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Judicial Conference Returns to In-Person Format

by Jillian Berner

On April 7 and 8, 2022, the Court held its Fifteenth Judicial Conference at the National Press Club in Washington, D.C. Participants had the option of attending in person or virtually for the first time ever.

The conference kicked off on Thursday, April 7, with a call to order by conference cochairs Judges Coral Wong Pietsch and Grant C. Jaquith, followed by presentation of the colors by the Military District of Washington Joint Service Color Guard. Judicial law clerk Ashley Varga sang the national anthem before Chief Judge Margaret Bartley provided welcome remarks.

Judge Grant Jaquith, Chief Judge Margaret Bartley, and Senator Tammy Duckworth

During the "Legal Trends" panel discussion, panelists Yelena Duterte, director of the Veterans Legal Clinic at the University of Illinois Chicago School of Law; Sarah Fusina, deputy chief counsel in the VA Office of General Counsel (OGC); and John Niles of Carpenter Chartered debated recent precedential decisions in veterans law and their potential import on litigants and representatives. Moderator Amy B. Kretkowski kept the lively group in line and provided thoughtful insight of her own. Following the first panel and in a second slot later Thursday afternoon, conference attendees were split into breakout discussions. These breakout sessions covered the new musculoskeletal rating schedule; Rule 33 prebriefing mediation conferences; constructive possession after *Lang v. Wilkie*, 971 F.3d

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1348 (Fed. Cir. 2020), and *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021); and the scope of a VA claim. Each breakout panel allowed attendees to further participate while selecting more specialized topics.

Law students who received scholarships to the conference, co-sponsored by the CAVC Bar Association and the Veterans Pro Bono Consortium

After a luncheon, Diane Boyd Rauber, president of National Organization of Veterans' Advocates, and longtime advocate Rory Topping Riley were presented with the Hart T. Mankin Award in recognition of their hard work on the recently published history book of the Court. Additionally, the Court's information technology department was presented with the Frank Q. Nebeker Award in recognition of its tenacity and innovation in supporting the Court and its litigants during the COVID-19 pandemic.

Later that afternoon, a brief schedule change was occasioned by a crucial Senate vote, which required Senator Tammy Duckworth's attendance at the Capitol. Panelists Maura Jean Black of Chisholm Chisholm & Kilpatrick (CCK), Veterans Law Judge (VLJ) Caroline B. Fleming of the Board of Veterans' Appeals (Board), and Jonathan Scruggs, senior appellate counsel in the VA OGC, discussed changes to the veterans benefits system following the passage of the Veterans Appeals Modernization and Improvement Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (codified as amended in scattered sections of 38 U.S.C.). The animated discussion, moderated by Dan Smith of Bosley & Bratch, kept the audience engaged as the attorneys candidly shared their experiences and advice for other counsel.

Following the panel discussion, Senator Duckworth arrived at the conference. After a touching introduction by retired Judge John J. Farley, III, Senator Duckworth responded to attendees' questions as presented by Judge Jaquith. Senator Duckworth shared her thoughts on her military service, her time in the Senate, working parenthood, veterans, and much more.

The first day of the conference culminated programmatically with a panel composed of Chief Judge Bartley, Judge William S. Greenberg, Judge Scott J. Laurer; Cheryl J. Mason, then-chairman of the Board; VLJ Jonathan Hager, VLJ Jane K. Nichols, and VLJ Estela Velez. The panel discussed new changes and topics facing the Court, VA, and the Board. Moderators Robert V. Chisholm of CCK and Mary A. Flynn, chief counsel of VA OGC, directed questions at the dynamic panel of participants, many of whom have worked in veterans law for decades and who shared their experiences with conference attendees. Following the panel, conferencegoers enjoyed a social reception.

The second day of the conference began on Friday with a panel discussion regarding emerging presumptive health conditions based on military and environmental exposure, which focused on new scientific and medical developments. Kerry Baker of Hill & Ponton; James Cho, counsel for the U.S. Senate Committee on Veterans Affairs; Chris Diaz, acting chief of staff and White House liaison for the

Office of the Secretary of VA; and Patricia R. Hastings, MD, chief consultant of Health Outcomes Military Exposures at Veterans Health Administration, shared data and insight on toxic exposures and potential conditions eligible for presumptive service connection for certain veterans. The panel, moderated by VLJ Nathaniel J. Doan, provided helpful information about the process for updating the list of conditions that may soon qualify for presumptive service connection.

Following the panel discussion, Court committee chairs reported to the conferencegoers. Stephen E. Castlen, chair of the Committee on Admission and Practice, and Kretkowski, chair of the Rules Advisory Committee, informed conference attendees of their respective committees' updates. Denis McDonough, Secretary of VA, then spoke to the conference participants and answered several audience questions regarding the VA benefits process and issues facing veterans today. Finally, the conference culminated in its last official program, in which Glenn R. Bergmann of Bergmann and Moore and Heather C. Bupp, deputy chief counsel in the VA OGC, spoke about ethics before the Court. Moderator Alexander Scherr, professor and Veterans Legal Clinic director at University of Georgia School of Law, guided Bergmann and Bupp in their discussion of proper ethical behavior for counsel. The day ended with a luncheon and closing remarks.

At the end of the official conference, the Bar Association presented a panel on best practices for Rule 33 memoranda. The panel, composed of Abigail Schopick of the VA OGC, Ronen Morris of the VA OGC, Jennifer Zajac of Paralyzed Veterans of America, and Sean Kendall of the Law Office of Sean Kendall, P.C., discussed how to most effectively achieve successful outcomes in prebriefing conferences and how to best convey arguments in the limited space available in Rule 33 memoranda.

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

Message from the President

Summer is approaching and with it comes some time to relax and reflect on the Bar Association's work this past year. Despite all the stress and sorrow that the pandemic has brought, it has also given us the opportunity to virtually strengthen our community ties. I am proud that the Bar Association today has more active and paid members than it has in several years. This is no doubt a result of our effort to provide a diverse and accessible selection of programming, as well as the tireless work that our Board of Governors has done to help the Bar Association run smoothly. From maintaining our budget, to working to improve our technology, to soliciting and editing articles for this Journal, the Board of Governors is the reason for the Bar Association's success. It is a true team that I am honored to lead.

And the Board of Governors needs more Bar Association members to continue to improve on our efforts! At-large members of the Board serve a 3-year term and this year we have three at-large members rolling off the Board. I enthusiastically encourage you to run for a position. I served as a member-at-large for three years before I ran for President-elect, and I can tell you that it is a wonderful opportunity to work with colleagues from both sides of the Bar. Please don't hesitate to reach out with any questions about the different positions. If you're looking for other ways to get more involved with the Court, I encourage you to participate in the Veterans Pro Bono Consortium Rule 33 pilot program. The program matches pro se veterans with experienced attorneys for limited representation in a CLS conference. The first year of the pilot program has been successful, with about half of the cases assigned reaching resolution at the CLS conference. This is a wonderful conservation of the veterans' time and Court resources considering

that, without this limited representation, each of these cases would have ultimately gone to a judge. The pilot will continue for another year and needs experienced professionals to continue its success. If you have appeared in at least 50 cases and been a member of the court's bar for two years, contact the clerk (Greg Block at gblock@uscourts.cavc.gov) to let him know you are interested.

Finally, I want to thank the Board and the Court for all their work on the Judicial Conference, as well as the Bar Association programs that we've held in the past few months. It was wonderful to see so many familiar faces at the Judicial Conference in April, and to hear from many accomplished speakers. The Volunteer Planning Committee and the Court worked extremely hard to make the conference a success and it paid off in spades. Thank you also to the panelists who participated in the JMR Negotiations discussion following the Judicial Conference: Ronen Morris, Abigail Schopick, Sean Kendall, and Jennifer Zajac. It was a lively and thought-provoking discussion from which I hope we'll continue to find ways to improve the process. And thank you to Kenneth Meador and Jason Johns for organizing and participating in a discussion with Sarah Wolfe and Jennifer Hamel about their experiences as veterans now serving veterans. They provided some vital insight into understanding the people we all serve.

Wishing you all a peaceful and relaxing summer,

Jenna Zellmer
President, CAVC Bar Association

Message from the Chief Judge

Greetings, Colleagues,

Our minireunion at the Court's Fifteenth Judicial Conference was long overdue. It was so good to see everyone who attended in person—greeting old friends and meeting new folks. And I'm pleased too that the Court was able to offer a virtual option and that many of you used it. Thank you to all who participated.

And thanks to the Judicial Conference Planning Committee led by Judges Pietsch, Allen, and Jaquith, and the program committee that spent over a year developing the conference content: Judy Donegan from the Law Office of John Robert Unruh; Amanda Haddock from VA General Counsel; Diane Boyd Rauber from National Organization of Veterans' Advocates (NOVA); Shereen Marcus from the Board of Veterans' Appeals; Chantal Camille Wentworth-Mullin from the National Law School Veterans Clinic Consortium; and Jenna Zellmer, President of the CAVC Bar Association. Many Court staff also volunteered to assist—thank you! And special thanks to the Court's Deputy Executive Officer, Frank Vila, who shepherded the Conference from start to finish. It was a memorable occasion and left us all looking forward to the next conference opportunity.

In other news, in April we held our first hybrid oral argument, in Stevenson v. McDonough, No. 20-4870, with judges present in the courtroom and counsel arguing virtually. Since then, we have had several other successful hybrid arguments, with different configurations of judges and counsel participating in-person and remotely. Although we have encountered a few audio glitches, these arguments have been successful, and the hybrid argument configuration will continue to be an option, along with fully in-person arguments and fully virtual arguments. We also recently held our first fully in-person onsite oral argument in two years. I know many of you are eager to return to the courtroom in person, and the May 24, 2022, oral argument in Davis v. McDonough, No. 20-5411, marks a promising step in that direction.

The Court recently resumed its outreach efforts after a two-plus-year hiatus, and in late March we visited Penn State Law in University Park, Pennsylvania, to hold argument in Walleman v. McDonough, No. 20-7299 (June 9, 2022). In addition to the argument, the judges participated in a class action roundtable with several other federal judges, and several Court law clerks and counsel in Walleman spoke at a seminar about employment in veterans law. It was a lot of fun participating in these events at my undergrad alma mater! And the Court is looking forward to more travel arguments this fall—mark your calendars for the following: September 21, 2022, at the University of Iowa College of Law in Iowa City, Iowa, and October 27, 2022, at Syracuse University College of Law in Syracuse, New York. More details will be available on our website as we get closer to those dates.

Finally, the Court recently asked Congress to authorize two additional judge positions. We currently have permanent authorization for seven judges and temporary authorization, expiring at the end of 2025, for two additional judges—for a total of nine judges. We have requested that the temporary authorization be made permanent, and in addition, we hope to have Congress add two more judge positions—for a total of eleven. The Court's caseload has grown substantially since Congress granted our temporary authorization to nine judges many years ago, and we anticipate that it will continue to grow for the foreseeable future, especially given the Board's expected steep uptick in decision-making. This imminent increase in the Court's workload justifies additional judges, and of course we have been adding to our Central Legal Staff and Public Office staff as well. The Court's mission is to provide fair and prompt judicial review of VA benefits claims for veterans and their families and survivors, and having additional judges will ensure that we continue to fulfill that mission.

I wish you all a safe and enjoyable summer—

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Experiencing the Judicial Conference as a Law Student

by Abby Gorzlancyk

This April, I had the honor of attending the U.S. Court of Appeals for Veterans Claims (CAVC) Fifteenth Judicial Conference thanks to the generosity of the CAVC Bar Association and the Veterans Consortium Pro Bono Program. The opportunity to attend the CAVC Judicial Conference was incredibly impactful for me as a rising 3L at Syracuse University's College of Law. Last semester, I participated in the Betty and Michael D. Wohl Veteran's Legal Clinic as a student attorney. My experience in the Veteran's Legal Clinic with Professor Beth Kubala has been one of the most rewarding parts of my legal education and introduced me to the practice of veterans law. My positive experience inspired my summer internship with the U.S. Department of Veterans Affairs Office of General Counsel this summer. The opportunity to attend the CAVC Judicial Conference and connect my experiences from the classroom and the clinic with insights from experts in the field was amazing. Just a few months ago, I had no idea such a robust, everchanging, and rewarding field of law existed. Being able to listen, learn, and network with leading veterans law practitioners was an invaluable experience for which I am extremely grateful. Some of my personal highlights from the conference include the interactions, and networking with the other conference attendees. The pandemic has halted networking and the opportunity to meet others the past two years, so to be able to see people in person, shake hands, and chat was refreshing. Additionally, I never expected all the different parties to be so humorous and full of life! It was unexpected but delightful to see laughs and smiles shared between attorneys from agencies and firms that are typically averse to one another. At a time when the world is seeming more polarized, it was refreshing to see opposite parties come together to support veterans.

The panels and breadth of speakers at the conference were also spectacular. Being from the

Midwest, I have heard Senator Tammy Duckworth speak before, but each time she sparks a new flame of inspiration for me. It was incredible to hear her story, struggles, and experience within the VA benefits system, as well as her words of encouragement to keep fighting for and assisting veterans.. Listening to her experiences including being a female veteran, becoming a Senator, and fightingto be able to bring her children into Senate chambers and feed them was inspiring. Her utter strength, determination, and grit was palpable from 100 feet away. I was grateful she was able to spend time speaking to us (after confirming a new Supreme Court Justice, nonetheless) and inspiring the work that veterans law advocates do.

The other portion of the CAVC Judicial Conference that I have continuously gone back to was the panel on Emerging Presumptive Conditions Based on Military and Environmental Exposure. It was so informative to hear about the issue of presumptive conditions from various perspectives. I appreciated the government's view from Doctor Patricia Hastings, MD, who gave great medical and research insights; the legislative perspective from James Cho of the Senate Veterans' Affairs Committee; the VA's legal perspective from attorney Christopher Diaz; and the veteran advocate angle from Kerry Baker. Learning about the science and research that goes into identifying presumptive conditions was enlightening and gave me a much better understanding of the work, time, and data that must be present. It was a perspective that I did not know I needed to hear from, so I was grateful I was able to learn from Dr. Hastings. Additionally, a hearing about presumptive conditions from the legislative perspective was fresh and insightful. Oftentimes in law school it feels like the legislative angle is forgotten and unappreciated, so it was great to learn the Majority's views on their role and their plans to implement those goals. Overall, I really enjoyed this panel and the different perspectives they provided on the issue of presumptive conditions. It was something I took back to the Syracuse College of Law's Veterans Legal Clinic, as it has better informed conversations with my peers and my clients on presumptive conditions.

This just scratches the surface of the great speakers, panels, and information I gleaned from the CAVC Judicial Conference. It was truly invaluable to be able to attend in person and learn from these veterans law experts and leaders. I have a newfound appreciation for all sides of veterans law, and hope that I am able to attend future conferences as a student and eventually as a practicing veterans law attorney. I am grateful to the CAVC Bar Association and the Veterans Consortium Pro Bono Program for sponsoring my attendance and Professor Beth Kubala for bringing me into the field of veterans law and encouraging my attendance. I am excited to use this experience to be a better veterans advocate moving forward!

Abby Gorzlancyk is a rising 3L at Syracuse University College of Law.

Student Perspective of the Judicial Conference

by Hayley Ferguson

I was honored to be granted a scholarship by the Court of Appeals for Veterans Claim Bar Association and the Veterans Consortium Pro Bono Program to attend the CAVC's 15th Judicial Conference this past April. During my 3L year at the University of Arkansas at Little Rock William H. Bowen School of Law, I worked as a Student Practitioner in the Veterans Legal Services Clinic (VLSC). I did not come to law school with an interest in veterans law, but the clinic seemed like a good opportunity to learn about veterans benefits law in order to help my family members who may need it. Little did I know, once you learn about veterans law, you can't not be interested! In my first semester at the clinic, I represented a veteran client before the Board of Veterans' Appeals.

While working with my client in the clinic, there was always a consideration about what would happen to her case if it was denied at the Board – would our clinic work on her case further? Would she want to appeal her case to the CAVC? Since the

VLSC has only been around since January 2021, our clinic has not had the opportunity to represent a veteran before the CAVC yet. But, I knew that I wanted to be able to assist my client at the CAVC should she need it. However, while I could learn about the CAVC from reading about the rules and best practices, I wanted something hands-on that I could really dig into and learn about how to be the best advocate for my client at the CAVC level.

