VETERANS LAW JOURNAL

A QUARTERLY PUBLICATION OF THE COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Bar Association Holds 2020 Annual Meeting Virtually to Close Out Year

by Sarah Blackadar

While the Bar Association's members were not able to meet in person as much this year due to the pandemic, the Bar Association was still able to accomplish quite a lot. During the annual meeting, held on October 22, 2020, the Bar Association finished out one year and began a new term.

Outgoing president Jenny Tang noted that the Bar Association hosted two major events since last year's annual meeting. First, the Bar Association organized an event at the U.S. Supreme Court last October. At a luncheon with Justice Breyer, attendees heard more about the history of veterans law cases at the Supreme Court in honor of the 30th anniversary of the establishment of the U.S. Court of Appeals for Veterans Claims (Court). Additionally, the Bar Association held a CLE (virtually) in June.

In addition to these big events, the Bar Association hosted numerous smaller events ranging on topics from the evolving constructive possession doctrine to changes affecting the application of Agent Orange exposure presumptions to Blue Water Navy Veterans. Jenny thanked the hardworking committee members who helped make these events happen. There were social gatherings as well, like the return of the Bar Association's holiday party last winter. Unfortunately, the holiday party will be on hiatus this year, due to the pandemic.

The Annual Meeting also marks a change of leadership for the Bar Association each year. Of special note, this meeting marked the end of Charles DiNuzio's term as Treasurer of the Bar Association. Charles's commitment to strengthening our financial foundation for a second year is greatly

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

TABLE OF CONTENTS

appreciated. The Bar Association's new Treasurer is Tom Susco. In addition to Charles's departure, the Bar Association Board of Governors said goodbye to Past President Amy Odom, Secretary Chris Wysokinski, and at-large Board Members Stuart Anderson, Jonathan Hager, and Richard Daley.

Joining the Board are new Secretary Freda Carmack, new President-Elect Jenna Zellmer, and new at-large Board Members Ashley Varga, Javier Centonzio, and Kenneth Meador. In addition, Jason Johns became President, succeeding Jenny Tang, who became Past President and will continue to serve on the Board of Governors in this capacity.

CAVC Bar Association Past President Jenny Tang presided over the Annual Meeting via Zoom.

Jason opened his tenure as President by thanking the outgoing board members for their work over the past year and by welcoming the new board members. He also noted that 2021 will mark the 20th anniversary of the founding of the Bar Association, presenting an excellent opportunity to reflect on the history and changes that have transpired over those 20 years.

Finally, the Annual Meeting concluded with an update from Chief Judge Margaret Bartley on the past year at the Court. Possibly the biggest news of the year, Chief Judge Bartley noted that the Court now has its full complement of nine judges. Even with the newly filled judgeships, the Court will continue to bring back senior judges in recall status to timely handle the almost 9,000 appeals the Court had in Fiscal Year 2020. The Court also received a five-year extension to keep nine judges on the bench, a welcome extension as the number of appeals continues to skyrocket. In addition, the Court's Central Legal Services division handled over 7,900 Rule 33 conference in Fiscal Year 2020. The CLS conferences continue to succeed at resolving between 60 to 70 percent of the cases where a conference is held.

Oral arguments have generally been on the increase, although Fiscal Year 2020 saw a slight drop in arguments from 2019. In April, the Court transitioned to teleconference arguments. The Court transitioned to videoconference arguments later this fall. The Chief Judge also noted that the Court continues to see a steady stream of class actions, now 20 in total, with 10 currently active before the Court. On that subject, Chief Judge Bartley noted that the Court is putting the final touches on new Rules 22 and 23, which will provide more guidance on class actions at the Court.

The Bar Association looks forward to another year of great events and hopefully more in-person opportunities to gather as a group.

Sarah Blackadar is a Veterans Law Practitioner.

CAVC Bar Association Holds Panel Event for Students Interested in Veterans Law

by Jillian Berner

On October 8, 2020, the CAVC Bar Association convened a panel of practitioners to provide insight into the field of veterans law for law students. Held via Zoom, the panel attracted 65 attendees, who heard about practitioners' career paths, best practices, and how to gain employment in this area of law.

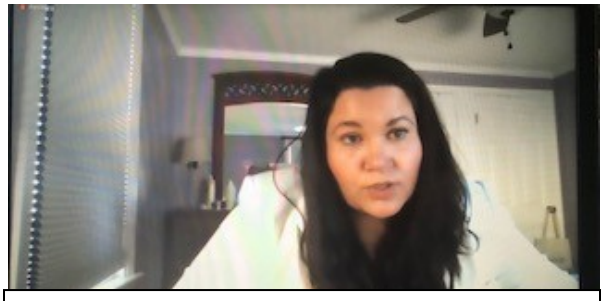
The panel consisted of VA Office of General Counsel Deputy Chief Counsel Megan Kral; Jenna Zellmer, Managing Attorney at Chisholm Chisholm & Kilpatrick; Jessica Seay, an attorney at the Board of Veterans' Appeals (and former Court of Appeals for Veterans Claims (Court) judicial law clerk); and

moderator Charles DiNunzio, a Court judicial law clerk. The panelists first introduced themselves and

VA Office of General Counsel Deputy Chief Counsel Megan Kral was a panelist during the student-aimed event.

explained their varying backgrounds and journeys to their current positions.

The panelists discussed both timely topics of interest, like working remotely and arguing before the Court via Zoom, as well as evergreen topics, including the key experiences and skills students should develop in order to work in this field. Panelists agreed that students interested in veterans law would be well-served by developing their writing and research skills during their law school careers. Zellmer encouraged students to participate in clinics if offered by their law schools. Panelists explained the importance of familiarity with administrative law in general, even without specific veterans law experience, before embarking on a career in the area.



Jenna Zellmer, Managing Attorney at Chisholm Chisholm & Kilpatrick, provided advice to students during the event.

Student Jackie Caroe was one of the attendees at the event. Caroe, a 3L at University of Florida Law School and a student in the UF Veterans Clinic for the past two years, said that the panel event was helpful for her. "I was really curious after working before the CAVC to see what [attorneys] said about their work and how they got there," she said. Caroe enjoyed the practical advice from the panelists. "I appreciated the panel's response about using prior appeals for writing samples," she said. Most of all, though, she said that it was important to her that the panelists were personally interested. "As a student, knowing that I could actually contact them…it means a lot," Caroe said.

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Legal Clinic.

VA Update Panel Event Informs Practitioners of 2020 Changes

by Sarah Blackadar

At an all-remote annual VA Update Panel on October 22, 2020, practitioners got a look behind the scenes at some of the ways the challenges of 2020 have shaped change at VA. Though it was a departure from the traditional in-person format, the change allowed nearly 200 bar association members to join the update.

The panel was composed of Richard J. Hipolit, Deputy General Counsel, Veterans Programs, VA Office of General Counsel (OGC); David J. Barren, Chief Counsel, Benefits Law Group, VA OGC; Mary Ann Flynn, Chief Counsel, CAVC Litigation Group, OGC; Board of Veterans' Appeals (Board) Chair Cheryl Mason; and Brianne Ogilvie, Deputy Executive Director, Office of Administrative Review.

Chairman Mason started out the presentation by noting where the Board has succeeded and fallen short of its ambitious goals of reducing its inventory of legacy appeals. This year, the Board prioritized holding more hearings for veterans with claims pending before the Board. In Fiscal Year 2020, the

Board held approximately 15,000 hearings. While this number fell short of the Board's goal, it still represented an enormous increase, an achievement made possible by an expanded telehearing program that allowed continued progress, despite the pandemic. As of October 2020, the Board still had approximately 65,000 legacy hearings to complete. The Chairman reiterated the Board's commitment to prioritizing these legacy hearings while also implementing the Appeals Modernization Act (AMA). Overall, Chairman Mason stated that the progress was clear—four years ago, the Board had over 400,000 pending legacy appeals and, today, the legacy appeals inventory is below 170,000.

Ms. Ogilvie followed with an update on the continued implementation of AMA. The Office of Administrative Review, formerly the Appeals Management Office, has been working hard to eliminate the inventory of legacy Notice of Disagreements and Form 9s. The Office was unable to completely eliminate the inventory this fiscal year, because some cases could not be processed due to pandemic-caused limitations on medical examinations. Ms. Ogilvie then turned to the implementation of AMA and noted that veterans' behavior has changed over the course of almost two years of implementation. From the Rapid Appeals Modernization Program to new claims after the official implementation of AMA, the needs of the Office have changed. Accordingly, VA is shifting resources to continue to meet these new demands. VA is hiring more decision review officers for higher level review appeals, as demand in this lane increases. The Regional Office review teams will also disband and VA will centralize the work of managing legacy remands in the DC Decision Review Office. Finally, in response to feedback from veterans and advocates, many AMA forms will undergo a redesign to make them more user-friendly. While the implementation of AMA has helped streamline the claims and appeals process, Ms. Ogilvie noted that VA is not expecting a decrease in in claims or appeals in the near future.

