even worse, because (s)he has already received all the benefits (s)he could possibly be entitled to during his/her incarceration period. Thus, *any* legal victory that such a veteran could achieve would produce *only a debt* in terms of his/her past-due benefits. If a veteran with a 20 percent pre-incarceration rating is awarded past-due benefits for a 100 percent rating, his/her past-due "award" is a debt in the amount of $26,810.66, which is $2,057.23 more than the debt of a veteran who achieved the same 100 percent rating after being incarcerated with a disability rated only at 10 percent.

To appreciate the magnitude of such a financial penalty, note that a $26,810.66 debt imposed upon a totally disabled veteran leaves him/her penniless, homeless, and starving, for eight and a half months after his/her release from incarceration, if this overpayment debt is recouped through withholdings of his/her entire monthly VA benefits and (s)he has no other sources of income.

Startlingly, the foregoing is still not the rock bottom of devastation achieved by *Snyder*. A VA pensioner, a destitute veteran who is totally disabled by his/her non-service-connected disabilities, is subject to the *Snyder* rule by analogy between the interplay of §§ 5313 and 5904 and that of §§ 1505 and 5904. Therefore, if a privately-represented prospective pensioner who filed a claim for a VA pension on October 2, 2017, was incarcerated the same day (*i.e.*, his/her 61st day of confinement was December 1, 2017), and (s)he was released on November 30, 2021, his/her pension "award" is a $10,876.80 debt. And while such a $10,876.80 debt pales in comparison to the debt incurred during the same period by an incarcerated veteran who succeeded at having his/her combined disability rating increased from 20 to 100 percent (since the latter's debt would be $26,810.66), a VA pensioner with a $10,876.80 debt would be left penniless, homeless, and starving, for nine and a half months if the debt is recouped through withholdings of his/her entire monthly VA pension, and (s)he has no other sources of income. Therefore, a totally disabled veteran who is a VA pensioner would have to starve and remain homeless for one month longer than an identically totally disabled compensation veteran who entered prison with service-connected disabilities that have a combined rating of 20 percent. In sum, a privately-represented incarcerated veteran, DIC

beneficiary, and VA pensioner are destined to have their legal victories turn into financial penalties, while their representatives remain spared from any risk of loss, meaning that *Snyder* covertly authorized champerty.

Champerty is defined as a quasi-predatorial support of litigation by a non-party, which is done in return for a share of the litigation proceeds.[i] In medieval England, "those who assume[d] the pleading of the legal claim of a stranger for [a post-litigation] reward were barred from doing so by penal statutes and the . . . doctrine [against] champerty,"[ii] being deemed to have engaged in illegal, quasi-predatorial litigation. However, in *Findon v. Parker*, Lord Abinger drew a distinction between champerty and deeply humane underpinnings of contingency, observing, "[I]f a man were to see a poor person . . . oppressed and abused, and without the means of obtaining redress, and . . . employed an attorney to obtain redress for his[/her] wrongs, it would require a very strong argument to convince me that [such a] man [would be] stirring up [a predatorial] litigation."[iii]

The views of English jurisprudence were adopted by American colonies, where clandestine contingent fee agreements became common but bitterly chastised and left unenforced.[iv] However, the societal value of contingent-fee agreements was later recognized, and the Court of Appeals of Kentucky in its 1923 *Rust v. LaRue* decision acknowledged that a claim-holder "may not have anything else to give, and without the aid [of a skilled legal representative, (s)he may] never sue for his[/her] right."[v] Shortly thereafter, contingent attorney's fees were legitimized in many areas of American jurisprudence, including the VA benefits system.

However, elimination of the predatorial aspect of contingent fees became critical in ensuring that the endeavor of seeking "redress [for] the wrongs [suffered by an] indigent" would be an "honorable duty of the [legal] profession," not a societal ill.[vi] Therefore, from their onset, VA laws were invariably sensitive to this concern and deeply paternalistic.[vii] And yet, *Snyder* unabashedly revived the ill carefully weeded out by centuries of American jurisprudence. Moreover, the Federal Circuit's misguided desire to ensure that incarcerated veterans would have access to private representatives was likely eliminated by the simple fact that an incarcerated VA beneficiary who ends up *indebted* due to his/her victorious private representative is highly unlikely to ever retain such a representative but would certainly spread a word of caution since, as Ovid observed, "the man who has experienced shipwreck shudders even at a calm sea."

Moreover, while prevailing beneficiaries who were incarcerated during their periods on appeal are likely to avoid such representation due to the debts charged to them by VA, there is no basis in law for VA's recoupment of such debts. This is so because VA could recoup such debts from only four sources.