When I heard about the scholarship to attend the 15th Judicial Conference, I immediately knew I wanted to attend for three reasons. I wanted the chance to learn about how the Court functions, network with members of the CAVC bar, and be shown topics that I could really dig into further on my own. Thankfully, the conference provided all of that – and more!

At the conference, I was able to learn about how the Court functions. Specifically, I learned about things that may be working well and things that may not be working so well at the Court. I got the chance to learn about best practices as a veterans law attorney from the people who practice at the Court every day, which was invaluable. Specifically, I was thankful to be in "The Scope of a VA Claim" breakout session. There, I was able to learn about the scope of an initial claim, complications, and reopened claims. As someone who is new to the practice of veterans law, this was a wonderful presentation to get me situated!

The conference provided so many opportunities to meet wonderful attorneys and law students from all over the country. I was able to sit with a group of attorneys from the Office of General Counsel, who were welcoming and never hesitated to answer any of my questions during the panels. I was also able to meet my CAVC Bar Association mentor in person for the first time, and she connected me with other attorneys that she knew. I also had the opportunity to network with law students who shared the common interest of veterans law!

Finally, the conference gave me so many topics to continue to follow and research in the veterans law world. I specifically enjoyed one of the first panels that discussed legal trends.

I had such a wonderful time learning and networking at the CAVC 15th Judicial Conference! If you are a law student who is interested in practicing veterans law, I highly recommend applying for this scholarship. It is a wonderful opportunity!

Hayley Ferguson is a 2022 graduate of the University of Arkansas at Little Rock William H. Bowen School of Law and will sit for the Arkansas Bar Exam in July 2022.

Veteran Practitioners on May Panel Discuss Serving Veterans

by Jillian Berner

On May 9, 2022, the Court of Appeals for Veterans Claims Bar Association hosted a panel event over Zoom in which practitioners who served in the military provided insight into their personal service experiences and how those affect their practice in veterans law. Each panelist provided a candid, unique perspective on his or her legal career path, which helped audience members understand how to best serve veterans from any side of the bench.

Jenna Zellmer, president of the CAVC Bar Association, introduced the event and moderated the Zoom chat. Panelists Kenneth Meador, Jason Johns, Sarah Wolf, and Jennifer Hamel, who have all served in the military, provided valuable insight into their personal stories.

Wolf is deputy chief counsel in the VA Office of General Counsel Court Appeals Litigation Group, and her experience includes 13 years of active duty service in the U.S. Army Judge Advocate General's (JAG) Corps and a deployment to Iraq.

Hamel also served on active duty and as a reservist in the Army JAG Corps. She is now an appellate attorney for VA.

Johns served as a combat engineer in the Army National Guard and Army Reserve and reenlisted on active duty, when he was deployed and earned a

Purple Heart. He has worked in various positions in veterans law and now works for a nonprofit providing veterans with transitional housing.

Meador served as a combat medic in the Army and deployed three times, eventually attaining the rank of sergeant. After leaving service in 2009, he attended college and law school, served as a judicial law clerk at the Court, and is now an attorney at the National Veterans Legal Services Program.

During the panel, the veterans discussed their personal stories and shared how their experiences have shaped their professional paths.

Meador discussed his initial plan to become a nurse after serving as a combat medic in the Army. After exploring his options for nursing careers and growing frustrated at his difficulty in transferring his service experience, he learned of others' challenges obtaining VA disability benefits, and he became inspired to pursue veterans law.

Jennifer Hamel, appellate attorney for VA Office of General Counsel, shared how her Army JAG Corps experiences have shaped her career in veterans law.

Johns shared that he was unfamiliar with veterans law and the Court when he left service in 2004, though he had already obtained his law degree. He explained that he began working with the Veterans of Foreign Wars on his personal disability claim and began meeting other veterans struggling with disability claims. After more research, in 2013, he began working with the Veterans Consortium Pro Bono Program and represented veterans with their claims, which led to further involvement in the field and in the Bar Association.

Wolf explained that she wanted to stay connected to the veterans community following her discharge from the JAG Corps, which led her to working for VA.

Hamel shared that her husband had worked for VA when she learned of the opportunity to also work for VA. She discussed her own disability claims process and the insight she has gained in working on cases regarding other veterans' claims.

The panelists addressed the misconceptions and difficulties many veterans share and experience about service and the VA disability claims process. Wolf, whose JAG service brought her in close contact with soldiers who faced disciplinary issues and potential punitive discharges, explained the importance and long-term implications of the separation process. Hamel shared her perspective regarding in-service disciplinary violations and the sensitivities surrounding non-veteran attorneys' handling of such issues. Meador shared the story of his battle buddy whose military trauma led to a less than honorable discharge but also allowed the man to obtain benefits that, as Meador said in the panel, "changed his life."

Johns and Meador discussed how their service informs their relationships with claimants and clients pursuing their own claims. Johns discussed the reticence of some veterans to file for benefits, especially those who do not consider themselves "that bad off," and the importance of dispelling the stigma of requesting benefits. Meador shared the responsibility he feels for other veterans with whom he served and the importance of the "safety net" provided for veterans.

Though Wolf and Hamel do not represent veterans directly, they each shared a personal angle. When Wolf began working for VA, she had to dispel misconceptions even within her own family about

the role of VA in the claims process and the non-adversarial nature of the benefits system. Hamel discussed her belief in the importance of preserving the legal underpinnings of the benefits scheme and how that has impacted her work at VA.

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

Retirement Tribute to Bart Stichman: Founding Father of Veterans' Law

Remarks by Judge Robert N. Davis at the Hay-Adams Hotel, Washington, D.C., on June 2, 2022

I am honored to be with you all this evening to share a few stories about my time getting to know Bart Stichman and working with him over the past 17 years. I'm always learning something about Bart. This evening during the cocktail hour, I learned that Bart was a poker player. Then it dawned on me that is why he is so successful as a litigator—he always has a couple of cards up his sleeve.

Let me make two observations about Bart. And, no matter what comes after these two comments, remember I led with these. First, Bart is a Renaissance man, a man who is knowledgeable, educated, and proficient in a wide range of fields. Second, Bart has class. He is cultured, sophisticated. He is a gentleman.

The first thing I remember about Bart Stichman when I met him in 2005 was that he was the president of the CAVC Bar Association and had written a letter to the judges of the court asking them to please participate in Bar Association activities.

Apparently, the judges had been rather disengaged from the Bar Association. As a new judge, I was shocked that the Bar Association president felt it necessary to write a letter asking the judges to engage with the bar.

As a former law professor, I didn't understand it, but decided in 2005 that I would make an effort to participate in Bar Association events, regardless of what my colleagues were doing at the time or what they thought. Later in my tenure as the Chief Judge, I would be able to help to set even more of a tone of engagement, interaction, and partnership with the bar. I think we were successful.

Before 2005, I didn't know Bart Stichman and was not aware of the NVLSP Veterans Benefits Manual—a manual that I would, in a few short months, come to rely on to help me learn the law in this very complex field.

I have a few stories I would like to share with you that have made Bart endearing to me and probably to many of you. For the most part, I don't think I will be telling you anything you don't already know about Bart. There is one thing, though. The one thing I know you don't know is the question I asked Bart when I was first getting to know him 17 years ago and his reply.

I am certain other people who worked with Bart will tell us more about his amazing 40-year career in this field representing veterans, the groundbreaking and precedent-setting cases he litigated, and benefits he secured resulting in awards of more than 5.2 billion dollars. But let me return to the question I asked him in 2005 and his answer.

Bart and I are about the same age and came through college and law school at about the same time. We were products of the 1960s and 70s, the Vietnam War, protests on campus, the civil rights movement, and the assassinations of President John F. Kennedy, Dr. Martin Luther King, Jr., and Senator Bobby Kennedy. Tumultuous times, to say the least.

I asked Bart then what led him to work with veterans. And he simply told me that he knew he wanted to do public interest work when he went to law school in 1971.

To me, that was surprising and impressive. Surprising because few of us really knew what we wanted to do when we went to law school, but Bart knew and was sure!

Impressive because—I thought to myself and probably expressed some of this to Bart at the time—how fortunate he was to have such clarity of vision to know what he wanted to do when he entered law school. And I also thought what a noble pursuit to then dedicate his life to helping veterans, something that he began doing as part of a clinical program for discharge upgrades in 1974-75, while getting his LLM degree at Georgetown.

In 2006, Meg Bartley, then the Director of Training for NVLSP, put together a program in Atlanta, Georgia, and asked me to represent the Court. Another opportunity to spend time with Bart, share meals, and visit. It was at that training session that I had a eureka moment recognizing the impact that Bart Stichman had on veterans' law development, and I referred to him in my remarks as a founding father.

I believe that might have been the first time he had been referred to as a founding father because of the twinkle in his eye when I said that. He looked surprised in a pleasant sort of way. And that designation stuck, for good reason. He truly is a founding father of veterans' benefits law.

You don't make an impact in a field like this without having a purpose-driven life, a dedication to those you serve, a vision, a commitment, an amazing work ethic, a keen intellect, and the kind of backbone that when you are knocked down, you get back up and keep fighting for what you believe in. Bart Stichman has all of these qualities and many more.

These qualities also make Bart a demanding person, one who expects and pursues excellence in all that he does. And, some would say, it also makes him perhaps not the easiest person in the world to work with. So here comes a few of those stories as well.

I spent some time interviewing a few people who worked with Bart over the years and here is what they had to say when I asked what Bart was like to work with. Are you ready for this, Bart?

He likes to work with no shoes, barefoot. He likes to walk around the office in his socks. Bart was the litigator and in charge of litigation and litigation strategy, so he had a litigator's personality. Dot, dot, dot. He was not always an easy person to work with.

Bart and Ron Abrams were co-executive directors for some time and Ron gives Bart credit for the original concept of the treatise. Ron acknowledges that Bart was a tough taskmaster. Ron describes Bart as Mr. Outside (outside of the VA, working with the Vietnam Veterans of America) and himself as Mr. Inside (growing up within the VA system). A good match for co-executive directors.

Bart was also known to be pretty proficient at multitasking, doing a thousand things at one time. But from time to time, he would get a little flustered and might forget where he put something. Ron remembered a trip to Puerto Rico to investigate a class of Puerto Rican veterans who had been ill-treated by the VA (their benefits had been reduced unfairly). In a bit of a rush, Bart dropped Ron off at the departure area at Ronald Reagan DC National Airport and then went to park the car. As he drove off, Ron noticed Bart's wallet on top of the car. So that created a few anxious moments for Ron, until Bart returned to the airport departure gate with wallet in hand. All was well.

We called him Battle Bart, a champion, a born litigator. Bart had a genius for picking the right cases.

Lou George and Andy Reynolds served as staff attorneys at NVLSP and shared a few stories with me. I asked them what Bart's communication and management style was like. They both agreed that he likes to get to the point. Don't give him a lot of extraneous information and don't waste his time with nonessentials. He will pepper you with questions. If you try to go toe-to-toe with Bart, you are going to come up missing some toes. You are not going to win. He allowed you to manage your own caseload. But you had to know the case inside and out and prove to him that you could win the case, be successful for veterans.

They also added Bart doesn't have much of a filter. He doesn't sugar coat things or try to be diplomatic. He just tells it like it is. Being from New York, Bart often would get frustrated with the government

when Washington, D.C., would shut down over an inch of rain or half-inch of snow.

Chief Judge Bartley began working with Bart and NVLSP in 1994 and shared this memory that many of us may not know about Bart. Bart has a pilot's license and always wanted to fly people to consortium training events. Two places Chief Judge Bartley remembers they had planned on flying to were Tampa, Florida, and Charleston, West Virginia. She went on to say: "Every time we tried to schedule a private jet from Montgomery County Airport in Gaithersburg, Maryland, so Bart could fly us, the weather intervened. So we often had to scramble at the last minute to find a commercial flight or drive." Chief, maybe you were fortunate, maybe that was divine intervention. Who knows?

For those of you who don't know Bart so well, you should know that he gets a little annoyed when people mispronounce his name. So you should know, it is STITCH-MAN, not STICK-MAN. And whatever you do, Chief Judge Bartley advises, don't mistakenly call him Bart Simpson, as someone did at a conference.

I would describe our relationship as a close one built on mutual respect and admiration. From our first meeting, Bart and I clicked. Bart is from Long Island, New York, and I am from Davenport, Iowa. I know, where is the common ground there? But I remember telling Bart I had gone to college in New England, had visited New York, had many friends from New York, and had grown very fond of New Yorkers and what I describe as the New York in-your-face personality. Beyond Iowa and Long Island, Bart and I had several other things in common, to include a connection to NYU and Georgetown. NYU, where I attended the appellate judges conference and he attended law school, to Georgetown, where I received my JD, and he received his LLM. We knew some of the same professors. We also both shared a passion for life, for traveling, for exploring, for baseball and tennis. We both liked spending time outdoors, hiking and biking.

To me, Bart is amazing, and he truly is a Renaissance man. On our first meeting, I remember being immediately impressed with his humility, unassuming personality, and depth of knowledge of some of the topics we discussed. Remember, I was new to veterans' law. He could have told me anything and I would have been impressed!

When you look at his life's work in veterans' law, he has been instrumental at every turn, from the Agent Orange *Nehmer* class action (before the Court was created) to the most recent class certifications in *Wolfe* and *Skaar*. He was a strong advocate for the creation of the United States Court of Appeals for Veterans Claims. He led NVLSP from its early fledgling days in 1981 with David Addlestone to the preeminent veterans' legal advocacy organization it is today.

As Ron Flagg, the Chair of the Board of Directors of NVLSP in March 2021, said:

"During the course of his extraordinary career, Stichman has been a trailblazing champion for veterans' rights. He has fought to break down barriers and create a more equitable and transparent system to better serve veterans, servicemembers, and their families. With a career that spans four decades, Bart's record of achievements for veterans' rights is a testament to his profound commitment to veterans, as well as his keen legal acumen. He has been a visionary leader, repaving the legal landscape that today affords millions of veterans a fighting chance for justice."

So, you see, it is really no exaggeration to say that many of the legal remedies and resources veterans, servicemembers, and their families can access today are a direct result of Bart's hard work.

I will leave it to other speakers to detail many of the legal highlights of Bart's work, including the cases and policy initiatives that he has led. I can only say that I admire Bart on many levels. The phenomenal impact he has had on the development of veterans' law will never be matched. He was the right person, at the right time, in the right place, to lead the effort of seeking justice for veterans and he succeeded. He is truly the founding father of veterans' law. What a wonderful legacy you leave, Bart!

As I worked with Bart during the ensuing 17 years on Bar Association and Court committees, at conferences and at NVLSP training programs, I learned to seek him out for counsel and to discuss ideas that I thought might be interesting to pursue. When I formed the Judicial Advisory Committee, Bart Stichman was one of the first people I invited to participate as an original plank owner, a charter member of that distinguished group of leaders in the veterans' legal community that would be a part of that committee's important advisory work. As we shared meals together at various venues, my appreciation for him continued to grow because of his humility and class.

How do I describe the essence of Bart? Let me offer a couple of examples. Bart and I worked closely together after the Federal Circuit's *Monk* decision, where it instructed the CAVC that we had class action authority. We then had to figure out if we would exercise that authority and how. We had to develop class action rules and, as always, Bart rolled up his sleeves and got to work. Bart had been on the Rules Advisory Committee and was also on the Judicial Advisory Committee (the RAC and JAC). In order to develop the class action rules, we put together a subcommittee of members from the RAC and JAC. And, of course, Bart brought to that subcommittee his experience, expertise, insight and knowledge of class action litigation.

As we worked together, I came to know Bart as relatively reserved in meetings. He listens and only offers comments when he has something to say. Often, I had to ask him for his thoughts. He never assumed what he had to say was more important than what others were offering. Given his experience, he could have easily taken charge of the meetings and ran his engine down the tracks. But that was not Bart's way. Bart is patient with many of us who knew only a fraction of what he knows. He doesn't judge those of us who may not have the depth of experience that he does. But he engaged us with the gentle perspective of someone wise and seasoned on the battlefield of experience. Many people come and go in veterans' law and some stay. Through it all, Bart has been there and is not the least bit impatient with those new to this area of law.