Attorneys from VA OGC echoed similar sentiments, as case volume is high and offices are expanding to meet the challenge. Chief Counsel Mary Ann Flynn noted that the continued flurry of activity at the Board has resulted in an uptick in CAVC activity. The litigation group has been busy handling over 9,000 appeals, 2,600 EAJA applications, and 300 writ petitions. To keep up with the influx of cases, the office has brought on almost 40 new staff, a mix of paralegals and attorneys. The office also added four new Deputy Chief Counsels and one new senior executive service position. The office has represented VA in 38 oral arguments this year, many of which were virtual. Ms. Flynn also noted that, spurred in part by the challenges of the pandemic, the office has been piloting a new method of delivering the Record Before the Agency (RBA). The office has, until recently, mailed CDs to counsel or appellants. This process has always suffered from mailing delays and damage to the discs. But the pandemic brought a new challenge. With few attorneys working in their offices, even fewer discs were timely reaching appellants or their attorneys. Adapting to the challenge, the office adopted, and is slowly expanding, the use of secure file transfer technologies to almost instantly transfer the large RBAs from VA to veterans' counsel. Finally, the growing CAVC Litigation Group has finally outgrown its home at 90 K Street and is headed around the corner to a new office space in 2021.

Panelists at the VA Update Event explained recent changes made by VA in agency- and appellate-level adjudication and processes. Then-Bar Association President Jenny Tang moderated the panel via Zoom.

Richard J. Hipolit, Deputy General Counsel, Veterans Programs, discussed some of the other challenges VA has faced during the pandemic and some of the technological innovation that VA has implemented. One example is the VA claim representative accreditation process, which until this year always required an in-person examination.

VA is now working on implementing virtual examinations on a trial basis and, if the process proves successful, the agency hopes to make this process permanent.

The pandemic response has brought a host of new issues to VA OGC, including advising on vaccine trial protocols, ensuring compliance with COVID-19 safety precautions while also ensuring delivery of critical services to the nation's veterans, and working with various FEMA pandemic response operations. Finally, Mr. Hipolit noted that VA OGC is improving its fee reasonableness decision process. Efforts include hiring additional paralegals, using overtime to process backlogged requests, and increased standardization in the process. So far, VA has seen a 26% increase in resolution of fee disputes and he anticipates additional improvements.

Finally, David J. Barren provided an update on veterans law cases at the Federal Circuit. Mr. Barren noted that the Federal Circuit had also seen an uptick of 37% in veterans law cases. Most notable among these cases is a pending challenge to the M-21 manual provisions, seeking to overturn the Federal Circuit's holding in *Disabled American Veterans* that held that provisions of the M-21 manual were not directly reviewable by the courts. Mr. Barren also took a moment to note the most unusual development, when the Federal Circuit went *en banc* in *Francway v. Wilkie* to change one footnote in the original opinion.

All in all, it has been a busy and challenging year at VA as it strives to protect the health and safety of veterans and the agency's staff that serve them during a global pandemic. But these challenges have spurred innovation that will hopefully benefit veterans for years to come.

Sarah Blackadar is a Veterans Law Practitioner.

Message from the President

I hope you enjoy Volume IV of the Veterans Law Journal for calendar year 2020. As always, this publication of the CAVC Bar Association is filled with helpful information that is sure to be beneficial. Our annual meeting was held on October 22nd and even though it was the first time we could not gather in person, the virtual format worked out well. The "VA Update Panel" provided insight from our panel members into the latest and greatest occurring within the VA. Thank you again to panel members David J. Barrans, Mary Ann Flynn, Richard J. Hipolit, Cheryl L. Mason, and Brianne Ogilvie for taking the time to be with us! Outgoing president Jenny J. Tang thanked our outgoing Board members: Charles DiNunzio, Stuart Anderson, Amy Odom, Chris Wysokinski, and Richard Daley. Thank you all for your service to the Bar! We then welcomed our new Board members: Thomas Susco (Treasurer), Freda Carmack (Secretary), Ashley Varga, Javier Centonzio, and Kenneth Meador. I look forward to working with each and every one of you and thanks for stepping up to serve in the Bar's leadership! We concluded the meeting by having the honor to hear from Chief Judge Bartley. Thank you, Judge!

On November 18th, the Bar held a virtual lunch with the Court's newest judges, Scott J. Laurer and Grant C. Jaquith. I wish to personally thank Judge Laurer and Jaquith for their participation and willingness to speak with us about their backgrounds and insights. There was a lot of fun had and I am sure that our members who joined us are very glad they did. Additional thanks to immediate past Board member Charles DiNunzio for moderating.

On November 15th, I had the privilege of judging the semi-final rounds of the National Veterans Law Moot Court Competition (NVLMCC). The moot court competition, sponsored by the Bar, the Court, TVC's Pro Bono Consortium, and George

Washington University Law School, was first formed in 2009 and continues to grow every year, with this year's competition being the largest yet. I encourage all CAVC Bar members to volunteer to judge the competition in 2021, as I am sure you will enjoy it as much as I did.

Reminder: if you have not yet renewed your membership for 2021, please do so. And if you are not yet a member of the Bar Association, what are you waiting for? Your membership helps support the facilitation of justice for all of our nation's veterans. By becoming a member, you not only support that mission but also receive access to valuable education, information and events. You may renew or apply for membership by going to www.cavcbar.net/membership.

On behalf of the entire Board of Governors for the CAVC Bar Association, we wish you and yours the happiest of Holidays!

Jason E. Johns
President, CAVC Bar Association

Message from the Chief Judge

Greetings Colleagues!

While the pandemic continues to impact us all, the Court and our community of litigants remain extremely busy. For this end-of-year VLJ issue I would like to acknowledge a few of the contributions that so many have made this year. And while I can only relate a few, on behalf of the Board of Judges I want to thank all who have worked to further shape veterans benefits law in positive ways this year.

- The CAVC Bar Association completed an incredible year under Jenny Tang's leadership and the support of a great Board of Governors—their work included organizing many remote events, and to top it off they successfully transitioned to new leadership and a new president, Jason Johns.
- The Court's ongoing partnership with George Washington University Law School, the CAVC Bar Association, and the Veterans Pro Bono Consortium produced a 2020 National Veterans Law Moot Court Competition (NVLMCC) with a record-setting number of schools and students competing.
- With the support of the Rules Advisory Committee and the Judicial Advisory Committee, and with helpful comments from the public, the Court published class action rules on the eve of Veterans Day. The rules require notice of all active class action cases, something that is now available on our Court website.
- The Court held our first audio-only teleconference oral argument in *Philbrook* on April 21, 2020, and our first video (Zoom) oral argument in *Fuller* on November 6, 2020—and judging by the number of views online, interest in our oral arguments is on the rise.

2020 will be a year we remember for many reasons, and while many of those memories will be painful, we can all be proud of our actions to stay the course and find new ways to improve our collective practice and heighten interest in veterans law.
I look forward to working, and hopefully visiting personally, with each of you in the new year. Until then, be safe and thanks again for what you are doing on behalf of the Court. I hope you have an awesome holiday season.

Meg

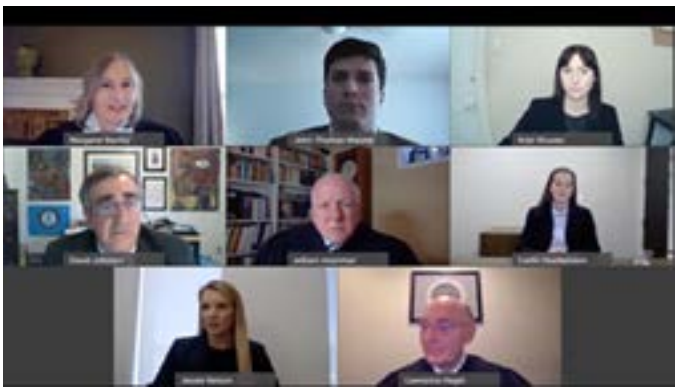
P.S. The summary below from the NVLMCC documents an incredibly successful 2020

competition that involved the efforts of so many hands. From problem development to judging briefs and arguments to executing the competition in a virtual environment, the level of effort involved is extraordinary. While there are too many involved to thank all who have contributed, special thanks to the competition co-chairs, Cassie Vangellow and Therese Desilets, Dean Johnson at George Washington University Law School, and to our own Judge Allen.