One source is a beneficiary's post-fee/past-due benefits paid for portions of his/her appeal period that preceded or followed his/her incarceration, since very few incarcerated beneficiaries file their claims on the 61st day of their incarceration or have their claims awarded on the date following the date of their release. However, recoupment from such portions of post-fee-past-due benefits is illegal since, on each day of an appellate period, the beneficiary and his/her private representative accrue their own, very different "entitlements." The claimant is "entitled to 80 percent of . . . the past due benefits awarded [for this day], and the [representative is] entitled to [the remaining] 20 percent of that . . . amount," pursuant to *Cox v. Gober*, 14 Vet. App. 148 (2000), *aff'd sub nom. Cox v. Principi*, 15 Vet. App. 280 (2001). Therefore, post-fee/past-due benefits accrued during portions of the period on appeal unaffected by § 5313 (or § 1505) cannot be reached by VA; otherwise, the prevailing beneficiary is charged an attorney's fee in excess of 20 percent during the portions of his/her period on appeal that occurred before the 61st day of his/his incarceration and/or after his/her release (which violates 38 U.S.C. § 5904(d) and 38 C.F.R. § 14.636), while, from the 61st day of incarceration to the date of his/her release, (s)he is charged no attorney's fee (or an attorney's fee less than that agreed upon), violating the fee agreement. Since each dollar of an attorney's fee is implicitly "earmarked" to a specific date of past-due benefits, these daily amounts are not interchangeable, even though the dollar bills paid by VA are fungible.

The other source of income used by VA for a *Snyder* recoupment is a prevailing client's recurrent benefits payable after the award. However, such a method of recoupment is barred by 38 U.S.C. § 5904(d) and 38 C.F.R. § 14.636(h)(3), which prevent VA from paying any attorney's fees from a recurrent VA benefit. While VA's violations of § 5904 and § 14.636 are concealed since VA first craftily repackages an "attorney's fee" into an "overpayment" and then withholds recurrent VA benefits to cover this attorney's fee, such a pro forma repackaging changes nothing. When Congress enacted the Act of July 14, 1862, it unambiguously stated that the bar on an attorney's fee payment from recurrent benefits was absolute and "designed to protect [a] veteran from . . . improvident bargains with unscrupulous lawyers."[viii]

The third source used for a *Snyder* recoupment is the prevailing beneficiary's other lump-sum past-due benefits, *i.e.*, payments ensuing from awards generated by the beneficiary's other claims. This practice, however, violates § 5904(d)(2), which only authorizes VA to disburse direct pay for legal assistance provided in connection with procuring the award at issue. Given that VA cannot mix and match different attorney's fees and awards by retitling an "attorney's fee" from one award into an "overpayment" to be deducted from another award, such a practice violates both the spirit and letter of the law, since it allows a representative to be paid for work (s)he had not done. Moreover, even if a representative who assisted a beneficiary with procuring both awards is the same individual, such a payment still violates § 5904(d)(2) – because, unlike monies, claims underlying each award are not fungible, and each claim yields its own attorney's fee implicitly "earmarked" for the work on this claim.

The last financial source occasionally used by VA for a *Snyder* recoupment is a prevailing beneficiary's liquid assets, e.g., his/her bank accounts, negotiable instruments, tax returns, wages, real estate, etc. True, VA is entitled to reach assets unrelated to VA benefits same as any government entity that resorts to the law of debtor and creditor. However, a "debt" that ensues from VA's direct pay of a contingent attorney's fee is different from other overpayment debts recouped by VA because the "risk-shifting" economic consideration is the cornerstone of the contingent-fee concept. Indeed, a contingent fee is allowed to be so high since the risk of a loss to the litigant should always be zero,[ix] and the issue is only the amount (s)he could *win*.

Accordingly, if VA pursues a prevailing beneficiary's assets to recoup a *Snyder* overpayment, VA utilizes its governmental power to execute a *de facto* civil forfeiture without a blush of adjudication since the beneficiary's property cannot legally be attached based on a debt for the money (s)he has not received or the *Snyder*-created attorney's fee scheme (s)he has not been notified of by a statute or regulation, or a statement in his/her attorney's fee agreement.[x] Further, unlike a state actor (who is bound by presumed knowledge of caselaw interpretations of provisions governing his/her conduct as a state actor for the purposes of invoking defense of qualified immunity), an incarcerated VA beneficiary, a *de facto* layperson plaintiff (even if represented), is not bound by financial obligations ensuing from a rather concealed effect of a precedent stated in the Federal Circuit's decision which exhibited ignorance of a fact that deficits created by its *Snyder* decision cannot be covered by funds that would miraculously appear.

