VETERANS LAW JOURNAL

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Farewell Message from Colonel Gregory Block

Dear Colleagues,

Thirteen years has gone by in a blur, and my quickly approaching retirement is a bittersweet moment for me. Yes, I'm looking forward to more time for personal pursuits (more cycling, tennis, golf, and travel), but I'm going to miss the collective energy and commitment to providing meaningful judicial review to veterans I've experienced at the Court and with the Court's bar. Not to mention dynamic changes we've experienced – more than doubling the Court's caseload, an expansion of the Court from 7 to 9 (and soon to be 11) judges, new class action rules and cases, growth in staffing at the Court, the OGC, the Board, and several thousand new members of the Court's bar. And let's not forget the pandemic! And the challenges of remote work and oral arguments!

In preparing to transition, I would be remiss if I didn't give a shout out to the appellants' bar (including the Court's Pro Bono Consortium partners) and government attorneys practicing before the Court – I have admired your enduring efforts to fully litigate issues while maintaining collegial and professional relations. Many of you have gone above and beyond to participate and make invaluable contributions through the Court's Rules Advisory Committee, Judicial Advisory Committee, Disciplinary Committee, Historical Society, and others have enhanced our practice community by serving in the CAVC Bar Association and volunteering for the Rule 33 Pilot Program. Overall, I have been amazed at the level of participation and enthusiasm at bar association events, judicial conferences, and bar and bench conferences, particularly from those who have assumed leadership positions and sat on planning committees. If you haven't joined in thus far, now is a great time to reach out.

My successor, Colonel Tiffany Wagner, comes to the Court after many years in an Air Force uniform. Like I was thirteen years ago, she is a veteran and lawyer, but new to the veterans law realm. I know Tiffany will impress you greatly with her positive energy and intellect, and I know she will be highly motivated by the talent and professionalism she will experience both inside and outside the Court. Please seek her out and share your experiences and thoughts with her just as you did with me. These are exciting times and I know that she can count on

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all of you to help her and the Court meet any and all challenges that may be ahead.

Mr. Block on the golf course, where he hopes to spend more time during his retirement.

Mr. Block and his newest grandchild, Sullivan Block

Even if I'm not at the Court working, you can count on me to be a great champion and supporter of the work of the Court and its practice community. I can't thank you enough for your support and friendship. Please call me if there is anything I can do for you. I won't say, "goodbye," but "see you later."

Regards,
Greg Block

Evolution of Appellant Representation

by Morgan MacIsaac-Bykowski

On June 22, 2023, the U.S. Court of Appeals for Veterans Claims ("Court") hosted a CAVC Bar panel presentation, where Judge Mary Schoelen, Linda Blauhut of Paralyzed Veterans of America ("PVA"), Mary Flynn of the Office of General Counsel ("OGC"), Ronald Smith, Esq., and Andrew Reynolds of Central Legal Staff ("CLS") gathered to discuss the evolution of appellant representation at the Court.

Ronald Smith began the conversation by recounting the early days of the Court. He said, "In my opinion, the genesis of the pro se problem at the Court began the day after the Court opened its doors because the entire veterans community believed that this was just going to be a 'super' Board of Veterans Appeals." He explained that almost none of the Veterans Service Organizations ("VSOs") had attorneys on their staffs. As a result, the National Organization of Veterans Advocates ("NOVA") began to assist these pro se appellants. However, NOVA was still relatively new and did not know how to best find and contact these appellants. VSOs then jumped in but seemed to appeal any denial from the Board of Veterans' Appeals ("Board"), regardless of whether the Court had jurisdiction. Eventually, the VSOs learned that they needed to screen the cases before filing Notices of Appeal.

Mary Flynn, who has worked at OGC since 1992, discussed how challenging it is to argue a case

against a pro se appellant, especially in a "pro veteran" context. She wanted to help them without violating her responsibilities to her client, the Secretary of the Department of Veterans Affairs. She was happy to see the appellants' bar grow, because "it helped keep the process cleaner" and "improved the process for everyone."

Linda Blauhut remembers the days when there was "virtually no bar" when she joined PVA in 1994. Everyone recognized the problem, but there were "way more cases than there were people to take them." She views the Veterans Consortium Pro Bono Program ("Consortium") as a "really innovative solution on the part of Congress and the Court."

Judge Schoelen provided her perspective on the challenges of working with pro se appellants. She remembered the struggle with funding in the early days of the Court. The Consortium was funded through the Court's budget, which became an issue when the budget was reduced in 1996. Because of this,Judge Nebeker, who is now retired, realized that the Court was put in a position where there could be an appearance of impropriety because the Court was sponsoring the appellant representatives. He testified about these problems to Congress, which resulted in the Consortium being severed from the Court. Judge Schoelen is appreciative of the many changes over the years.

Andrew "Andy" Reynolds began working at the Court in 1992, left to work with the National Veterans Legal Services Program ("NVLSP"), and then returned to the Court. He experienced the same struggle in working with pro se appellants, specifically regarding Record Before the Agency disputes. He also remembered the struggle of dealing with paper records and joked that "someone would lose one of the volumes" and that there were files "all over the Court."

The moderator asked, "What is it about a pro se case that makes it more difficult to handle?" Judge Schoelen responded that "there are a whole bunch of problems that come with dealing with a pro se case," including the lack of understanding of the Court's procedures, the informal and sometimes illegible submissions, confusion about what was relevant or at issue, and the possible remedies – or lack thereof – the Court could provide." She also noted that pro se veterans often wish to submit new evidence, something not allowed before the Court.

Ronald recalled times when he was frustrated with the lack of understanding of jurisdiction and standard of review – an issue he mostly experienced with pro se appellants but also saw from attorneys.

The moderator then turned to the chart (pictured above), and asked what difficulties the panelists experienced with initial pro se filings. Judge Schoelen recalled veterans filing notices of appeal on paper bags. She said that the Court established a hotline and hired veterans to answer calls from veterans wondering how to go about the process. She thinks that between this hotline, the Consortium, and the steady growth of the appellant's bar, these issues were largely resolved.

When discussing other advancements, Andy explained that he has seen a shift in the conferencing process. He remembers more generosity and leniency at the outset around 2008, which he thought was much-needed. Judge Schoelen said, "The conferences are what keeps the Court alive," and that these are only possible with involvement of attorneys.

The moderator noted that the pro se rate regarding petitions is still fairly high – in 2022, 60% of the filings were done pro se. He asked what about petitions makes this so, and Judge Schoelen responded, "EAJA (Equal Access to Justice Act)," likely because these fees are not available following a petition. Linda said this is also because "the standards are different. It is pretty darn difficult."

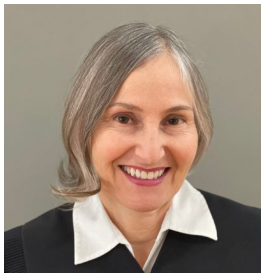
Linda discussed how interest in veterans issues increased following September 11, 2001, and that she saw a shift in the practice around that time. Andy thought this increased interest added some sophistication to the process, finding that the Court became more structured, to the point where there are law school courses on veterans law and attorneys who specialize in practice at the Court now. Mary commented that the Court's bar association has helped to stabilize the practice as well. Judge

Schoelen noticed the most growth following the change in law regarding when attorneys could be paid. She also commented on the significant impact law school veterans can have, both with representing individual clients at the Court and in supporting class actions, as Yale has done in the past.

Andy then explained the new program offering veterans representation through the Consortium, which is limited to the Rule 33 process. He has found this program to be successful, with 239 conferences held through this program – over half of which resulted in a Joint Motion for Remand.

Linda commented that compared to U.S. district courts, "we are doing pretty well" regarding the numbers of pro se appellants we have now. She said this is "something to be applauded." Judge Schoelen agreed, stating that we exceeded the goal of reducing the number of pro se filings to under one-third of all filings. She wrapped up the event by saying that "one of the exciting things about this area of law is that you are constantly getting a chance to help shape it," which attracts "people who are interested, who want to do the right thing, and who want to help veterans."

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



Message from the Chief Judge

Colleagues,

This message is bittersweet. At the end of the month, Greg Block, our Clerk of Court and Executive Officer, will retire. For the past 13 years, Greg has embodied the Court's mission of ensuring that veterans and their families receive prompt and fair judicial review, and that all parties before the Court are treated with dignity and respect. He is a dedicated public servant, an innovative leader, and a trusted advisor to me, to prior Chief Judges under whom he served, and to all active, recall-eligible, and senior judges. The Court has benefitted tremendously from his consummate professionalism, collaborative spirit, and tireless work ethic. It is difficult to see Greg go, but there is no doubt that he will continue to be a friend to the Court, the Bar, and all those he has worked with throughout his distinguished career.

Greg's contributions to the Court and the practice of veterans law at large are too numerous to list. He has stewarded the Court's operations through periods of great challenge and change, including a doubling caseload, the statutory expansion of the Court, and a global public health crisis. As to that last, notably, along with Chief Judge Greene's steps to take the Court paperless, Chief Judge Kasold's and Greg's efforts to develop and promote the Court's continuity of operations plan (COOP) allowed us to seamlessly transition to remote operations in March 2020. Greg pushed the Court to secure the technical infrastructure that made our stellar COOP plan fully operational. This also allowed us to host hybrid oral arguments and fully remote oral arguments. That the Court was so well-prepared for the 2020 pandemic is a testament to Greg's strategic vision and his steadfast commitment to ensuring that the Court is capable of handling any challenge that comes its way.

Greg has always favored innovation. One of his greatest strengths is his rapport with practitioners, which has helped him to effectively collaborate with the private Bar and government lawyers on initiatives that have greatly improved practice before the Court. He has served as the Court's liaison to the Rules Advisory Committee, working with that group to devise first-of-its-kind class action rules. He also worked with the Judicial Advisory Committee (JAC) and the Veterans Consortium Pro Bono Program to spearhead the Rule 33 pilot program that provides limited representation to pro

se appellants in mediation conferences. Greg has served as the JAC's chair since its inception, helping to shape its mission and guide its efforts from day one. And, of course, Greg has wholeheartedly embraced his role as a public representative of the Court; his kindness, approachability, and knowledge in all settings reflect great credit upon him and the Court.

I could go on and on, but the bottom line is that the Court and the practice of veterans law are both dramatically better because of Greg's time as the Clerk of the Court. Greg, on behalf of the Board of Judges, all recall-eligible and senior judges, and all Court staff, thank you for your outstanding service. I think I speak for the veterans law community as a whole in wishing you the best in your well-deserved retirement. You will be missed!

Meg

Message from the Immediate Past President

Dear fellow CAVC Bar Association members,

It's bittersweet writing my last message to you as President this month. This past year has been one of incredible growth, learning, and opportunity for me, both personally and professionally, and I first want to thank you, the members, for entrusting me with this responsibility.

The members of the Bar Association, and especially those who volunteered and were elected to the Board of Governors, are a special group—among the most creative and hardest-working attorneys out there. The CAVC bar is collegial and inventive, and I am proud to be among you all.

Ashley Varga, the new President of the Bar Association, is knowledgeable, experienced, and dedicated. I am proud that she will be leading the Bar Association and know she will do a great job.

In this time of transition, we are also saying goodbye to longtime Clerk of Court Greg Block. Anyone who has worked with Greg knows that he is a kind and thoughtful soul with a wealth of knowledge. We will miss Greg upon his departure. Tiffany Wagner will be joining the Court in Greg's stead, and I look forward to continuing the strong working relationship between the Bar Association and the Clerk.

This month, we hosted, with representatives from the appellants' bar, VA, and the Court, the third Bar and Bench Conference. This conference, intended to foster open discussion and develop ideas addressing issues the Court and its practitioners face, was last held in 2015. Since then, many aspects of practice before the Court have drastically changed, and the veterans' bar has vastly expanded in size. Opportunities like this to create change and better the landscape for your fellow attorneys and for litigants are rare. Even if you were not able to attend the conference, please do not hesitate to reach out to the Bar Association if you have ideas about how to improve Court functions.

Hopefully you were able to join us this month for either the Bar and Bench Conference or the Annual Meeting. Events like these are great opportunities to develop the collegiality we pride ourselves on—if you were not able to make it this month, I hope you'll join us during the upcoming year!

Best,
Jillian Berner

CAVC's Review of Benefit of the Doubt and the Clear Error Standard

by Devin deBruyn

Reporting on *Bufkin v. McDonough*, No. 2022-1089 (Fed. Cir. August 3, 2023).

In *Bufkin v. McDonough*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) addressed 38 U.S.C. § 7261(b)(1), which requires the U.S. Court of Appeals for Veterans Claims (CAVC) to "take due account of the Secretary's application" of the benefit of doubt rule. The first issue before the Federal Circuit was whether this statute requires CAVC to review how the Secretary applied benefit of doubt throughout the entire adjudication, as opposed to only looking at how the rule was applied by the Board of Veterans' Appeals (Board). The second issue was whether this statute requires CAVC to conduct a de novo, non-deferential review of how benefit of doubt was applied.

In July 2013, U.S. Air Force veteran, Mr. Bufkin, filed a claim seeking service connection for a psychiatric disorder. Mr. Bufkin submitted treatment records from his appointments with a Department of Veterans Affairs (VA) psychiatrist, Dr. R.G., who noted that Mr. Bufkin met the criteria for a diagnosis of posttraumatic stress disorder (PTSD). However, the psychiatrist could not identify a stressor. In March 2014, the Agency of Original Jurisdiction (AOJ) denied service connection for PTSD on the basis that the evidence failed to show the presence of a stressor related to service.

Subsequently, Mr. Bufkin was evaluated by a VA psychiatric examiner, who indicated that he did not meet the criteria for PTSD. In August 2015, the AOJ again denied service connection for PTSD on the basis that a diagnosis had not been established.

Mr. Bufkin was later seen by a different VA examiner, who also found that he did not meet the criteria necessary to render a PTSD diagnosis. In May 2018, the AOJ again denied service connection for PTSD, and Mr. Bufkin appealed that denial to the Board. In February 2020, the Board denied service connection for an acquired psychiatric disorder, finding that the record did not support a diagnosis of PTSD. Mr. Bufkin appealed to CAVC and CAVC affirmed.

At the Federal Circuit, Mr. Bufkin argued that CAVC erred by only taking into account how the Board applied benefit of doubt, as opposed to how the VA Secretary applied benefit of doubt at the AOJ level independently from the Board. The Federal Circuit rejected this argument, noting that it has for a long time interpreted "Secretary" in the benefit of doubt statute (38 U.S.C. § 5107(b)) to include the Board. "Secretary" is used in Section 7261(b)(1) to mean the same thing as it does in Section 5107(b). Thus, use of "Secretary" includes "the Board acting on behalf of the Secretary" in applying the benefit of doubt doctrine.

The Federal Circuit also explained that while CAVC is authorized to "review the entire record of proceedings before the Secretary in determining whether the benefit of the doubt rule was properly applied," CAVC is not required to conduct such review sua sponte in the absence of an explicit challenge to fact-finding or how benefit of doubt was applied. The Federal Circuit held that CAVC did not error in declining to consider how benefit of doubt was applied at the AOJ level and only looking at how the Board applied benefit of doubt.

Mr. Bufkin next argued that "take due account" in Section 7261(b) requires CAVC to conduct a de novo, non-deferential review of how the Board applied benefit of doubt. Highlighting Sections 7261(a) and 7261(c), the Federal Circuit explained that CAVC is prohibited from conducting a de novo review of material facts and CAVC reviews facts under a clear error standard. Here, the Federal Circuit held that CAVC applied the proper standard in reviewing the Board's application of benefit of doubt for clear error. Specifically, the Board found that the medical evidence showing the absence of a PTSD diagnosis was more persuasive than the evidence in favor of a diagnosis. CAVC concluded that neither the Board's underlying fact-finding nor its application of benefit of doubt was clearly erroneous. Thus, the Federal Circuit concluded that CAVC did not err.

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

Attorneys' Fees are Not Recoverable under EAJA after a Petition is Dismissed as Moot

by C. Jeffrey Price

Reporting on *Cavaciuti v. McDonough*, No. 22-1531, 75 F. 4th 1363 (Aug. 3, 2023).

In *Cavaciuti v. McDonough*, the Court of Appeals for the Federal Circuit (Federal Circuit) affirmed the Court of Appeals for Veterans Claims' (CAVC) denial of attorneys' fees under the Equal Access to Justice Act (EAJA) because the petition was dismissed as moot without any type of court adjudication, as required by EAJA.

In February 2020, the Board granted the veteran, Mr. Cavaciuti, entitlement to total disability for individual disability (TDIU), and it directed the Regional Office (RO) to grant an effective date. Despite the Board's directive, in April 2020, the RO made its own determination that Mr. Cavaciuti is capable of gainful employment and denied TDIU outright.

Mr. Cavaciuti filed a petition with the CAVC for writ of mandamus, seeking an order compelling the VA to grant him TDIU as directed by the prior Board order. The VA filed, and the Court granted, an unopposed motion for a 30-day stay so the parties could discuss a possible alternative disposition of the case. Later, the VA filed a response to the petition requesting that the Court dismiss the petition because the RO had since effectuated the Board's decision and awarded TDIU. Thus, the VA provided Mr. Cavaciuti with the relief he requested in the petition, making it moot. The CAVC then dismissed the petition as moot.