Greg Block and I were talking the other day and remembering some of our time with Bart. And we both agreed that in working with Bart, he is not driven by an ego, but instead a commitment to making the veterans benefits delivery and adjudication system better.

During our lengthy and tedious meetings discussing policy and drafting language and words and sentences and paragraphs, Bart quietly listens, measures, and then contributes. And, wow, did he contribute to the development of the Court's class action rules in a big way with his insightful comments, both verbal and written. He doesn't overwhelm you, though. He just makes his points clearly, succinctly. And the impact of what he says stands on its own. But it goes beyond that. Bart has helped to shape the Court itself. And it goes beyond that. Bart has shaped this field of veterans' law in ways very few others could. He had the vision, perhaps he saw this coming, and he certainly helped to make it happen.

As Greg and I talked about memories in working with Bart, Greg shared a story with me about a time he was in Heidelberg, Germany, at the officer's club with a visiting friend. They were having lunch and his friend wondered out loud, saying: "I can't even imagine what kind of amazing person can be in charge of such a large and important operation like the United States European Command with the Battalions and Brigades and Divisions and more than a quarter of a million soldiers all under one person's command and responsibility." He said: "I just can't imagine who that person could be and what he or she would be like." Greg pointed to a gentleman sitting at a table nearby, with family and friends, a rather ordinary unassuming, quiet man. Greg pointed to him and said: "That's him sitting over there, Four Star General Crosbie Saint, Commander in Chief of the United States Army Europe." And Greg said to me—something I will never forget—he said, whenever he tells that story or thinks about that lunch at the officer's club in Heidelberg, he thinks of Bart Stichman. And I said: "Yes, I understand completely why you would think of Bart, because he also is an unassuming, rather ordinary guy who does extraordinary things."

In conclusion, as someone who came to this amazingly complex and stimulating area called veterans' law in complete ignorance with no preconceived notions of what it was; as someone who came to this area of the law only 15 years into the creation of the newest and most unusual federal court in the country—a laboratory, if you will—certain to make new law by experimenting with unfamiliar concepts and applications; as someone who arrived ignorant of its substance, but at the cusp of an explosion of veterans' law—what I refer to as a subject at the intersection of law, medicine, and war—I say thank you to Bart. because he has been the driving force behind the development and explosion of veterans' law. I feel so fortunate to have shared some of this veterans' law developmental time with the likes of Bart Stichman, to spend time with him, to get to know him professionally and personally, to appreciate his patience, his intellect, his passion for the work he has done and his class. Bart, we are all indebted to you. I love you, man! Thank you.

Judge Robert N. Davis was appointed to the Court on December 4, 2004, and served as Chief Judge of the Court from October 2016 to December 2019.

Editor's note: Bart Stichman continues to work as Special Counsel to NVLSP on a part-time basis.

Book Review: *Justice and the American Veteran: A History of the United States Court of Appeals for Veterans Claims*

by Michelle V. Smith

In case you couldn't attend the Court of Appeals for Veterans Claims (CAVC or Court) judicial conference in April 2022, you should know that *Justice and the American Veteran: A History of the United States Court of Appeals for Veterans Claims* was gifted to all attendees. The book was authored by Rory Riley Topping (founder of Riley-Topping Consulting) and Diane Boyd Rauber (Executive Director of National Organization of Veterans' Advocates, Inc.), who both were awarded the Hart T. Mankin Distinguished Service Award. In presenting the award, the Court noted that the authors' "ardent and effective research, interviewing and writing" produced "a masterful and comprehensive account of the Court's creation and first three decades and have afforded the Court the honor of preserving and sharing its story through this extraordinary book." I must agree.

The book is very well organized and easy to follow with its natural chronological flow. There are four parts: 1) the state of veterans' law and legal review of claims before the CAVC was established; 2) the process and challenges of establishing the CAVC; 3) the growth of the CAVC in the decades after the first generation of judges retired; and 4) the current programs and legal challenges of the CAVC.

Because the book starts at the beginning, like any good story does, it reads a bit like a history book. However, with its deeper delve into legal issues, it also reads somewhat like a law review article. The combination of these formats means the book is full of footnotes, legislative history, caselaw summaries, interviews, and historical context. Overall, it is a very easy read and presents many insights into veterans' law that I had not previously considered.

Part I provides the history surrounding the establishment of the CAVC and the passage of the Veterans' Judicial Review Act (VJRA), which established the Court. In learning about the journey to obtain judicial review of VA decisions, one adage came to mind: the more things change, the more they stay the same. The authors actually reference this idea at the end of the book, but it definitely rang true through the entirety of the book. Everyone has (and has had) differing opinions regarding the best way to afford review of benefit decisions to veterans. Additionally, some veterans believe they have been unjustly treated in the claims process. As noted in Part IV of the book by the authors, the current debate surrounding the AMA and the best mechanism to offer judicial review mirrors the debate that existed in the 20th century regarding the type of review that should be available and the proper venue for such review. Moreover,

the view that veterans are treated unfairly has persisted since. The book contains several quotes from veterans regarding the battle with VA to obtain the benefits they deserve. These are the same statements seen in case files today.

Before the VJRA created the Court, VA was the sole administrative agency without judicial review. As a result, many veterans filed *pro se* claims, with appeals going no higher than the Board. Veteran service officers (VSOs) also handled cases, but attorney representation was sparse, given the negative views of "unscrupulous" attorneys at the time, the significant limits on attorney fees, and the nonadversarial nature of the claims process. Some thought judicial review was unnecessary because of the perceptions that VA made few errors, court scrutiny would make the system more formal and less pro-veteran, and there was no "right" to live off the government. Others thought that providing judicial review signaled that VSOs weren't doing their jobs. One final concern was the burden on both the courts and VA of allowing veterans judicial review. After decades of political back-and-forth, the VJRA was passed as a compromise that addressed many competing perspectives. This was all new information for me.

Part I felt like an unnecessarily detailed part of the book. While it is actually one of the shortest parts, it identified a lot of Congressional players and included interviews of their staffers. Congressional testimony from various interested parties was included. I appreciate the hard work that went into the book, and it really does a good job showing the long and drawn-out nature of the fight for judicial review, but I believe it could have been done more succinctly. Part I feels like it could have been a book on its own.

Part II provides background on the judges of the first Court and details the challenges they faced. It is clear that the political battles involved in establishing the CAVC continued throughout the Court's early years and beyond. Throughout the CAVC's existence, for instance, Congress has taken its time to appoint judges. The first Court was the start of that trend. The VJRA was passed in 1988; the first chief judge wasn't confirmed until 1989 and all judges weren't confirmed until 1990. Other challenges discussed in the book include forming the Court's identity, establishing jurisprudence and procedures, developing the Court's bar and processes for *pro se* litigants, the authority and role of the Federal Circuit, and practical issues like finding a proper space and use of technology. Like Part I, a lot of information is packed into Part II. However, it was well done.

Part III outlines the transition after the retirement of the first generation of judges and the challenges the CAVC faced with its large number of cases. Again, the slow pace of nominating and confirming judges is a central theme. For example, Boyd Rauber and Riley Topping write, "the Court, in 2005, had a full slate of judges for the first time in several years." It is indeed eye-opening to see the CAVC was forced to function without the necessary judges, especially with case numbers spiking. Part III also covers topics such as expanding Court staff, mediation, and use of single-judge and panel authority. Many of these topics are a bit foreign to me as someone who has never practiced before the CAVC. However, they were nevertheless interesting and insightful.

Part IV analyzes the Court in present day. The authors skillfully summarize significant cases that have influenced the CAVC's jurisprudence. This is particularly so with the book's discussion of *Kisor* and deference to agency interpretation of regulations, and the debate over the Court's authority to hear class actions.

As I mentioned, the authors do note at the end that, for the Court, the more things change, the more they stay same. This is highlighted in Part IV by the reflection on implementation of the Appeals Modernization Act (AMA). The issue of fairness to veterans from Part I is reiterated. Additionally, a theme from Part III, the use of panel authority, is raised in the context of the new law. The themes of the role of the Federal Circuit and questions about caseload impact are also echoed from Parts II and III. I appreciate how the authors wove these themes throughout the book.

Finally, from my perspective, the book overall seems a bit skewed against the Board and VA in general.

In Part I, for example, there were numerous mentions of how VA had wrongfully denied benefits and veterans were seeking justice. VA opposed judicial review at the time. There were few, if any, mentions of all the good and benefits that VA provided. Similarly, in Parts II and III, one theme that emerged was the emergence of the Court's jurisprudence. Cases were highlighted in which Board decisions were overturned or VA took a losing position before the Court or Federal Circuit. VA's Office of General Counsel appellate attorneys were interviewed, but there are very few interviews of Board personnel. The Chairman and perhaps one Veterans Law Judge are the only ones interviewed. There is no acknowledgement of how difficult it can be to draft a legally sufficient decision for different audiences—the veterans and potentially the Court—while still providing adequate reasons and bases. It's hard not to feel like VA and the Board always get things wrong, and that VA is an easy target for legal attacks. There is also little recognition of the cases that the Board gets right and of the benefits it does award in grants. Of course, those cases don't get appealed.

All in all, I do like the book and would recommend it to anyone practicing veterans' law. This book sheds light on how we got where we are and reminded me of the importance of understanding battles of the past in order to improve things in the future.

Michelle Smith is Attorney Advisor for the Board of Veterans' Appeals.

Agent Fees: Notice of Disagreement Must Identify the Specific Determinations with which the Claimant Disagrees

by Natasha N. Pendleton

Reporting on *Gumpenberger v. McDonough*, 35 Vet. App. 195 (2022).

In *Gumpenberger v. McDonough*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (Court), comprised of Judges Allen, Falvey, and Jaquith, affirmed a July 2019 Board of Veterans' Appeals (Board) decision that denied entitlement to agent fees because a Notice of Disagreement (NOD) had not been received regarding the claim awarded. The Court held that 38 C.F.R. § 20.201, a regulation that provides that an NOD, under the pre-AMA (legacy) system, must identify the specific determinations with which the claimant disagrees, is valid. The Court also ruled that the plain language of 38 U.S.C. § 5904(c)(1), regarding what constitutes a "case," is tied to the NOD, and the services provided by an agent must relate to the underlying issue(s) appealed in the NOD to warrant the direct payment of a fee.

In other words, agents are only entitled to fees paid directly by VA for legacy appeals if an NOD was filed in response to a rating decision issued by the agency of original jurisdiction (AOJ) and the subsequent rating decision that ultimately granted the claim for past-due benefits was related to the issue(s) appealed. Further, 38 C.F.R. § 19.21(a)(4) (recodified from 38 C.F.R. § 20.201), provides that, in cases where a rating decision addresses several issues, the NOD must identify the specific determination(s) or issue(s) with which the claimant disagrees.

By way of background, Mr. Gumpenberger, a non-attorney accredited practitioner (agent) represented a veteran in an appeal of a May 2013 rating decision. The May 2013 decision granted a 70 percent disability rating for a traumatic brain injury (TBI) and granted various service connection claims for TBI residuals but denied entitlement to a total disability rating due to individual unemployability (TDIU) and denied service connection for an acquired psychiatric disorder as secondary to the TBI. Mr. Gumpenberger filed an NOD in June 2013 that specifically appealed only two issues: (1) entitlement to a TDIU and (2) service connection for an acquired psychiatric disorder as secondary to the TBI; the June 2013 NOD did not express disagreement with the TBI disability rating. Subsequently, VA decided to conduct a special review of certain TBI cases in June 2016 and notified the veteran and Mr. Gumpenberger that the veteran's case qualified for such review. The veteran

responded to the notification letter and requested that his case be reprocessed under the special TBI review. As a result, the AOJ awarded an increased rating of 100 percent for the TBI in a September 2016 rating decision.

In a March 2017 Summary of the Case (fee decision), the AOJ decided that Mr. Gumpenberger was not entitled to fees arising from the past-due benefits awarded for the 100 percent TBI disability rating because the favorable decision was not the result of an appeal. Mr. Gumpenberger appealed the fee decision, and the Board, in July 2019, denied his claim. The Board decided that no NOD had been filed disagreeing with the TBI disability rating set forth in the May 2013 rating decision because Mr. Gumpenberger only appealed entitlement to a TDIU and service connection for an acquired psychiatric disorder; the 100 percent TBI disability rating awarded was the result of VA's internal special review.

Before the Court, Mr. Gumpenberger argued he was entitled to fees because 38 U.S.C. §§ 5904 and 7105 did not require any specificity in the pleading requirements of an NOD, even when multiple issues were decided in the initial determination, and that the pro-veteran canon of interpretation supported his reading of the statutes. He also contended that, even if specificity was required in an NOD, the Court should strike down 38 C.F.R. § 20.201 and hold the regulation was invalid because it was inconsistent with 38 U.S.C. § 7105, as it narrowed an NOD only to the specific claims identified, which was not supported by the plain language of the statute. He alternatively argued that, even if 38 C.F.R. § 20.201 was a valid interpretation of 38 U.S.C. § 7105, the Board erred in finding the award of a 100 percent schedular rating for the TBI was not encompassed in the June 2013 NOD challenging the denial of entitlement to a TDIU because a 100 percent schedular rating and a TDIU were simply different means to the same result—a total disability rating.

The Secretary, in contrast, argued the June 2013 NOD did not result in any past-due benefits that entitled Mr. Gumpenberger to a fee. Indeed, 38 C.F.R. § 20.201 was a valid construction of 38 U.S.C. § 7105 and unambiguously required that a claimant specify the issue(s) challenged when the AOJ adjudicated multiple issues in the initial rating decision; Mr. Gumpenbergernever challenged the TBI disability rating. The Secretary also asserted that the Board did not err by finding the 100 percent rating for the TBI was based on VA's own initiative and not in response to an NOD. The Secretary lastly opposed Mr. Gumpenberger's reliance on the pro-veteran canon of interpretation because he was not a veteran, and he did not show how the veteran was prejudiced by the Board's decision to deny agent fees.

The Court affirmed the Board's decision to deny fees and held that an NOD was not received appealing the issue of a disability rating in excess of 70 percent for the TBI. It ruled that both the statute and regulation, in effect at that time, 38 U.S.C. § 7105 and 38 C.F.R. § 20.201, required a claimant to identify the specific issue(s) appealed in the NOD. The NOD then triggered VA's duty to assist the development of the claim(s) per 38 U.S.C. § 7105(d)(1), and it would be illogical for Congress to direct development of issues that a claimant did not intend to appeal or require VA to determine the scope of a claimant's disagreement. The Court also held that the plain language of 38 U.S.C. § 7105, read as a whole, revealed that Congress intended for the issue(s) that a claimant appeals be identified with the filing of the NOD.

Further, even if 38 U.S.C. § 7105 did not require specific identification of the claim(s) on appeal, at worst, 38 C.F.R. § 20.201 served as a gap-filling function, consistent with *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Court highlighted the fact that the May 2013 rating decision addressed several claims, and under 38 C.F.R. § 20.201, the veteran was required to identify the specific determination(s) with which he disagreed on appeal.

As for Mr. Gumpenberger's argument that a 100 percent schedular rating and entitlement to a TDIU are "simply different means to the same end," the Court held that a schedular rating for the TBI and entitlement to a TDIU were separate "cases" as defined by *Carpenter v. Nicholson*, 452 F.3d 1379

(Fed. Cir. 2006), because the claims were on different procedural tracks and required the establishment of different elements. While the Court has held that entitlement to a TDIU is "part and parcel" to an increased schedular rating on appeal per *Rice v. Shinseki*, 22 Vet. App. 447 (2009) (per curiam), this case presented the opposite fact pattern; entitlement to a TDIU was in appellate status, but the veteran's service-connected disabilities were not.

The Court, therefore, concluded that Mr. Gumpenberger made a tactical choice as to which issues to pursue on appeal, and that tactical choice dictated the outcome of this case. He expressly and unambiguously appealed two issues: entitlement to a TDIU and service connection for an acquired psychiatric disorder. Accordingly, the June 2013 NOD did not appeal the disability rating for TBI, and the Court affirmed the Board's decision that denied fees.

Natasha N. Pendleton is Counsel at the Board of Veterans' Appeals.

No Diagnosis? No Benefits!: Federal Circuit Declines to Rate an Undiagnosed Mental Health Condition

by Yesenia M. DeJesús Torres

Reporting on *Martinez-Bodon v. McDonough*, 28 F.4th 1241 (Fed. Cir. 2022).