Since VA has no right to recoup the portion of a *Snyder*-created attorney's fee exceeding the past-due benefits, if any, owed to a prevailing beneficiary who has been incarcerated during his/her appeal period, the true but, alas, unnoticed, victims of the *Snyder* shipwreck are the taxpayers. That said, there is also no basis in law to use a cent of the taxpayers' monies to pay an attorney's fee to a private representative of a VA beneficiary. Indeed, the Sixth Amendment to the Constitution provides the right to taxpayers-paid counsel to criminal defendants who are represented by *public* attorneys, but not to VA beneficiaries, civil plaintiffs who litigate with the assistance of private representatives. Further, there has not been a fiscal allocation by Congress to VA for payment of attorney's fees to private representatives of VA beneficiaries. The Equal Access to Justice Act extends only to litigations adjudicated by the Court against VA and not to the period when past-due benefits accrue while an incarcerated VA beneficiary's claim is pending before an agency of

original jurisdiction or the Board of Veterans' Appeals.

Therefore, the *Snyder* utopian reality verifies Mark Twain's sad tease that "Truth is stranger than fiction . . . because Fiction is obliged to stick to possibilities; Truth isn't." However, given that the Court remains bound by the Federal Circuit's holding in *Snyder* that §§ 5904 and 5313 are "not in conflict," salvation could come only from: (a) a Court's conclusion that a fee agreement is unenforceable as against public policy if the agreement lacks a clause clarifying the effect of *Snyder*, especially if the agreement is executed by a prospective or current VA beneficiary who was or remains incarcerated during the period on appeal; and/or (b) a statutory or regulatory change that expressly removes a direct-payment attorney's fee affected by §§ 5313 and 1505 from the reach of § 5904. Such actions would apprise prospective VA claimants and private representatives of their financial risks, allowing them to assess the fact or likelihood of the claimant's incarceration intelligently and either accept the *Snyder* risk or hedge their bets. For example, the claimant might prefer to litigate *pro se* or with assistance of a VSO, while a private representative might favor a reduced fee during his/her client's incarceration period. This way, incarcerated VA beneficiaries would be spared from wondering about the wisdom of legal philosophers who transformed their victories into financial penalties, while the taxpayers would be spared from quoting Voltaire who, 100 years after Descartes' line, reiterated a regretfully obvious fact that "common sense is not so common."

Anna Kapellan is an Associate Counsel with the Board of Veterans' Appeals, Specialty Case Team, Overpayment and Waiver Group. *She would like to thank Veterans Law Judge Alexandra P. Simpson for invaluable mentorship and strong encouragement to explore the issues addressed in this article.*

[i] CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 150 (2d ed. G.G.H. & Charles Viner 1793).

[ii] Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts*, 47 DePaul L. Rev. 231, 232 (1998).

[iii] 152 Eng. Rep. 976, 979 (Ex. 1843).

[iv] *See, e.g.*, *State v. Chitty*, 17 S.C.L. 379, 401 (1830); *Arden v. Patterson*, 5 Johns. Ch. 44, 46-47 (N.Y. Ch. 1821).

[v] 14 Ky. 411, 421 (4 Litt. 1823).

[vi] *Moore v. Trustee of Campbell*, 17 Tenn. 115, 116, 118 (9 Yer. 1836).

[vii] *See, e.g.*, Judicial Review Act, Pub. L. No. 100-687 (Nov. 18, 1988); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 334-35 and n.3 (1985) (citing Cong. Globe, 37th Cong., 2d Sess., 2101, 3119 (1862) and Cong. Globe, 41st Cong., 2d Sess., 1967, 4459 (1870), to point out that VA laws were meant to ensure that a veteran and his/her family would not end up deprived of VA benefits by a representative after the veteran's legal victory); *see also In re Fee Agreement of Vernon in Case Number 91-1812*, 8 Vet. App. 457 (1996); *Lewis v. Brown*, 5 Vet. App. 151, 154 (1993).

[viii] *Walters*, 473 U.S. 360 and n.3.

[ix] *But see Johnson v. Tran*, No. 20-7918, 2021 U.S. App. Vet. Claims LEXIS 186 (Ct. Vet. App., Feb. 8, 2021) (a back-pay award for an incarcerated veteran yielded his private representative's $90,454.77 attorney's fee, *i.e.*, 20 percent of the veteran's hypothetical past-due benefits of $452,273.84, but – since the veteran's actual past-due benefits under § 5313 were only $84,322.33 – the award produced a debt of $6,132.44 ($84,322.33 – $90,454.77), prompting the veteran to litigate his resulting mandamus claim and its underlying challenge to the debt *pro se*).

[x] *Overton v. Nicholson*, 20 Vet. App. 427, 438-439 (2006) (a legal representative is presumed to know the law and required to communicate the law to his/her client). However, none of many attorney's fee agreements (that were used by private representatives who successfully litigated on behalf of incarcerated beneficiaries) that have been reviewed by the author had a statement that could be qualified as mentioning the effect of the *Snyder* rule.

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