In March 2021, Mr. Cavaciuti filed an EAJA application seeking attorneys' fees and expenses. The CAVC read the EAJA application as arguing that fees were warranted under the "catalyst theory." That is, Mr. Cavaciuti argued he was a prevailing party for purposes of EAJA because he achieved the desired result by filing the lawsuit, which brought about a voluntary change in the VA's conduct. The CAVC found that its dismissal order did not award benefits, remand any claims, change the parties' legal relationship, or otherwise address the merits of the writ petition. It also rejected the argument that an exception is created when the government attempts to evade judicial review by orchestrating a case's dismissal as moot. Thus, the CAVC concluded Mr. Cavaciuti did not satisfy the criterion for prevailing party status under EAJA and it denied the application for fees.

On appeal to the Federal Circuit, Mr. Cavaciuti argued, among other things, that the CAVC erred in rejecting the catalyst theory because the VA's change in conduct was not voluntary and that it would not have granted the benefit if the action had not been filed. The Secretary responded that the CAVC's dismissal did not amount to a court-ordered change in the parties' legal relationship that resulted in prevailing-party status as set forth and required by EAJA.

The Federal Circuit agreed with the Secretary that Mr. Cavaciuti must be a prevailing party as defined by EAJA to be entitled to fees. Prevailing party status requires the award of a benefit or, at the very least, that a court order a remand predicated upon administrative error. That is, the Federal Circuit explained that the granting of a benefit from the agency without a judicial imprimatur, even if prompted by litigation, is insufficient under EAJA. The Federal Circuit notes that in this case there was no such judicial change in the legal relationship between the parties. The CAVC did not award any benefits or remand any claims because of Mr. Cavaciuti's writ of mandamus petition. The CAVC's dismissal order did not evaluate the merits of the petition and it did not materially alter the parties' legal relationship. In short, the Federal Circuit reasoned that to be a prevailing party under EAJA, there must be a judicial action changing the legal relations of the parties. In this case, the Board implemented the Board's TDIU decision following settlement discussions rather than based on any

court order. Therefore, Mr. Cavaciuti was not a prevailing party under EAJA and he is not entitled to attorneys' fees.

The Federal Circuit also addressed Mr. Cavaciuti's additional argument that the Secretary improperly used confidential settlement information, sharing it with the VA, to implement the TDIU before a court order could be entered. The Federal Circuit rejected that argument, in part, because Mr. Cavaciuti did not specify what confidential information was allegedly misused and there is nothing in the record suggesting the VA acted inappropriately. Therefore, the Federal Circuit affirmed the denial of the application for attorneys' fees under EAJA.

Jeff Price is an Appellate Attorney with National Veterans Legal Service Program (NVLSP).

Federal Circuit Affirms Permissibility of Regulatory Prohibitions on Eligibility for Benefits in Addition to Statutory Prohibitions

by John Butcher

Reporting on *Grounds v. McDonough*, 72 F.4th 1368 (Fed. Cir. 2023).

In *Grounds v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) upheld a decision of the United States Court of Appeals for Veterans Claims (CAVC) affirming a Board of Veterans' Appeals (Board) decision that denied Mrs. Grounds' claim for benefits because the veteran, Mr. Grounds, was not eligible for benefits.

Mr. Grounds served in the Army from May 1969 to November 1972. In October 1972, he was charged with being absent without leave (AWOL) during three separate periods from April 1972 to October 1972. Mr. Grounds sought discharge from the Army "for the good of the service" to avoid a trial by court-martial for his AWOL offenses. He stated that his military service was causing marital and financial problems and that he would continue going AWOL if he remained in the Army. Mr. Grounds' commanding officers recommended grant of the discharge request because they believed punishment would have minimal rehabilitative effect in his case and would provide no benefit to the Army. In November 1972, Mr. Grounds was discharged "For the Good of the Service" and "Under conditions other than Honorable."

In December 2013, Mr. Grounds applied for veterans benefits. In a November 2014 rating decision, a Veterans Affairs (VA) agency of original jurisdiction (AOJ) determined that Mr. Grounds' multiple periods of AWOL constituted "willful and persistent misconduct," rendering him ineligible for benefits under 38 C.F.R. § 3.12(d)(4). VA regulations in 38 C.F.R. § 3.12 address character of discharge. Section 3.12(a) provides that if a former servicemember did not die in service, veterans benefits are payable only if the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. Section 3.12(d)(4), in turn, provides that discharge or release for willful and persistent misconduct is considered to have been issued under dishonorable conditions. Mr. Grounds challenged the AOJ's November 2014 rating decision, and after he passed away in June 2016, Mrs. Grounds, the veteran's surviving spouse, was substituted for him as the claimant.

In January 2020, the Board issued a decision confirming the AOJ's findings. The Board determined that Mr. Grounds' multiple AWOL periods constituted "willful and persistent misconduct," that his discharge was "dishonorable" for VA purposes, and that he was therefore ineligible for benefits.

Mrs. Grounds appealed to CAVC, arguing that 38 U.S.C. § 5303(a) controlled as a matter of law and could not be superseded by the regulatory provisions of 38 C.F.R. § 3.12(d)(4). Under section 5303(a), a veteran is not eligible for benefits if the veteran was "discharge[d] or dismiss[ed] by reason of the sentence of a general court-martial… on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eight days…" In rejecting Mrs. Grounds' argument, CAVC

explained that 38 U.S.C. § 5303(a) was not the exclusive test of eligibility for benefits. Citing *Garvey v. Wilkie*, 972 F.3d 1333, 1334 (Fed. Cir. 2020), CAVC noted that the regulation promulgated by VA in 38 C.F.R. § 3.12(d)(4) was consistent with and authorized by statute. While Mr. Grounds' AWOL periods did not constitute a statutory bar to VA benefits under section 5303, the Board's finding that his AWOL periods constituted a regulatory bar to benefits under 38 C.F.R. § 3.12(d)(4) was proper. CAVC affirmed the Board, and Mrs. Grounds appealed.

Before the Federal Circuit, Mrs. Grounds argued that 38 U.S.C. § 5303(a) did not bar Mr. Grounds from receiving benefits because he was never convicted of an AWOL offense and his AWOL periods did not amount to a continuous period of at least 180 days. According to Mrs. Grounds, the finding that Mr. Grounds' AWOL offenses constituted willful and persistent misconduct under 38 C.F.R. § 3.12(d)(4) was inconsistent with section 5303(a). In advancing this argument, Mrs. Grounds indicated that she was not challenging the validity of 38 C.F.R. § 3.12(d)(4).

The Federal Circuit agreed with Mrs. Grounds that section 5303(a) did not bar Mr. Grounds from obtaining veterans benefits. However, it found that the Board's decision was properly grounded on the regulatory bar set forth in 38 C.F.R. § 3.12(d)(4). Citing its holding in *Garvey*, the Federal Circuit stated that section 5303 was not the exclusive test for benefits eligibility and that 38 C.F.R. § 3.12(d)(4) was a permissible additional prohibition on eligibility for benefits.

The Federal Circuit explained that the statutory definition of veteran in 38 U.S.C. § 101(2) also rendered Mr. Grounds ineligible for benefits. A former servicemember must be a "veteran" as defined in 38 U.S.C. § 101(2) to be eligible for benefits, and to be a "veteran" under section 101(2), a former servicemember must have been discharged "under conditions other than dishonorable." Because 38 C.F.R. § 3.12(d)(4) provides that a discharge for willful and persistent misconduct is a discharge under "dishonorable conditions," Mr. Grounds was not discharged "under conditions other than dishonorable," and he therefore did not meet the statutory definition of "veteran" for benefits purposes.

The *Grounds* decision is a straightforward application of judicial precedent affirming agency rulemaking authority. Whether it might also be an endangered species depends on the outcome of *Loper Bright Enterprises, et al., v. Raimondo*, 143 S. Ct. 2429 (2023). In May 2023, the Supreme Court granted certiorari in *Loper Bright* as to whether it should overrule *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

A staple of administrative law, *Chevron* sets forth a two-step inquiry for determining when courts should defer to an agency's interpretation of an ambiguous statutory provision. First, *Chevron* directs courts to ask whether the statute directly addresses the relevant issue, in which case courts and agencies "must give effect to the unambiguous intent of Congress." Second, where the statute is silent or ambiguous with respect to the relevant issue, courts must determine whether the agency's construction of the statute is permissible. 467 U.S. at 842-843. While the various strands of opposition to *Chevron* are beyond the scope of this summary, a central criticism involves the judiciary's abdication of its duty to interpret the law by ceding that interpretive function to agency officials. *See, e.g., Buffington v. McDonough*, 143 S. Ct. 14 (2022) (Gorsuch, J., dissenting from denial of certiorari).

The Federal Circuit's affirmation of VA's "willful and persistent misconduct" bar to veterans benefits in 38 C.F.R. § 3.12(d)(4) does not appear to implicate this concern. In *Garvey*, the Federal Circuit thoroughly examined the roots of 38 U.S.C. § 5303(a) and 38 U.S.C. § 101(2) in the G.I. Bill enacted in 1944. 972 F.3d at 1337-1339. Based on an independent analysis of the statutory text and legislative history, the Federal Circuit determined that 38 U.S.C. § 101(2) delegated authority to VA to interpret "conditions other than dishonorable," and that VA's classification of a discharge for "willful and persistent misconduct"

as a discharge under "dishonorable conditions" was consistent with the statute. *Id.* at 1340.

Of course, this favorable assessment is based on the same stable, backward-looking picture of the law as *Grounds*' invocation of *Garvey*. Going forward, whether *Loper Bright* extends to decisions like *Grounds* and *Garvey* will depend on whether the Supreme Court modifies the *Chevron* doctrine or overturns it altogether. The impact of *Loper Bright* on lower courts and administrative agencies may yet prove a non-story. But it could prove an interesting one we are writing for years to come.

John Butcher is an Attorney-Advisor with the Board of Veterans' Appeals.

Federal Circuit Confirms that an Explicit Discussion of New and Material Evidence is Not Required for the Purposes of Section 3.156(b)

By Katie M. Becker

Reporting on *Hampton v. McDonough*, 68 F.4th 1376 (Fed. Cir. 2023).

In *Hampton*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) considered whether 38 C.F.R. section 3.156(b) obligates the VA to explicitly state whether evidence submitted within a one-year appeal window is new and material even when the claim is implicitly denied after receiving that evidence. Or, as argued by the veteran, if the absence of that explicit decision renders the previous pending claim unadjudicated for the purposes of establishing an earlier effective date.

In short, the Federal Circuit applied its recent holding in *Pickett v. McDonough*, 64 F.4th 1347 (Fed. Cir. 2022) and similarly held that an explicit discussion is not required; in other words, it rejected the veteran's position.

The relevant facts follow. Ms. Hampton was denied total disability rating based on individual unemployability (TDIU) in a March 1999 rating decision. She did not appeal that decision but did submit within a year two pieces of evidence, a statement and a VA examination report identifying her daily headaches lasting 2-24 hours. VA construed this evidence as a request for an increased rating, later denied. It did not explicitly discuss whether those pieces of evidence were new and material, or whether she was entitled to TDIU. This appeal arises from a later TDIU grant.

In *Pickett*, the Federal Circuit held that an implicit finding from VA that evidence is new and material is enough to satisfy section 3.156(b). This is met "so long as there is some indication that VA determined whether the submission is new and material," and "if so, considered such evidence in evaluating the pending claim." *Pickett*, 64 F.4th at 1347.

Applying the *Pickett* standard to the facts of Ms. Hampton's case here, the Federal Circuit confirmed that section 3.156(b) was satisfied where there "was some indication that (1) the VA had determined that the May 1999 statement and May 1999 VA examination were new and material," and "(2) the VA considered that evidence as to her 1999 TDIU claim."

The court held that both elements were met. As to the first element, the VA determined that the May 1999 statement and VA examination report were new and material because the RO and BVA listed the May 1999 VA examination report as evidence considered, discussed the requirements for a higher rating, and denied her increase for migraines on the merits.

Although neither the RO nor the BVA identified her statement as evidence considered, the RO acknowledged receipt of her statement and issued a decision in response to it. Later, the BVA also addressed it and concluded that a higher rating was not warranted. The Federal Circuit held that all of

this constituted an implicit finding that those pieces of evidence were new and material.

As to the second element, the RO and Board's decisions indicated that the VA considered the May 1999 evidence in adjudicating Ms. Hampton's 1999 increased rating claim. Therefore, when they denied her a higher rating for her migraines based on schedular and extra-schedular criteria, this implicitly denied her entitlement to TDIU.

Notably, the Federal Circuit declined to address the issue of whether the BVA can make a new and material evidence determination in the first instance, but noted that its precedent appears to allow it to do so.

Katie M. Becker is the staff attorney at the University of Georgia Veterans Legal Clinic.

Light Reading: Pyramiding, CUE, and Harmless Error

by Eric Wilson

Reporting on *Perciavalle v. McDonough*, 74 F.4th 1374 (Fed. Cir. 2023).

This case is based on a clear and unmistakable error ("CUE") claim alleging that the VA erred in a 1971 rating decision by not awarding Mr. Perciavalle a second disability rating, under a separate diagnostic code, for his service-connected knee injury. The VA Regional Office ("RO") and Board denied the claim, believing that Mr. Perciavalle sought to retroactively apply a later interpretation of the regulation prohibiting pyramiding – despite him explicitly disclaiming that argument to the Board. By a "fractured," *en banc* opinion, the CAVC affirmed the Board, ruling either that the Board had not erred in its interpretation or that any error was harmless.

The Federal Circuit vacated the controlling portion of the CAVC's opinion, ruling that the Board erred in its interpretation of Mr. Perciavalle's claim and rejecting at least a majority of the controlling CAVC opinions. The complicated procedural history of this case unfortunately limits its immediate value, but practitioners should keep an eye on it because a precedential decision could affect decades of veterans' claims.

Mr. Perciavalle injured his left knee while serving in the Army and filed his initial VA compensation claim for that injury in 1966, shortly after leaving service. The examiner for that claim noted that Mr. Perciavalle experienced "[w]eakness and feeling of instability of left knee," but had a normal range of motion from 0 to 145 degrees. The VA thus awarded the veteran a 10% disability rating due to knee instability.

Mr. Perciavalle sought an increased rating for his knee in 1971 and underwent another orthopedic examination. The x-ray obtained in connection with that examination noted degenerative changes that were not noted in 1966 as well as a ten degree decrease to Mr. Perciavalle's range of motion with his left knee. The 1971 exam also noted continuing instability of Mr. Perciavalle's knee. Despite the degenerative changes, the VA denied an increased rating and continued Mr. Perciavalle's 10% rating for instability (that decision, the "1971 Decision"). He did not appeal the 1971 Decision, and it became final.

In 2015, Mr. Perciavalle asked the RO to reopen the 1971 Decision and determine whether it contained CUE, in accordance with 38 U.S.C. § 5109A and 38 C.F.R. § 3.105. Specifically, he contended that he was entitled to two separate disability ratings in 1971: the existing instability rating and a second rating for limitation of motion of flexion and discomfort secondary to arthritis. Mr. Perciavalle argued that he was entitled to the second disability rating because the 1971 x-ray "clearly show[ed] degenerative changes in the veteran's left knee" as compared to the 1966 examination, which resulted in a 10 degree decrease to his range of motion.

CUE claims are a "narrow category" of claims that could include, "for example, the VA's failure to apply an existing regulation to undisputed record evidence." *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022). But a CUE claim must be evaluated by the law as it existed *at the time the challenged decision was rendered*, even if the law or regulation

was later invalidated. *See id.* at 1959-60. Further, the regulation specifically excludes from CUE claims "the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. § 3.105(a)(1)(iv). Thus, to prevail on his CUE claim, Mr. Perciavalle must prove that the VA incorrectly applied the "regulatory provisions extant at the time." *Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008).

At the time of the 1971 Decision, and as applicable to Mr. Perciavalle's claim, the rating schedule provided a separate diagnostic code ("DC") for (1) recurrent subluxation or lateral instability of the knee (DC 5257), (2) arthritis, generally (DC 5003), and (3) limitation to flexion of the leg (DC 5260). As they do today, the regulations in 1971 allowed for the combination of two or more disability ratings in 1971, so long as there was no "pyramiding" of disabilities or symptoms. For VA disability purposes, "pyramiding" refers to evaluating the same disability, or the same manifestation of a disability, under various diagnoses. *See* 38 C.F.R. §§ 4.14, 4.25 (1971).

Separate ratings for non-overlapping symptoms have explicitly been allowed for nearly thirty years. In its 1994 decision in *Esteban v. Brown*, the CAVC ruled that separate ratings were permissible under 38 C.F.R. § 4.14 so long as "none of the symptomatology for any one of the[] conditions is duplicative of or overlapping with the symptomatology of the other . . . conditions." 6 Vet. App. 259, 262 (1994). Citing *Esteban*, the VA's General Counsel issued a precedential opinion in 1997 that specifically held that a veteran "who has arthritis and instability of the knee may be rated separately under diagnostic codes 5003 and 5257." VA Gen. Coun. Prec. 23-97 at 3 (July 1, 1997) (the "1997 VA G.C. Opinion").