In *Martinez-Bodon v. McDonough*, the United States Court of Appeals for the Federal Circuit (the Federal Circuit) affirmed the United States Court of Appeals for Veterans Claims' (CAVC) decision that denied service connection for a mental health condition because the veteran did not meet the criteria for a diagnosis, and 38 C.F.R. §§ 4.125(a) and 4.130 require an official diagnosis as a precondition to compensate a mental health condition.

Mr. Martinez-Bodon served from 1967 to 1969 in the United States Army. In April 2016, he filed claims for diabetes mellitus and for anxiety as secondary to the diabetes. Veterans Affairs (VA) granted service connection for diabetes but denied the claim for anxiety because his symptoms did not meet the criteria for a mental health condition pursuant to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM–5). The extent of his anxiety-related symptoms was that his "right eye trembles too much," that he "gets very anxious about it," and that he had trouble sleeping. Without a formal diagnosis, the VA examiner could not establish a relationship between the diabetes and anxiety and denied the claim. The Board of Veterans' Appeals (Board) and CAVC affirmed the VA's denial for benefits.

Mr. Martinez-Bodon timely appealed to the Federal Circuit, arguing that 1) the rule in *Saunders v. Wilkie*, 886 F.3d 1356, 1363 (Fed. Cir. 2018), can apply to undiagnosed anxiety, and 2) CAVC misinterpreted 38 C.F.R. § 4.125(a) and § 4.130, which govern the establishment of a mental health diagnosis and the rating schedule for mental health conditions, respectively.

In *Saunders*, the Federal Circuit held that pain reaching the level of a "functional impairment of earning capacity" could constitute a disability under 38 C.F.R. § 1110. Mr. Martinez-Bodon asserted that because the *Saunders* rule is not limited to pain and could encompass "any undiagnosed disability that results in functional loss," it can apply to undiagnosed anxiety.

The Federal Circuit disagreed. It concluded that *Saunders* did not apply because the question there involved whether a rating could be applied to an established condition (pain) that was not listed on the schedule but still caused functional impairment in earning capacity for the veteran.

Next, Mr. Martinez-Bodon challenged CAVC's interpretation that 38 C.F.R. § 4.125(a) and § 4.130 require a formal mental health diagnosis as a precondition to compensation. Under § 4.125(a), "[i]f the diagnosis of a mental disorder does not

conform to DSM–5 or is not supported by the findings on the examination report, the rating agency shall return the report to the examiner to substantiate the diagnosis." Mr. Martinez-Bodon argued that since he does not have a diagnosis that conforms to DSM–5, then § 4.125(a) is not applicable to him, and the agency should proceed to rating his symptoms.

The Federal Circuit rejected this argument as well because the act of rating undiagnosed conditions would obviate the need for the section to be included in the regulation. The court further explained that the two sections of the regulation should be interpreted in conjunction with each other, not separately. Under 38 C.F.R. § 4.130, "[r]ating agencies must be thoroughly familiar with this manual *to properly implement the directives in § 4.125 through § 4.129 and to apply the general rating formula for mental disorders in § 4.130*" (emphasis added). This instructs the rating official to consider the regulation chronologically: first, establish a diagnosis as stated in § 4.125, then proceed to the rating schedule in § 4.130.

Additionally, the Federal Circuit surveyed the responses to comments on the Federal Register for the revision in 1996 of 38 C.F.R. §§ 4.125 to 4.130. The VA had proposed to eliminate the following language from § 4.126: "[i]t must be established first that a true mental disorder exists. The disorder will be diagnosed in accordance with the APA manual. A diagnosis not in accord with this manual is not acceptable for rating purposes and will be returned through channels to the examiner." One of the VA's responses explained that this language already existed in § 4.130 and did not need to be repeated in two other previous sections. Ultimately, the agency deleted the language with the intent of retaining the requirement for a DSM–5 diagnosis before a rating for compensation could be determined.

Lastly, Mr. Martinez-Bodon argued that since the phrase "a mental condition has been formally diagnosed" only appears at the 0% rating level of § 4.130 and is omitted at the higher percentages, this section also does not apply to him. However, the Federal Circuit rejected this argument because this interpretation would create an absurd result, imposing a more stringent requirement on the higher ratings than it does on the non-compensable rating.

In sum, in *Martinez-Bodon*, the Federal Circuit held that a veteran is not entitled to benefits for a mental health condition if he does not first meet the criteria for a diagnosis pursuant to DSM–5 because 38 C.F.R. §§ 4.126(a) and 4.130 require a diagnosis in order to qualify for service-connected compensation awards.

Yesenia is a 2L at the George Washington University Law School and a Legal Intern for the Department for Veterans Affairs. She is also a retired Army musician with a Doctorate in Music Pedagogy, History, and Theory.

Reimbursement of Emergency Medical Expenses at Non-VA Facilities Includes Coinsurance but Not Deductibles and Writ of Mandamus Ruled Inappropriate Due to Alternative Available Remedies

by Devin deBruyn

Reporting on *Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022).

In *Wolfe*, a three-judge panel of the U.S. Court of Appeals for the Federal Circuit issued a precedential decision addressing the scope of reimbursement that a veteran may receive from the Department of Veterans Affairs (VA) for medical costs at non-VA hospitals. Under the controlling statute, copayments or "similar payments" are not subject to reimbursement. The question before the Federal Circuit was whether "similar payments" included deductibles and coinsurance. The Federal Circuit held that deductibles were similar to copayments, but coinsurance was not; thus, coinsurance was subject to reimbursement, but deductibles were not. The Federal Circuit also held that because the

veteran-appellee (Ms. Wolfe) had access to the VA's administrative appeal process, it was inappropriate for the lower court to have granted mandamus. Because mandamus was deemed inappropriate, the Federal Circuit did address whether it was appropriate for the lower court to have certified a class action on behalf of appellants similarly situated to Ms. Wolfe.

Before reaching the Federal Circuit's analysis, a background of the legal landscape and factual and procedural history is helpful to understand the case.

Legal Landscape

The Federal Circuit begins by noting that the "VA provides health care to nine million enrolled veterans through its Veterans Health Administration, the largest health care system in the country." Under certain circumstances, enrolled veterans may augment their VA healthcare benefits with other coverage, such as private insurance, Medicare, Medicaid, or TRICARE. For emergency care, enrolled veterans may receive treatment at the closest available non-VA hospital emergency department and can qualify for payment or reimbursement from the VA for the expense of treatment if certain conditions are met.

Before 1999, in general, the VA could only reimburse emergency costs associated with treatment for a service-connected condition, as well as in a few other circumstances. 38 U.S.C. §§ 1703(a)(3), 1728 (1999). In 1999, Congress broadened the scope of costs that could be reimbursed by creating 38 U.S.C. § 1725. This new law authorized the VA to reimburse additional veterans who were not eligible for reimbursement under 38 U.S.C. § 1728 for "the reasonable value of emergency treatment" provided at a non-VA healthcare facility if certain conditions were met, to include the requirement that (a) the veteran was not entitled "to care or services under a health-plan contract" (contract provision), and (b) the veteran lacked other "contractual or legal recourse" that would cover the costs "in whole or in part" (third-party provision). 38 U.S.C. §§ 1725(a)(1), (b)(3)(B)-(C) (1999). In essence, under 38 U.S.C. § 1725, if the veteran had even partial entitlement to payment for the emergency healthcare in question from any non-VA health contract or insurance plan, the VA was not authorized to reimburse any of the costs of the emergency treatment at non-VA facilities. Although this new section expanded the VA's reimbursement authority, it rendered this additional class of eligible veterans liable for "essentially the full cost of emergency treatment" if they had any form of health insurance coverage, even minimal coverage—such as "a state-mandated automobile insurance policy"—that covered just a tiny fraction of the cost of the treatment provided.

To mitigate this problem, in 2010 Congress revised § 1725 in the Emergency Care Fairness Act (ECFA) by striking the "or in part" language from the third-party provision. This change generally authorized the VA to reimburse a veteran for the remaining expenses even if the veteran had third-party coverage that paid a part of the expenses. It also meant that the VA still could not reimburse a veteran if she or he had coverage that would cover liability to the provider "in whole." While expanding the VA's reimbursement authority to include portions of expenses left unpaid by third-party insurers, the ECFA also limited reimbursement by adding § 1725(c). This subsection provided that the VA could not reimburse a veteran "for any copayment or similar payment that the veteran owes the third party or for which the veteran is responsible under a health-plan contract" (copayment provision). 38 U.S.C. § 1725(c)(4)(D).

The statute provided no definition of "copayment" or "similar payment;" however, the Federal Circuit noted the following definitions upon which the parties agreed:

Copayment: "fixed amount that a patient pays to a healthcare provider according to the terms of the patient's health plan."

Deductible: "the portion of the loss to be borne by the insured before the insurer becomes liable for payment."

Coinsurance: "health insurance in which the insured is required to pay a fixed percentage of the cost of medical expenses after the deductible has been paid and the insurer pays the remaining expenses."

Following in Congress's footsteps, in 2012, the VA revised its regulations in light of the ECFA. The VA removed "or in part" from its regulation that mirrored the third-party provision (38 C.F.R. § 17.1002(g)) and created a regulation providing that the VA "will not reimburse a claimant . . . for any deductible, copayment or similar payment that the veteran owes a third party." 38 C.F.R. § 17.1005(f). The VA left untouched the regulatory version of the contract provision, which maintained that reimbursement was contingent on the veteran having "no coverage under a health-plan contract for payment or reimbursement, in whole *or in part*, for the emergency treatment" (contract regulation). 38 C.F.R. § 17.1002(f).

The "or in part" language that VA maintained in the contract regulation did not withstand judicial scrutiny. In *Staab v. McDonald*, 28 Vet. App. 50 (2016), the U.S. Court of Appeals for Veterans Claims (CAVC) considered the 2010 ECFA amendments and the VA's 2012 regulations (in particular, the contract regulation). In that case, a veteran sought reimbursement for the portion of emergency costs at a non-VA facility that was not covered by Medicare. The Board of Veterans' Appeals (Board) denied the claim for reimbursement because Medicare covered some of the veteran's costs. Applying the contract regulation, the Board held that reimbursement was contingent on the veteran having no other plan that would cover expenses "in whole or in part." Because Medicare covered part of the costs, the Board held that the VA was prohibited from reimbursing the veteran for the unpaid balance.

However, on appeal, the CAVC invalidated the VA's contract regulation and reversed the Board's denial of Staab's claim. The CAVC reasoned that, in passing the ECFA, Congress intended for the VA to reimburse veterans the remaining balance of emergency medical expenses for which the veteran was personally liable that were not covered by another insurer, even if that insurer covered some of the costs. The CAVC noted the one exception to this rule was copayments, which the statute excluded from reimbursement.

Following *Staab*, the VA amended its contract regulation to authorize reimbursement in situations where the veteran had a health-plan contract that covered some portion of emergency treatment, but not the full amount of expenses. 38 C.F.R. § 17.1002(f). The VA also revised the regulation to add coinsurance along with deductibles and copayments as expenses that are not eligible for reimbursement (similar payments regulation). 38 C.F.R. § 17.1005(a)(5). In other words, the VA's post-*Staab* regulations allowed for reimbursement of the portion of expenses that were left uncovered by third-party insurers, except for coinsurance, deductibles, and copayments, which were not eligible for reimbursement. The substantive issue before the Federal Circuit in *Wolfe* concerns the validity of this post-*Staab* similar payments regulation.

Factual and Procedural History

In 2016, veteran Ms. Wolfe received emergency care at a non-VA medical facility and incurred expenses of $22,348.25. Ms. Wolfe was enrolled in VA healthcare at the time. She had healthcare coverage through her employer that covered most of the expenses; however, she was left with a copayment of $202.93 and coinsurance of $2,354.41. In 2018, the VA denied reimbursement of these expenses, stating that "patient responsibility (deductible, coinsurance, co-payment)" was excluded from reimbursement. Ms. Wolfe filed a Notice of Disagreement to this denial.

Later the same year, while her appeal remained pending at the VA, she filed a mandamus petition at the CAVC. The petition sought "class relief invalidating the similar payments regulation" and an order for the VA to reimburse otherwise-eligible veterans for coinsurance and deductibles incurred from emergency treatment at non-VA medical facilities not covered by third-party insurance.

In 2019, the CAVC granted the mandamus petition and certified the requested class. The CAVC held that deductibles and coinsurance are not like copayments and that the similar payments regulation was inconsistent with *Staab*. In other words, the CAVC invalidated the similar payments regulation as it applied to deductibles and coinsurance, holding that the VA was legally required to reimburse Ms. Wolfe and similarly-situated veterans for the cost of deductibles and coinsurance arising from emergency medical treatment at a non-VA facility. As a result, the CAVC ordered the readjudication of claims of class-member veterans that had been denied because the expenses in question were attributable to a deductible or coinsurance. The CAVC further held that granting mandamus was appropriate because the Board lacked jurisdiction to invalidate the similar payments regulation that Ms. Wolfe challenged. The CAVC reasoned that it would have been futile for Ms. Wolfe to continue her appeal within the VA because VA adjudicators were not empowered to invalidate the challenged regulation. Therefore, she lacked an adequate remedy, making mandamus relief necessary. The VA appealed to the Federal Circuit.

Analysis

In reviewing the CAVC's decision to grant a mandamus petition, the Federal Circuit considers "whether the petitioner has satisfied the legal standard for issuing the writ." Issuing a writ of mandamus is contingent on three conditions being satisfied: (1) "clear and indisputable" right to the writ; (2) "no other adequate means" for relief; and (3) the issuing court determines "the writ is appropriate under the circumstances."

The Federal Circuit began by asking whether Ms. Wolfe had a "clear and indisputable" right under the correct reading of 38 U.S.C. § 1725(c)(4)(D). This approach required the Federal Circuit to decide the merits of Ms. Wolfe's position that under 38 U.S.C. § 1725(c) a qualifying claimant is entitled to reimbursement for coinsurance and deductibles. As a reminder, this statute states that the VA "may not reimburse a veteran . . . for any copayment or similar payment." Under the VA's similar payments regulation (38 C.F.R. § 17.1005(a)(5)), deductibles and coinsurance are considered "similar payments" to copayments, meaning that the VA may not reimburse a veteran for deductibles and coinsurance. The Federal Circuit found this regulation invalid with respect to coinsurance and valid with respect to deductibles, holding that deductibles are like copayments, but coinsurance is not. Thus, deductibles are not reimbursable, but coinsurance is reimbursable.

The Federal Circuit reasoned that its interpretation of the relevant provisions gave meaning to all terms in the statute and followed their plain meaning. The Federal Circuit highlighted that copayments and deductibles share a critical characteristic: they are fixed quantities. In contrast, coinsurance is a variable amount that "becomes known only after medical expenses are incurred." Because of the variable and unknown nature of coinsurance, the Federal Circuit found that coinsurance constitutes partial coverage. The Federal Circuit further reasoned that by striking "or in part" from the third-party provision, the ECFA manifested Congress's intent for veterans with partial coverage to receive reimbursement. Because Congress intended partial coverage to be subject to reimbursement, excluding coinsurance from reimbursement by considering it similar to copayments would be inconsistent with the statute's purpose.

The Federal Circuit further determined that accepting the VA's view that both deductibles and coinsurance are akin to copayments, and thus excluded from reimbursement, results in the exclusion of all forms of cost-sharing from reimbursement. Reading "similar payments" in a way that excluded all forms of cost-sharing used in the healthcare insurance industry would be inconsistent with the ECFA amendments that enabled reimbursement to veterans with partial coverage (i.e., that relied on cost-sharing).

In addition, the Federal Circuit noted that the statute's legislative history revealed Congress's intent that "similar payments" include deductibles but not coinsurance. On this point, at a House committee hearing concerning the pertinent amendment to 38 U.S.C. § 1725, the VA stated that it understood its "financial liability to 'exclud[e] copayment or deductible amounts owed by the veteran,'" but did not mention coinsurance.

The VA argued that its interpretation still allowed for reimbursement to veterans with partial coverage because veterans who reached annual or lifetime non-VA healthcare policy limits could still be reimbursed. In rejecting this argument, the Federal Circuit noted that the Affordable Care Act (ACA), which passed shortly after the ECFA, imposed a general prohibition against annual and lifetime limits. The Federal Circuit reasoned that Congress was likely not concerned with annual and lifetime limits when it contemplated the because, at the same time, it was in the process of eliminating those limits in the ACA. Consequently, the Federal Circuit concluded that Ms. Wolfe had a "clear and indisputable" right to relief regarding reimbursement of coinsurance but not deductibles.