The 2020 National Veterans Law Moot Court Competition (NVLMCC) was held from November 13-15, 2020. This year's competition was historic for two reasons: first, for being held virtually, and second, for having a record 28 teams from 23 schools across the nation. Competitors hailed from Arizona State University Sandra Day O'Connor College of Law, Baylor Law School, Brooklyn Law School, Campbell Law School, Elon University School of Law, Emory University School of Law, Florida Coastal School of Law, George Mason University Antonin Scalia Law School, George Washington University Law School, Pepperdine Caruso School of Law, South Texas College of Law Houston, Stetson University College of Law, Temple University Beasley School of Law, UC Hastings College of the Law, UIC John Marshall Law School, University of Cincinnati College of Law, University of Connecticut School of Law, University of Denver Sturm College of Law, University of Detroit Mercy School of Law, University of Iowa College of Law, University of Kansas School of Law, University of Richmond School of Law, and University of Virginia School of Law.

Competitors argued in several rounds spanning three days on a problem addressing two issues: (1) Does the U.S. Department of Veterans Affairs comply with the "fair process" standard when it removes a veteran's permanent and total disability status without advance notice, thereby leaving the overall rate of compensation unchanged but reducing or eliminating ancillary benefits previously available to the veteran, and (2) does VA's removal of a veteran's permanent and total disability status amount to a taking of property for purposes of Chapter 35 Dependents Educational Assistance.

After several rounds of tough argument, Caitlin Huettemann and Jessie Nelson of Baylor Law School and John-Thomas Malone and Ariel Shuster of University of Cincinnati College of Law competed in the final round. The Chief Judge of the United States Court of Appeals for Veteran Claims (CAVC) Margaret Bartley and CAVC Senior Judges Lawrence Hagel and William Moorman presided over the final round.



A scene from the final round of the 2020 National Veterans Law Moot Court Competition.

Competition winners include:

1. Finalists:
    a. Champion: Baylor Law School; Caitlin Huettemann, Jessie Nelson (coached by Alejandra Garciacas)
    b. Runner-Up: University of Cincinnati College of Law; John-Thomas Malone, Ariel Shuster (coached by Nancy Oliver)
2. Best Oral Advocate: Ariel Shuster, University of Cincinnati College of Law (coached by Nancy Oliver)
3. Best Petitioner Brief: UC Hastings College of Law; John Paul, Hayden Soria (coached by Christina Connolly)
4. Best Respondent Brief: George Washington University Law School; Perry Denton, Roxanne Cassidy (coached by Lisa Schenck)

Judges Jaquith and Laurer Meet the Bar During Online Event

by Jillian Berner

On November 18, 2020, the Court's two newest judges, Scott J. Laurer and Grant C. Jaquith, acquainted themselves with the Bar Association membership during a discussion event held via Zoom. Moderated by Court judicial law clerk Charles DiNunzio, the judges explained their backgrounds and got to show the bar a bit more of a personal side.

First, Judge Laurer told the audience about his origins. As the third of seven children, he was raised in a small town in New Jersey, outside of Philadelphia. Following his graduation from Rutgers University, he attended law school at Temple University and was commissioned in the Navy Judge Advocate General (JAG) Corps while a 2L. He served 30 years in the Navy JAG Corps, retiring as a Captain, after service that took him to locations like Kabul, Baghram, and Naples. He has been married for 30 years after meeting his now-wife in law school and they have two children.

Judge Jaquith also provided some of his personal background. During his childhood in St. Petersburg, Florida, as the oldest of four, Judge Jaquith decided he wanted to be a soldier and a lawyer—and did just that. Following his undergraduate education (and Army ROTC career) at Presbyterian College in South Carolina, he attended law school at the University of Florida, then served on active duty for six years at Fort Leonard Wood. While in the Army Reserves, he worked at a large law firm in Syracuse, New York, before he became the United States Attorney for the Northern District of New York. He and his wife, the daughter of Cuban immigrants, have six children and five grandchildren (with one more on the way).

Next, the judges described their most proud career accomplishments. Judge Laurer discussed his service as a senior adviser to the U.S.S. Abraham Lincoln during a 10-month deployment to the Persian Gulf. Judge Jaquith told the audience that he was most proud of his service as a U.S. Attorney and the successful prosecution of the murder of Wally Howard, a police officer working with a drug task force.

As always, the audience enjoyed hearing the judges' recollection of the process of their nomination to the Court. Additionally, the judges discussed the changes to their current day-to-day work from their previous positions, as well as the COVID-related teleworking changes many of us have experienced. As many in this field can commiserate over, Judge Laurer explained the steep learning curve for veterans law and "building a plane while you're flying it," as he called it.

The judges both discussed their influences and how they have affected their judicial philosophies. Judge Laurer discussed his military background, which caused him to value "service before self" and the importance of the oath he took both in the military and at the Court. Judge Jaquith emphasized his respect for the service and sacrifice of veterans, as well as the importance of the rule of law. Judge Laurer said that his philosophy most aligned with late Supreme Court Justice Antonin Scalia and admiration of Scalia's "mastery of language and respect for words," shared by Justices Elena Kagan and John Roberts. Judge Jaquith replied that he most aligned with former Justice Sandra Day O'Connor because she ruled based on the facts or law, "rather than a political or ideological agenda."

The judges said that they believed that the most pressing issues for practitioners and veterans were case delay and backlog at the agency, as well as transition to the Appeals Modernization Act systems. Both judges weighed in on their tips for attorneys practicing before the Court, with Judge Jaquith advising litigants to focus on detail and developing the record, while Judge Laurer said that attorneys could focus more in their briefs, though he was "impressed" with the bar thus far.

Finally, the judges didn't hold back on the most pressing issues—they vigorously disagreed as to whether a hot dog was a sandwich, with Judge Laurer providing helpful contextual comparison to hoagies and submarines.

Following the panel event, I had the opportunity to interview Judges Laurer and Jaquith further. During our interview, the judges provided more detail about themselves. Judge Jaquith told me that, after realizing as a child that he likely would not be the "next Johnny Unitas," he turned his focus to the most common subject of his beloved biographical books—soldiers and lawyers—and pursued a career accordingly. Judge Laurer explained that his uncle served in Vietnam and his father had served in Korea and both relatives influenced his career path. Once he was in law school, he spoke to recruiters who helped him enter the JAG Corps.

Both judges stressed the difference between their prior military service and their roles as judges. "Judge Jaquith and I had both advised veterans and their family members with respect to various [benefits]…but it's totally different than immersing yourself in this complex practice," Judge Laurer explained.

Finally, both judges discussed the changes to their day-to-day lives spurred on by the pandemic. Judge Jaquith praised the administrative support from the Court staff and the ease of transition to working remotely during the pandemic. Judge Laurer discussed the increased time he has spent with his family and reduced commute, as well as echoing Judge Jaquith's positive comments for the Court and its staff. While both judges acknowledged that starting their judicial career during the pandemic has presented challenges (including building rapport as a chambers team with their law clerks and court clerks), they both expressed happiness with their current positions. "I think I went from what was maybe the best job to what may be its equal," Judge Jaquith said. Judge Laurer agreed, stating, "For me, it's all about the mission…this is an opportunity to…ensure that veterans and their family members get the benefits they're entitled to—another great mission."

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Legal Clinic.

Court Rules That VA Must Rate All Migraine Symptoms Based on Frequency, Duration, Severity, and Economic Impact

by S. Mohammad Mahmoudi

Reporting on *Holmes v. Wilkie*, No. 19-2495 (November 25, 2020).

Recently, the United States Court of Appeals for Veterans Claims (Court) held that the rating criteria for migraines governed by 38 C.F.R. § 4.124a (Diagnostic Code (DC) 8100) contemplates more than just headaches. The Court held that DC 8100 requires that VA consider all the symptoms the veteran experienced as a result of migraine attacks, then rate those symptoms based on the frequency, duration, severity, and economic impact of the attacks.

Mr. Holmes was granted service connection for migraines in June 2010. In July 2015, VA requested a medical examination to determine the status of his migraines. That month, the Regional Office (RO) issued a decision continuing the assigned 50 percent rating. Mr. Holmes submitted evidence that he suffered from light-headedness, mood swings, nausea, and that his migraines caused dizziness, depression, and anxiety and warranted a rating greater than 50 percent. He did not, however, have separate diagnoses for those separate symptoms. He underwent another VA examination in March 2017. Following that examination, the RO issued a Statement of the Case denying his claim for a rating greater than 50 percent for migraines. Mr. Holmes perfected his appeal to the Board of Veterans' Appeals (Board).

The Board found that Mr. Holmes's 50 percent disability rating was adequate because the DC contemplates very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability. Therefore, all symptoms related to Mr. Holmes's headaches that were productive of economic inadaptability and/or that

cause prostrating attacks had been taken into consideration.