However, as discussed above, the operative question for Mr. Perciavalle's CUE claim is whether he could have been awarded separate ratings under the law *as it existed in 1971*. To that end, the Federal Circuit discussed a 1964 decision by its predecessor court, the Court of Claims: *Wolf v. United States*, 168 Ct. Cl. 24 (1964). While *Wolf* involved a claim for disability retirement, rather than veterans' benefits, it directly examined both the VA's rating schedule and 38 C.F.R. § 4.14's pyramiding prohibition. The Court of Claims ultimately ruled that the veteran in *Wolf* was entitled to separate disability ratings for resections of his small and large intestines, noting that "each of the resections produce[d] a different manifestation." 168 Ct. Cl. at 32.

Whether *Wolf* accurately stated the law governing pyramiding as it existed in 1971 for veterans' benefits remains unanswered, however, because both the RO and the Board instead interpreted Mr. Perciavalle's claim as a request to retroactively apply the provisions of *Esteban* and the 1997 VA G.C. Opinion. The Board's position is particularly head-scratching because, in response to the RO's Statement of the Case, Mr. Perciavalle's representative sent a letter to the Board that expressly stated that they were not arguing for the application of "the 1997 General Counsel opinion or any VA rules after the 1971 rating decision." Instead, they contended that "the law has always permitted that a separate evaluation can be applied."

After denials by the RO and the Board, Mr. Perciavalle appealed to the CAVC, which eventually reviewed the case *en banc*. In the resulting opinion, the CAVC "fractured" into three groups, with three judges in each group. The first group ruled that the Board did not err and should be affirmed (the "No-Error Opinion"). The second group, itself split between two decisions, ruled that the Board had erred but should be affirmed because any error was harmless (the "Harmless-Error Opinions"). The final group ruled that the Board had erred and that error was prejudicial.

So, while a majority of CAVC judges found that the Board had erred, a separate (and controlling) majority affirmed the Board's ruling because those judges believed either that the Board did not err, or any error was harmless. The Federal Circuit first noted that there was an argument that the CAVC erred in counting the No-Error Opinion in the majority after a majority of justices had already determined an error occurred. But it eschewed analyzing that issue because it found reversible error in at least two of the controlling opinions,

representing four of the six judges that concurred in the majority opinion.

The Federal Circuit first dispatched the No-Error Opinion by finding that it "rested on an erroneous legal principle." That opinion not only read Mr. Perciavalle's claim as based on retroactivity but also found that he failed to satisfy the pleading requirements for a CUE claim by not included "a full-fledged legal argument as to why, in 1971, the RO erred in rejecting his claim."

Certainly, there is a higher pleading requirement for CUE claims than other claims for VA benefits, but the Federal Circuit also recognized that the VA has a "duty to sympathetically read a veteran's pro se CUE motion to discern all potential claims" when determining whether the CUE claim has been sufficiently described. *Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005). And while Mr. Perciavalle had the assistance of an accredited representative in filing the CUE claim, because that representative was not an attorney, Mr. Perciavalle was still considered "pro se." *See Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) ("[L]imited assistance [from a non-attorney representative] is insufficient to disqualify [a claimant] as a pro se claimant."). Thus, the No-Error Opinion also erred by failing to require a sympathetic reading of Mr. Perciavalle's CUE claim.

Moving next to the Harmless-Error Opinions, the Federal Circuit began with Judge Toth's opinion, which found any error harmless because a CUE claim is not allowed "wherever the alleged legal error or disputable question of law was resolved by a court decision or official Agency publication (such as a General Counsel precedential decision) issued after the decision the veteran seeks to collaterally attack became final" and that an error that "has yet to be identified as erroneous by a court decision or VA publication" cannot be CUE.

The Federal Circuit rejected that position, noting that "the language of the regulation itself can establish the existence of CUE." Citing to the Supreme Court's 2022 decision in *George*, the Federal Circuit found that "the correct CUE inquiry is simply whether the original decision was a 'correct application of a binding regulation' or law, regardless of later changes in the law or later decisions by the agency or a court. . . . In short, a legal error may be clear for the purpose of CUE despite the fact that there was no preceding court or agency decision on the precise legal question."

The second CAVC opinion that found harmless error was based on a finding that Mr. Perciavalle's medical records did not support a disability rating for limitation of motion secondary to arthritis even if CUE existed; Mr. Perciavalle objected to this finding on the grounds that it was appellate fact finding that was impermissible in accordance with *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir. 2021). As noted above, the Federal Circuit declined to analyze this issue because it already had rejected enough of the CAVC's majority opinion to support reversal.

The Federal Circuit ultimately ruled that the CAVC *did not* err in concluding that the Board incorrectly interpreted Mr. Perciavalle's CUE claim but *did* err in affirming the Board. Thus, it vacated the CAVC's opinion and remanded with directions to further remand the claim to the Board.

Eric Wilson is an Appeals Attorney with the Virginia Department of Veterans Services in Richmond, Virginia. He primarily practices before the Board of Veterans' Appeals, helping Virginia veterans obtain benefits that the VA improperly denied.

Federal Circuit Holds Constitutional Right of Access Allows Backdating of Edgewood Veteran's Effective Date

by Noah Goldberg-Jaffe

Reporting on *Taylor v. McDonough*, 71 F.4th 909 (Fed. Cir. 2023).

In *Taylor v. McDonough*, a plurality of the en banc United States Court of Appeals for the Federal Circuit (Federal Circuit) held that the Secretary of Veterans Affairs (Secretary) violated U.S. Army Veteran Bruce R. Taylor's fundamental right to access the courts. Thus, it held, he is entitled to an effective date for disability benefits equal to the date he would have been able to access had his rights not been violated.

By way of background, Mr. Taylor served on active duty in the U.S. Army from 1969 to 1971, including two tours in Vietnam. During that time, Mr. Taylor volunteered to participate as a human subject in a testing program at a U.S. Army facility in Edgewood, Maryland (Edgewood). While at Edgewood, he was subject to the testing of various chemical warfare agents so that their effect on his performance as a soldier could be studied. Importantly, before participating in the program, Mr. Taylor signed a secrecy oath that committed him to hide his participation in Edgewood from anyone "not officially authorized to receive such information" under threat of punishment consistent with the Uniform Code of Military Justice.

Mr. Taylor was honorably discharged on September 6, 1971, and despite attempting to get treatment for the posttraumatic stress disorder (PTSD) he believed he suffered as a result of his participation in Edgewood, he was not able to do so until after the Department of Defense declassified his name and connection to that testing program. On February 22, 2007, Mr. Taylor filed a claim for benefits for his PTSD. By October of that year, he had been granted a total disability rating based on PTSD, major depressive disorder, and individual unemployability, with an effective date of February 28, 2007. The February 2007 effective date was applied because under the governing statute, 38 U.S.C. § 5110, the earliest possible effective date (with some limited exceptions) for a disability claim "shall not be earlier than the date of receipt of application therefor." One exception to this general rule provides that a veteran's award effective date "shall be the day following the date of the veteran's discharge or release" if the application for benefits is "received within one year from such date of discharge or release." § 51110(b)(1).

Because Mr. Taylor believed that the exception applied to him even though he did not apply for benefits within one year of his discharge, he appealed to the Board of Veterans' Appeals (the "Board") requesting a September 7, 1971, effective date, the date following the day of his discharge. The Board denied his original claim, which the U.S. Court of Appeals for Veterans Claims (CAVC) vacated and remanded. On remand, the Board again denied his claim, and this time, the CAVC affirmed. The Federal Circuit reversed and remanded that decision, which was subsequently vacated, but it then considered the matter en banc.

Mr. Taylor presented three bases on which the Federal Circuit could grant him an earlier effective date: (1) the general doctrine of equitable estoppel; (2) 38 U.S.C. § 6303's outreach directives; and (3) the fundamental right of access to the courts as protected by the United States Constitution. In a plurality opinion written by Judge Taranto––joined by Chief Judge Moore and Circuit Judges Prost, Chen, Stoll, and Cunningham––the Court agreed with Mr. Taylor's third line of reasoning, holding that "when a veteran has been determined to be entitled to benefits for one or more disabilities connected to participation in the Edgewood program at issue, the required effective date of such benefits is the date that the veteran would have had in the absence of the challenged government conduct." The Court considered Mr. Taylor's challenge to be as applied and only extended it to the narrow set of circumstances presented.

Recently, the Supreme Court held in *Arellano v. McDonough*, 598 U.S. 1 (2023), that the § 5110(b)(1) exception is not subject to equitable tolling but declined to resolve whether other equitable doctrines such as equitable estoppel apply. Mr. Taylor's first argument was that equitable estoppel in fact does apply here. The Court addressed two foundational hurdles before reaching the merits of his argument. As an initial matter, it assumed without deciding that if the doctrine of equitable estoppel was legally available to Mr. Taylor, the secrecy oath that prevented him from filing his claim for decades reaches a sufficient level of affirmative misconduct required for making a claim. Then it assumed without deciding that the Board and the CAVC have the equitable power needed to award equitable remedies such as estoppel. Ultimately though, the Court held that *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), limits the availability of equitable estoppel such that it cannot be applied to the effective date provision in § 5110. *Richmond* confines the availability of the doctrine of equitable estoppel against the federal government to situations that the Congress has expressly allowed. 496 U.S. at 426. The Court held that neither § 5110 nor any related statute authorizes the Secretary to supersede *Richmond*'s presumption against the application of

equitable estoppel. Thus, equitable estoppel is not available to override the general rule and exceptions found in § 5110.

Mr. Taylor's second argument was based on 38 U.S.C. § 6303, which requires that the Secretary "advise each veteran at the time of the veteran's discharge . . . of all benefits . . . for which the veteran may be eligible." Mr. Taylor argued that § 6303 (1) justifies applying equitable estoppel even if compliance with § 6303 is not a statutory precondition to the application of § 5110, or (2) is such a precondition, and thus equitable estoppel need not be applied. The Federal Circuit disagreed with both arguments. In response to Mr. Taylor's first argument, the Federal Circuit held that if Mr. Taylor is correct that § 6303 is not a statutory precondition for § 5110, *Richmond* precludes the application of equitable estoppel for the simple reason that Congress has not authorized that use. In response to Mr. Taylor's second argument, the Federal Circuit held that its prior caselaw squarely instructs that the Secretary's compliance with § 6303 is not a precondition to § 5110, citing *Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999), and *Andrews v. Principi*, 351 F.3d 1134, 1137 (Fed. Cir. 2003). Thus, under the doctrine of stare decisis, and without Mr. Taylor's express request to overturn that precedent, *Rodriguez* and *Andrews* survived and § 6303 did not save Mr. Taylor's claim.

Mr. Taylor's third, and winning, argument was that the federal government violated his fundamental right of access to the only adjudicatory forum available to him to seek his alleged entitlement to VA benefits. The Court explained that as far back as *Marbury v. Madison*, the Supreme Court has protected "the right of every individual to claim the protection of the laws," 5 U.S. 137, 163 (1803), which is grounded in various constitutional provisions. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). While the Secretary agreed that this fundamental right exists and is available to Mr. Taylor, it pursued three defenses as to why Mr. Taylor may not use it to access an earlier effect date here. The Court dismissed all three.

First, the Secretary argued that the secrecy oath's effective interference with Mr. Taylor's right to access was not sufficiently severe to block him from adjudicating his claim. To this the Court decided that because the oath effectively and predictably caused Mr. Taylor to not file a claim until his name was declassified, it was sufficiently severe. Second, the Secretary argued that its interference was justified because it was necessary considering Edgewood's confidential nature. Because the government's secrecy oath threatened a fundamental right, the Court applied a strict scrutiny analysis. Doing so, it found that although the government indeed had a compelling state interest in military secrecy, it did not demonstrate why preventing Edgewood veterans from accessing the adjudicative process was narrowly tailored to meet that interest. To highlight this point, the Court explored the Secretary's history of setting up special administrative offices to handle sensitive issues and pointed out that it could have done so here. Third, the Secretary argued that even if a constitutional violation did occur, no remedy is available to Mr. Taylor. The Court responded that because the Secretary has the statutory authority to provide backdated benefits, it may do so here, even when that backdate is roughly five decades in the past.

After dismissing these arguments, the Court ultimately decided that because the Secretary violated Mr. Taylor's fundamental right to access his exclusive adjudicatory forum, he must "be given the effective date for his benefits, without regard to the claim-filing effective-date limits of § 5110, that he would have had in the absence of the government's unconstitutional interference with his access to the VA adjudicatory system." Additionally, it provided that although it was not ruling on the specifics nor the exact effective date for receipt of those benefits, the effective date could be as far back as September 7, 1971.

Two additional opinions accompanied the plurality. In a concurring opinion, Judge Dyk––joined by Judges Newman, Reyna, and Wallach, and partially by Judge Stark––agreed with the ultimate result of granting the earlier effective date to Mr. Taylor. However, Judge Dyk would have concluded that the case could have been properly resolved on non-constitutional grounds by holding that the government's conduct equitably estops it from limiting Mr. Taylor's recovery under § 5110. That holding, Judge Dyk wrote, would not require the Court to partially invalidate Congress's directive in §

5110 on constitutional grounds, which should be a consideration of last resort. In a dissenting opinion, Judge Hughes, joined by Judge Lourie, agreed that Mr. Taylor deserved an earlier effective date but disagreed that he had a constitutional right to that benefit. Rather, he would have held that it is the Congress's job to pass a statute that allows the Secretary to award Edgewood volunteers an effective date corresponding to their date of discharge. Because it did not do so here, Judge Hughes would have held that Mr. Taylor is not entitled to a backdated effective date.

Noah Goldberg-Jaffe is a law clerk to Judge Donald W. Molloy, United States District Court for the District of Montana.

Interpreting the Requirements for Rating an Unlisted Condition by Analogy

By Jasmine A. Crawford

Reporting on *Webb v. McDonough,* 71 F.4th 1377 (Fed. Cir. 2023).

In *Webb*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) vacated and remanded a decision of the U.S. Court of Appeals for Veterans Claims (Court) that misinterpreted the requirements of 38 C.F.R. § 4.20, analogous ratings, and erroneously concluded that Mr. Webb was not entitled to benefits because he did not show that his unlisted condition identically matched the requirements of the listed disability. The Federal Circuit held that rating an unlisted condition by analogy under § 4.20 did not require a veteran to demonstrate that his unlisted condition precisely matched the criteria of the listed disability.

John W. Webb honorably served in the United States Army from 1968 to 1970. After service, Mr. Webb was diagnosed with prostate cancer; his treatment caused him to develop erectile dysfunction. In 2015, a Regional Office (RO) of the Department of Veterans Affairs (VA) granted the veteran's reopened claim for service connection for erectile dysfunction and assigned him a noncompensable rating for his disability. However, at that time, the schedular rating criteria did not include a diagnostic code for erectile dysfunction. As a result, the RO rated Mr. Webb's disability by analogy to diagnostic code (DC) 7522, which provided that a 20 percent disability rating would be assigned for penis deformity with loss of erectile power. *See* 38 C.F.R. § 4.115b (2015). The RO determined that the veteran was only entitled to a noncompensable rating because he did not have a penis deformity with loss of erectile power. It should be noted that since then, DC 7522 has been amended to contain a single, noncompensable rating for erectile dysfunction. *See* 86 Fed. Reg. 54081 (Sept. 30, 2021) *codified at 38* C.F.R. § 4.115b, DC 7522 (2021).

Subsequently, Mr. Webb appealed this decision to the Board of Veterans' Appeals (Board), which also denied a compensable rating. The Board held that Mr. Webb was not entitled to a compensable disability rating because rating his disability by analogy, under 38 C.F.R. § 4.20, to DC 7522 required the veteran to show deformity of the penis with loss of erectile power, and the veteran did not have such deformity.

Subsequently, the Court affirmed the decision of the Board and cited *Williams v. Wilkie*, 30 Vet. App. 134 (2018), as being fatal to the veteran's argument. The Court in *Williams* implicitly found that when erectile dysfunction is rated under DC 7522, a veteran must show a penile deformity to be entitled to benefits. Mr. Webb appealed the Court's decision to the Federal Circuit and challenged the Court's interpretation of 38 C.F.R. § 4.20.

Ultimately, the Federal Circuit ruled in favor of Mr. Webb and held that the Court misinterpreted the language and meaning of 38 C.F.R. § 4.20. This regulation provides that a veteran having a condition that is not listed in the schedular rating criteria can be rated under a closely related disease or injury provided that the affected functions, anatomical location, and symptomatology of the veteran's unlisted condition are "closely analogous" to those of the listed condition.

The Court in *Lendenmann v. Principi*, 3 Vet. App. 345, 350 (1992), listed three factors to be considered when determining which diagnostic code is most "closely analogous" to a given unlisted disability, which were determining whether: (1) the functions affected by ailments were analogous; (2) the anatomical localization of the ailments was analogous; and (3) whether the symptomatology of the ailments was analogous. The Federal Circuit explained that the Court did not address the explicit requirements of § 4.20 or the *Lendenmann* factors. Instead, Mr. Webb was required to meet the exact requirements of DC 7522 as if he were being rated directly under the code. According to the Federal Circuit, the Court erred in requiring the veteran to show that his unlisted disability identically matched the criteria of that of the listed disability.

The Federal Circuit explained that the text of § 4.20 means that when rating an unlisted condition by analogy, the unlisted condition must be only "closely related" and not identical to the listed condition. To require a veteran's unlisted disability to precisely meet the criteria for a listed condition would defeat the purpose of rating by analogy. The Federal Circuit noted that the precedent of the Court supports this conclusion. For example, in *Stankevich v. Nicholson*, 19 Vet. App. 470, 472-73 (2006), the Court determined that the Board erred by requiring a veteran with an unlisted disability to demonstrate that his disability matched each requirement of a listed condition to which his disability was being rated by analogy.