The Federal Circuit next addressed whether Ms. Wolfe had adequate means other than mandamus for obtaining reimbursement for coinsurance. Ms. Wolfe's appeal was still pending at the VA when she petitioned CAVC for mandamus relief, and the Federal Circuit noted that the administrative appeal at the VA was not shown to be an inadequate remedy. Importantly, the effect of granting mandamus would be to force action on the appeal; it could not "dictate a particular outcome." Because of this, mandamus may have been appropriate if the administrative appeals process was "unreasonably delayed," in which case a writ could be issued to require action on the appeal. However, Ms. Wolfe did not argue that administrative adjudication was delayed or not progressing as it should. If the VA's appeal process played out as normal, the result would have been a Board decision that could be appealed to the CAVC.

Ms. Wolfe argued that following the VA's appeal process to the Board would have been futile because the Board could not invalidate the challenged regulation. The Federal Circuit rejected this argument, holding that the appeals process is not rendered futile simply because the Board is unable to address an issue, given the fact that the CAVC could address it on appeal after the Board rendered a decision. Responding to Ms. Wolfe's argument that mandamus was necessary to ensure compliance with *Staab*, the Federal Circuit held that "mandamus is not available to enforce the principle of stare decisis." Lastly, the Federal Circuit noted that 38 U.S.C. § 502 provided an alternative to mandamus. Under this statute, Ms. Wolfe could have asked the Federal Circuit to review the similar payments regulation. The Federal Circuit noted that this option was still available to her.

In sum, the Federal Circuit held that the CAVC's issuance of a writ of mandamus was not appropriate, as Ms. Wolfe did not have a clear and indisputable right regarding deductibles and because alternative legal recourse was available to her. Thus, the Federal Circuit reversed the CAVC's issuance of a writ of mandamus. Because mandamus was not available, the Federal Circuit declined to address the issue of class certification.

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

Federal Circuit Holds Specific Allegations of Entitlement Are Not Necessary to Show Harmful Error

by Claire L. Hillan Sosa

Reporting on *Slaughter v. McDonough*, 29 F.4th 1351 (Fed. Cir. 2022).

In *Slaughter v. McDonough*, the U.S. Circuit Court of Appeals for the Federal Circuit (Federal Circuit) determined that the prejudicial-error analysis—which is a legal and not factual determination—does not place a great burden on the claimant; an appellant from a Board of Veterans' Appeals (Board) decision need not allege specific prejudice by showing entitlement to a higher rating. The Federal Circuit also held that disability ratings based on radicular groups are appropriate only if the claimant has multiple service-connected nerve disabilities—not a combination of service-connected and non-service-connected nerve disabilities.

Mr. Slaughter was service-connected for a right upper extremity (RUE) ulnar nerve disability and was also diagnosed as having a non-service-connected RUE median nerve injury. Because the symptoms of the two disabilities could not be separately identified, VA assigned a 40 percent rating based on all RUE nerve disability symptoms. Mr. Slaughter contended that rather than a 40 percent rating under Diagnostic Code (DC) 8516 for ulnar nerve disabilities, he should have been awarded a higher rating under DC 8512 for lower radicular group disabilities based on a combination of nerve injuries.

Specific Allegations Not Necessary for Harmful Error

The Federal Circuit held that the U.S. Court of Appeals for Veterans Claims (Court) imposed too great a burden on Mr. Slaughter to show harmful error. Based on U.S. Supreme Court precedent stating that harmful error is not "a particularly onerous requirement" (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009)), and the sympathetic care with which veterans' claims are treated, the Federal Circuit held that the Court erred when it required Mr. Slaughter to "specifically allege prejudice and 'suggest or point to evidence showing that he would be *entitled* to a higher rating under DC 8512'" (emphasis in original).

Instead, the Federal Circuit held, "[t]he Veterans Court should have looked to the circumstances of the case and not faulted [the Appellant] for insufficiently demonstrating prejudice." Because Mr. Slaughter argued that the Board applied the wrong DC to rate his service-connected disability, and the DC he sought made a higher rating available, Mr. Slaughter made sufficient allegation of prejudicial error. The mere availability of a higher evaluation under the DC Mr. Slaughter argued should apply was enough to show harmful error because the alleged error "*could have* affected the outcome" (quoting *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018)) (emphasis added).

In other words, Mr. Slaughter did not need to show evidence to prove or even allege that he would have actually been entitled to the higher rating under DC 8512 had it been applied.

Radicular Group Ratings for Service-Connected Disabilities Only

Despite holding that the Court erred in its prejudicial-error analysis, the Federal Circuit affirmed the Court's decision on the merits.

First, the Federal Circuit determined that it had jurisdiction to review VA's interpretation of a note to 38 C.F.R. § 4.124a describing when radicular group ratings are appropriate. The Secretary argued the case rested on the proper choice of DC based on the facts at issue—which the Court would not have jurisdiction to review. Rather, the Federal Circuit explained this was a question of legal interpretation of the note to the rating schedule.

As for the merits, Mr. Slaughter argued the note to 38 C.F.R. § 4.124a, setting forth that "[c]ombined nerve injuries should be rated by reference to the major involvement, or if sufficient in extent, consider radicular group ratings," required application of a radicular group rating to his RUE

disabilities, even though only one of the two nerves involved were service-connected.

The Federal Circuit disagreed. First, the Federal Circuit explained the general rule in 38 C.F.R. § 4.1 that the rating schedule is intended as a guide to evaluate disabilities or injuries that *result from military service*. Then the Federal Circuit noted that in some regulations, VA identified particular instances when non-service-connected disabilities may be compensated. Given that VA regulations expressly departed from the general rule in some situations, but not in the note to 38 C.F.R. § 4.124a for radicular ratings, the Federal Circuit held that "[c]ombined nerve injuries" referred only to service-connected injuries.

Main Takeaway

Practitioners should keep the *Slaughter* decision in mind in their appellate practice. The decision suggests that appellants need not dedicate many brief pages to the ultimate issue of entitlement to the benefits sought. Rather, showing the *possibility* of service connection or a higher rating based on legal interpretation should trigger judicial consideration of the merits of an appellant's arguments.

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Federal Circuit Grants Petition to Set Aside VA's Definition for "Need for Supervision" of the Caretakers Act

by Jennifer A. Howley

Reporting on *Veteran Warriors, Inc. v. Sec'y of Veterans Affairs*, 29 F.4th 1320 (March 25, 2022).

In *Veteran Warriors, Inc. v. Sec'y of Veterans Affairs*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) considered a petition for review of the Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments under the VA MISSION Act of 2018 (Final Rule) promulgated by the Department of Veterans Affairs (VA). Petitioners, who included Veterans Warriors, a veterans advocacy group, as well as Andrew Sheets, a veteran, and Kristie Sheets, Mr. Sheets's caregiver, primarily argued that *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), supports their claim that seven parts of the rule are invalid. In opposition, the VA challenged the petitioners' standing.

The Final Rule was promulgated by the VA under the authority given in the 2018 VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act (VA MISSION Act), which amended the 2010 Caregivers and Veterans Omnibus Health Services Act (Caregivers Act). Petitioners challenged seven parts of the rule: six parts regarding definitions and one part regarding a residency requirement. The six contested definitions were: "in need of personal care services," "inability to perform an activity of daily living," "need for supervision, protection, or instruction," tying benefit amounts to the GS scale, "serious injury," and "unable to self-sustain in the community."

First, the Federal Circuit considered the VA's challenge to petitioners' standing and found that petitioners established proper standing in all but one claim: challenging the definition of "unable to self-sustain in the community." The Federal Circuit maintained that Veteran Warriors could not establish the requisite associational standing as no individual members had standing to sue under this issue. Accordingly, the court dismissed petitioners' challenge of that definition.

In evaluating each remaining claim, the Federal Circuit relied on the two-step framework analysis for statutory interpretation as prescribed in *Chevron*. Under *Chevron*, a court must defer to an agency's interpretation of a statute so long as the statute is silent or ambiguous as to the issue at hand and that interpretation is "based on a permissible construction of that statute."

The Federal Circuit first considered petitioners'

challenge to the VA's definition of "In need of personal care services." In the VA MISSION Act, "an individual who… is in need of personal care services" may qualify as an "eligible veteran," but the VA concluded Congress had not spoken to the meaning and thus inserted its own interpretation of the phrase. The Final Rule defines a veteran in need of personal care services as one who requires *in-person* personal care services. Petitioners alleged that this interpretation is inconsistent with the Act, which does not establish the in-person requirement, and is unreasonable.

The court determined Congress had not spoken directly to the issue even when considering the surrounding text and the ordinary meaning of "personal care services" does not help to show Congress' intent. The court considered several provisions offered by petitioners but found none adequately answered the question of where the care must be given. Therefore, there was a statutory gap that the VA was authorized to fill.

Petitioners argued under *Watt v. Alaska*, 451 U.S. 259 (1981), that the interpretation should be afforded less deference by the courts. *Watt* applies when the "current interpretation [is] in conflict with [the VA's] initial position." The court, however, determined there was no conflict as the VA had not previously determined the question of where the services must be given.

The court ultimately held the interpretation was permissible as Congress had been silent on the issue and the VA provided a reasonable gap-filler for that absence.

Next, the court considered the VA's definition of "serious injury," which petitioners argued is both inconsistent with and an unreasonable interpretation of the statutory text.

The phrase is used in the statutory definition of "an eligible veteran," specifying that it is one who "…has a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of [active] duty [during certain service dates]." 38 U.S.C. § 1720(G)(a)(2)(B). The term is significant as a veteran's family caregivers cannot receive benefits unless the veteran has a "serious injury." Notably, from 2011 to 2020, the VA vaguely defined "serious injury" as "any injury… that renders the veteran or servicemember in need of personal care services." 38 C.F.R. § 71.15. This circular language caused problems for the VA and therefore the agency redefined the phrased to mean:

> [A]ny service-connected disability that:
> (1) Is rated at 70 percent or more by VA; or
> (2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.

38 C.F.R. § 71.15.

Under step one of *Chevron*, the court found that the statute was ambiguous with respect to the definition of "serious injury." The court stated, "['Serious injury'] has no statutory definition, and the parties have not identified common meaning for that phrase." Due to the ambiguity, the court found that Congress implicitly delegated the authority to define the phrase to the VA.

Under step two of *Chevron*, the court considered whether the VA's definition was a permissible construction of the statute. Petitioners again referred to *Watt* to argue that the definition should be afforded less deference since the VA changed its position on the meaning of serious injury. However, citing the Supreme Court's decision in *Smiley v. Citibank (S. Dakota), N.A.*, the Federal Circuit rejected this argument, writing, "So long as the change is not 'sudden and unexplained' and the agency 'take[s] account of legitimate reliance on prior interpretation,' the 'change is not invalidating.'"

The court, holding that the interpretation was both reasonable and consistent with the statutory text, denied the petition to review based on the VA's definition of "serious injury."

The Federal Circuit then considered petitioners' challenge to the VA's interpretation of "inability to

perform." Petitioners argued the VA's requirement that the veteran have "total inability for a single activity of daily living" conflicts with the Act's language.

Because Congress was silent on the meaning of "inability to perform" under 38 U.S.C. § 1720 G(a)(2)(C), the VA established its own regulation to fill that gap. Accordingly, the VA mandated that to be in need for personal care services, a veteran must meet one of four requirements, including possessing "an inability to perform one or more activities of daily living." 38 U.S.C. § 1720 G(a)(2)(C)(i). But the language failed to illustrate just how frequent the "inability" needed to be for the veteran to qualify. As a result, the VA amended its definition in 2020 to add clarity. That amendment reads: "Inability to perform an activity of daily living (ADL) means a veteran or servicemember requires personal care services each time he or she completes one or more of" several common daily activities listed in the regulation. 38 C.F.R. § 71.15.

Petitioners argued that requiring this type of consistent total inability conflicts with the statutory language and is an unreasonable interpretation of the statutory requirement.

Although the court conceded that the meaning of "inability to preform" itself is fairly clear, Congress left a statutory gap as "it did not speak to how often an inability is required." Although Congress used the descriptor "daily," which assumes the relevant activities are occurring with some regularity, the required frequency remained unclear. The court found that Congress left a statutory gap for the VA to fill.

Claiming the VA's definition contradicts a prior 2015 regulation determining "Veterans Ability" (*see* 38 C.F.R. 71.40(c)(4)), petitioners again argued for a lower level of deference under *Watt*, but the court disagreed. The court reasoned that the prior regulation addressed how much assistance is needed, but not how often it is required.

Petitioners also argued that the rule was unreasonable because it excluded many veterans who deserved benefits and because the VA could have adopted a less stringent rule. Citing *Deacero S.A.P.I. de C.V. v. United States*, 966 F.3d 1283 (Fed. Cir. 2021), the court dismissed these arguments, reasoning that it could not set aside the VA's construction simply because petitioners preferred a different rule. The court added that so long as the interpretation by the VA could be construed as reasonable, it should be upheld. Accordingly, it denied the petition for review.

Petitioners next challenged the VA's interpretation of 38 USC § 1720G(a)(2)(C):

> For purposes of this subsection, an eligible veteran is any individual who—
> (C) is in need of personal care services because of . . .
> (ii) a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; [or]
> (iii) a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired[.]

To implement subsections (ii) and (iii), the VA issued a regulation stating that the need for supervision, protection, or instruction requires the individual to have "a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis." 38 C.F.R. § 71.15.

However, the court agreed with petitioners and granted the petition based on Congress having "create[d] two distinct pathways that the VA…improperly combined into a single definition." Nevertheless, the court noted that the VA can promulgate regulatory definitions that combine subsections, but they must be consistent with all statutory provisions.

The court next evaluated petitioners' fifth claim that the residency requirement of the regulations promulgated by the VA was both inconsistent with

the statutory text and an unreasonable interpretation of the statutory language.

In determining whether veterans were eligible for benefits, the VA added regulatory language that states: "These benefits are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20)." 38 C.F.R. § 71.10(b).

The court first determined that because Congress had not spoken directly to the residency requirement, there was a statutory gap that the VA was permitted to fill. Because Congress had not spoken directly to the issue, and because the VA had been authorized to establish the family caregivers program, the court held that it had to defer to the VA's regulation.

Further, the court determined the requirement was a permissible construction of the statute as it was reasonable given the difficulty of providing benefits "outside the United States, and the VA concluded the high costs outweighed the benefits."

The court also rejected petitioners' argument that *Watt* applies to this interpretation (451 U.S. at 273, *holding* that when an agency's interpretation is inconsistent with the statutory text, that interpretation is entitled to less deference). The court disagreed, however, stating that "Petitioners have failed to identify any internal inconsistency." Concluding that the VA's interpretation was reasonable and that it required the court's deference, the court denied the petition for review.

Petitioners also challenged the schedule for stipend payments, the authority for which to set was delegated to the VA by Congress. 38 U.S.C. § 1720G(a)(3)(C)(i). Despite that delegation, Congress set some guidelines for the VA, including a minimum compensation level and certain factors for which the schedule had to account. *Id. at (i)-(iii)*.

The VA amended the schedule in 2020 to set the stipend amounts based on whether the veteran was "unable to self-sustain in the community" and based the stipend rates on the Office of Personnel Management's General Schedule (GS) scale. Previously, the VA relied on a schedule that combined the Bureau of Labor Statistics hourly wage rate and the Consumer Price Index for All Urban Consumers. Petitioners argued that the VA's regulation was inconsistent and unreasonable in light of the statutory framework provided by Congress. The court disagreed, holding that because Congress left a statutory gap for the VA to fill and the VA enacted a reasonable policy to fill that gap, the regulation was due deference.

The court also dismissed petitioners' argument that the interpretation was due less deference under *Watt*. Although it conceded that petitioners had "made the predicate showing necessary for *Watt* to apply: a conflict between the VA's current position and its initial position," the court determined that the VA provided a reasonable explanation for adopting the GS scale. As Congress left a gap, and the VA reasonably filled it, the court denied the petition on that ground as well.