Mr. Holmes appealed to the Court, arguing that DC 8100 does not contemplate non-headache symptoms such as nausea, vertigo, mood swings, sleep impairment, anxiety, isolation, or depression. He argued that the Board erred when it did not consider separate ratings for those symptoms. Furthermore, Mr. Holmes believed the Board was mistaken when it relied on a dictionary definition of "migraines," which caused the Board to impermissibly make its own medical findings. Conversely, the Secretary disputed Mr. Holmes's interpretation of the underlying facts. The Secretary argued that the Board only listed symptoms reported by Mr. Holmes but did not decide whether they were all caused by his migraines, the Board found that the symptoms at issue were all contemplated by the rating criteria, and the Board could not award separate ratings for all alleged symptoms.

In its decision, the Court used the principles of regulatory interpretation, including referring to the common definition of "migraine," to hold that the term as used in DC 8100 included more than just headache symptoms. The Court also held that DC 8100 required that VA consider all of the symptoms the Veteran experienced as a result of his migraine attack and then rate those symptoms based on the frequency, duration, severity, and economic impact of the attacks. The Court pointed out a similar analysis is required when evaluating psychiatric disorders pursuant to 38 C.F.R. § 4.130.

The Court stated that it may not strike down a valid interpretation of a diagnostic code merely because its plain text was less favorable than other diagnostic codes i.e., 38 C.F.R. § 4.130. Without a constitutional claim, the Court was prohibited from reviewing the validity of the rating schedule. Furthermore, the Court held that it lacked the authority to rewrite a more favorable rating schedule.

Furthermore, the Court did not rule out the possibility that a veteran's migraines could cause or aggravate a separate disability, cause a veteran to become unable to secure substantially gainful employment, or raise the question of extraschedular considerations in exceptional cases.

The Court then turned to applying the law and its holdings to this particular case. Mr. Holmes's argument that the Board impermissibly failed to assign separate ratings or consider all schedular alternatives before proceeding to an extraschedular analysis did not sway the Court. The Court noted that Mr. Holmes did not carry a separate diagnosis for depression, anxiety, or his other symptoms. The Court also reasoned that there was nothing for the Board to compensate on an extraschedular basis or through alternate means because the Board's decision was correct in finding that all of Mr. Holmes's symptoms were adequately contemplated in the rating criteria.

Accordingly, the Court affirmed the Board decision because Mr. Holmes failed to show that the Board clearly erred in finding that his migraines led to frequent completely prostrating and prolonged attacks productive of severe economic inadaptability.

S. Mohammad Mahmoudi is Associate Counsel at the Board of Veterans' Appeals.

Federal Circuit Denies Class Certification to Legacy Claimants Waiting Over a Year for VA to Decide their Claims

by Michael Canavan

Reporting on *Monk v. Wilkie*, 978 F3d. 1273 (Fed. Cir. 2020).

In Monk v. Wilkie, the Federal Circuit denied class certification of the proposed class of veterans whose disability claims had not been resolved by the Board of Veteran' Appeals (Board) within one year of filing their notices of disagreement (NODs). The Court affirmed the decision of the Court of Appeals for Veterans Claims (CAVC) after determining that the

commonality requirement of Federal Rule of Civil Procedure 23(b)(2) had not been met.

Mr. Monk and seven other veterans petitioned the CAVC for class action certification for a class of veterans who filed a timely NOD upon denial of VA disability benefits and on whose appeals VA failed to render a decision within one year from the date of the NOD. The veterans sought judicial relief compelling the Secretary of Veterans Affairs to decide all pending appeals within one year from receipt of a timely NOD.

Reviewing the matter *en banc*, the CAVC requested Mr. Monk and the other veterans separate the proposed class into issues that met the "commonality" requirement of Federal Rule of Civil Procedure 23(b)(2). The rule provides that "[a] class action may be maintained if . . .the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The veterans declined to separate or limit the class, alleging that delay was systemic throughout the VA claims system. The CAVC found no single injunction would provide relief to the class as a whole and denied the petition for class certification. *Monk v. Wilkie*, 30 Vet.App. 167 (2018).

While the case was still pending at the CAVC, Congress enacted the Veterans Appeals Improvement and Modernization Act of 2017 (AMA). The Federal Circuit requested additional briefing from the parties and *amicus curiae* as to the impact on the AMA on the proposed class. The government asserted that the AMA was designed to avoid the major causes of delay in the legacy appeals system. During the congressional hearings, the idea of a fixed deadline system had been considered but ultimately rejected as a solution, given the variety of issues in veterans' disability claims. The government also highlighted that the AMA provides veterans in the legacy system with an opportunity to "opt in" to the AMA system that was designed to expedite their claims while protecting their due process rights. The Government alleged that nearly every member of the proposed class had been notified of the legislative change, but some elected not to take advantage of Congress's chosen remedy to delays in the legacy system.

Mr. Monk and the veterans maintained that the AMA did not apply to the over 200,000 cases still pending in the legacy system and argued that the opt-in provision was inadequate. Writing as *amicus*, the National Law School Veterans Clinic Consortium argued that "it is too early to tell if the AMA provides veterans with accurate and timely decisions" and, therefore, judicial intervention was still necessary on behalf of claimants who have not opted into the AMA system.

The Federal Circuit disagreed, however, and, quoting the Second Circuit's view in *Sugrue v. Derwinski,* 26 F.3d 8, 12-13 (2d Cir. 1994), held "that when Congress has 'carefully crafted' a 'comprehensive remedial structure' that structure warrants evaluation in practice, before judicial intervention should be contemplated."

Turning to the question of commonality, the Federal Circuit agreed with the CAVC that, in order to be certified, a class action must present a common question capable of a common legal answer and whether such commonalities existed could not be determined here, as the issues had not been adequately specified. The Federal Circuit determined that the proposed class of all legacy claimants did not satisfy the commonality standard, nor had Mr. Monk and the other veterans suggested how the class could satisfy commonality. The Federal Circuit noted that the veterans had not responded to the CAVC's request for a more narrowly defined class. Additionally, neither the veteran petitioners nor *amicus* had elaborated on the remedy sought beyond imposition of a one-year deadline.

The veterans argued the CAVC had erred in not allowing them to move for certification of subclasses as necessary after the *en banc* argument. However, the Federal Circuit had not been informed as to what legal remedy would be sought by any subclasses. Therefore, the Federal Circuit held that Mr. Monk and the veterans had failed to show error in the CAVC's decision or any other basis for remand. Certification of the class was denied.

In his concurrence, Judge Reyna emphasized that, although Rule 23(b)(2) had not been satisfied in this case, class certification is available to classes of veterans that are able to demonstrate commonality. Judge Reyna was not persuaded that the AMA affords a remedy to the over 200,000 claimants with pending legacy appeals, who should not have to switch into a new system before they can expect and receive timely resolutions of claims. He closed by adding that it remains to be seen whether the AMA will resolve the VA's systemic and unacceptable delays but, until then, "the availability of class certification to address such delays remains available and important as ever."

Michael Canavan is an associate attorney at Chisholm Chisholm and Kilpatrick Ltd.

CAVC Declines to Grant Writ Requested for Claimants Who Have or Will Receive BVA Remand Not in Accordance with Law

Reporting on *Gardner-Dickson v. Wilkie*, No. 19-4765 (Oct. 21, 2020).

In an October 21, 2020, panel decision filed by Judge Falvey, the Court of Appeals for Veterans Claims (Court) found the requirements for entitlement to a writ of mandamus had not been met. The petition was denied on the merits, which then mooted the petitioner's motion for a class action.

Here, the Veteran initially sought service connection for ischemic heart disease under VA's herbicide presumption, testifying that temporary duty in Thailand during the Vietnam War placed him near the perimeter of his base. The Board of Veterans' Appeals (Board) remanded his claim in 2019 for further development to confirm his testimony. The Veteran immediately filed a motion for reconsideration, which was denied. He then, following the Board remand and prior to a final Board adjudication, appealed to the Court, requesting the Secretary withdraw the 2019 Board remand and re-decide the case, characterizing the remand as an unlawful remand to develop negative evidence. He also moved to certify a class of claimants who have or will receive Board remands wholly or partially not in accordance with law. Unfortunately, the Veteran passed away during his appeal and his wife, Mrs. Gardner-Dickson, was substituted as the petitioner.

In a single-judge decision, the Court initially denied the petition because Mrs. Gardner-Dickson was found to have adequate alternate means to obtain her desired relief (in other words, her claim was not yet ripe for Court review) and had not demonstrated that Court jurisdiction was necessary. She then filed a motion for a panel decision.

The Court first noted that the writ sought was not within its jurisdiction because the Petitioner requested a ruling on the merits of a claim that has not yet been fully developed by VA (i.e. a claim that has been remanded by the Board for further development that had not yet been performed). The Court also seemed to suggest that a petition focused specifically on attacking the mechanics and widespread effects of VA's procedural delays may have been more fruitful. As to the question of whether the Court had jurisdiction to decide a Board remand on the merits in the immediate case, however, the answer was decidedly no. The Court determined the petitioner did not have a clear and indisputable right to a writ and had not demonstrated she lacked an alternate means to obtain relief, since VA had not yet completed its development of her claim.