In contrast, the Federal Circuit explained that the Court erred in determining it was bound by its interpretation of *Williams* requiring a veteran seeking to be rated by analogy to DC 7522 to meet the exact criteria of that diagnostic code. The Federal Circuit pointed out that *Williams* was distinguishable from Mr. Webb's case in that the veteran in *Williams* explicitly claimed that he met all of the requirements of the diagnostic code under which he sought benefits. Here, the veteran does not meet each of the requirements of DC 7522, which is why he sought to be rated by analogy and not directly under a listed code.

VA cited *Green v. West*, 11 Vet. App. 472, 475 (1998), to support its position that the veteran's unlisted disability must meet the exact requirements of the listed condition to be rated by analogy. However, the Federal Circuit held that this case did not actually support VA's view or the Court's position. In *Green*, VA had erroneously applied an outdated version of the schedular rating criteria to a veteran's case. *Id.* at 475. The Federal Circuit held that, in context, the cited language from *Green* required that, when determining which listed condition should be used to rate a veteran's condition by analogy, VA must apply the relevant version of the rating schedule.

In sum, the Federal Circuit found that Mr. Webb need not meet the exact requirements of the listed condition when rating his unlisted condition by analogy under 38 C.F.R. § 4.20. Since the Court misinterpreted the language of § 4.20, the Federal Circuit vacated and remanded the Court's decision to appropriately apply § 4.20 as previously discussed to Mr. Webb's case.

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The Court Defines the Board's Duty to Provide a General Statement of Evidence Considered in AMA Appeals

by Max C. Davis

Reporting on *Cook v. McDonough*, 36 Vet. App. 175 (2023).

In *Cook v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") held (1) that under 38 U.S.C. § 7113(c)(2)(A), a provision of the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"), evidence submitted "with" a Notice of Disagreement ("NOD") means evidence submitted at the same time as the NOD and no earlier, and (2) that 38 U.S.C. § 7104(d)(2) requires decisions of the Board of Veterans' Appeals ("Board") to provide an adequate general statement informing the claimant whether the Board did not consider evidence received during a time not permitted and what

options may be available for having the Department of Veterans Affairs ("the VA") consider that evidence.

The AMA created three Board dockets that impose various limitations on the evidence the Board may consider. Under the Board's "additional evidence" docket, for example, the evidentiary record before the Board is limited to the evidence considered by the Agency of Original Jurisdiction ("AOJ") in the decision on appeal, "[e]vidence submitted by the appellant and his or her representative, if any, with the [NOD]," and evidence submitted by the appellant and representative within 90 days following receipt of the NOD. 38 U.S.C. § 7113(c). Moreover, if evidence was received during a time not permitted, the Board must include in its decision "a general statement[] (A) reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under [section 7113]; and (B) noting such options as may be available for having the evidence considered by [the VA]." 38 U.S.C. § 7104(d)(2).

In *Cook v. McDonough*, a June 2019 AOJ decision denied multiple of Mr. Cook's claims. After the AOJ's denial, but before filing a NOD, he submitted to the record additional lay statements in July 2019 and a new private examination report in September 2019. Then, in October 2019, he filed a NOD for the Board's review of the June 2019 decision on its "additional evidence" docket. Neither the lay statements nor the private examination report was resubmitted with the NOD or within 90 days of filing the NOD.

The Board ultimately denied the claims and included the following statement in its decision:

> Evidence was added to the claims file during a period when new evidence was not allowed—after the 90 days following the election of the Evidence appeal lane. As the Board is deciding the claims herein, it may not consider this evidence in its decision. 38 C.F.R. § 20.300. The Veteran may file a Supplemental Claim and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously considered. *Id.*

Mr. Cook appealed the Board's decision to the Court, first arguing that 38 U.S.C. § 7113(c)(2)(A) plainly required the Board to consider all evidence associated with the VA claims file at the time the NOD was filed, which would have included the lay statements and private examination. The Court held that the statute clearly connotes a timeframe tied to the filing of the NOD and therefore plainly requires the Board to consider evidence submitted at the same time as, or simultaneously with, the NOD. Accordingly, it concluded that it was proper for the Board to not consider the evidence submitted between the time the AOJ issued its June 2019 decision and the time that the NOD was filed.

The Veteran additionally argued that the Board's decision failed to provide a general statement compliant with 38 U.S.C. § 7104(d)(2), and with respect to this argument the Court agreed that the Board erred. The Court began by addressing the standard of review and ruled that the "reasons and bases" standard in subsection 7104(d)(1) was not intended to apply to subsection 7104(d)(2)'s requirement that the Board provide a general statement. Rather, the Court held that Congress intended for Board decisions to include a general statement that is "adequate."

As to what constitutes an adequate general statement, the Court held that Congress plainly intended that an adequate general statement is one that "accurately informs" a claimant whether the Board did not consider evidence because it was received during a time not permitted by 38 U.S.C. § 7113 and what options may be available for having VA consider that evidence. The Board decision on review here did not provide an adequate general statement because its statement inaccurately informed Mr. Cook only that it did not consider evidence received after the 90 days following receipt of the NOD (as opposed to it not considering the evidence submitted after the AOJ decision and before the filing of the NOD). The Court found that this prejudiced Mr. Cook, and it therefore set aside

the Board decision and remanded the matter for the Board to include in its decision an adequate general statement as required by 38 U.S.C. § 7104(d)(2).

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

The AMA Additional Evidence Docket's 90-day Evidentiary Window Begins the Date the Board Receives a VA Form 10182, Not the Date it is Uploaded or Acknowledged

by S. Michael Stedman

Reporting on *Davis v. McDonough*, 36 Vet. App. 142 (2023).

In *Davis*, a panel of the U.S. Court of Appeals for Veterans Claims (Court) comprised of Chief Judge Bartley and Judges Falvey and Laurer addressed a July 2020 Board of Veterans' Appeals (Board) decision which found a December 2018 Notice of Disagreement (NOD) to be untimely. The Court affirmed the July 2020 Board decision, holding that the Board did not clearly err in determining it received the Appeals Modernization Act (AMA) VA Form 10182 (AMA NOD) on August 14, 2019 or in refusing to consider evidence submitted after the evidentiary window had closed, and that certain evidence was not in the Board's constructive possession. Chief Judge Bartley authored the opinion of the Court, and Judge Falvey issued a concurring opinion.

Mr. Stanley L. Davis' claim for service connection for lupus was initially denied in a May 2004 Regional Office (RO) rating decision. Following a request to reopen, the claim was granted in June 2010. Mr. Davis appealed the effective date to the Board, arguing that the May 2004 RO rating decision contained clear and unmistakable error (CUE). Following a February 2014 Board remand, the RO denied the CUE motion in a May 2016 rating decision.

Mr. Davis' counsel contacted VA in August 2016 to make a Privacy Act request, which was fulfilled in April 2018. Mr. Davis filed a December 2018 NOD in response to the May 2016 rating decision. He argued that he was not made aware of the rating decision until the fulfillment of the Privacy Act request and VA did not respond to his counsel's letters.

The RO notified Mr. Davis that his NOD was untimely in January 2019 and he filed an NOD as to this determination that same month. A June 2019 Statement of the Case (SOC) was issued, in which Mr. Davis was notified that he could opt into AMA by filing an AMA NOD with the Board.

On August 14, 2019, Mr. Davis' AMA NOD was submitted via facsimile to the Board's fax number. Mr. Davis selected the additional evidence docket. The Board sent a letter dated September 9, 2019, stating Mr. Davis had 90 days from the date the Board received his AMA NOD to submit additional evidence. On September 12, 2019, Mr. Davis' counsel responded to the Board letter, requesting the Board wait the full 90 days before making a decision. Mr. Davis' counsel claimed that the Board received the AMA NOD on September 9, 2019, meaning the 90-day window would close on December 6, 2019. On December 5, 2019, Mr. Davis submitted a brief with evidence in support of his appeal.

In its July 2020 decision, the Board found the 90-day window began on August 14, 2019, the date the Board received the AMA NOD, and ended on November 12, 2019. As such, the December 5, 2019 brief and evidence were submitted outside of the evidentiary window and could not be considered. Finally, the Board found that the December 2018 NOD was untimely as to the May 2016 RO rating decision.

Under AMA, appellate review is initiated by filing an AMA NOD with the Board, at which time an appellant must choose one of three dockets, each with different restrictions on the evidence which the Board may review. Under 38 U.S.C. § 7113(c)(2)(B),

the additional evidence docket provides a 90-day window following receipt of an AMA NOD to submit evidence. A Board determination regarding the date of receipt of an AMA NOD is a finding of fact that is reviewed under the "clearly erroneous" standard.

Mr. Davis argued that the Board erred in concluding that it received the AMA NOD on August 14, 2019, and therefore erred in determining that the 90-day evidentiary window closed on November 12, 2019. In this regard he contended that "receipt" under 38 U.S.C. § 7113(c) meant taking physical possession of a document and differed from "filing" under section 7105(a). The crux of Mr. Davis' argument was that the Board did not take physical possession of the AMA NOD until VA's Evidence Intake Center (EIC) uploaded the document to his claims file and the Board acknowledged receipt on September 9, 2019.

The Court found that any distinction between "file" and "receipt" was insignificant. Notably, Mr. Davis compared the plain language and congressional intent of 38 U.S.C. § 7113(c) to that of 38 U.S.C. § 7105(b)(1)(B) and section 7266(c), which pertain to the statutory mailbox rules of the Board and the Court. However, Mr. Davis did not mail his AMA NOD to the Board, he faxed it. The Court noted that when a document is successfully faxed, it is sent and received immediately.

Mr. Davis argued that the date of receipt should be September 9, 2019, as that is the date his AMA NOD was uploaded to his claims file by EIC and the Board was made aware of it. The Court found this argument unpersuasive, as the Board's awareness of an AMA NOD is irrelevant to the date of its receipt, as evidenced by the 90-day window, during which the Board cannot act on an appeal. Moreover, Mr. Davis acknowledged that he properly filed the AMA NOD and his argument attempting to distinguish between EIC's handling of the AMA NOD and the Board's handling of it was underdeveloped. As such, the Court found there was no clear error in the Board's findings that the 90-day evidence window had closed on November 12, 2019, and that the evidence submitted by Mr. Davis on December 5, 2019 was untimely.

Mr. Davis alternatively argued that the Board had constructive possession of three documents in support of the timeliness issue: a Government Accountability Office (GAO) report; letters dated June 2019 from his counsel to VA regarding the nonreceipt of VA correspondence in other veterans' cases; and the "Chisholm" and "Rauber" affidavits from *Romero v. Tran*, 33 Vet. App. 252 (2021).

The Court noted that the requirements of constructive possession of evidence are (1) the evidence must pre-date the Board decision; (2) it must be within the Secretary's control; and (3) it must be relevant and reasonably connected to the claim. Mr. Davis argued these documents were relevant and reasonably related as they highlight his position that VA's mail practices were irregular, and VA failed to effectively perform its mailing.

The GAO report was created to examine the efficiency and cost-effectiveness of VA's mailing practices. As it did not address the accuracy or reliability of VA's mailing practices, the Court found the report irrelevant.

Regardless of relevance, the Court also found the GAO report would not have been reasonably expected to be constructively before the Board. The Court noted that Mr. Davis did not mention irregularity in VA's mailing practices, rather his only assertion was that the May 2016 rating decision was not received. Furthermore, the report was a non-VA generated document which was not mentioned by Mr. Davis prior to his untimely December 2019 evidence submission. As such, the GAO report had no real connection to the timeliness issue and could not have been in the Board's constructive possession.

The Court found the June 2019 letters to be not relevant to the claim, noting it was unclear why letters sent to VA leadership regarding other veterans' claims would be associated with Mr. Davis' claims file. The Court also found it would not be reasonable for the Board to have investigated, gathered, and considered the June 2019 letters, as there was no suggestion in the record prior to the out-of-window December 2019 evidence submission

of a pattern of mailing irregularity in general or with respect to Mr. Davis' counsel.

As to the affidavits, the Court explained that this appeal differed from *Romero*, as the present issue was whether the Board constructively possessed the affidavits and should have considered them in its January 2020 decision. The Court noted that the *Romero* decision was issued six months after the Board's January 2020 decision, meaning the discussion of the affidavits therein could not be a basis for constructive possession. The Court further noted that the affidavits were not referenced or attached to the December 2019 brief, nor did Mr. Davis or his counsel mention mailing irregularities regarding other law firms. Accordingly, the affidavits were not reasonably connected to his case and his assertion of constructive possession could not stand.

Mr. Davis also argued that the affidavits were known by VA at large since June 2019, and therefore could reasonably be expected to be associated with his appeal. In support of his argument, Mr. Davis likened the affidavits and GAO report to the National Academy of Sciences (NAS) reports, which pertain to disabilities associated with herbicides. The Court pointed out that there was no evidence that anyone at VA outside of those associated with the *Romero* appeal would have been aware of the affidavits. Furthermore, the affidavits and GAO report are not as well-known as the NAS reports, which were required by the Agent Orange Act, and there is no dispute that Board adjudicators are aware of the NAS report.

Another argument by Mr. Davis was that the Board should have considered the December 2019 brief that included discussion of the GAO report and the June 2019 letters, as this constituted argument and not evidence. Mr. Davis asserted that the inclusion of the GAO report and the June 2019 letters in the December 2019 brief established relevance and reasonableness to trigger constructive possession.

The Court disagreed, as the argument presented in the December 2019 brief relied on the evidence of the GAO report and the June 2019 letters in establishing a material fact. The Court noted that if Mr. Davis' position were accepted, it would essentially create a loophole to allow constructive possession of evidence when actual possession is prohibited. As there was no evidence in the record to suggest that VA mail irregularities would be relevant to the appeal, the Court found that it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law for the Board to refuse to consider the evidence submitted with the December 2019 brief.

Mr. Davis also argued that the June 2019 letters constituted new and material evidence under 38 C.F.R. § 3.156(b), however the Court rejected this position, as the letters were not actually or constructively before VA at any point in this case.

Finally, Mr. Davis made the argument that he detrimentally relied on the September 9, 2019 letter in determining the 90-day evidentiary window for his appeal. However, the Court noted that there was no information in that letter which would indicate that the evidentiary window began on September 9, 2019. Additionally, the Court pointed out that Mr. Davis had completed the AMA NOD, and that document specifically provides that an appellant has 90 days to submit additional evidence when selecting the additional evidence docket.

Accordingly, the Court affirmed the July 2020 Board decision which found that the December 2018 NOD was not timely filed.

In a concurring opinion, Judge Falvey stressed the importance of relevancy and reasonableness when addressing constructive possession. Judge Falvey emphasized that constructive possession is a tool to ensure that relevant evidence is included when it can be reasonably expected that VA would have investigated, gathered, and considered that evidence. In this case, Judge Falvey noted that the evidence proffered by Mr. Davis was irrelevant to his claim and would not have been reasonably expected to be included as part of the record.

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

Under Diagnostic Code 8004, Separate Ratings Under Other Diagnostic Codes Do Not Replace the Minimum 30% Rating for Ascertainable Manifestations Not Rated as Compensable

by Monica Ball Jackson

Reporting on *Duran v. McDonough*, 36 Vet. App. 230 (2023).

In *Duran*, the U.S. Court of Appeals for Veterans Claims (Court) reversed the Board of Veterans' Appeals' (Board) decision to discontinue Mr. Duran's minimum 30 percent rating under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8004 for Parkinson's disease. The Board decision discontinued the minimum rating for manifestations that are noncompensable because, it reasoned, Mr. Duran had compensable ratings for manifestations of Parkinson's under other diagnostic codes that totaled more than the 30 percent minimum. The Court opinion, authored by Judge Toth, held that, under the plain meaning of the regulation, manifestations of Parkinson's that are compensable under other diagnostic codes are added to the minimum 30 percent rating.

On appeal, Mr. Duran contended that the minimum 30 percent rating remained as long as there are manifestations that are not compensable under any other diagnostic code. In response, the Secretary argued that the minimum 30 percent rating should be replaced when manifestations rated under other diagnostic codes exceed the minimum 30 percent rating and, in the case of ambiguity, his interpretation was entitled to deference. The question before the Court is the proper interpretation of 38 C.F.R. 4.124a in this context.

The Court began its de novo review by looking at the language of the regulation, applying the rule that "if the meaning of a regulation is clear from its language, that meaning controls and that is the end of the matter." The Court noted that the text, history, structure, and purpose of a regulation must be considered prior to finding that a regulation is ambiguous and considering whether deference is warranted. In that regard, the Court focused its attention on three components of § 4.124a: the preamble, Diagnostic Code 8004, and the note applicable to Diagnostic Code 8004.

In discussing these three components, the Court found that the preamble provides that manifestations of Parkinson's are rated under the rating schedule applicable to the relevant bodily system. The Court next noted that under Diagnostic Code 8004 service-connected Parkinson's justifies a minimum rating of 30 percent regardless of the specific manifestations. Finally, the Court concluded that the note to Diagnostic Code 8004 acknowledges that ratings in excess of the minimum may be assigned and emphasizes the importance of clearly identifying the diagnostic codes for such ratings.