Lastly, petitioners challenged the VA's policy to provide the caregiver with the full stipend benefits only when the veteran is "unable to self-sustain in the community." If the veteran does not meet the criteria, the primary family caregiver is only allowed 62.5 percent of the maximum stipend amount.

The relevant regulation provides:

> Unable to self-sustain in the community means that an eligible veteran:
> (1) Requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in this section, and is fully dependent on a caregiver to complete such ADLS; or
> (2) Has an need for supervision, protection, or instruction on a continuous basis.

38 C.F.R. § 71.15.

Again, because Congress had not spoken directly to this issue, and the court determined the VA's promulgated schedule did not conflict with the statutory language, the court turned to step two of the *Chevron* framework.

The VA previously explained that it adopted the two-tier stipend schedule because the agency believed it "would provide a clear distinction between those veterans with moderate needs, and those with severe needs." *Proposed Rule*, 85 Fed. Reg. at 13,383-84. The court determined that because the VA experienced problems administering the program and addressed those issues by generating "clear administrable rules," the agency made a reasonable policy choice.

While petitioners argued that the VA's definition for the higher tier—"unable to self-sustain in the community"—is an unreasonably high standard, the court disagreed. Again, citing *Deacero*, the court ruled that it could not set aside a regulation based on petitioners preferring a lower bar.

Petitioners again made an argument in furtherance of the *Watt* level of deference: the VA's regulation differed from its previous policy. However, the court again held that because the change was clearly explained and reasonable, a lower level of deference was not warranted.

Ultimately, the court found that the VA made a reasonable policy choice regarding the stipend schedule. Therefore, the petition for this matter was denied.

In conclusion, the court granted petitioners' challenge to the Final Rule for "Need for Supervision, Protection, or Instruction," denied five other claims, and dismissed one claim due to lack of jurisdiction.

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Court Considers Applicability of Extraschedular Evaluations Under Diagnostic Code 7307

by Payton Fletcher

Reporting on *Rivera-Colon v. McDonough,* No. 19-6129 (April 11, 2022).

In *Rivera-Colon*, the Court of Appeals for Veterans Claims (Court) determined it could not decide whether extraschedular consideration was warranted because the Board of Veterans' Appeals (Board) failed to define a key term used in Diagnostic Code (DC) 7307.

Jose Rivera-Colon, an Army veteran, filed a claim in June 2014 for gastritis secondary to medication he used to treat his other service-connected disabilities. In November 2015, he was granted service connection at 10 percent for gastritis, rated under DC 7307. Mr. Rivera-Colon filed a supplemental claim in August 2016 requesting an increased rating for his gastritis.

In November 2016, Mr. Rivera-Colon had a VA examination of his stomach and duodenal conditions. The examiner found his symptoms were not severe with incapacitating episodes and did not affect his ability to work, and therefore, categorized Mr. Rivera-Colon's gastritis as mild. His 10 percent rating was continued in December 2016, and he filed a Notice of Disagreement (NOD) in response in January 2017. Mr. Rivera-Colon's 10 percent rating for gastritis was continued in November 2017. In December 2017, he filed a substantive appeal.

In August 2018, Mr. Rivera-Colon received another VA examination, during which the examiner found the veteran experienced the same mild symptoms as he did in November 2016. His 10 percent rating was again continued in September 2018, so Mr. Rivera-Colon submitted a Disability Benefits Questionnaire (DBQ) in August 2018 that diagnosed him with multiple disabilities, including gastritis. His rating was continued at 10 percent in an October 2018 Supplemental Statement of the Case (SSOC). On

appeal in June 2019, the Board determined Mr. Rivera-Colon did not display any symptoms warranting a higher rating for gastritis.

Mr. Rivera-Colon appealed the Board's decision to the Court and argued that the reasoning was inadequate because it did not consider whether his gastritis rating should have been referred for extraschedular consideration as his record reflected exceptional symptoms that did not fit into a specific diagnostic code. His symptoms included emergency room treatment for diarrhea and inability to walk due to pain.

Contrarily, the Secretary argued the functional effects of Mr. Rivera-Colon's gastritis did not reasonably raise an issue to warrant extraschedular consideration by the Board, and Mr. Rivera-Colon's gastritis was properly rated under Diagnostic Code (DC) 7307. Further, the Secretary stated Mr. Rivera-Colon did not demonstrate clear error in the June 2019 decision.

Under 38 C.F.R. § 3.321(b)(1), extraschedular evaluation is considered for exceptional symptoms that do not fall into any other schedular rating. This includes frequent hospitalization or interference with employment.

DC 7307 includes the term "and symptoms" in both the 10 and 30 percent rating descriptions. The Court determined "symptoms" needed to be defined and instructed both parties to determine whether the term foreclosed extraschedular evaluation. Mr. Rivera-Colon asserted the term allowed for extraschedular evaluations, while the Secretary agreed and stated extraschedular evaluations should be determined under 38 C.F.R. § 3.21(b)(1) and *Thun v. Shinseki*, 572 F.3d 1366 (2009).

The Court accepted both Mr. Rivera-Colon's and the Secretary's interpretation of the term "symptoms" to allow for extraschedular evaluations for gastritis. However, the Court ultimately found that the Board did not explain its reasons or bases for determining that Mr. Rivera-Colon's symptoms were not exceptional.

Additionally, the Court determined that the Board failed to define what the usual symptoms of gastritis are under the 10 and 30 percent ratings in DC 7307. As a result, judicial review was frustrated on the issue and the Court remanded the Board's June 12, 2019, decision denying an increased rating for Mr. Rivera-Colon's gastritis.

Payton Fletcher is a recent graduate of Stetson University College of Law, where she was a Teaching Assistant for Stetson's Veterans Advocacy Clinic.

Equitable Tolling and the Timely Filing of an NOA by an Accrued-Benefits Claimant

by Morgan MacIsaac-Bykowski

Reporting on *Craig-Davidson v. McDonough*, No. 20-4372 (May 16, 2022).

In *Craig-Davidson*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential opinion holding that an eligible accrued benefits claimant has standing to submit a Notice of Appeal (NOA) to the Court after 120 days from the date of the Board of Veterans' Appeals (Board) decision has passed when there are extraordinary circumstances warranting equitable tolling.

The Board issued a decision on December 3, 2019, denying Mr. Virgil Davidson's claim for disability compensation for residuals of lung cancer. At the time of the decision and until his death on May 23, 2020, Mr. Davidson was in hospice care, where he was highly medicated, unable to comprehend information, and often unconscious. His widow, Ms. Sherry Craig-Davidson, filed an NOA on June 22, 2020, listing her deceased husband as the appellant. She signed her own name, indicating that she was his spouse. The Secretary moved to dismiss the appeal as untimely because it was filed 202 days after the Board's decision was issued.

Ms. Craig-Davison argued that she had statutory and constitutional standing to file the NOA based on

Demery v. Wilkie, which held that eligible accrued benefits claimants have standing to file an appeal when the veteran dies "during the time permitted to file an NOA." 30 Vet. App. 430, 438 (2019). However, unlike *Demery*, where the NOA was filed within 120 days of the Board's decision, the NOA in this case was filed *after* the 120 days had passed. Ms. Craig-Davidson argued that the NOA was nevertheless filed "during the time permitted to file an NOA" because her husband's terminal illness and death was an extraordinary circumstance warranting equitable tolling, and that the clock did not actually start until the day her husband died, ending the extraordinary circumstance. She also argued that dismissing the appeal would present an inherent inequity, as her husband was physically unable to file an appeal and she did not have standing to do so on his behalf until he died.

Conversely, the Secretary maintained that Ms. Craig-Davidson could not establish standing because she could not meet the requirements of 38 U.S.C. § 7266(a), and that the *Demery* Court did not intend for *Demery* to excuse those requirements. Further, the Secretary argued that Ms. Craig-Davidson did not become a person adversely affected by the Board's decision until after Mr. Davidson died, which was after the 120 days had passed, so equitable tolling could not apply. Both parties agreed that Ms. Craig-Davidson was an eligible accrued-benefits claimant and that the issues surrounding her husband's illness and death presented "compelling" circumstances.

When analyzing the issue, the Court first looked to the "legal landscape," noting how case law has evolved regarding standing over time – now aiming to prevent a "zone of no substitution" when a veteran dies with a pending claim. The Court took note of *Demery*'s conclusion that "the timing of a veteran's death should not determine whether an accrued-benefits claimant may continue the appeal."

The Court agreed with Ms. Craig-Davidson that the phrase "during the time permitted to file a NOA" from Demery must be read in conjunction with Rule 4 of the Court's Rules of Practice and Procedure to include a period of equitable tolling if the veteran would have been entitled to one. Accordingly, if a veteran dies during the time in which an NOA could be timely filed, an accrued benefits claimant steps into the shoes of the veteran as an adversely harmed claimant impacted by the Board's decisions. Therefore, Ms. Craig-Davidson had standing.

The Court then turned to the issue of equitable tolling to determine whether Ms. Craig-Davidson's NOA was timely filed. Because there was a definite end date to the extraordinary circumstance – the veteran's death – the "stop-clock" principle of *Checo v. Shinseki* applied. 748 F.3d 1373, 1380 (Fed. Cir. 2014). The Court determined that because there was a connection between the extraordinary circumstances and the failure to file an NOA within 120 days of the Board's decision and the veteran could not have been expected to exercise due diligence during that time due to his condition, equitable tolling would apply.

Ultimately, the Court held that Ms. Craig-Davidson had both statutory and constitutional standing to file the NOA because as an eligible accrued benefits claimant, she was adversely affected by the Board's denial in the same way that her husband had been. Further, because equitable tolling was warranted, and she filed within 120 days of the end of the extraordinary circumstances, the NOA was timely.

Morgan MacIsaac-Bykowski is a staff attorney at the Stetson University Veterans Law Institute.

Federal Circuit Holds VA Not Required to Automatically Grant Appellant's Request to Pause Adjudication of Appeal

by Jason Massey

Reporting on *Groves v. McDonough,* No. 2021-2081 (May 17, 2022).

In *Groves,* the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued a precedential decision written by Judge Dyk that vacated and remanded a United States Court of

Appeals for Veterans Claims (CAVC) precedential decision finding that the Board of Veterans' Appeals (Board) erred in adjudicating Mr. Groves's claim despite his request to pause the adjudication. The Federal Circuit found that the VA was not required to automatically grant Mr. Groves's request for an indefinite stay.

Mr. Groves filed an appeal seeking Veteran Readiness and Employment (formerly known as Vocational Rehabilitation and Employment) (VRE) benefits. During the appeal, Mr. Groves submitted numerous statements seeking to enjoin the VA from adjudicating the claim. He requested that the Board refrain from adjudicating his claim and cited *Hamilton v. Brown*, which states that "where… the claimant expressly indicates an intent that adjudication of certain specific claims not proceed at a certain point in time, neither the RO nor the Board has authority to adjudicate those specific claims, absent a subsequent request or authorization form the claimant or his representative." 4 Vet. App. 528, 544 (1993), *aff'd* 39 F.3d 1574 (Fed. Cir. 1994).

In a July 2017 decision that denied the VRE claim, the Board acknowledged Mr. Groves's multiple requests, but found that those statements did not constitute withdrawals of the appeal for VRE benefits. Therefore, there was no basis for the Board to not proceed with appellate review of the claim.

Mr. Groves appealed to the CAVC. The CAVC found that the Board erred when it adjudicated the claim notwithstanding Mr. Groves's request that the Board wait. The CAVC determined that *Hamilton* required the VA to comply with a claimant's request to pause adjudication because *Hamilton* intended for a veteran to seek that a decision was not issued on an inadequately developed record.

The CAVC acknowledged that the Board has inherent authority to place reasonable limits on requests to halt adjudications and that the appropriate length of a pause in adjudication should be determined on a case-by-case basis. However, the CAVC did not reach these issues in this case. Notwithstanding the Board's error, the CAVC affirmed the Board's decision because this error was procedural in nature and Mr. Groves had not shown how he was prejudiced by this error. Mr. Groves timely appealed this determination to the Federal Circuit.

The Federal Circuit vacated the CAVC decision, holding that *Hamilton* did not compel the VA to automatically grant a stay of proceedings. Distinguishing *Hamilton* from the facts of this case, the Federal Circuit held that *Hamilton* did not involve the propriety of stays on appealed cases, but only addressed situations in which the Board adjudicates claims that were not appealed. It reasoned that if *Hamilton* could be read to require an automatic stay of proceedings upon request, such a rule is neither required nor appropriate.

The Federal Circuit found that allowing appellants to automatically stay proceedings would be inconsistent with the VA statutory scheme, which is replete with measures designed to facilitate the timely adjudication of veterans' appeals and is antithetical to the interests of prompt adjudication. Further, automatic stays would be inconsistent with ordinary principles of judicial administration, which award the decision to grant or deny a stay of proceedings to the sound discretion of the adjudicating authority.

The Federal Circuit held that a "good cause" standard should be applied to the Board, stating that it would be consistent with the prevailing standard in district court litigation and with VA regulations that allow veterans to stay deadlines in other contexts. Under a "good cause" standard in determining whether to grant a stay, relevant considerations include the reasons given for the stay, the identity of the party seeking the stay, whether other parties oppose the stay, and the requested duration of the stay. Any stay that is granted by the Board should be appropriately tailored to prevent undue delay. If a long stay is justified, the Federal Circuit held that requiring recurrent status reports throughout the duration of the stay is an appropriate mechanism for helping prevent undue delay.

The Federal Circuit did not reach the harmless error question and did not foreclose the CAVC from making a harmless error determination on remand.

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

CAVC Provides Guidance on "Authorized Travel" for Active Duty for Training

by Meredith Pryce

Reporting on *Watkins v. McDonough*, No. 20-5612 (Vet. App. Jun. 2, 2022).

In *Watkins v. McDonough*, the Board of Veterans' Appeals (Board) concluded that a reservist from Memphis, Tennessee, with orders to report to Pensacola, Florida, and who first manifested bipolar disorder in Little Rock, Arkansas, was not eligible for veteran benefits. The Court of Appeal for Veterans Claims (Court) held that the Board failed to provide adequate reasons and bases for its conclusions as to what constitutes "authorized travel" to and from a period of active duty for training (ACDUTRA), under 38 U.S.C. § 101(22)(e) and 38 C.F.R. § 3.6(c)(6). The Court also instructed the Board regarding the evidence and legal decisions to consider when addressing the legal arguments appellant's counsel raised for the first time during oral arguments.

Ms. Watkins served in the Naval Reserve from August 1992 to December 1997, including periods of ACDUTRA. On April 29, 1997, the Naval and Marine Corps Reserve Center in Little Rock, Arkansas, issued an advance copy of Orders (Advance Orders) to Ms. Watkins at her home in Memphis, Tennessee, directing her to report for ACDUTRA at the Naval Hospital Pensacola in Pensacola, Florida, no later than 0700 hours on June 2, 1997, for a period of 12 days, "plus 1 travel day." The Advance Orders also specified she would be in "duty status for the number of days of [ACDUTRA] that is performed plus the time necessary to travel to and from [her] regular duty station not in excess of the allowable constructive times prescribed in the Joint Travel Regulations." The Advance Orders at the heart of this case include on the first page: "ADVANCE COPY—DO NOT TRAVEL ON THESE ORDERS." The Advanced Orders are the only orders of record; there is no copy of any official or final Orders pertaining to the June 1997 period of ACDUTRA in the record.

On June 2, 1997, Ms. Watkins was admitted to a civilian hospital in Little Rock, Arkansas, manifesting acute psychotic symptoms. She was discharged 10 days later; the following month, she was diagnosed with bipolar disorder. On July 21, 1997, she reported to her duty station in Pensacola and served on ACDUTRA until August 1, 1997. The record does not contain any Orders concerning this later period of service, and neither party could explain during oral arguments how she came to serve her period of ACDUTRA at this later date. Ms. Watkins was discharged from the Naval Reserve in December 1997.

In September 2012, Ms. Watkins filed a claim of service connection for bipolar disorder, which was denied by the Department of Veterans Affairs (VA). She appealed that denial and in January 2018, the Board denied her claim, finding that it was "impossible for the Veteran to be on a period of [ACDUTRA] in Florida, as she alleges, at the same time she was being hospitalized in Arkansas." She appealed that decision to the Court, which issued a memorandum decision in July 2019, returning the matter to the Board because the Board did not consider her expressly raised argument that her bipolar disorder manifested while she was on authorized travel to her duty station. In April 2020, the Board again denied the claim, finding that "no language in the Orders states or implies that the Veteran was authorized to include Little Rock, Arkansas, in her itinerary for authorized travel from Memphis, Tennessee to Pensacola, Florida." The Board explained that Ms. Watkins failed to obtain an "authorized change in the itinerary set forth in the Orders," and found she was "neither in active duty status nor on authorized travel to or from such duty service at the time of onset of her bipolar disorder on June 2, 1997."