The petitioner argued that 38 U.S.C. § 7261(a)(2) authorized the Court to compel action because the Secretary unlawfully withheld and/or created unreasonable delay in remanding the claim rather than issuing a final Board decision. The Court disagreed, noting that in this specific case, the petitioner was asking them to directly review a nonfinal Board decision that was not yet ripe for appellate review on the merits rather than prospectively review a final Board decision. In other words, the Court held that it lacked jurisdiction to decide the case on the merits because the claim had not yet been decided by the Board. In addition, the

Court also noted that the Petitioner did not successfully demonstrate unreasonable delay that might otherwise provide a means of granting a writ.

To this end, the Court outlined the unreasonableness factors articulated in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (hereinafter, *TRAC*), that could be used to frame future arguments supporting a finding of unreasonable delay. The Court noted that *TRAC* factors addressing delays affecting health and welfare, as well as delays involving impropriety or bad faith on the part of the Agency might weigh in the petitioner's favor; however, the Court made clear that these two factors were strongly outweighed by other *TRAC* factors. In particular, the Court emphasized that *TRAC* factors are not applicable to the Petitioner's argument, in that she did not allege or point to any specific evidence that there had been unreasonable delay in adjudicating her claim. The Court also noted that the Petitioner did not make contentions as to system-wide delays or repeated Board remands, which, it infers, may have been more convincing. So, while the Court noted that it had some latitude to address the issue of unreasonable delay in future cases, the Petitioner's case, because of its specific focus on requesting the Court to decide the remand on its merits, failed to meet the high threshold that would be required to establish entitlement to a writ.

The Court seemed to suggest that a future case placing a greater focus on the time VA spent or will spend contemplating the Board-ordered development would be more successful than the Petitioner's argument, which primarily focused on the unreasonableness of the Board remand. The Court also noted that an argument asking the Court to ensure claims are moved along in the adjudicatory process might also be more successful.

With respect to Board development, the Court referenced *Mariano v. Principi* and *Douglas v. Shinseki* in discussing the petitioner's argument that the remand was unlawful. Both *Mariano* and *Douglas* represent situations where the Court has ruled on issues related to Board remands and the propriety of remanding for negative evidence. The Petitioner argued that the Board had remanded the claim illegally in order to obtain negative evidence. The Court, citing *Douglas*, clarified, however, that the Board has an affirmative duty to gather evidence necessary to render an informed decision, even if this means developing for negative evidence, provided it is done in an impartial, unbiased, and neutral manner. There is no rule that prohibits the Board from remanding just because negative evidence may be developed. To successfully claim that the Board impermissibly remanded a claim, a petitioner would specifically need to demonstrate the Board acted with partiality, bias, malfeasance, or bad intent in obtaining evidence under its duty to assist. Notably, the Court also emphasized that this case could be distinguished from *Mariano* and *Douglas* because in this case, case development had not yet been performed. Therefore, any finding that the remand was a biased, prohibited search for negative evidence would be speculative.

Judge Greenberg dissented with the decision, writing that the Board's remand in this case was an impermissible remand for negative evidence; instead, he would have granted the Petitioner's writ and decided in her favor based on the evidence at hand. Further, he notes the conduct of VA to be "emblematic of a systemic bureaucratic disorder, which [the Court] is uniquely ordained to deal with," evoking the late Justice William Brennan's view of veterans as a unique class of litigants.

Caitlin Kucera is Associate Counsel at the Board of Veterans' Appeals.

VA's Statutory Interpretation of the Section Governing VRAP Payments Beyond the Date of Secretarial Authority was Not Reasonable

By Chantal C. Wentworth-Mullin

Reporting on *Welcome v. Wilkie*, No. 18-4601 (October 29, 2020).

In *Welcome*, the Court of Appeals for Veterans Claims (Court) reviewed a decision by the Board of Veterans' Appeals (Board) that denied Mr. Welcome the full 12 months of Veterans Retraining Assistance Program (VRAP) benefits for which he was eligible. The Board justified their denial by stating that the law did not provide for an extension of Mr. Welcome's VRAP benefit payments beyond March 31, 2014, the date upon which the Secretary's authority to issue payments was terminated.

The Court used its previous discussion of VRAP in *Lacey v. Wilkie*, 32 Vet.App 71 (2019), to clarify the program and its parameters. VRAP was intended to provide benefits to Veterans between 35 and 60 who were otherwise ineligible for TDIU or other educational assistance such as VA education benefits or state and federal job training programs. To be eligible for VRAP and up to 12 months of benefits, veterans were required to pursue an approved full-time program of training for Certification or an Associate's Degree in a high-demand occupation. VRAP commenced on July 1, 2012, and Mr. Welcome timely applied for benefits in August 2013, prior to the application cutoff date of October 1, 2013. Thereafter, his eligibility for up to 12 months of benefits was certified. Due to enrollment issues, he was forced to wait until February 10, 2014, to begin his program of education.

In preparation for the termination on March 31, 2014, of its payment authority pursuant to a sunset provision, VA created an "earliest of" decisional matrix to be used to calculate the final payment date for any Veteran that remained in a program of education supported by VRAP. Through this analysis, the veteran would receive their final VRAP payment on the *earliest* of the following dates: 1) the end date of the term/quarter/semester, or 2) the date the Veteran's enrollment dropped from full-time, or 3) June 30, 2014, or 4) the date upon which their 12 months of entitlement was exhausted. Following this rationale, Mr. Welcome received a two-month lump sum payment that provided benefits to the end of his then-current term, May 30, 2014. This final payment date, in effect, left 10 months and nine days of his eligibility unfulfilled.

Mr. Welcome challenged the termination of his benefits with entitlement still remaining at the Board. He argued that because VA was able issue two months of future payments to him, they presumably were also able to issue a lump sum payment that would have accounted for the remaining 10 months and nine days of his entitlement. The Board, in its decision, simply stated that there was no legal basis for payments to Mr. Welcome beyond the termination date of the Secretary's authority. The Board did not address the lump sum payment that he received for the two months left in his term. Mr. Welcome appealed to the Court.

Following a *Chevron* analysis, the Court addressed Mr. Welcome's appeal. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984.) The Court first addressed the clarity of the Congressional intent in the relevant statutory section. This statutory section, § 211(a), (k), 125 Stat. at 713-715, and specifically subsection (k) of 211 at 715 reads, "TERMINATION OF AUTHORITY – The Authority to make payments under this section shall terminate on March 31, 2014."

Although the statute's text articulated that Congress intended for the Secretary's payment authority to terminate on March 31, 2014, it did not include any limitation language that required the veterans to have completed their program of study by that date, or any other. Nor did the statute state that their benefits would cease on that date no matter their progress in their course of study. The statute, though, was not devoid of limitations. Citing *Lacey,* the Court discussed that Congress had intended VRAP to be "limited in duration and scope" and that there was text within the statute that imposed "discrete, if implied limitations" on the veterans. As discussed above, the statute limited a veteran's entitlement to an approved program of education, for up to 12 months, full-time, and with the goal of a Certification or Associate's Degree in a high demand occupation.

The Court then addressed the mandatory language used by Congress in § 211(b), 125 Stat. at 713. Congress expressed in this section that "each veteran…*shall* be entitled to up to 12 months of

retraining assistance by the Secretary of Veterans Affairs." *Id*. (emphasis added.) The Court stated that within this section, only the "up to" language could give rise to a question of ambiguity with regard to the intended duration of benefits. The Court gave short shrift to this possibility, as it stated that there was nothing in the language of the statute that indicated that the Secretary had any discretion to determine the length of a veteran's entitlement to VRAP. Instead, the Court found that the length of entitlement of "up to 12 months" is determined by the length and nature of the veteran's full-time program of education.

To define a "program of education," the Court looked to 38 U.S.C. §3452(b) for guidance. It concluded that all of the program types described within this section had the goal of a "full attainment of a[n]... objective." Since VRAP was tied to an entitlement for a "program of education" that would result in a Certification or Associate's Degree, the Court found that an interpretation that the entitlement could be issued in smaller units would frustrate the attainment of the program's objective and run counter to Congressional intent. Therefore, when the Secretary issued lump sum payments to the veterans remaining in VRAP, VA were obligated to provide the benefits to the veteran in the manner expressed in the statute.

The second step of the *Chevron* analysis addressed the VA's interpretation of the statute. At the outset, the Court dismissed the possibility that the VA's proposed four alternative "earliest of" dates was a permissible interpretation of the statute. As such, VA's interpretation did not warrant deference.