Because the majority found the regulation unambiguous and was able to discern the plain meaning using standard interpretive principals, they did not reach the Secretary's argument that his interpretation was entitled to deference.

Judge Jaquith concurred with the majority opinion but wrote separately to express his belief that the pro-veteran canon informs the plain meaning of regulatory provisions. In other words, Judge Jaquith believes the pro-veteran canon should be considered when evaluating whether a regulation is ambiguous. Further, Judge Jaquith agreed with Judge Allen's concurrence in part that Board decisions are not due any deference.

Judge Allen concurred in part and concurred in the judgment. Unlike the majority, Judge Allen found §

4.124a, Diagnostic Code 8004 to be ambiguous in that the language in the three components is susceptible to other reasonable interpretations. After establishing ambiguity, his next inquiry was whether the Secretary's interpretation of the regulation was entitled to deference. Citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019), Judge Allen unequivocally opined that Board decisions are not entitled to *Auer* deference because they are not binding and do not set out authoritative policy or the Secretary's official position on the meaning of ambiguous regulations. Having found that deference was not warranted, Judge Allen applied the pro-veteran canon and agreed with the majority's conclusion. Judge Allen expressed the view that a finding of ambiguity is required before applying the pro-veteran canon.

In sum, the Court held that the minimum 30 percent rating under Diagnostic Code 8004 for noncompensable manifestations of Parkinson's disease is added to and not replaced by separate ratings under other Diagnostic Codes so long as there is at least one ascertainable manifestation that is not rated as compensable under any other Diagnostic Code.

Monica Ball Jackson is an Attorney Advisor at the Board of Veterans' Appeals.

Court Interprets Diagnostic Codes for Shoulder and Knee Disabilities

by Claire L. Hillan Sosa

Reporting on *Estevez v. McDonough*, 36 Vet. App. 157 (2023), *appeal docketed*, No. 23-2284 (Aug. 16, 2023).

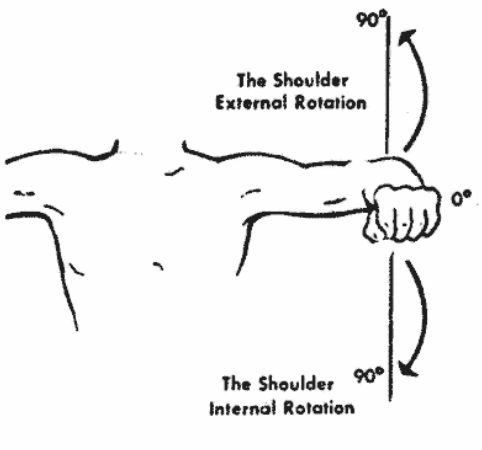
In *Estevez*, the U.S. Court of Appeals for Veterans Claims ("Court") interpreted shoulder, knee, and lichen planus rating criteria existing prior to February 7, 2021 amendments.

Mr. Estevez challenged the Board's denial of increased staged ratings for all three disabilities. The Court affirmed in part and set aside in part the Board's decision, ruling that:

1. Pre-amendment Diagnostic Code 5201 for limitation of motion of the shoulder contains no rating criteria for limitation of rotation.

2. Pain is a single manifestation of knee disabilities, and compensating pain separately depending on circumstance (at rest or on motion) violates the prohibition on pyramiding.

3. It could not address whether "required" systemic therapy must be prescribed for rating a skin disability, and instead remanded for reasons and bases.



Diagnostic Code 5201 has never included rating criteria for limitation of shoulder rotation.

The Court affirmed the Board's denial of a rating greater than 20 percent for Mr. Estevez's right shoulder under Diagnostic Code 5201.

Under the rating criteria prior to February 2021 amendment, Diagnostic Code 5201 provided for a 30 percent evaluation of the dominant side shoulder if motion was limited to midway between the side and shoulder level. 38 C.F.R. § 4.71a, Diagnostic Code 5201 (2015). In February 2021, the Secretary amended

the criteria to clarify terminology, which contains the same language but also specifies, "flexion and/or abduction limited to 45" degrees. 38 C.F.R. § 4.71a, Diagnostic Code 5201 (2021).

In addition, 38 C.F.R. § 4.71, which has not been amended since its 2002 promulgation, explains that the starting point for measuring internal rotation of the shoulder should be with the arm abducted 90 degrees from the body (parallel to the ground) and the elbow 90 bent 90 degrees (with the fist directed forward). The range of motion is then measured depending on how much the veteran can move the arm up or down with the elbow remaining bent. 38 C.F.R. § 4.71, Plate I. The maximum normal extents of internal and external rotation are 90 degrees each.

In *Estevez*, the record showed abduction limited to 90 degrees, functional loss due to pain and inability to carry heavy objects, and limitation of internal rotation to 55 degrees. Mr. Estevez thus argued that under the pre-2021 version of Diagnostic Code 5201, the rating schedule included all ranges of shoulder motion—not just flexion or abduction—and he should be awarded a 30 percent evaluation because his range of internal rotation was closer to 45 degrees (halfway from the side) than 90 degrees (shoulder level).

The Court rejected Mr. Estevez's argument, interpreting the pre-amendment criteria to be limited to flexion or abduction because the language at 38 C.F.R. § 4.71a, Diagnostic Code 5201 (2015), was incompatible with the explanation of shoulder rotation in § 4.71. The rating criteria were (and still are) based on the amount a claimant can move their arm away from the side of their body, and the method for measuring internal shoulder rotation is entirely different starting away from and moving toward the body. The rating criteria, the Court held, were dependent entirely on the range of motion in the sagittal and coronal planes, while shoulder rotation takes place in the transverse plane.

The Court thus held that a shoulder-rotation disability has no bearing on evaluation under Diagnostic Code 5201.

Knee pain at rest and knee pain on motion are a single manifestation of disability and cannot be compensated separately.

Although it remanded for reasons and bases, the Court confirmed the Board's and Secretary's understandings that pain caused by a knee disability may be compensated only once, without separate ratings for pain at rest and pain on motion. The Court considered the application of three Diagnostic Codes to Mr. Estevez's service-connected knee disability:

- 5258, assigning 30 percent for dislocated semilunar cartilage with frequent episodes of locking, pain, and effusion;
- 5259, assigning a 10 percent evaluation for symptomatic removal of semilunar cartilage; and
- 5261, assigning 0 percent for limitation of extension to 5 degrees and 10 percent for extension limited to 10 degrees.

A meniscus/semilunar cartilage rating under Diagnostic Code 5258 or 5259 does not preclude a separate range-of-motion rating under Diagnostic Code 5261 or similar. *Lyles v. Shulkin*, 29 Vet. App. 107 (2017). And neither does a meniscus rating necessarily preclude a lateral-instability rating under Diagnostic Code 5257. *Walleman v. McDonough*, 35 Vet. App. 294 (2022).

In *Estevez*, evidence showed that during the relevant period, Mr. Estevez experienced flare-ups and additional symptoms after prolonged standing or walking. Range-of-motion testing showed limitation of flexion to 110 degrees, and a later report of frequent episodes of knee locking and pain and history of meniscal tear and Baker's cyst. Subsequent testing during a flare-up showed flexion limited to 85 degrees and extension limited to 10 degrees. Examination showed less movement than normal, interference with sitting and standing, and pain.

Mr. Estevez sought a separate rating for limitation of extension under Diagnostic Code 5261 to account for his pain on motion—which he asserted was not

compensated within his 20 percent evaluation under Diagnostic Code 5258.

The Court agreed with the Secretary's assertion that pain is a single manifestation of disability, regardless of whether at rest or on motion. Mr. Estevez could not, therefore, obtain a separate compensable rating for his pain on motion under Diagnostic Code 5261 for limitation of motion, because it was already compensated under Diagnostic Code 5258 for meniscus disability.

The Court nevertheless remanded for reasons and bases because it was unclear on what facts and under which Diagnostic Codes it assigned ratings during the period on appeal.

Open question: whether systemic treatment of skin disability must be prescribed for rating purposes.

The Court remanded for reasons and bases without addressing the legal question posed by the parties regarding interpretation of rating criteria for skin disabilities.

Skin disabilities are evaluated in several ways, but as relevant in *Estevez* can be determined based on the type of therapy required. Prior to August 13, 2018, 38 C.F.R. § 4.118, Diagnostic Code 7806 (2012), for dermatitis or eczema assigned a 0 percent evaluation for no more than topical therapy during the past 12 months, 10 percent for systemic therapy such as corticosteroids or other immunosuppressive drugs required for total duration of less than six weeks during the past 12 months, 30 percent if the systemic therapy was required for six weeks or more, and 60 percent if the requirement for systemic therapy was constant or near-constant.

The rating language prior to August 13, 2018, essentially mirrors the current General Rating Formula for the Skin, but without the Secretary's limitation of systemic therapy to exclude topical treatment. 38 C.F.R. § 4.118 (2018).

In *Estevez*, the parties disputed the definition of "required" as it appeared in Diagnostic Code 7806 prior to August 13, 2018. The Secretary asserted that Mr. Estevez was not entitled to a 60 percent evaluation prior to February 2016 because that was when constant or near-constant systemic therapy was first prescribed. Mr. Estevez, on the other hand, argued for an earlier 60 percent rating based on evidence that—prescription or not—he was constantly or nearly constantly relying on systemic therapy to treat his lichen planus prior to receiving a doctor's prescription.

But the Court did not reach an interpretation of whether "required" means "prescribed" because the Board failed to address lay statements in February 2016 medical records indicating that Mr. Estevez previously received steroid shots. The Court emphasized its prior precedent from *Swain v. McDonald*, 27 Vet. App. 219 (2015). The Board must not mechanically and arbitrarily assign an effective date for increased or staged ratings.

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38 USC § 5104(b) Applicability and Board Attorney Expertise Addressed by the Court

by Gillian Slovick

Reporting on *Greer v. McDonough*, No. 20-3047 (June 12, 2023).

In *Greer*, the Court of Appeals for Veterans Claims (Court) addressed two issues of first impression: 1) Whether the Board of Veterans' Appeals must provide notice pursuant to 38 U.S.C. § 5104(b) notice in AMA cases; and 2) Whether the Board must obtain an expert opinion to interpret a legal document.

This case followed the appeal of a Board of Veterans' Appeals (Board) decision denying Ms. Greer's (the substitute appellant) late father's claim for non-service connection pension.

In its decision, considered under the Appeals Modernization Act (AMA), the Board concluded that the veteran's income, including a family trust,

rendered him ineligible for non-service-connected pension.

Ms. Greer argued that the Board erred in failing to provide adequate notice under 38 U.S.C. 5104(b), and that the Board's attorneys were not qualified to interpret the terms of the veteran's trust.

Addressing the issue of notice in AMA cases, the Court conceded that it had historically presumed that section 5104 applied to Board decisions. In *Greer*, the Court reexamined this presumption and held that following the passage of the AMA, Congress made clear that that the requirements of section 5104(a) [and therefore 5104(b)] were not applicable to Board decisions.

In so holding, the Court noted that following the passage of the AMA, the Honoring Our PACT Act of 2022 was passed. The Court explained that the PACT Act rules of construction specifically noted that amendments made to 38 USC § 5104, sections (c) and (d), *were not to be construed as making section 5104(a) applicable to the Board*. The Court explained, then, that "the plain language of the provision reads as a *continuance* of Congress's previously held understanding-that is that AMA-amended section 5104(b) did not apply to the Board at the time the PACT Act was passed and should not apply to it now." (Emphasis added).

Additionally, the Court rejected Ms. Greer's argument that an outside legal expert was required to interpret the veteran's trust. Pointing to *Colvin v. Derwinski,* which discussed the required expertise to make medical determinations, Ms. Greer argued that a legal expert was similarly required to interpret the Veteran's trust document. *Colvin v. Derwinski*, 1 Vet. App. 171 (1991).

The Court rejected this argument, explaining that Board attorneys were generalists capable of doing the research necessary to interpret legal documents such as the veteran's trust.

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

CAVC Denies Power to Review the Propriety of a Regional Office's Denial of a Request for Substitution

by John Hubert

Reporting on *Mayfield v. McDonough*, 36 Vet. App. 251 (2023).

In *Mayfield*, the U.S. Court of Appeals for Veterans Claims (Court) vacated and dismissed for lack of jurisdiction a November 2021 Board of Veterans' Appeals (Board) decision that denied a substitution request for a pending claim for special monthly (non-service connected) pension, dependency and indemnity compensation, and death pension benefits, to Mrs. Virginia T. Mayfield, the surviving spouse of veteran Mr. Jerry C. Mayfield. The Court held that a movant dissatisfied with the Regional Office's (RO) denial of a request for substitution may not seek to have the Court directly review the propriety of the RO's ruling, and that the Court will not grant a motion for substitution unless the Agency determines that the movant is the appropriate party to step into the appellant's place.

After Mr. Mayfield died in July 2020, the U.S. Department of Veterans Affairs (VA) granted the request of his surviving spouse, Mrs. Mayfield, to be substituted in his pending claim for special monthly (non-service connected) pension, and she also filed two claims on her own behalf as his widow: dependency and indemnity compensation and death pension benefits. The Board denied all three of Mrs. Mayfield's claims, and the next month she filed a notice of appeal with the Court. However, while briefing was underway, Mrs. Mayfield's counsel informed the Court that she had passed away in January 2022.

Counsel promptly filed a motion on behalf of Ms. Jacquelyn W. Covington, Mrs. Mayfield's granddaughter, to be substituted as the

appellant. Ms. Covington asserted that she is a proper substitute because, having paid six hundred and forty dollars towards her grandmother's burial expenses, she qualified as an accrued benefits claimant. The Court stayed normal appellate proceedings and ordered the Secretary to respond to the motion. The Secretary advised that the RO had not yet reached a determination on the substitution request that Ms. Covington had filed with VA and that, consequently, he was not able yet to take a position on her motion. The Court ordered the Secretary to file an additional update within thirty days.

On September 5, 2022, the Court received the first of several submissions from Ms. Covington, with it specifically being a *Solze* notice, where she informed the Court that her counsel had uncovered a VA letter stating that it had not yet received evidence that she incurred expenses related to Mrs. Mayfield's last sickness or burial. Ms. Covington maintained that the letter reflected either oversight of the evidence she had submitted or erroneous rejection of that evidence, and when the next update by the Secretary reiterated the status quo that the RO had not yet reached a determination on the substitution request and that he was not yet able to take a position on the matter, Ms. Covington filed an opposed motion for leave to submit a reply, which essentially means that Ms. Covington charged the RO with either incompetence or bad faith.
On October 19, 2022, the Court issued an order holding the motion for leave in abeyance and instructing the Secretary within thirty days to have VA reach a determination on Ms. Covington's substitution request and to inform the Court of his position on the substitution motion pending in the case.

A few weeks later, Ms. Covington filed a second *Solze* notice, in which she advised that the RO informed her, before it could rule on her substitution request, that she would have to file VA Form 21-601 instead of VA Form 21-0847, which she had already filed, and she believed that this requirement was legally erroneous. A week later, Ms. Covington filed a third *Solze* notice, pointing out what she considered to be additional VA missteps, and adding to the confusion, the Secretary filed his response to the October 19 Court order, where he explained that because Ms. Covington had not filed the proper form, the RO could not rule on her substitution request, and because of that the Secretary would not take a position on the substitution motion of the Court. This elicited another opposed motion from Ms. Covington for leave to file a reply.

The Court issued another order in December 2022, which reminded the Secretary that compliance with Court deadlines is not optional and instructed him within thirty days to have the RO rule on Ms. Covington's substitution request, whether on substantive or procedural grounds, and to inform the Court of his position on the substitution motion pending before the Court. Six days later, the Secretary informed the Court that the RO had denied Ms. Covington's request for substitution because she had not returned VA Form 21-601 and that the RO had advised her of the right to seek higher-level or Board review of the denial, and that given the RO's resolution, the Secretary opposed Ms. Covington's motion to substitute in the present case. The Court then granted Ms. Covington's motions to file a reply and for initial review by a panel to resolve the substitution motion in light of the parties' dispute.

The *Mayfield* case was heard by the panel of Judges Meredith, Toth, and Lauer, and the opinion of the Court was written by Judge Toth. The opinion starts by noting that in *Breedlove v. Shinseki*, 24 Vet. App. 7, 20-21 (2010), the Court holds that it has the discretion to permit a movant to be substituted for an appellant who dies during the pendency of an appeal before the Court, provided that there is either a determination by VA or a concession by the Secretary that the movant is an eligible accrued benefits claimant, and that the RO's ruling is usually dispositive on the factual question of a movant's

status as an eligible, and thus proper, accrued benefits claimant.

While noting that *Breedlove* outlines some of the actions the Court may take when the status is legitimately in dispute, the Court here realizes that it had to consider an issue that the *Breedlove* case did not specifically address, and that is whether a movant dissatisfied with the RO's denial of a request for substitution may seek to have the Court directly review the propriety of the RO's ruling.

The Court then next chooses to answer that question negatively, and by doing so reaffirms that the Court will generally not grant a motion for substitution unless the Agency determines that the movant is an appropriate party to step into the appellant's place, and that a would-be substitute dissatisfied with the RO's determination must challenge it through the administrative appeals process.