In general, when a claim of service connection is based on a period of ACDUTRA, there must be evidence that the individual concerned became disabled as a result of a disease or injury incurred or aggravated in the line of duty during the period of ACDUTRA. ACDUTRA includes "[f]ull time duty in the Armed Forces performed by Reserves for training purposes . . . [a]nd authorized travel to or from such duty." 38 U.S.C. § 101(22); 38 C.F.R. § 3.6(c). The question at the heart of this appeal is whether Ms. Watkins was engaged in "authorized travel" to her duty station when her bipolar disorder first manifested on June 2, 1997. The Court found the Board's conclusion that she was not on authorized travel inadequate for two reasons.

First, the Court found the Board's finding that Ms. Watkins deviated from a set "itinerary" lacked an adequate rationale. Specifically, the Board did not explain how it determined the Advanced Orders required her to follow a specific route or itinerary between her home and her duty station, as there was nothing in the Advance Orders that prescribed a specific route she was required to take. This omission in the Advance Orders is significant, as the Board did not explain its understanding of Ms. Watkins's "itinerary" or the source of its understanding. The Court questioned if the Board had some other source beyond the Advance Orders to make this determination, as no specific other source was discussed in the Board's decision. The Court further questioned whether the Board looked to "nothing" to determine Little Rock was "off-limits for travel," but rather reached this conclusion without any supporting evidence. If this were the case, noted the Court, such a finding without supporting evidence would constitute clear legal error on the part of the Board. However, the Court declined to find explicit error, stating that it simply could not tell where any travel "itinerary" was set for Ms. Watkins, based on the Board's decision as written. In sum, when determining whether a party is on "authorized travel" to a period of ACDUTRA, the Board must provide a clear rationale with citation to the evidence of record in determining whether that travel included a specific route or itinerary which the party was required to follow.

Second, Ms. Watkins argued that the Advance Orders expressly authorized "travel via [privately owned vehicle (POV)]," and reimbursement for costs associated with that travel via POV in accordance with the Joint Travel Regulations (JTRs). Therefore, because the JTRs allowed for indirect or circuitous travel routes at the service member's personal expense, any deviation to Little Rock should have been considered part of her "authorized travel" to her duty station. Here, the Court noted that this provision addresses reimbursement for travel expenses, and not for the purpose of determining "veteran" status. Nonetheless, the Court held that the Board failed to discuss whether this portion of the JTRs was instructive of whether Ms. Watkins had deviated from any "itinerary," if such an itinerary existed. In short, when determining whether a party is on "authorized travel" to a period of ACDUTRA, the Board should consider any military regulations which are relevant to the travel, particularly if they are cited in the travel Orders and may be instructive of any deviation from an expected travel route or itinerary.

During oral arguments, counsel for Ms. Watkins put forth two additional arguments in support of her appeal. First, Ms. Watkins argued that the Board is bound by, or should have at least discussed the holding in *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), when determining the meaning of "full time duty in the Armed Forces performed by Reserves for training purposes." In *Cline*, what is now the United States Court of Appeals for the Armed Forces (CAAF) held that a Reserve member is on duty 1 minute past midnight on the day the Reserve member is ordered to appear for training, and therefore, at that time is subject to the terms of the Uniform Code of Military Justice (UCMJ). Ms. Watkins argued that *Cline* set a bright-line rule for when a service member is deemed to be on ACDUTRA, regardless of travel status, and therefore, because she was admitted to the hospital sometime after 1 minute past midnight on June 2, 1997, she was clearly on ACDUTRA at that time.

Initially, the Court noted that decisions of the CAAF are not binding on the Board. However, the Court stated that "[i]t would be remarkable if [Ms. Watkins] were considered to have been on active duty by the service department for the purpose of

imposing discipline, but not considered to have been on active duty by VA for the purpose of awarding benefits." Thus, while the Court stated that its discussion of this point was not on the merits, it did make an inference regarding whether being subject to the UCMJ establishes such service for VA purposes. Additionally, while stating that the Board is not bound by decisions of CAAF, the Court required the Board to address any relevant CAAF decision raised as part of any future arguments when such a decision may be instructive of the question on appeal. The Court stated that the Board was required to consider any CAAF decision as part of its duty to provide adequate reasons or bases for all its determinations.

Ms. Watkins also made a due process argument that, in issuing unclear Advance Orders, the Naval Reserve violated her due process rights; in essence, the Advanced Orders "lulled" her into believing that she could travel to Little Rock during her authorized travel. Here, the Court declined to provide any specific guidance to the Board regarding this argument; however, it did note that the precedential portion of its decision required the Board to fully explain how it reads any relevant Orders and how Ms. Watkins would have understood the meaning the Board assigns to them.

The Court declined to address both new arguments on the merits, agreeing with the Secretary that they had not been raised by Ms. Watkins prior to the Board's decision on appeal. Still, the Court noted that because it was remanding the appeal on other grounds, Ms. Watkins could raise those issues in the first instance when the matter returned to the Board.

Finally, the Court, *sua sponte*, stated that the evidentiary record in this matter was obviously incomplete with respect to Ms. Watkins's service in the Naval Reserve. The Court identified multiple gaps in the record between 1992 and 1997, to include whether any official Orders existed pertaining to the period of ACDUTRA in June 1997. The Court stated that, on remand, the Board must address any issues concerning the incomplete record, and if the Board determines that any additional records cannot be obtained, it has a heightened duty "to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt."

Meredith Pryce is Counsel at the Board of Veterans' Appeals.

Declining to Waive an Overpayment of Pension Benefits Is Suitable When Misrepresentation of Income Was In Bad Faith

by Stefanie Stockwell

Reporting on *Hayes v. McDonough*, No. 20-0449 (Mar. 7, 2022).

In *Hayes*, the Court of Appeals for Veterans Claims (Court) issued a precedential opinion written by Judge Toth that affirmed a decision of the Board of Veterans' Appeals (Board). The Court held that a waiver of debt is barred when misrepresenting the extent of one's income and doing so in bad faith under 38 C.F.R. § 1.962(b) and 38 C.F.R. § 1.965(b)(2).

Merriletta Hayes is the surviving spouse of veteran William H. Hayes. After William's death in 2008, Mrs. Hayes applied for survivor benefits, which require that a recipient's income falls below a certain threshold as required by 38 C.F.R. § 3.252. The application instructed that all income should be reported.

Mrs. Hayes indicated on her initial application that she received no monthly income from any source and VA granted $660 per month for non-service-connected pension benefits. Over the next three years, VA had asked Mrs. Hayes several times to verify her continued eligibility. Mrs. Hayes continued to report no changes.

In December 2013, it was discovered that Mrs. Hayes was receiving other income. Mrs. Hayes's newly verified income exceeded the eligibility ceiling and VA concluded that it had overpaid her pension

benefits by $35,970. Mrs. Hayes denied intentionally reporting her income incorrectly but instead claimed she did not know which sources of income were countable.

Mrs. Hayes appealed, and the Court granted a joint motion for remand (JMR), expressing that the Board did not make clear findings on material questions of fact and law. In the decision on appeal, the Board again denied the waiver of overpayment, finding that waiver was unavailable if the overpayment was the result of Mrs. Hayes's "misrepresent[ation] [of] the extent of her income and [having] done so in bad faith" as defined in 38 C.F.R. § 1.962(b) and 38 C.F.R. § 1.965(b)(2). The Court focused on the definitions of "misrepresentation" and "bad faith" to further determine whether the Board erred in its findings.

The Court first focused on the definition of the term "misrepresentation" in 38 C.F.R. § 1.962(b). Across definitions, the scienter element is presented as a range of intentions. Misrepresentation can occur when a false statement is made intentionally, knowingly, negligently, or recklessly. Therefore, the Court agreed with the Board's decision that Mrs. Hayes committed misrepresentation because she made a conscious choice not to disclose any income, despite clear statements from VA that the law required her to do so.

The Court next focused on the definition of "bad faith" under 38 C.F.R. § 1.965(b)(2). The Board determined that Mrs. Hayes was informed by VA no fewer than five times that it was her duty to report her income. VA directly informed Mrs. Hayes that she should report "Social Security benefits, wages, [and] other payments from anyone." Not only did Mrs. Hayes fail to report her Social Security and unemployment benefits, nor the sale of a home she inherited, but she did not report her earned wages. The Board even stated that "had the appellant reported her wage income, but not her other sources of income, it would have been more persuasive," in terms of not reporting. The Court agreed with the Board's determination that Mrs. Hayes' intentions were in "bad faith" and thus waiver was barred.

Ultimately, the Court held that the Board did not err when it determined that the waiver of debt was barred because Appellant misrepresented the extent of her income and did so in bad faith.

Stefanie Stockwell is a summer fellow at the Stetson University Veterans Law Institute.

National Academy of Sciences Updates Are "Evidence" Subject to 38 U.S.C. § 7113

by Morgan MacIsaac-Bykowski

Reporting on *Aviles-Rivera v. McDonough*, No. 19-5969 (May 2, 2022).

In *Aviles-Rivera*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential opinion written by Judge Bartley holding that the Board did not err when it did not consider the 11th National Academy of Sciences (NAS) update regarding Agent Orange, which was published after the veteran opted in to the Rapid Appeals Modernization Program (RAMP) but before the Board decided the claim.

Victor Manuel Aviles-Rivera, Appellant, served from March 1968 to December 1969, with service in Vietnam. He filed a claim for hypertension in 2013, which was eventually appealed to the Board after a Statement of the Case in 2014. The Board remanded the claim for a new medical opinion regarding a nexus in 2017, instructing the examiner to "consider the NAS Update[s] which concluded there was 'limited suggestive evidence of an association' between hypertension and herbicide exposure." The examiner reviewed the 2014 NAS update and found no nexus between the veteran's hypertension and his service in Vietnam.

In June 2018, after a Supplemental Statement of the Case was issued denying his claim for hypertension, Mr. Aviles-Rivera elected into RAMP and selected a higher-level review. The September 2018 higher-level review decision denied the claim again, and the

veteran appealed to the Board, choosing the direct review lane. The Board then issued a decision in February 2019 denying the claim for hypertension because the preponderance of the evidence weighed against a link between Mr. Aviles-Rivera's hypertension and his service in Vietnam. The Board noted that the evidentiary record closed on the date of election into RAMP and discussed the findings of the 8th and 10th NAS reports.

Mr. Aviles-Rivera appealed to the Court, arguing that the Board erred by not considering the 11th NAS report, published in November 2018, which noted "sufficient evidence of an association" between Agent Orange and hypertension. In doing so, he made four assertions: (1) that the Board's 2017 remand order expanded the scope and timeframe of relevant evidence, so the 11th NAS update was constructively before the Board; (2) that NAS Updates are not "evidence" as contemplated by the Board's evidentiary restriction in 38 U.S.C. § 7113; (3) that while 38 U.S.C. § 7113 limits the time that claimants may submit evidence, 38 U.S.C. § 7104, the Board's jurisdictional statute, requires that the Board consider all evidence of record, to include the 11th NAS Update here; and (4) that the Board's lack of consideration of the 11th NAS Update was unfair, unjust, and unreasonable. Conversely, the Secretary argued that the veteran's attempt to create an exception to 38 U.S.C. § 7113 was unsupported and that Mr. Aviles-Rivera was not prejudiced because he may file a supplemental claim and submit the NAS report for consideration below.

When analyzing the issue, the Court first looked to the notice provided to Mr. Aviles-Rivera upon his election into RAMP, noting that he was informed that the higher-level review would be based on the evidence currently in the record and that VA would not seek additional evidence. Thus, the 11th NAS report, which was published six months after the veteran's election into RAMP, was not part of the evidentiary record.

The Court then determined that the 11th NAS Update was not constructively before the Board, because evidence is only constructively possessed by VA when it could be reasonably expected to be part of the evidentiary record. Because the evidentiary record closed in June 2018, and Mr. Aviles-Rivera was informed of this record closure, the expectation of constructive possession was not reasonable. Further, the Court opined that the Board's 2017 remand order could not have been referring to the 11th NAS Update because it had not existed at that time, so it was not possible for an examiner to review it.

Next, the Court turned to the veteran's argument that NAS reports are not "evidence" as contemplated by 38 U.S.C. § 7113. Mr. Aviles-Rivera advanced that because the reports are mandated by Congress, they should be considered "authoritative documents," citing the *Euzebio* decisions. *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021), vacating and remanding *Euzebio v. Wilkie*, 31 Vet.App. 394 (2019). The Court looked to the definition of "evidence" in Black's Law Dictionary and determined that the NAS Update clearly falls under that definition. Additionally, the Court noted that even the *Euzebio* cases refer to the NAS Updates as evidence.

The Court then addressed the jurisdictional argument under 38 U.S.C. § 7104 and decided that sections 7104 and 7113 must be read in concert with each other and cannot stand alone. Therefore, section 7104 simply mandates that the Board consider all evidence properly before it and does not, then, prescribe what that evidence is. The Court further found that Congress did not intend to negate the evidentiary limits in 7113 through its promulgation of 7104. Lastly, the Court noted that VA modified section 7104 though the Appeals Improvement and Modernization Act, requiring the Board to notify claimants that evidence submitted outside of the section 7113 timeframe would not be considered. Accordingly, the two sections were not independent.

Finally, Mr. Aviles-Rivera argued that there was a disparate treatment of veterans similarly situated because he knew of a situation where the facts were largely the same regarding opting-in to RAMP using the direct evidence lane and the 11th NAS Update was applied. However, the Court noted that the 11th Update was only applied after the issue was remanded by the Board due to a duty-to-assist error below, something not present in Mr. Aviles-Rivera's

case. The Court did not find a fair process violation either, because Mr. Aviles-Rivera failed to show that the closure of the evidentiary record is an "unfair flaw" rather than an "intended feature" of the new process.

Ultimately, the Court held that the evidentiary restriction in 38 U.S.C. § 7113(a) prevented the Board from considering the 11th NAS Update, published after Mr. Aviles-Rivera opted into the direct evidence lane under RAMP.

Morgan MacIsaac-Bykowski is a staff attorney at the Stetson University Veterans Law Institute.

Federal Circuit Defines "VA Issue"

by Ben Small

Reporting on *Kennedy v. McDonough*, No 2021-1798 (May 11, 2022).

In *Kennedy v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued a panel decision (Newman, Stoll, and Cunningham, Judges), affirming the Board of Veterans' Appeals (Board) decision denying the appellant's request for an earlier effective date for Dependency and Indemnity Compensation (DIC) under 38 C.F.R. § 3.702.

At issue in the case was 2013 Fast Letter 13-04, "Simplified Processing of Dependency and Indemnity Compensation (DIC) Claims." VA Fast Letters were internal updates that provided guidance, clarification, and processing instructions to VA Regional Office employees regarding claims. All Fast Letters have been rescinded, and the summaries are incorporated into VA's Adjudication Procedures Manual. The essence of Fast Letter 13-04 was to instruct VA adjudicators to grant "service connection for the cause of death when the death certificate shows that the service-connected disability is [a]…contributory cause of death." After several unsuccessful attempts at obtaining DIC benefits prior to the issuance of the 2013 VA Fast Letter, the appellant was awarded DIC in July 2015, the date her claim was received by VA, because "depression," a condition for which the deceased Veteran was service connected, appeared on his death certificate.

The appellant appealed the effective date of the award under 38 C.F.R. § 3.114, arguing that her claim was "granted based on a change in VA regulatory guidance," VA Fast Letter 13-04, and as a result, "a retroactive effective date for the award of DIC" was available under 38 C.F.R. § 3.114(a).

Section 3.114 authorizes an effective date "for a period [up to] 1 year prior" for claims, including DIC, when the award is based on a "liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction."