The Court then addressed the Secretary's argument that the "hard stop" date of June 30, 2014, was justified because Congress had requested a report of VRAP's achievement of target objectives by July 1, 2014. The Court dismissed this argument, noting that the Secretary could have, for example, begun to tally its numbers at the close of the application period on October 30, 2013. The Court reasoned that even if those numbers would not reflect the full picture of the program, there was no indication that Congress wanted to prioritize accurate data at the expense of a veteran's remaining entitlement. The result of such a prioritization would be the opposite outcome intended by this statute.

The Secretary also argued that the use of the end-of-term option as an "earliest of" date for the cessation of a veteran's entitlement was informed by and was analogous to Chapter 30, under which the Montgomery GI Bill is administered. In particular, the Secretary cited 38 U.S.C. § 3014A(c)(2), which authorized accelerated payments. Here, the lump-sum payments were limited to the portion of the entitlement that would carry the veteran to the end of their current term in their program. This section also applied to veterans involved in educational programs with an objective of employment in a "high technology occupation in a high technology industry." These programs charged tuition and fees more than double the VA's basic educational assistance allowance. Neither of these factors were remotely analogous to Mr. Weather's program of education. In addition, the lump sum payments that were allowed under this section did not signal the termination of the veteran's total entitlement. Rather, it simply allowed VA to accelerate the payments, if necessary, to fulfill the remaining entitlement of each term or semester. In contrast, when VA accelerated the payments and paid the lump sum to Mr. Weather, it eliminated the remaining 10 months and nine days of his entitlement by ceasing payments at the end of the term, without statutory authority.

At the conclusion of this second *Chevron* step, the Court held that the justifications brought forth by the Secretary were only justifications for his strategy in this forum, not a "reasoned" interpretation of the statute, as those reasons were not cited in the Board's decision.

In the final section of the opinion, the Court addressed the Board's decision directly. Since the Court had found the Secretary's interpretation of VRAP unreasonable, the Board's decision could already be considered in error. The Court, though, went further and addressed the Board's justification that a veteran's entitlement would end on the applicable "earliest of" date because they did not have a right to these benefits after March 31, 2014. This was in direct conflict with the lump sum

payments that the veterans received after that date. As such, the Court stated that the Board's decision could not be upheld. The Board decision was vacated and the matter was remanded to the Board to address the factual findings necessary to address the length and eligibility or Mr. Welcome's remaining entitlement.

Chantal Wentworth Mullin is the Managing Director of the Wohl Family Veterans Legal Clinic at Syracuse University's College of Law.

Court Declines to Exercise Jurisdiction Over Board Determinations of Finality

by Audrey Kim

Reporting on *Dallman v. Wilkie*, No. 18-4075 (Nov. 30, 2020).

In *Dallman*, the Court of Appeals for Veterans Claims (Court) dismissed an appeal of a claim of service connection for right thigh hematoma residuals, holding that it had no jurisdiction over the Board of Veterans' Appeals (Board)'s determination as to the finality of a prior rating decision and subsequent reopening of the claim based on its determination that new and material evidence had been submitted. The Court also vacated and remanded the Board's decision regarding issues of effective date and ratings awards.

The dispute in this case arose from a December 1999 Regional Office (RO) rating decision denying service connection for right thigh hematoma. In January 2000, the appellant submitted a statement, which he titled a "reply and a[n] appeal," to the December 1999 rating decision. In response to a December 2010 request to reopen, the RO denied the appellant's claim for service connection for right thigh hematoma. The appellant then filed a substantive appeal in October 2013. In an April 2018 decision, the Board found that the December 1999 rating decision denying service connection for right thigh hematoma residuals was final, held that the appellant had submitted new and material evidence sufficient to reopen the claim since 1999, and remanded this issue for further adjudication.

On December 13, 2019, the Court issued a memorandum decision dismissing the claim for entitlement to service connection for right thigh hematoma and vacated and remanded the Board decision as to all other issues. In a motion for reconsideration, or, in the alternative, panel review, the appellant argued that the Court committed a legal error in dismissing the right thigh hematoma claim for lack of jurisdiction. Specifically, the appellant argued that the determination of finality regarding the December 1999 rating decision is a legal issue appealable at this stage of litigation because of the possible adverse effect on the downstream issue of the proper effective date for service connection of the Veteran's right thigh hematoma. The Court withdrew the memorandum decision and assigned a panel to determine whether the Board's finality determination was an independently appealable issue. In a November 30, 2020, panel decision, the Court held that the Board's finding as to the finality of the December 1999 rating decision does not constitute a final decision.

First, the Court noted that it has exclusive jurisdiction to review decisions of the Board under 38 U.S.C. § 7252(a). For the appellant to obtain review of a Board decision by the Court, that decision must be final. Moreover, a Board remand is not a final decision.

The court cited *Myers v. Principi*, 16 Vet. App. 228 (2002), for the proposition that, to the extent that the Board's finality finding as to a prior rating decision in the context of reopening could affect a veteran's effective date, this issue can be adjudicated later, after service connection is granted.

Second, the Court determined it could not address the issue now. Citing *Acosta v. Principi*, 18 Vet. App. 53 (2004), the Court held that once the Board reopens a claim and remands it for adjudication of service connection on the merits, the finality issue may only be litigated downstream. Specifically, in *Acosta*, in January 1998, the Board found that a March 1983 rating decision denying service

connection for a psychiatric condition was final and reopened and remanded the claim based on new and material evidence submitted after the 1983 decision. After the RO granted service connection, the appellant attempted to appeal the effective date, but the Board determined the appeal was untimely, as the original 1983 rating decision (which denied service connection) was not appealed. However, on appeal, the Court vacated the 2001 Board decision, as the Board's remand of the claim to the RO was not an adverse final decision over which the Court had jurisdiction, and the Board's remand did not also constitute a final decision of his earlier claim because the further development of the claim could affect the decision on the effective date.

Third, at the time of the Board's remand, service connection had not yet been awarded; therefore, no effective date determination was required. The Court determined that it was only after service connection was granted and the agency assigned an effective date, and after those decisions had been reviewed finally by the Board, could the veteran appeal to the Court concerning the effective date or rating assigned. Pursuant to *Acosta*, the Court held that it cannot consider an appellant's contentions regarding the Board's finality determination after reopening but prior to the award of service connection, because the decision to reopen and remand does not constitute a final Board decision as to the claim for service connection or the effective date of an award.

Accordingly, the Court held that, as there was no final decision on the service connection claim here, dismissal was required because it had no jurisdiction over the matter under 38 U.S.C. §§ 7252(a) and 7266.

As to the remaining issues before the Court, the Court vacated and remanded them on the basis that the Board did not consider all theories of entitlement to VA benefits that are either raised by the appellant or reasonably raised by the record, that the Board provided an inadequate statement of reasons or bases for denying an earlier effective date for the appellant's service-connected radiation proctitis with fecal urgency, and for an inadequate VA examination regarding the appellant's right knee disability.

Audrey Kim is Associate Counsel at the Board of Veterans' Appeals.

Federal Circuit Extends Period for Challenge to M21-1 Provisions to Six Years After Issuance

by Jillian Berner

Reporting on *National Organization of Veterans' Advocates, Inc., et al, v. Secretary of Veterans Affairs*, No. 2020-1321 (Dec. 8, 2020).

In *National Organization of Veterans' Advocates, Inc., et al. (NOVA)*, the Federal Circuit, sitting en banc, considered a January 2020 petition brought by veterans and advocacy organization NOVA under 38 U.S.C. § 502 to challenge two M21-1 Manual (Manual) provisions—one assigning a disability rating for joint instability for service-connected knee conditions under 38 C.F.R. § 4.71a and the other barring evaluation under Section 4.71a for claims for partial knee replacement. The knee replacement rule was first published in the Federal Register and later promulgated in a Manual provision.

In so filing, NOVA was requesting that the Federal Circuit overrule its 2017 decision in *Disabled American Veterans v. Secretary of Veterans Affairs ("DAV")*, 859 F.3d 1072 (Fed. Cir. 2017), which held that the Federal Circuit had no jurisdiction under Section 502 to review interpretive rules issued in the Manual. The petitioners also challenged the conflict between 28 U.S.C. § 2401(a) (allowing a six-year statute of limitations for civil actions against the government) and Federal Circuit Rule 15(f) (formerly Rule 47.12(a)), which allowed only a 60-day period for judicial review of agency rules and regulations under Section 502.