In justifying the Court's conclusions, the Court turns to case and statutory precedent, starting from the basic premise that as a general rule in VA law, when a claimant dies, the claim for benefits also terminates. *See Crews v. McDonough*, 63 F.4th 37, 39 (Fed. Cir. 2023). But by statute, certain successors acquire an interest in benefits that were due and unpaid at the time of the claimant's death. *See Phillips v. Shinseki*, 581 F.3d 1358, 1363 (Fed. Cir. 2009). And such accrued benefits are ones to which the claimant was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death. *See* 38 U.S.C. § 5121(a). The Court then provided an extensive discussion of substitution in accrued benefits claims before and after Congress enacted the Veterans' Benefits Improvement Act (VBIA), where, before its enactment, benefits claimants were required to restart from the beginning and file a new accrued benefits claim.

Before the VBIA's enactment, cases like *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996) demonstrated a general no-substitution rule by the Court, but the Court notes that 38 U.S.C. § 5121A was specifically enacted by Congress to remedy the inefficiencies and delays from restarting the process, and the provision permits an accrued benefits claimant to be substituted in the place of a deceased claimant. And in *Breedlove*, the section's enactment causes the Court to reconsider its substitution caselaw and to conclude that there was no longer rationale for foreclosing the opportunity for substitution on appeal at the Court based on the timing of the death of the appellant.

Breedlove causes the Court to develop a substitution procedure, where initially, there must be a determination by the RO, or a concession from the Secretary, with regard to whether a particular movant is an eligible accrued benefits claimant, which is a factual determination that must be made by VA in the first instance and determined in accordance with 38 U.S.C. section 5121. To obtain this factual determination, the Court may remand the question, stay the appeal until a determination by VA is made, or direct the Secretary to inform the Court of his determination within a set period of time. And when accrued benefits status is established by decision below or concession by the Secretary, standing is established. The Court states that though substitution will generally be allowed in these circumstances, the Court still retains the discretion to deny substitution based on considerations of delay, unfairness, and inefficiency, but if no one seeks substitution, or the person seeking substitution is not an eligible accrued benefits claimant, then vacatur of the Board decision and dismissal of the appeal would be the appropriate action.

In a majority opinion by Judge Toth, the Court analyzes the applicable authorities and states that it is apparent from *Breedlove*, as well as prior case law, that the Court may not review and potentially reject an RO determination when resolving a disputed pending substitution motion because the factual issues of eligibility appeared clearly foreseen by the

Court. More specifically, *Breedlove* states that vacating the Board decision and dismissing the appeal is the appropriate action if the person seeking substitution is not an eligible accrued benefits claimant. This means that according to the Court, it has never suggested that the RO's adverse ruling on a substitution request could be immediately reviewed by the Court itself. Another reason is because the Court's jurisdiction is confined to review of final Board decisions, the consequence of which is that the Court has no authority to review RO adjudicative determinations directly. *See Hayre v. Principi*, 15 Vet.App. 48, 51 (2001), aff'd, 78 F. App'x 120 (Fed. Cir. 2003). Referring back to the *Zevalkink* case, the Court reasons that in that case, the Court concludes that the enactment of 38 U.S.C. section 5121A eliminates the underpinnings of the timing-based rule against substitution in the Court, but the decision does not short-circuit the administrative adjudicative process, and that it is clear from *Breedlove*'s reasoning that the Court may not directly review the RO's adverse substitution determination. And the Court is not permitted to address the propriety of the RO's reasons for denying substitution.

The Court then addresses alternative arguments by Ms. Covington, the first one being that *Breedlove* should be overturned, or at least not regarded as binding, because it conflicted with holding in *Hayre*. After noting that when intervening higher authority is absent, when a precedent of the Court is on point, a panel is bound to follow it. *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992). And since *Breedlove* is not in conflict with itself or with other cases, the Court takes an extensive look at the *Hayre* case in order to dispel the notion that it conflicts with *Breedlove*.

According to the Court, *Hayre* concerns the Court's jurisdiction and the Court's obligation to assure itself that it has jurisdiction before taking action in a case. In *Hayre*, the Court holds that it cannot accept jurisdiction simply because the parties conceded it, but Ms. Covington is attempting to expand that statement to mean that because the Court has an independent duty to ensure its jurisdiction, it is as entitled to dismiss a party's jurisdictional objections as it is to dismiss a party's jurisdictional concessions, and that the Court cannot reject jurisdiction here simply because the Secretary has not conceded that she is an eligible accrued benefits claimant and thus has standing to pursue the appealed claim. Accordingly, to Ms. Covington, the Court must conduct a de novo review of the RO's denial of substitution, a review that includes the relevant factual determinations.

The Court answers that the issue with this line of reasoning is that it would invite the Court to exercise the duty to ensure its jurisdiction to act by violating other jurisdictional limitations placed on the Court. As prior cases such as *Kyhn v. Shinseki*, 716 F.3d 572, 578 (Fed. Cir. 2013) point out, Congress vests the Court with limited jurisdiction, and even the weighty interest of judicial economy cannot enlarge that which a statute directly limits, and that in the appeals context, statutorily-granted jurisdiction limits the Court to review of a Board decision based upon the record before the Board, and Congress does not authorize the Court to review and settle a dispute over this fact-bound issue before the Board has made a decision on it. Further distinguishing the *Hayre* case, the Court notes that in that case the Court's jurisdiction turned on a legal question, which the Court in that case could resolve with de novo review without transgressing statutory authority, but Ms. Covington's eligibility for substitution is a factual question, which is committed to the RO for initial resolution.

The Court then rebuts Ms. Covington's argument that there is a contradiction between *Breedlove*'s statements that the Court must first obtain a determination from the Secretary as to whether a particular movant is an eligible accrued benefits claimant and that it remains in the Court's discretion to permit substitution. Based on the principle that a court exercises discretion not according to its inclination, but to its judgment

which is to be guided by sound legal principles, *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005), the Court reasons that *Breedlove*'s reference to the Court's discretion must be read as being cabined by the legal prerequisite that the VA has found that a particular movant is an eligible accrued benefits claimant, and even when eligibility, and therefore standing, has been established, the Court may still decline to permit substitution based on relevant considerations of delay, unfairness, and inefficiency, which gives the Court discretion to deny, but not to permit, substitution.

Attention then turned to an argument Ms. Covington makes during oral argument, where she asserted that the portion of *Breedlove* reiterating the prohibition on the Court undertaking initial factfinding regarding a would-be substitute's eligibility for accrued benefits was dictum. After pointing out that the Court is not obliged to consider a belated assertion, *see Overton v. Wilkie*, 30 Vet.App. 257, 265 (2018), the Court chooses to address it by stating that dictum is language in an opinion that is unnecessary to the decision in a case and therefore nonbinding in future cases, and contrasts it with a case's holding, which consists of those propositions along the chosen decisional path or paths of reasoning that are actually decided, are based upon the facts of the case, and lead to the judgment. This is all to point out that the limitation on the Court's authority to undertake initial factfinding regarding a would-be substitute's eligibility for accrued benefits was a critical component of the Court's reasoning on the way toward granting Mrs. Breedlove's motion for substitution, especially given its preliminary determination that section 5121A does not apply directly to the Court; therefore, it is not free to disregard that portion of *Breedlove*'s analysis.

Ms. Covington also makes the argument that *Breedlove* and its discussion of sections 5121 and 5121A are immaterial because Rule 43 of the Court's Rules of Practice and Procedure gives the Court the authority to grant substitution independent of any determination by VA regarding her eligibility for accrued benefits. The Court rebuts this by responding that Rule 43 is simply a procedural mechanism for substitution which explicitly leaves the substantive standard for substitution to be filled in by other authorities. *See Smith v. McDonough*, 35 Vet.App. 454, 463 (2022). And the subsequent statutes and caselaw interpreting them are those authorities. *See Merritt v. Wilkie*, 965 F.3d 1357, 1360 (Fed. Cir. 2020).

The Court next addresses what appears to be the overarching view that most of Ms. Covington's arguments stem from, which is that a grant of substitution in the Court is an end unto itself that *Breedlove* mistakenly ties to substitution proceedings before the Agency. The Court thinks that this view misunderstands not only the role substitution at the Court plays in the VA adjudicative process, but also the relationship between substitution and the accrued benefits claim. Section 5121 permits certain survivors to seek unpaid benefits owed to the claimant at the time of their death, and section 5121A's enactment provided eligible survivors a faster, fairer, and more efficient way to process their accrued benefits claim, but regardless of whether a survivor chooses to pursue substitution or a traditional, accrued benefits claim, the object of both is accrued benefits, specifically those benefits due and unpaid to claimant at the time of their death. Essentially, both section 5121 and 5121A provide separate and distinct procedural paths for pursuing accrued benefits, but substitution does not lead to a different kind of benefit.

The Court's opinion speaks to the connection between substitution and accrued benefits because it may help the dubious reader understand why *Breedlove* conditions a grant of substitution at the Court on favorable resolution of a substitution request at the Agency. More specifically, a would-be substitute, even for a claimant who dies while their case is pending at the Court, will eventually have to be recognized as an eligible accrued beneficiary by VA, because it is VA, and not the Court, that will pay

an accrued benefits ultimately granted, so requiring the prospective substitute to provide evidence of eligibility to substitute is thus a reasonable measure to ensure that VA has the current and accurate information it needs to promptly process substitution requests in accordance with the priority established in section 5121(a). *See Nat'l Org. of Veterans Advocates, Inc. (NOVA) v. Sec'y of VA*, 809 F.3d 1359, 1363 (Fed. Cir. 2016). Evidence of eligibility must be presented to, and a request for substitution initially adjudicated by, the RO, including in cases where the claimant dies with a claim pending before the Board. The Court notes that the Federal Circuit has affirmed this requirement as reasonable, because the Board is an appellate tribunal and is not well equipped to conduct the fact-gathering that may be necessary to determine eligibility for substitution, and because there would be no appellate recourse for the claimant within VA if the Board were to decide the substitution issue in the first instance. Extending this reasoning, the Court believes that these same concerns about appellate tribunals' competence regarding fact-bound eligibility determinations likewise counsel against a process that would task the Court with making initial substitution decisions.

After concluding that both law and policy support *Breedlove*'s reasoning and outcome, as well as noting that the Court had considered Ms. Covington's remaining arguments unpersuasive, the Court states that whether the RO committed any error in its resolution of the request for substitution is not an issue the Court may consider, and that Ms. Covington's remedy lies in the administrative appeals process. Because Ms. Covington had not been determined to be an eligible accrued benefits claimant, and thus was not an eligible substitute, vacatur of the Board's decision and dismissal of the appeal is the proper disposition.

In conclusion, the Court orders that the motion for substitution be denied, that the Board decision be vacated, and that the appeal be dismissed for lack of jurisdiction.

John Hubert is a student attorney at the Syracuse University College of Law's Betty and Michael D. Wohl Veterans Legal Clinic.

Court Rejects Proposed New Standard for Equitable Tolling under EAJA

by Katherine Jennings

Reporting on *Roseberry v. McDonough*, No. 20-0945(E) (Vet. App. May 17, 2023).

In *Roseberry*, a panel of the U.S. Court of Appeals for Veteran Claims (Court) comprised of Judges Greenberg, Falvey, and Jaquith, rejected Mr. Roseberry's Application for Attorney Fees and Expenses associated with his previously remanded case for untimely filing.

The Court granted the Secretary's motion to dismiss the Equal Access to Justice Act (EAJA) application holding that equitable tolling of the filing deadline was not warranted because Mr. Roseberry failed to demonstrate an extraordinary circumstance for filing one day late. Judges Falvey and Jaquith issued the opinion of the Court, and Judge Greenberg issued a dissenting opinion.

Mr. Roseberry appealed a January 28, 2020, Board decision to the Court, and it was remanded on July 20, 2021. On October 15, 2021, the Court entered mandate with an effective date of October 12, 2021. Counsel submitted an Application for Attorney Fees and Expenses under EAJA on November 13, 2021. To establish eligibility for an EAJA award, the application must meet all of the statutory requirements. When no appeal to the Federal Circuit is filed, the application must be filed within 30 days after final judgement, i.e., the effective date of the mandate.

Mr. Roseberry's counsel, seeking payment of the EAJA fees, did not dispute missing the deadline and

admitted that a calendaring error related to the mandate's effective date was the reason for the lapse. At oral argument, new counsel retained by Mr. Roseberry, argued that the motion to dismiss the EAJA application should be denied, and equitable tolling should be granted, because the original counsel's response to the motion to dismiss "had demonstrated good cause and excusable neglect."

Equitable tolling is appropriate in situations where the claimant has actively sought available remedies through defective pleading during the statutory period or the claimant has been tricked by opposing counsel into disregarding the filing deadline.

To establish that equitable tolling is appropriate, the claimant must demonstrate an extraordinary circumstance, due diligence in attempting to seek all available remedies, and a connection between the circumstance and the failure to timely file.

In the past, the Court has concluded that several situations suffice as extraordinary circumstances. For example, physical or mental illness, homelessness, and misinformation from a VA employee have all been cited as appropriate justification for equitable tolling. However, relying on the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, the Court specifically clarified that equitable tolling principles do not apply to a "garden variety claim of excusable neglect." Accordingly, the Court held that the error in this case did not come close to meeting the extraordinary circumstance standard.

During oral argument, Mr. Roseberry argued for the first time that the Court is permitted to grant equitable tolling under a lower standard of good cause and excusable neglect. While counsel argued that any instance of garden variety neglect could meet this lower standard, he also asserted that the error by Mr. Roseberry's former attorney was more complicated than garden variety neglect. The Court addressed these arguments by discouraging arguments raised for the first time at oral argument, and declining to adopt the proposed lower standard for tolling the EAJA filing deadline as barred by case law.

Specifically, in *Nelson v. Nicholson*, the Federal Circuit expressly rejected the argument that excusable neglect should be incorporated into the test for equitable tolling in veterans' cases because the standard was not mentioned in any applicable rule or statute. Mr. Roseberry's argument for the new lower standard first relied on Rule 4 of the Court's Rules of Practice and Procedure, but this rule is inapplicable in an EAJA context. Rule 4 permits equitable tolling of the Notice of Appeal deadline for good cause or excusable neglect if the deadline is missed within 30 days, or for an extraordinary circumstance when the Notice of Appeal is filed more than 30 days late. In addition, Mr. Roseberry's further reliance on the Court's Rule 26 was misplaced because that rule acknowledges the Court's authority to extend the Notice of Appeal deadline under the circumstances outlined in Rule 4, but does not provide the Court with authority to extend the EAJA filing deadline under the same circumstances.

The Court noted that the different standards for Notices of Appeal versus EAJA applications reflect differing relevant interests, "preserving the often-unrepresented veteran's opportunity to be heard in appeal," on one hand, and "bounding the veteran's opportunity to have an attorney paid by public funds," on the other.

The Court acknowledged that equitable tolling principles must be applied on a case-by-case basis. The Court also acknowledged that some level of attorney neglect, other than "garden variety" or "ordinary" neglect, could constitute an extraordinary circumstance in an appropriate case where the requirements of due diligence and a connection between the attorney neglect and the untimely filing were also met.

Judge Greenberg issued a dissenting opinion concluding that equitable tolling was warranted in Mr. Roseberry's case for three reasons. First, he emphasized that Congress created the Court "for the express purpose of ensuring that veterans were treated fairly by the Government and to see that all veterans entitled to benefits received them." To carry out that statutory grant of jurisdiction, the

Court should exercise its equitable powers to toll the deadline. Judge Greenberg criticized the majority opinion for "provid[ing] a rigid and self-limiting view of the Court's authority to grant equitable tolling." Because Congress, through EAJA, delegated the determination of when to grant equitable tolling to the Court, he asserted that the Court should take full advantage of that power.

Second, Judge Greenberg reasoned that any instance of mistake by a veteran's attorney in the context of an application for EAJA fees -- that results in the dismissal of the application -- constitutes an "extraordinary circumstance" from the veteran's perspective. The fees offered through EAJA are given to the veteran, not the representative, and the Court should consider situations on a case-by-case basis. By creating a harsh standard for equitable tolling, Judge Greenberg expressed a concern that the Court would limit the availability of representation to veterans who cannot afford to pay for counsel.

Judge Greenberg further criticized the majority for "fram[ing] its standard of review and conclusions in terms of a case-by-case analysis," while actually improperly applying "a categorical ban, foreclosing the possibility that an attorney's miscalculation of the filing date based on the mandate's date of entry may ever constitute an extraordinary circumstance."

Finally, Judge Greenberg reasoned that the majority did not interpret the law in a manner that favors veterans consistent with the pro-veteran scheme created by Congress. He emphasized that a favorable interpretation of equitable tolling would both ensure that lawyers are paid for the work they do for veterans, and encourage lawyers to represent veterans by eliminating needless obstacles to their payment.

Katherine Jennings is a second-year law student at the Penn State Law Veterans and Servicemembers Legal Clinic.

Election of Dependents' Education Assistance Benefits under Section 3562 Bars Entitlement to Duplicate Benefits under Section 1115.

By Joseph F. Sawka

Reporting on *Wright v. McDonough*, No 20-2154 (Aug. 4, 2023).

In *Wright*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential decision holding that when a child of a totally disabled veteran exhausts his or her dependents' educational assistance (DEA) benefits under chapter 35, title 38, U.S. Code, before finishing a chosen "program of education or special restorative training," 38 U.S.C. § 3562 permanently bars the veteran parent from again receiving a dependent allotment based on that child under 38 U.S.C. § 1115. Basically, section 3562 prohibits duplicate benefits.