Before the United States Court of Appeals for Veterans Claims (CAVC), the appellant argued that she should be granted a retroactive year of DIC because VA Fast Letter 13-04 was a "liberalizing VA issue approved by the Secretary or by the Secretary's direction." The appellant asked the CAVC to accept her definition of "VA issue" as "a directive from or approved by the Secretary *and is binding on VA* (emphasis added)."

The CAVC adopted the appellant's definition of "VA issue" and affirmed the Board's decision regarding a July 2015 effective date. In arriving at its decision, the CAVC stated, "VA Fast Letter 13-04 does not constitute a… 'VA issue approved by the Secretary or by the Secretary's direction'" because it "is not binding on the Board" and therefore "does not bind the Agency."

Before the Federal Circuit, the appellant argued that the CAVC definition of "VA issue," adopted at her behest, was too restrictive. Applying its ruling in *Logan v. Principi*, 71 F. App'x 836, 838-39 (Fed. Cir. 2003), which held that "an appellant who 'urged upon the Veterans Court' a position forfeits any argument on appeal that the Veterans Court 'committed reversible error' when the court applied that position," the Federal Circuit concluded that the appellant forfeited her argument that the CAVC erred in its interpretation of "VA issue" and affirmed the decision of the lower court.

Judge Newman, who dissented from the majority, would have had the Federal Circuit address the basis of the CAVC decision rather than avoid the issue on forfeiture grounds. The dissent highlighted the arguments of the appellant that the VA Director of Pension and Fiduciary Service acted under the delegated authority of the VA Secretary in issuing Fast Letter 13-04.

However, the CAVC concluded that the appellant "has pointed to nothing in the law establishing the necessary delegation, nor has she provided any factual evidence of this multilink chain of delegation illustrating Fast Letter 13-04 was issued with the [VA] Secretary's approval." Further, Judge Newman wrote, the CAVC ruled that "even if there were evidence…that the director…issued Fast Letter 13-04 with the [VA] Secretary's approval, the Fast Letter is still not a 'VA issue' because it is not binding on the Agency."

Citing *Ortiz v. McDonough*, 6 F.4th 1267, 1276-77 (Fed. Cir. 2021), Judge Newman wrote that "Fast Letter [13-04] 'relaxed the [appellant's] affirmative responsibility in presenting and supporting a claim for [DIC]' and met the plain meaning definition of 'liberalizing.'" Judge Newman concluded that there was "no contrary holding as to whether this Fast Letter is a VA issue," and, "[a] matter that is not in dispute cannot be deemed to have been forfeited."

Ben Small is an Attorney Advisor with the Board of Veterans' Appeals.

The Bar Association will conduct a ceremonial washing of the Vietnam Veterans Memorial Wall in Washington, DC, on Sunday, June 26, at 6:30 am. Please contact Bar Association President Jenna Zellmer if you wish to join. The Memorial is located at 5 Henry Bacon Dr NW, Washington, DC 20002.

Mapping Five Years of Class Action Proceedings in the Court of Appeals for Veterans Claims

by C. Jeffrey Price

"*Where we've been says a lot about where we're going.*"
Judge Greenberg in *Wolfe v. Wilkie* (*Wolfe I*), 32 Vet. App. 1, 13 (2019) (order), *rev'd sub nom. Wolfe v. McDonough* (*Wolfe II*), 28 F.4th 1348 (Fed. Cir. 2022).

In April 2017, the Court of Appeals for Veterans Claims ("CAVC" or "Veterans Court") became the only national appellate court to have "authority to certify a class for a class action and to maintain similar aggregate resolution procedures." *Monk v. Shulkin* (*Monk I*), 855 F.3d 1312, 1314 (Fed. Cir. 2017), *denying request for class certification sub nom. Monk v. Wilkie* (*Monk II*), 30 Vet. App. 167 (2018) (en banc order), *aff'd*, *Monk III*, 978 F.3d 1273 (Fed. Cir. 2020).

Many believe that class action proceedings hold great promise for addressing systemic problems and bringing about a more efficient resolution of veterans claims, while others question whether an appellate court with few resources and limited statutory powers could effectively do so. Moreover, an inherent tension exists between the Court's authority to issue precedential decisions as a nationwide appellate court and its newfound authority to certify class actions. These circumstances create legal questions of first impression. In short, these are uncharted waters.

The purpose of this article is to map out in general terms the first five years of this journey. It gives the

lay of the land and summarizes the contours of the major issues and the key decisions.

So far, only one case has successfully traversed these treacherous waters. That is, the CAVC has received approximately 20 requests to certify class actions, but of those, just one has resulted in a final judgment in favor of the class with a mandate for an award of attorneys' fees. Three others have been certified, but one was recently reversed on the merits, while the other two are currently on appeal before the Federal Circuit.

These initial decisions reveal what kinds of class claims could succeed. And the journey is far from over. Both the Court and Federal Circuit will continue to map out the routes veterans advocates can take through class actions to address systemic failures.

Veterans Class Action Litigation Before the Creation of CAVC

Before Congress created the CAVC in 1989, veterans advocates turned to civil district courts to pursue class litigation. The *Nehmer* class action, the most well known, provided relief to a class of Vietnam veterans exposed to Agent Orange. *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987) (single-judge order certifying a class). The details of the *Nehmer* class action and its continued legacy are covered in an article recently published in the Veterans Law Journal. *See* Benton Jay Komins, "Nehmer *in Resume: Guidance from Four Instructive Cases*," 1 VETERANS L. J., 2021, at 42.

CAVC Initially Refuses to Adopt a Class Action Procedure

After the creation of CAVC, advocates were hopeful that it would provide a forum for class action proceedings.

In one of its earliest decisions, however, the CAVC ruled that it lacked authority to adopt procedures for class actions. *Harrison v. Derwinski*, 1 Vet. App. 438 (1991) (en banc order) (per curiam). The Court cited statutes that indicated it was concerned that it would exceed its powers if, for example, it certified a class that included veterans that had not yet received a Board decision or had not yet filed a notice appealing a Board decision. *Id.* In addition, it noted that a class action procedure would be "highly unmanageable" for an appellate court. *Id.* at 438.

Harrison remained established law, and class action proceedings were disallowed in the Veterans Court for over 25 years.

Watershed *Monk* Decision Recognizes Class Action Authority

On April 26, 2017, the Federal Circuit held that the CAVC indeed has authority to certify class actions and maintain aggregate resolution procedures. *Monk I*, 855 F.3d at 1314. In reaching its watershed decision, the Federal Circuit cited to three separate sources granting that authority: (1) the All Writs Act, (2) the Veterans Judicial Review Act, and (3) the CAVC's inherent powers. *Id.* at 1321.

The Federal Circuit pointed to efficiency, consistency, and fairness as reasons for granting the CAVC with class action authority. *Id.* at 1321 ("We see no reason why the Veterans Court cannot use class actions to promote efficiency, consistency, and fairness in its decisions."). Specifically, the Federal Circuit's decision noted that class actions "could be used to compel correction of systemic error and to ensure that like veterans are treated alike." *Id.*

The Federal Circuit's decision did not, however, address which specific class action procedures the CAVC should adopt, leaving that to the CAVC to decide.

CAVC Denies Class Certification in *Monk II*

On remand, in a split en banc decision, the CAVC looked to the numerosity, commonality, typicality, and adequacy requirements found in FED. R. CIV. P. 23(a) as guidance, and under that framework denied class certification in *Monk II*, 30 Vet. App. 167.

In *Monk II*, the petitioner sought to certify a very broad class. That is, he defined the proposed class as consisting of all individuals who had been denied VA disability compensation benefits and had not

received a decision from the Board of Veterans' Appeals within 12 months. *Id.*

The CAVC found that class certification in *Monk II* turned on FED. R. CIV. P. 23(a)'s commonality requirement: that there be a question of law or fact common to the class as a whole. *Id.* at 175-80. The CAVC concluded the members of the proposed class did not meet this prong because they did not seek to certify a class "based on a specific practice or policy." *Id.* at 179. On appeal, the Federal Circuit agreed with the plurality and affirmed the order denying class certification. *Monk III,* 978 F.3d 1273.

In short, the courts quickly dismissed the notion that a CAVC class action proceeding would be the panacea for all delays plaguing the VA claims process.

CAVC Certifies Its First Class Action

In June 2019, for the first time in its history, the CAVC certified a class in *Godsey v. Wilkie*, 31 Vet. App. 207 (2019) (per curiam order). Given the nature of the injury and the need for rapid remedial action, the Court resolved both class certification and the merits of the underlying petition in a single order. *Id.*

Specifically, the *Godsey* petitioner asserted extreme delays by the Secretary in the Board's appeals process under the legacy system. *Id.* On average, it took more than 1,000 days to complete this administrative process, according to an annual report. *Id.*

As in *Monk II*, the CAVC relied on FED. R. CIV. P. 23 as a guide for establishing the requirements for class certification. Because the commonality prong had proven problematic in the past, the CAVC addressed this requirement first. Indeed, it noted that, as proposed, there were factual and legal differences among class members' claims that could prove fatal to commonality. Therefore, the CAVC modified the proposed class and narrowed it to include only those claimants who had been waiting more than 18 months since filing their appeals. *Id.* at 225.

After finding that all remaining requirements had been met, the CAVC certified the class and decided the merits in a single order. The CAVC further concluded that there was no need to provide class members with notice of the action, and the Court instead ordered the Secretary to take immediate action to resolve the delays and to provide a status update within 120 days.

In its status update, the Secretary reported that it had satisfied the obligations imposed by the CAVC order by identifying over 2,300 class members and ensuring that their appeals had been successfully certified to the Board or otherwise resolved. At the conclusion of the case, the CAVC awarded class counsel's attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which totaled approximately $125,000. This marked the first, and so far the only, time a certified class action has resulted in an award of attorneys' fees.

CAVC's Second Certified Class Action Addresses Management Issues Before a Reversal on the Merits

In September 2019, the CAVC certified its second class action in *Wolfe I*, 32 Vet. App. 1. As in *Godsey*, the Court simultaneously certified the class and granted the writ of mandamus. In *Wolfe I*, however, at issue was not unreasonable delays or procedural irregularities, but rather whether it was proper for the VA to deny reimbursement of certain emergency medical expenses associated with non-VA hospital visits. *Id.*

Earlier this year, the Federal Circuit reversed the CAVC's *Wolfe* decision. *Wolfe II*, 28 F.4th 1348. Its decision focused exclusively on the merits of the petition and concluded that the petitioner did not have a clear and indisputable right to the deductibles under a correct interpretation of the All Writs Act. *Id.* at 1350-51. The Federal Circuit did not, however, address class certification because the issue had become moot. *Id.* at 1360 ("Because we conclude that mandamus was inappropriate, we need not and do not reach the issue of class certification.").

Prior to the Federal Circuit's reversal, the CAVC addressed class management issues. Most significantly, in a March 24, 2021, precedential decision, the CAVC granted a motion to appoint a special master, paid for by the court, to enforce the class action judgment. *Wolfe v. McDonough*, 34 Vet. App. 162 (2021). The special master successfully completed his appointment and filed a final report in November 2021.

CAVC Certifies a Class in the Individual Appeal Context and Establishes Its Superiority Test

In December 2019, in a split en banc decision, for the first time the CAVC granted class certification in the context of an individual appeal of a Board decision. *Skaar v. Wilkie* (*Skaar I*), 32 Vet. App. 156 (2019) (en banc order), *class certification aff'd, Skaar II*, 33 Vet. App. 127 (2020), *argued sub nom. Skaar v. McDonough* (*Skaar III*), No. 21-1757 (Fed. Cir. Apr. 7, 2022).

In *Skaar I*, the veteran appealed the denial of service connection for disabilities arising from radiation exposure while participating in the 1966 cleanup of plutonium dust in Palomares, Spain. In short, the appellant challenged the government's complex dose estimate methodology. *Id.* at 166-67.

Skaar I set forth the CAVC's superiority test for class certification. *Id.* at 195. After acknowledging its unique "appellate nature and limited factfinding abilities," the majority opinion stated that class actions are the exception, not the rule, and that CAVC "will presume classes should ***not*** be certified because [its] ability to render binding precedential decisions ordinarily will be adequate." *Id.* at 196 (emphasis added). However, a claimant can rebut the presumption with a preponderance of evidence showing that a class action would be superior to a precedential decision. *Id.* at 196-97 (providing a non-exhaustive list of factors to determine superiority).

The dissenting opinion focused on the "primary tension" of being an appellate court while trying to complete basic functions vital to certifying a class. *Id.* at 220 (Falvey, J., dissenting). The dissent concluded: "The Court has seized more power than Congress allotted to it with unsound legal innovations." *Id.* at 225 (Falvey, J., dissenting).

In December 2020, the CAVC issued an order on the merits of Skaar's appeal, setting aside and remanding the Board's decision. *Skaar II*, 33 Vet. App. 127. A dissenting opinion reiterated its concerns with class certification. *Id.* at 150 (Meredith, J., dissenting in part). Not surprisingly, the Secretary appealed the CAVC's *Skaar* decisions to the Federal Circuit, where they are currently pending.

CAVC Grants Class Certification under Newly Adopted Rules 22 and 23

In November 2020, the CAVC adopted Rules 22 and 23, establishing its procedural requirements for class certification. *See In re Rules of Practice and Procedure*, U.S. VET. APP. MISC. ORDER No. 12-20 (Nov. 10, 2020). Consistent with the CAVC's prior decisions, Rule 22(a)(3) incorporates the superiority test, and Rule 23(a) incorporates the numerosity, commonality, typicality, and adequacy requirements.

In April 2021, the CAVC applied its newly adopted rules and granted class certification in *Beaudette v. McDonough*, 34 Vet. App. 95 (2021) (order), *appeal docketed*, No. 22-1264 (Fed. Cir. Dec. 15, 2021). In *Beaudette*, the CAVC considered whether decisions related to the Caregiver Program are insulated from Board review. *Id.* The CAVC concluded that the VA wrongfully denied claimants the right to seek Board review of Caregiver Program determinations, and the Court granted both petitioners a writ on the merits and their request for class action.

Whether petitioners had met the superiority test was hotly disputed. But after addressing the *Skaar* factors, the CAVC found that the superiority test had been met. *Id.* The CAVC found most persuasive the fact that a precedential decision would not effectively inform past program claimants of their important appellate rights, and that their discovery of that right would be left to chance. Therefore, it concluded, class-wide relief would be superior to a precedential decision in this matter. *Id.*

As in *Skaar I*, a dissenting opinion criticized the class certification in *Beaudette*. The dissent stated: "The bottom line is that our jurisprudence on class certification, and in particular whether a class is superior to a precedential decision, is at risk of becoming incoherent and the 'equivalent of because I say so.'" *Id.* at 111 (Falvey, J., dissenting) (quoting *Hood v. Brown*, 4 Vet. App. 301, 303 (1993)).

The CAVC denied the Secretary's motion for en banc reconsideration. *Beaudette v. McDonough*, No. 20-4961 (Aug. 2, 2021) (nonprecedential en banc order) (per curiam). In December 2021, the Secretary appealed the *Beaudette* decision to the Federal Circuit, where it is currently pending.

Completing the Map of CAVC Class Action Developments

Much like those of early explorers, the current map of the development of class action proceedings in the CAVC is far from complete. Five years of CAVC class action litigation has, however, started to reveal the major features and the general lay of the land. The top takeaway so far is that *Godsey* established a viable path for using class action proceedings to remedy certain VA systemic errors, as originally contemplated by the Federal Circuit in its watershed *Monk* decision.

The class action journey, however, continues to be treacherous for the unwary, with plenty of pitfalls to avoid. Many of these can be successfully navigated with the help of the CAVC's initial landmark decisions concerning class certification. These decisions, for instance, underscore the importance of ensuring that a request for a class action complies with the nuances of the CAVC's commonality requirement and overcomes the superiority test presumption.

Nonetheless, the courts are still developing the class certification requirement in certain contexts, such as individual appeals. For example, as noted above, the CAVC decisions from *Skaar* and *Beaudette* are currently pending before the Federal Circuit. In addition, three requests for class action are currently pending before the CAVC, two of which have already completed oral arguments, and precedential decisions should be forthcoming shortly.

With this further development of the law and additional clarity to the CAVC class action landscape, veterans advocates may begin to file requests for class action more frequently and repeat on a regular basis the success of *Godsey*. Perhaps then CAVC class action proceedings will begin to cause systemic changes that make the claims process more efficient for veterans, as the Federal Circuit initially anticipated it could.

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