First, the Federal Circuit held that NOVA had associational standing to challenge the rules because its members were veterans adversely affected by the

rules. NOVA pointed out that this logic had been used in *Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000) ("*Gober*"), to grant standing to an association. The Federal Circuit overruled *Gober* in part by holding that associational standing for VA rulemaking challenges requires a showing that the organization's member has an actual or potential claim sufficiently affected by the particular rule to prove actual or imminently threatened concrete harm, along with the remaining standing requirements. The Federal Circuit disagreed with the government's argument that the veteran members lacked standing as they had no pending proceedings at the time of the petition for review. The Federal Circuit agreed with NOVA that its purpose was related to the interests it sought to protect, in that the organization's general aim is to help veterans obtain VA benefits. The Federal Circuit also declined to require "individualized proof," as the petition for review was based on a legal question. The Federal Circuit declined to address NOVA's argument that its attorney members were harmed by the rules because their ability to earn contingent fees was affected or that it had organizational standing on behalf of its attorney members.

Second, the Federal Circuit determined that the knee joint stability rule was an interpretive rule subject to review under Section 502 as a final agency action. The joint stability rule, which assigned ratings for "severe," "moderate," and "slight" joint instability, based on specific ranges of joint translation, was first introduced in a 2017 notice of proposed rulemaking in the Federal Register. VA did not adopt the rule after the notice and comment process and later issued the knee joint stability rule in the Manual, using nearly the same measurement-based rating schedule as proposed in the 2017 notice. NOVA argued in its petition that the rule was arbitrary and capricious due to its subjectivity. The Federal Circuit first held that it did not have jurisdiction over the rule under 5 U.S.C. § 553. The Federal Circuit determined that it *did* have jurisdiction under Section 552(a)(1), as the rule was a Manual provision of "general applicability," overruling its own holding in *DAV* insulating such Manual provisions from judicial review. Because the Manual provision adopted an interpretive rule, limited VA staff discretion, and impacted benefits for all veterans seeking claims for knee joint instability before the Regional Office (RO), it constituted an "interpretation of general applicability," despite the government's argument that the provision was not binding on the Board of Veterans' Appeals and therefore was not for "general applicability" across the agency. Because the knee joint stability rule was required to be published in the Federal Register under Section 552(a)(1), the Federal Circuit affirmed its own jurisdiction under Section 502. This holding also overruled the Federal Circuit's previous holding in *Gray v. Secretary of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017).

The government argued that the knee joint stability rule was not a reviewable final agency action because the RO's reference to a Manual provision was not the "consummation" of agency decision-making. The Federal Circuit held that the knee joint stability was in fact a final agency action subject to review, because the rule was attributable to the agency and reflected the agency's consideration of an issue, as it was not tentative or the ruling of a subordinate agency official. The Federal Circuit determined that, regardless of potential future changes to the rule, its promulgation and approval by the Under Secretary of Benefits afforded it finality, as the government's argument would exclude *all* agency rules from judicial review. The Federal Circuit also held that the rule was final because rights, obligations, and legal consequences flowed forthwith and the Manual was the basis for the resolution of nearly all benefits claims resolved at the RO. Finally, the Federal Circuit noted that the government itself had sought *Auer* deference for Manual provisions in several actions, granting the provisions finality under the Administrative Procedure Act.

Third, the Federal Circuit held that the knee replacement rule was also a final agency action reviewable under Section 502. The knee replacement rule added an explanatory note under Section 4.71a explaining that "prosthetic replacement" required a total, not partial, joint replacement. This rule was issued in November 2016 in the Manual. The petitioners argued that the knee replacement rule violated Federal Circuit case

Hudgens v. McDonald, decided in 2016, which held that the Court of Appeals for Veterans Claims had erred by limiting Diagnostic Code 5055 to total knee replacements only and that the VA had *post hoc* rationalized the language of the regulation, entitling VA to no deference in its interpretation. The Federal Circuit held that the knee replacement rule was eligible for judicial review under Sections 502 and 552 for the same reasons as the knee joint stability rule. The Federal Circuit declined to decide whether the Manual provision or the earlier publication in the Federal Register was the reviewable action and referred this matter to a merits panel. The Federal Circuit, sitting *en banc*, noted that a Manual provision "merely republish[ing] prior agency interpretations or restat[ing] existing law" is not reviewable under Section 502 as a final agency action.

Finally, the Federal Circuit decided that the six-year statute of limitations to challenge agency rules invalidated Federal Circuit Rule 15(f), which established a 60-day limitation for petitions under Section 502. Therefore, the Federal Circuit ruled that NOVA's petition was timely. Because Section 502 did not contain its own statute of limitations, Section 2401 applied to the action. The government had conceded that Section 2401 applied, but argued that the Federal Circuit rule shortened the timeline to file a petition for judicial review. The Federal Circuit disagreed, stating that its rules could not be inconsistent with acts of Congress and, therefore, the local rule shortening the time in which to file a petition was invalid.

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Clinic.

CAVC Defines a "VA Issue" under 38 C.F.R § 3.114(a), Holds that VA Fast Letter 13-04 Was Not Binding on VA

by Benton Jay Komins

Reporting on *Kennedy v. Wilkie*, No. 19-0256 (December 9, 2020).

In *Kennedy v. Wilkie*, a widow appealed a November 2019 Board of Veterans' Appeals (Board) decision, in which the Board denied an effective date prior to July 7, 2015, for a grant of dependency and indemnity compensation (DIC) based upon the Veteran's cause of death. The Court affirmed the Board's decision.

In October 2015, the Regional Office (RO) granted service connection based upon guidance in Fast Letter 13-04, which, in pertinent part, provided: "[F]or DIC claims where the cause of death listed on the death certificate matches one of more of the deceased Veteran's service-connected disabilities, take immediate action on the claim by referring it to the rating team for a decision without further development regarding the cause of death."

Thus, by dint of the Veteran's death certificate, which listed depression (which was service-connected at the time of his death in November 2005) as a contributing cause of death, Ms. Kennedy was awarded DIC benefits, effective July 7, 2015.

In the instant case, Ms. Kennedy argued that she was entitled to a November 2005 effective date for the DIC grant, from the time of her first claim, because the claim had been granted due to the liberalizing authority of a "VA issue"—Fast Letter 13-04. Pursuant to 38 C.F.R. § 3.114(a), she argued that an earlier effective date was warranted, as the Fast Letter was a liberalizing law. Under 38 C.F.R. § 3.114 (a), where service connection is awarded based on a "liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction," the effective date must be "in accordance with the facts found," but no earlier than the effective date of the "act or administrative issue."

The underlying facts of the case reflect that, as the Court stated, Ms. Kennedy "was persistent in her quest." Ms. Kennedy's November 2005 claim for DIC benefits was denied in January 2006. She sought to reopen the claim in September 2007. In January 2008, a VA clinician rendered a negative nexus opinion, upon which the RO in large part denied this re-opened claim in February 2008. In August 2009, Ms. Kennedy summited another request to reopen her DIC claim, which the RO

denied in September 2010. But this compendium of denials ended when RO granted Ms. Kennedy's July 2015 claim for DIC in October 2016, assigning an effective date of July 7, 2015. The RO's grant was based on "new guidance" for DIC claims, as outlined in Fast Letter 13-04, which went into effect in March 2013. (VA rescinded Fast Letter 13-04 in July 2016, incorporating its contents into the VA Adjudication Procedures Manual (M21-1).)

The Board had denied Ms. Kennedy's request for an earlier effective date and found that the VA Fast Letter and other "changes to VA procedural manuals and guidance provisions" were not "liberalizing" changes creating entitlement to benefits. Because the Fast Letter concerned procedural matters and "merely relaxe[d]…the evidentiary standard" for service connection for cause of death, the Fast Letter did not create a new basis for entitlement to benefits.

Following its detailed description of Ms. Kennedy's rather thorny course to prevailing in her claim (not to mention her quest for an earlier effective date that brought the issue before the Court), the Court found that the facts in this case provided an opportunity, for the first time in caselaw, to define what precisely constitutes a "VA issue" under 38 C.F.R. § 3.114(a). Through a disquisition of the history, scope, and authority of Fast Letter 13-04 (now fallen into desuetude), the Court defined a "VA issue" under 38 C.F.R. § 3.114(a) with great specificity.

With "relative ease," the Court found that a "law" under 38 C.F.R. § 3.114(a) generally boils down to either a statute or a regulation. Fast Letter 13-04 was neither; hence, it cannot be characterized as a *law* for purposes of establishing entitlement to an earlier effective date for DIC benefits under 38 C.F.R. § 3.114(a). However, the Court carefully avoided delving into the issue of whether a Fast Letter is a *rule* under the Administrative Procedure Act (M21-1)—an issue which the Federal Circuit has addressed in a stream of decisions, as noted below.

From whence did Fast Letter 13-04 derive authority? Here, the Court turned its attention to what constitutes a "VA issue." Upon a close reading of the parties' briefs offering definitions of a "VA issue" under 38 C.F.R. § 3.114(a), the Court held that a "VA issue" is a directive from, or approved by, the Secretary that is binding on VA. The Secretary need not produce this directive personally; however, the directive must "lie within the scope of [the Secretary's] delegation of power."