The veteran, Mr. Wright, was granted a total disability rating based on individual unemployability (based on several service-connected disabilities) in a December 2014 VA Regional Office Decision. He was also awarded DEA benefits. VA awarded Mr. Wright's daughter DEA benefits, effective in August 2015. In February 2016, the VA Regional Office notified Mr. Wright that, as of August 2015, his daughter would no longer be considered his dependent for purposes of a dependency allotment under section 1115 because she was over 18 years old and receiving DEA benefits.

In June 2018, Mr. Wright filed a Request for Approval of School Attendance, on behalf of his daughter, who was attending college full-time as of August 2015. He asked VA to keep her on the award of dependent allotment under section 1115 until she graduated in June 2019. The VA Regional Office denied Mr. Wright's request. He was informed that once a child opts for DEA benefits, the child cannot be added back to the award under section 1115 as a dependent. Mr. Wright appealed to the Board of

Veterans' Appeals (Board), which denied his claim on appeal, finding section 3562 precluded reinstatement of Mr. Wright's daughter as his dependent, even after she exhausted her DEA benefits, was under the age of 23, and still attending college. He appealed to the Court.

On appeal, the Court set forth a detailed discussion of the history of the relevant statutory provisions: sections 1115 and 3562. That discussion included analyses of the congressional hearings between 1954 and 1956 giving rise to section 3562; the War Orphans' Educational Assistance Act of 1956; the Servicemen's and Veteran's Survivor Benefits Act; the creation and amendment of Title 38, U.S. Code pertaining to veterans benefits; and the current statutes, 38 U.S.C. §§ 1115, 3562.

Section 1115(1)(B) provides:

> Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30[%], shall be entitled to additional compensation for dependents in the following monthly amounts. . . .

Moreover, section 1115(1)(F) indicates that,

notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $240 for a totally disabled veteran and proportionate amounts for partially disabled veterans. . . .
Section 3562 provides:

> The commencement of a program of education or special restorative training under this chapter *shall be a bar* (1) to subsequent payments of compensation, [DIC], or pension based on the death of a parent to an eligible person over the age of eighteen by reason of pursuing a course in an educational institution, or (2) to increased rates, or additional amounts, of compensation, [DIC], or pension because of such a person whether eligibility is based upon the death or upon the total permanent disability of the parent." (emphasis added).

"DIC" is "Dependent and Indemnity Compensation."

The Court found it was required to answer four questions:

(1) what triggers the bar to payment in section 3562;

(2) whether the bar affects payments to the veteran or to the child;

(3) what benefits are barred; and

(4) under what circumstances, if any, the bar may be lifted?

Relying on the canons of statutory interpretation, the Court held:

(1) Section 3562's bar is triggered when an adult child begins a curriculum leading to an educational, professional, or vocational objective at a secondary school.

(2) Section 3562 subsection (1) prohibits certain payments to *adult children*, and subsection (2) prohibits certain payments to those who receive payments because of their *relationship* to that adult child, including a veteran parent.

(3) Section 3562(2), which bars "additional amounts" or "increased rates" of disability compensation "because of" an adult child attending an educational institution, applies to payments under section 1115(1)(F).

(4) Once the bar to payment in section 3562 is triggered, it is permanent. Under the system Congress established, once the government begins assisting *an adult child* in furthering his or her education through the DEA program, the government ceases to assist *a veteran* in assisting that adult child in pursuing an educational program.

Applying the foregoing analysis to Mr. Wright's appeal, the Court found his daughter was a child and began a program of education in August 2015.

The daughter's election of DEA benefits triggered a permanent bar to benefits under section 3562(2). The Court thus affirmed the Board's decision denying entitlement to benefits under section 1115.

Joseph F. Sawka is an attorney at the Board of Veterans' Appeals.

Life After Death: Overpayments Resulting from Oversights in VA Organizational Improvements

by Anna Kapellan

Life is really simple,
but we insist on making it complicated. – Confucius

"The meaning of life is that it stops," observed Franz Kafka, whose works are known for a unique mix of reality and surrealism viewed through the lens of bureaucratic absurdity. Alternatively, it might be that Kafka was a visionary who drew his inspiration from foreseeing an odd side effect of the otherwise indisputably laudable organizational improvements undertaken by VA from the mid-1980s to 2008. Notably, the first seeds of this side effect were planted half a century earlier, *i.e.*, when, pursuant to the Veterans Administration Act of July 3, 1930, VA came into existence upon a merger of the National Home for Disabled Volunteer Soldiers, the Bureau of Pensions, and the Veterans Bureau.

The just-born VA, back then a rather small agency, created its own system of files to house new hard copy claims, as well as prior hard copy claims of preexisting claimants and beneficiaries inherited from the three consolidated agencies. In light of these four sources of hard copy claims, VA created its own merger-based file numeration system to duly reflect the origins of these files since – at the time – this aspect appeared critical due to VA's obligation to comply with the duties that had been undertaken by the consolidated agencies, that is, in addition to addressing new VA claims. Moreover, back then, the relationship between VA and the Social Security Administration (SSA) was neither clear nor well developed, *i.e.*, the impact of SSA records and benefits on VA records and benefits was yet to be fully appreciated. Hence, quite understandably, SSA numbers of VA beneficiaries were not made part of VA's system of numerating files in 1930.

A decade and a half later, when World War II ended, and VA had already grown to be one of the larger federal agencies, American WWII veterans serviced by VA were still having their submissions stored in hard copy files having the original numeration system that had been coined by VA in the 1930s. These WWII veterans were of two broad categories. One category consisted of the veterans who had VA files that were consistently active because these veterans were middle-aged or older and/or had experienced serious physical or mental injuries leading to conditions that kept increasing in severity and/or causing/aggravating other disabilities. Thus, VA files of this category of veterans were always in "active" status.

In contrast, the other category consisted of WWII veterans who were still in their late teens or early 20s and, to top it off, had experienced only minor injuries or disabilities(e.g., they were diagnosed with tinnitus attributable to service due to their exposure to acoustic trauma without proper hearing protection). Accordingly, many of these veterans were awarded service connection for disabilities that yielded combined ratings of 20 percent or lower. And, since a veteran with a combined rating below 30 percent is not eligible for an upward adjustment based on his/her dependent spouse or children, VA files of these veterans quickly became "sleeper" files in the sense that these veterans had no reason to seek service connection for disabilities resulting from any post-separation events, and their service-connected disabilities were not increasing in severity or had already been assigned maximum applicable ratings (e.g., 10 percent for tinnitus). Predictably enough, the stream of VA communications with

such veterans quickly reduced to zero and then restarted in 1975 in the form of a single cost-of-living adjustment (COLA) letter mechanically mailed by VA to these veterans once a year, every December.

A decade passed by and, in the mid-1980s, the VA beneficiaries who had been in their late teens or early 20s at the end of WWII reached their mid-50s. By that time, VA too grew up and became the largest civilian federal agency that, unfortunately, but not entirely unjustifiably began to be perceived as a slow bureaucratic behemoth flooded with hard copy files of existing VA beneficiaries and new VA claimants. At that point, two developments, one technological and another legal, began to take place.

First, initial adaptations of computer technologies began to allow large employers a chance to pay wages to employees by means of direct deposits rather than by checks, saving in costs of printing, mailing, and keeping records. By the late 1980s, taking a cue from large employers, large federal agencies began exploring the viability of using direct deposits for purposes other than payments of wages. VA, the largest civilian agency, began exploring this option too and – once the direct deposit method proved advantageous for wage payments – began offering direct deposits to VA beneficiaries, starting with those entitled to recurrent disbursements of disability compensations.

While this technological improvement was taking place, a series of legal changes in veterans law made it abundantly clear that VA claims and the contents of the claimants' SSA records were closely related. These legal changes triggered the first round of transformations in VA file keeping system that further distanced, that is, for managerial purposes, the category of veterans whose files qualified as regularly active from the category of veterans whose files became sleeping beauties. While the latter category mostly consisted of WWII veterans who were in their late teens and early 20s by the end of WWII, this category began being replenished by those Korean War and Vietnam War veterans who analogously were very young when they had become VA beneficiaries and became service connected for disabilities yielding a 20 percent or lower combined rating, with conditionsneither increasing in severity nor causing or aggravating other disabilities, etc.

However, seemingly not aware that some of its files had become sleeping beauties, VA elected to reorganize its file system. Specifically, VA separated the legal/financial matters falling within the scope of operations of the Veterans Benefits Administration (VBA) and created an entirely new, different system of file numeration based on the claimants' and beneficiaries' SSA numbers. Moreover, mindful of conundrums ensuing from the sheet magnitude of the task of renumbering its files, VA – solely out of an abundance of caution and to ensure against any loss of documents – decided to create SSA-number-based hard copy files duplicating the original files instead of merely renumbering the original files: so that the original files would be retained as a *de facto* archive for comparison in the event an unfortunate comingling of files ensued.

However, unlike the U.S. Federal court system that had its own archive location in Kansas City, Missouri, where all archived hard copy files of all U.S. federal courts were stored, VA did not have a separate nationwide archive depository. Hence, once duplicated, the original VA files were simply stored at the same locations where the new files (numbered based on SSA numbers) begun to be kept, even though the original VA files essentially transformed into dust collectors. This fact, coupled with the direct deposit initiative (that took a notably shorter period of time than the task of duplicating all files under SSA numbers), inconspicuously but critically increased the divide between "active" and "sleeper" VBA files. This was so because most of the veterans with "sleeper" files – not being preoccupied with any other VA paperwork – swiftly accepted the offer to have their recurrent VA benefits directly deposited to their bank accounts, and VA's actions of authorizing direct deposit to these beneficiaries' bank accounts became tied to these beneficiaries'

original files long before the SSA-numbered files were created for the same beneficiaries. Simply put, the SSA-numbered hard copy files and the process of direct deposit became divorced, and the direct deposit process began to have a life of its own.

Another 20 years passed by and, in 2005, the federal judiciary began implementing its CM/ECF system, *i.e.*, started the process of replacing hard copy files with electronic files. Operating as the early adaptors of this innovation, federal district courts coined the by-now-classic method of scanning hard copy files into electronic format and then uploading these electronic records into CM/ECF-PACER files, while sending the scanned hard copies of the files to the national archive in Kansas City, Missouri. A year later, when the CM/ECF-PACER system of electronic records proved to be superior in accessibility and maintenance, federal circuit courts followed suit, thus inspiring and paving way for Federal agencies performing quasi-judicial functions to do the same.

Therefore, it is hardly surprising that, in 2007, VA too began transitioning from its hard-copy, SSA-numbered files to an online file system using VBMS analogously to how the federal courts were using CM/ECF-PACER. However, since veterans law is a unique area of law that is far more lenient in terms of acceptable forms of claims/lay statements, VA faced a task that easily dwarfed the task faced by all 94 federal district courts taken together since, unlike courts, VA could not ignore or discard as irrelevant even tiny sticky notes or blank pages containing just a scribble or two, or statements that were literally written on paper napkins, etc., since each such note, scribble, or napkin could easily qualify as a critical document for VA purposes.

Moreover, since VA had no human resources with sufficient legal savvy to carefully evaluate each such note or scribble, or napkin, etc., to assess its legal relevance, VA elected – again, solely out of an abundance of caution – to scan and upload into its electronic files each and every piece of paper that VA had in every hard copy file having an SSA number. Further, not having sufficient staff to perform this mass of scanning tasks, VA retained contractors to do the scanning. Unfortunately, not trained in VA matters, many contractors ended up having some documents uploaded many times over, especially when these contractors were getting confused by beneficiaries' lengthy medical records that had hundreds of identical medical entries.

While VA's approach was undoubtedly prudent and understandable, it converted VA's already mammoth transitional task into a Kafkaesque monster, leaving VA drowning in bureaucratic tides of hard copies of the SSA-numbered files that had begun joining their predecessors, *i.e.*, the original files that lacked SSA numbers. Having to house the mountainous piles of scanned files, VA made a not unreasonable decision to begin shredding those SSA-numbered hard copy files that had already been scanned and uploaded to VBMS as electronic files with SSA numbers identical to those of hard copy files. Indeed, the shredding task was in sync with the PII-protection initiatives that VA had been implementing at the time, which were a chain of PII security processes that VA had begun adopting since 2005 (after one of VA's contractors unfortunately lost a laptop with a multitude of claim numbers of VA beneficiaries, triggering VA-wide training modules and installation of shredding machines meant to protect VA beneficiaries' PII).

However, while VA's election to begin shredding all such already scanned and uploaded SSA-numbered hard copy files was reasonable, VA's assessment of its record-keeping abilities unfortunately proved to be unduly optimistic. Specifically, many Regional Offices – lacking both in staff and in space – began storing the SSA-numbered hard copy files subject to scanning/uploading together with the files already scanned/uploaded, plus with newly received claims/related documents that were yet to be filed or scanned, as well as with the original non-SSA-numbered files. Simply put, all these documents were often moved into the same intake facilities, yielding mountains of paperwork, often mixed but

not matched into particular files. The result of such an arrangement was as regretful as it was probably predictable.

Within a year after the transition and shredding process had begun, the files awaiting shredding became comingled with new filings and, upon attempts to resort these documents, many new filings ended up misplaced into unrelated files and shredded, thus creating an impression that these new documents were never filed at all. With that, many new claimants, as well as already existing VA beneficiaries who filed new claims or Notices of Disagreements (NODs) ended up having their submissions unanswered or their follow-up NOD inquiries dismissed on the grounds that the initial submissions were never received and the follow-up inquiries about NODs amounted to untimely NODs. Understandably dismayed, the claimants began writing complaints to the VA Office of Inspector General (VA OIG).

In 2008, the VA OIG conducted a chain of internal investigations that uncovered plenty of new claims and NODs in shredder bins, as well as in bins of documents awaiting shredding. Recognizing that its managerial and organizational initiative had gone awry, VA: (a) instituted a temporary program to assist those veterans who had alleged that they had made filings from April 14, 2007, to October 14, 2008, but these filings disappeared; and (b) stopped the practice of shredding hard-copy files until each SSA-numbered hard-copy file was fully uploaded into an electronic file having the same SSA number.

Only once the entire task of transforming all SSA-numbered files into VBMS format was completed did VA resume shredding of the already scanned and uploaded SSA-numbered files. In contrast, the original files that were not SSA-numbered remained kept until, about half a decade later, they too found their way into the shredding machines. Unnoticed in the last step of this process was the fact that many of these original files were "sleeper" files that had been not touched for decades, but these sleeper files were the only source of activated long ago automatic disbursements of VA funds via the direct deposit system that had no SSA-numbered links to the SSA-numbered counterparts of the electronic files kept on VBMS.

Correspondingly, an entire category of WWII and post-WWI veterans service-connected decades ago for disabilities reflected in VA's original sleeper files continued to be paid but, for all practical purposes, they disappeared from VA's radar once the original files were shredded. Unfortunately, these veterans did not escape Kafka's grim observation that "[t]he meaning of life is that it stops." Hence, even though the majority of these veterans lived their lives while enjoying good health, these septua-, octo-, and nonagenarians began to pass away in the 2010s, and even more frequently in the 2020s, often leaving elderly surviving spouses whom these veterans had shared their lives with for half a century or longer.

Notably, the societal perspectives half a century ago or longer were different from those of the modern day and age. Hence, the majority of these veterans had the same last names as their surviving spouses and, typically, had joint bank accounts where these veterans' VA benefits were directly deposited for decades. Notably, if one of the holders of a joint bank account passes away, the account remains unaffected, *i*.e., it neither gets closed nor becomes frozen subject to reopening upon completion of probate. Instead, the account just vests, in its entirety, in the surviving holder, and operates as a testamentary substitute vehicle that bypasses both the testate and intestate legal processes that might otherwise be applicable. Moreover, while the majority of banks and credit unions performing banking functions have systems in place to detect and investigate first-time direct deposits made to accounts having a proper account number but with an incorrect last name of the account holder, most financial institutions do not have either automated systems or personnel to detect and investigate direct deposits made to properly designated account numbers with correct last names if the first name

of the payee is that of the person who might have passed away. In other words, banks predominantly rely on account holders to inform the banks about any changes in account holders' information to bar future deposits that might be made in the name of deceased coholders.

However, VA does not notify its beneficiaries of any additional steps that bank-account coholders have to take to ensure against receipts of VA's direct deposits erroneously paid to deceased coholders. Moreover, VA has been proactively notifying VA beneficiaries about VA benefits their surviving spouses might be entitled to upon their passing. Accordingly, many a surviving spouse of a VA beneficiary believes that VA benefits might be automatically disbursed to the surviving spouse upon the death of his/her veteran-spouse. Hence, most surviving spouses of former VA beneficiaries are not alarmed and take no action if they continue receiving recurrent direct deposits of funds from VA, especially if these surviving spouses are elderly on their own and lack savvy in financial matters.

True, conscious of its duty to avoid overpayments, VA has a well-developed system in place to swiftly process all notices of deaths of VA beneficiaries. However, while this system relies on a chain of federal and state agencies to promptly provide VA with the required information, the system is based exclusively on the beneficiaries' SSA numbers, given that many veterans and their dependents might be namesakes, share dates of birth, etc., and the most reliable identifier that could allow VA to distinguish one beneficiary from another is his/her SSA number that – unless an extremely rare SSA error took place – is unique to each person and, thus far, has never been recycled. Accordingly, VA is typically notified of the passing of its beneficiary within 24 to 72 hours and, usually within 24 hours to a week, terminates disbursement of VA funds to this beneficiary, plus properly marks the beneficiary's SSA-numbered electronic claims file to reflect his/her passing.

However, as to those veterans who had become VA beneficiaries prior to the mid-1980s and then had only sleeper VA files while being enrolled for direct deposits, VA's system necessarily fails since all such beneficiaries are paid through a system that remains unaffected if their electronic SSA-numbered records are marked to reflect their deaths. Simply put, these beneficiaries continue living past their death for the purposes of VA disbursements of their recurrent VA payments via direct deposits. Moreover, if these beneficiaries shared their bank accounts – to which direct deposits were made - with their spouses, these surviving spouses continue to receive VA's direct deposits without VA or the bank being notified of the error in these direct deposits. Thus, each month when direct deposits are made, these surviving spouses become overpaid only more and more.

To make matters even worse, such surviving spouse usually cannot claim that their overpayment debts were improperly created due to a sole administrative error on the part of VA. This is so because the sole administrative error test is a two-prong analysis that requires a debtor to establish that, on the one hand, (s)he did not either cause or even contribute to the creation of the overpayment, and that the debtor neither knew nor could have known that (s)he was being paid the funds the debtor was not entitled to. Since a reasonably prudent person standing in the shoes of a surviving spouse would have notified the bank of the veteran's death and would have removed the veteran's name from the account, plus should have known that (s)he was not entitled to receipt of VA benefits in the amount equal to that previously disbursed by VA to his/her deceased veteran-spouse. All such surviving spouses have their challenges to the propriety of the creation of their debts defeated. Hence, the sole hope that these spouses have is a claim for a waiver of the recoupment of their debts by VA. However, unless such a surviving spouse establishes an extraordinarily dire financial hardship that might ensue from recoupment of his/her debt to VA, the surviving spouse is unlikely to prevail on his/her waiver claim because all other elements of

the equitable waiver analysis are virtually certain to strongly counsel against his/her waiver claim.

It follows that the duty to remedy a peculiar side effect of decades of managerial and organizational improvements should fall on VA, because VA should ensure that neither US taxpayers nor surviving spouses of the veterans who fought during WWII, Korean War, and Vietnam War are disadvantaged by this odd side effect of VA's otherwise laudable operational improvements.

Fortunately, the law of negotiable instruments is an area of law markedly more developed than the law of electronic financial transactions since the first negotiable instruments akin to modern promissory notes and bills of exchanges had begun being used in China in the eighth century and appeared in Europe in the 12th century. Therefore, by now, the law protecting any payor whose funds were misappropriated after the payor had issued a check in the name of a proper payee is well developed. Correspondingly, all that VBA has to do is to distribute, once a year, e.g., in conjunction with issuing a COLA letter, a *mandatory* request for a verification of the beneficiary's direct deposit information, so to ensure that the actual VA beneficiary – rather than just his/her former bank account coholder – is the current holder of the account. If such a verification is not received within one month, VA should switch the records so that VA would begin payments by check, rather than direct deposit. This is so because, if a surviving spouse is to forge his/her deceased veteran-spouse's signature for the purposes of cashing such a check: (a) the doctrine of fictitious payee would assist VA in retrieving the lost funds from the financial institution that accepted and cashed the check; and (b) the bar on an equitable waiver analysis set forth in 38 U.S.C. § 5302(c) and 38 C.F.R. § 1.965(b) would be a proper punishment to those surviving spouses who purposely abuse taxpayers' funds, while sparing surviving spouses that are merely lacking financial or legal savvy due to their old age. If VA fails to act now, as we are at the point when many veterans who were in their late teens and early 20s at the end of WWII, Korean War, and Vietnam War pass away, many helpless elderly surviving spouses of these veterans could have their lives utterly devastated by the side effect of VA's organizational improvements.

The magnitude of such a devastation is obvious from the letters penned in shaky handwriting by those surviving spouses who have already been charged with this type of overpayment. Almost two millennia ago, Roman poet Marcus Annaeus Lucanus (Lucan), who passed away at 25, noted that "Gods conceal from men the happiness of death, that they may endure life." Hopefully, VA would act before such elderly surviving spouses of veterans come to appreciate Lucan's gloomy observation.

Anna Kapellan is Counsel to the Board of Veterans' Appeals with the Specialty Case Team, Overpayment and Waiver Group. *She would like to thank Veterans Law Judge Jeffrey D. Parker for generously sharing his impressive knowledge of VA history and his admirable belief that the lack of easy answers is not a sufficient reason to stop asking hard legal questions, including about the difficult logistics of VA overpayment law.*

Job Announcement: Bergmann & Moore, LLC.

Bergmann & Moore, LLC., is seeking to fill an appellate litigation position in its court practice.

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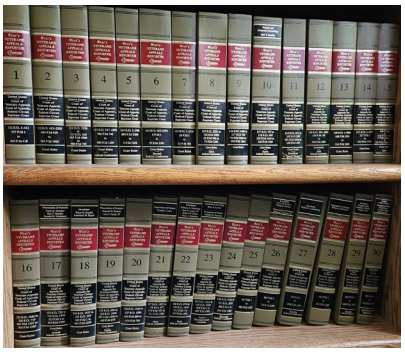

Peter Carroll is selling the first thirty volumes of West's Veterans Appeals Reporter. He is asking $3500 for the set, FOB Kalispell, Montanta.

If you are interested in purchasing these, please contact him at petercarroll@flatheadlaw.com.

Remarks by Senior Judge Robert N. Davis on the Retirement of Gregory O. Block

Maureen Block

Within the last year, I had the privilege of sharing a meal together with Greg and Maureen. I was in Washington for Chairman Cheryl Mason's retirement dinner. Greg attended that as well, and we ended up meeting Maureen Block, Greg's wife, at the Army Navy club for dinner. Over the years, I have come to understand that Maureen is the real secret to Greg's success, so I wanted to start with her. She is the quiet person in the background who makes things happen. Whether it is finding tickets for flights to Scotland, China, or other destinations around the world, or preparing to entertain her sons, daughters-in-law and grandchildren, it is Maureen who keeps everything together, organized and running efficiently. I think Greg will tell you this himself. Maureen is just as insightful, kind, witty, funny, caring, and adventurous as Greg is. They are a great team and I have grown to love them both.

At dinner, I shared with them that I was thinking about getting married but that I had misgivings. Over a delicious meal and a beer, Maureen had wine, we shared a lot of personal information – the kind you share with good friends. And of course, Maureen and Greg offered great advice, the kind that you can only give after being married for forty years and nurturing two sons and four grandchildren. I know how important family is to Greg and Maureen. It is wonderful to hear some of their stories about their family visits and trips.

The first time I met Maureen, was at a Christmas party at Larry Hagel's home. There was a table tennis set up in the basement. Apparently, Maureen had beaten everybody who challenged her at table tennis that evening. Well, I played a lot of table tennis when I was a resident counselor at Georgetown and got to be pretty good at it. I knew how to place spin on the ball. I could hit, side spin, top spin, back spin, and slams from either forehand or backhand wing and keep the ball on the table. Always up for a challenge, I called the next game against Maureen. Every point was a battle, back and forth we went until someone forced an error or hit a winner. The first person to 11 points by two wins the game. So, we started 3-2, then 5-5, then 6-5 and on until we had a winner. After a very spirited game. She beat me, but it was close. If you know anything about me, when it comes to sports (and most other things), I am very competitive in a quiet sort of way. I called, "best two out of three."

If you know anything about Greg and Maureen, they too are very competitive, so the second game

promised to be more intense and spirited than the first game. I was thinking to myself that she surely wasn't going to beat me again, I would beat her the second game then we would have to have a third game to determine the champion. Well, again every point was tough, point by point it was a battle. In the end, Maureen won again, two games in a row. To this day, it bothers me, but I take solace that at least on that day, I was beaten by the better player. I have tried repeatedly for a rematch, but she just smiles with a smug look on her face.

As I was putting some of these highlights together for this talk, I asked Greg to send me his bio. I want to share this quote with you because it is precious and priceless. Greg, I hope you don't mind. Greg wrote, and I quote:

"She is not in my bio but my real secret to life, work and everything is—through thick and thin—having a somewhat wild and crazy (in a good way) Scottish woman named Maureen by my side."

Isn't that simply a lovely tribute!

Gregory O. Block, the 4th Clerk of Court

Gregory O. Block was sworn in as fourth Clerk of Court for the United States Court of Appeals for Veterans Claims in a ceremonial session of the Court convened on September 1, 2010. I affectionately call him Colonel Block; he had recently completed his 30th year in uniform as an Army Judge Advocate Corps Officer and retired from active service.

He served in multiple overseas locations, including Germany, Korea, Bosnia, and Afghanistan. We had Germany and Bosnia in common, as well as Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF). He completed his military service in Charlottesville, Virginia, where he served as the Dean of the Judge Advocate General's School. We knew people in common at the University of Virginia, like John Norton Moore (National Security) and Bob Turner (National Security).

Working with Greg Block as a Judge

I would like to tell a few stories about what it was like to work with Greg Block as a Judge then as the Chief Judge. To put what I am about to share with you into perspective, I think it is helpful to understand how Greg saw his role as Clerk of the Court. I quote:

"I think I would describe the clerk's role as an implementer of Chief Judge and Board of Judges guidance, and a steward of the Court's operations both in the near term and long term. Overall, maintaining the court's capacity to handle whatever comes its way, whether that is in the form of increased caseload, government shutdowns (which may be looming soon), or even a pandemic, without distracting the judges and chambers staff from their judicial duties is the clear goal."

Greg joined the Court in 2010, during my 6th year as a judge. I was still trying to figure things out at the Court and then things changed. Greg started shortly after the new Chief Judge took over. The next 5 years were marked with what Greg refers to as "a period of dynamic change." I think that is a very nice way to describe what we as an institution experienced. Norm Herring, Greg's predecessor, recommended that we all read a book titled "Who Moved My Cheese," a book about change. Change can be uncomfortable for many, but it is certainly a constant state of affairs in life. And it was a bit uncomfortable for many of us during those 5 years.

In 2010, we had a 700 hundred plus case backlog in CLS, and we were looking at projections from the Board of Veterans' Appeals that could potentially increase that backlog significantly. The Board, of course, was working on case backlogs in the hundreds of thousands. Only a year or two earlier, we had exercised our recall authority for senior judges for the first time at the suggestion of or with pressure from Congress as we scrambled to figure out a way to deal with the backlog. This included changing how we did business in all chambers and

how we worked with CLS. We were asked to change our requests for CLS screening memorandums from for all cases to only those that we felt we really needed. Cases began to flow directly to chambers instead of through CLS. This, in turn, added to some additional backlogs in chambers. Ultimately, CLS was restructured to better address the backlog. This restructuring was initiated by the Chief Judge with buy-in from the Board of Judges, but some of us were uncomfortable with the direction things were going. It really was a situation in which I said to myself "let's see what happens."

Greg was on the front line of all this, so for me as one of the judges, I wasn't quite sure if he was helping to create the problem or helping to solve the problem. Many people were unhappy.

We also would ask Congress for authority to temporarily increase our number of judges from 7- to 9. Ultimately, we asked that increase to become permanent.

So, for me, the jury was still out on Greg Block. Despite what I would hear from complaining staffers from time to time, I hasten to add that I found Greg always be a straight shooter, direct, professional, polite, and thorough in answers to questions I might pose. Ultimately, by 2015, we had begun to significantly reduce the backlog and we could see a light at the end of the tunnel.

Working with Greg Block as the Chief Judge

Beginning in 2016, as the Chief Judge for three and a half years, I got to know Greg on a professional and personal level. We still had a backlog, but it was not quite as large. We spread the cases of the backlogged chambers among judges who were not so behind. On becoming the Chief Judge, I had three goals. First, to advance the Court on different fronts; second, to make sure the Court staff were treated fairly and provided support for advancement; and third, to make sure my judicial colleagues had the resources they needed to efficiently do their jobs. I saw my role as a steward of the Court for a short period of time.

Greg and I interacted an awful lot on many projects for the Court. The courthouse project, the class action rules, creation of the Judicial Advisory Committee (JAC), the court history project, telework, and outreach, just to mention a few. Greg served as a JAC founding member and its first chair, expanded the footprint at 625 Indiana Avenue, grew the court and the Court staff; developed senior judge's chambers and reconfigured floor space. He designed the relocation IT and CLS to the newly acquired 6th floor; created a library and conference center, expanded the bench and improved the appearance of the courtroom. I mention all of these projects in a paragraph but believe me, these were all major initiatives and took so much attention to detail. Greg thrived on this work.

Working closely together allowed Greg us to get to know each other much better. I came to know what was important to Greg and how he felt about a wide variety of issues of the day. He also came to know what was important to me and how I felt about a wide variety of issues. We would have conversations about a wide spectrum of political and social issues, in his office or mine. Among many commonalities at the top of both of our lists was moving the Court forward. Greg, I miss that time we used to spend together but greatly appreciate the bond we formed through those daily and weekly meetings.

At the beginning of his tenure, he was focused on continuity of operations in the event of a terrorist attack or natural disaster. We secured remote sites in the event evacuating 625 became necessary. Who knew that in 2019 we would face a worldwide pandemic that would drastically change how the world worked? This continuity of operations initiative would position the Court for a seamless transition to remote work when Judge Bartley began as Chief Judge in December 2019.

Through it all, Greg provided sage counsel on a host of issues. As I mentioned at the portrait ceremony, in my view, the progress of the Court and its continuity is the direct result of the quality of the occupant of the office of the Clerk of Court and Court staff.
On the IT level, Greg was forward thinking along with some of us who wanted video oral arguments, telework and more remote access to our files. I had been the Chair of the IT committee and helped to push the Court to take advantage of technology and allow technology to help us become more efficient. And today we have a YouTube channel and remote oral arguments on video!

What I learned about Greg Block as the Clerk of Court was that he was singularly dedicated to making sure that the Court operated at a high level of efficiency and professionalism. On that question in particular, we were of one accord.

As he provided counsel to me as the Chief Judge, he was creative, forward-thinking and looked at all aspects of an issue. He was this way with all nine judges all of the time. Moreover, if one surveys the scope of the job of the Clerk of Court within the Court, which includes the public office, finance and budget, human resources, IT, and Central Legal Staff (CLS), you only touch the surface of the wide ranging responsibility that the Clerk's position includes. The Clerk is also very often a liaison with the judicial committees, the bar association and Capitol Hill.

His guiding principles were very simply, "what was in the best interests of the Court." Again, our minds melded.

During my tenure as Chief, we cleared the backlog of cases. Greg was a team player and supported and took on a variety of initiatives again to improve the operations of the Court. He was also a good listener, as I shared frustrations with him about dealing with some of my colleagues on a variety of issues we confronted.

Bonding on a Personal Level

On a personal level, Greg and I shared a lot of sports interests in common, whether it was golfing, tennis, bicycle riding or traveling. We shared a lot of stories.

One time, we played tennis doubles on a gorgeous fall day. The young guys against the old guys – James Lee, Andy Reynolds, Greg and me. In any event, It was a competitive and fun match. Greg, Andy and I were all college players and Andy and I would practice together sometimes. Given his excellent level of play, you would think that James was a college player also. After a while, as the old man out there, they wore me out and had to carry me off the court. We later had a few beers and great fellowship.

One of the many things that I admire about Greg was his sports knowledge; we could talk about any sport and he would know something pretty esoteric about it. In fact, he knew a lot of esoteric stuff in general. It was not always useless, though. So, sometimes I would call him up and ask him about his bike ride to work or home. Greg rode his bike in all kinds of weather from his home in Arlington. We would often discuss some of the finer aspects and merits of bikes, whether it was Trek, Cannondale, Specialized, Giant or some of the more high-end bicycles. We would talk about head winds and tail winds and speed and drifting and rain, and icy road conditions.

Sometimes, we would talk about golf and golf clubs or the Saint Andrews course or a course that I had played on like Troon North. Though he and I have yet to play together, I grew to understand his passion for golf and all sports. We would talk about people in different sports on the professional tours and what separated them from each other. Or sometimes I would call him up just to talk about something that struck me as interesting. We are both early risers, so we would often have a short conversation before or at sunrise.

We would frequently share beers together after a conference, trip, or an oral argument at a school. We

would discuss what went well and what we could do better. (I didn't even mention the details that he coordinated that go into planning oral arguments at other venues or at law schools). I remember being frustrated at one law school oral argument because the school did not deconflict other activities, which led to a low turnout for our oral argument. That prompted me to reset our approach so that we became the only action in town when we agreed to an oral argument.

Sometimes after a bar association meeting, we would join friends at the Yard House or some other venue for good food, beer, and comradery. I think that time spent with our colleagues at the bar was healthy for the Court and bar association relations.

So, our almost ten years working together helped me to appreciate Greg as an intelligent, hardworking, dedicated, adventurous, kind, considerate, decent, caring man who I am proud to call my friend. Greg, the Court was made better because of your contributions and leadership as its Clerk. I love you, brother, and hope that your retirement will give us more opportunities to continue to spend time together.

Senior Judge Robert N. Davis

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

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