In the instant case, the Undersecretary of Benefits (USB) has authority over matters concerning the Veterans Benefits Administration (VBA). Thus, only the USB has the delegated authority to issue directives for purposes of promulgating "VA issues" under 38 C.F.R. § 3.114(a).

The Director of Pension and Fiduciary Services issued Fast Letter 13-04. In VA's labyrinthine structure, this Director reports to the Principal Undersecretary of Benefits, who reports to the USB. Therefore, the Court reasoned that Fast Letter 13-04 did not lie within the usual scope of the Secretary's delegation of power.

The Director of Pension and Fiduciary Services (DPFS) is not a direct delegatee of the Secretary (in fact, the DPFS is twice removed from such authority), therefore the Fast Letter 13-04, issued by the DPFS, cannot be a "VA issue" under 38 C.F.R. § 3.114(a), without evidence of the Secretary's approval of a "multi-link" chain of delegation. There was no evidence that disclosed such a multiply-linked chain of delegation whereby the Secretary approved of the promulgation of Fast Letter 13-04.

However, according to the Court, there are other bases for finding that Fast Letter 13-04 was not a "VA issue" under 38 C.F.R. § 3.114(a). Not only is Fast Letter 13-04 not binding on VA as an Agency, on its face, it exclusively instructed a circumscribed group of adjudicators only at the VBA.

The plain language of Fast Letter 13-04 makes it abundantly clear that its scope was indeed limited. As the Court opined, the letter lacked the "indicia of authoritativeness" necessary under 38 C.F.R. § 3.114 (a) to be "subject to [a] liberalizing analysis." Where a deviation from the language in Fast Letter 13-04 might have required the Board to discuss why it chose to deviate from rules applicable to

adjudicators who fell directly under the umbrella of the DPFS, the Board was never obligated to follow Fast Letter 13-04, as it would if it were a "VA issue."

Lastly, as noted above, the Court distinguished its holding in *Kennedy* from Federal Circuit jurisprudence. Stated more specifically, the issues before the Federal Circuit in *Gray v. Secretary of Veterans Affairs* (2017); *DAV v. Secretary of Veterans Affairs* (2017); and *NOVA v. Secretary of Veterans Affairs* (2020), according to the Court, were simply different. Hence, the Court's definition of "VA issue" under 38 C.F.R, § 3.114(a) does not fall into direct conflict with the Federal Circuit's determination that a VA Fast Letter is a rule under the APA (M21-1).

Benton Jay Komins is Counsel at the Board of Veterans' Appeals.

When Appellant Informs VA of Intent to Submit Additional Evidence During the 90-Day Period Pursuant to 38 C.F.R. § 20.1304(a), Fair Process Requires the Board to Wait Full 90 Days or Until It Receives Evidence Before Issuing Adverse Decision

by Amy B. Kretkowski, Anna R. Lynch, Dakota R. Wright

Reporting on *Bryant v. Wilkie*, No. 18-0092 (Oct. 26, 2020).

In *Bryant*, the Court of Appeals for Veterans Claims (Court) held that when an appellant notifies VA that he or she intends to submit additional argument or evidence to the Board of Veterans' Appeals (Board) during the 90-day period specified in 38 C.F.R. § 20.1304(a) (2017) (now 38 C.F.R. § 20.1305(a)), "principles of fair process prohibit the Board from issuing an adverse decision until it either receives that argument or evidence or until 90 days have elapsed since mailing the § 20.1304(a) notice."

Under § 20.1304(a), an appellant has 90 days following the mailing of notice that an appeal has been certified and transferred to the Board to submit additional evidence. After that 90-day period expires, the Board may accept additional evidence if the appellant shows good cause for the delayed submission. 38 C.F.R. § 20.1304(b). The mailing of the notice that the appeal has been certified and transferred to the Board is the event that triggers the application of § 20.1304(a). *Williams v. Wilkie*, 32 Vet.App. 46, 51 (2019).

The veteran, Mr. Bryant, served in the U.S. Marine Corps from 1971 to 1974. He filed claims for service connection in October 2013 that were denied by the regional office (RO) in December 2014. He appealed and the RO continued its denials in an April 2017 Statement of the Case. In his Substantive Appeal, Mr. Bryant stated that he would submit additional argument once the Board sends the 90-day letter. In July 2017, the RO certified the appeal to the Board.

On September 21, 2017, the Board sent Mr. Bryant the 90-day letter, stating: "Please note that you have 90 days from the date of this letter or until the Board issues a decision in your appeal (whichever comes first) . . . to submit additional argument or evidence, if you elect to do so. *See generally* 38 C.F.R. § 20.1304." Seventy days after the date of this letter, the Board denied Mr. Bryant's claims. Mr. Bryant appealed to the Court.

The parties agreed that the 2017 version of § 20.1304(a) applied in this case. The question before the Court was whether the Board erred in issuing its decision before the 90-day period had lapsed.

Mr. Bryant first challenged the constitutionality of § 20. 1304(a), arguing that the regulation violates due process because it does not provide a clear date by which appellants must submit evidence to the Board without showing good cause. He also argued that the Board's actions were unfair and prejudicial because it decided his appeal before the 90-day period had expired, even though he had informed the Board he would be submitting additional argument.

The Secretary countered that § 20.1304(a) was constitutionally valid and asked the Court to affirm the Board's decision because the veteran failed to demonstrate prejudicial error.

The Court first noted that it was "troubled by the Secretary's admission at oral argument that § 20.1304(a) permits the Board to deny an appeal the same day it notifies an appellant that the appeal has been certified and the appellate record transferred to the Board." Nevertheless, the Court avoided the constitutional argument and instead concluded that the Board's actions deprived Mr. Bryant of fair process. The Court held that once the veteran "informed VA that he planned to submit new argument following receipt of the § 20.1304(a) notice letter, implicitly requesting that VA withhold a decision until he had done so, basic fairness obligated the Board to wait 90 days or until he submitted that argument to decide his appeal."

The Court emphasized the importance of fair process in the development and adjudication of a veteran's claim, which stems from the nonadversarial nature of the VA benefits adjudication system. In the context of this system, the Court noted that additional process may be required even "where no particular procedural process is required by statute or regulation." The Court relied on *Haney v. Nicholson*, 20 Vet.App. 301 (2006), to support its holding. The veteran in *Haney* stated during a Board hearing that he would submit additional evidence. The presiding Board member agreed to hold the record open, but did not identify a deadline for that submission. Five months later, before receiving the submission, the Board issued its decision. On appeal, the Court held that "fair process principles required the Board member to notify the veteran and his representative of the chosen deadline for submitting that evidence before issuing a decision." *Haney*, 20 Vet.App. at 305-06.

As in *Haney*, Mr. Bryant informed the Board of his intent to submit additional evidence, but the Board issued its decision before receiving that evidence. The Court distinguished *Haney* and Mr. Bryant's case from *Williams v. Wilkie*, 32 Vet.App. 51 (2019), where the Court held that § 20.1304(a) did not apply to an appeal that was returned to the Board after a remand to the RO, even when the Board erroneously cited that regulation in its notice letter. In *Williams*, the Court found that the veteran did not have a "reasonable expectation that he had 90 days to submit additional evidence" because "§ 20.1304(a) sets forth a maximum, not a minimum, 90-day period for submitting additional evidence." The Court found that the Board did not violate fair process in *Williams* because the veteran affirmatively stated that he had nothing more to submit. Mr. Bryant, on the other hand, had told VA that he intended to submit additional argument during the 90-day period, "implicitly requesting that VA withhold a decision until he had done so."

The Court added that the history of § 20.1304(a) supported its conclusion, noting that the proposed precursor to this regulation allowed for a 60-day limit to submit additional evidence. In the final regulation, VA responded to public comment by extending the period to 90 days and adding a good-cause exception for later submissions. In the present case, the Court noted that requiring the Board to wait the full 90 days – "in the limited circumstance where an appellant affirmatively notifies the Board that he or she has additional argument or evidence to submit during the § 20.1304(a) period" – preserves the Board's resources and "ensures that appellants are treated fairly and safeguards their right to meaningfully participate in the appellate process."

The Court concluded that the Board's actions were prejudicial because Mr. Bryant asserted, in his pleadings at the Court and at oral argument, that he would have submitted not only additional argument, but also supporting medical evidence within the 90-day deadline. Based on his notice to VA of his intent to submit additional argument within the 90-day deadline and his assertions that he actually had additional argument and evidence to submit, the Court found that he demonstrated prejudicial error. The Court remanded for the Board to provide him "with the fair process to which he was entitled."

In a footnote, the Court explained that it was not suggesting that the Board would violate fair process by issuing a favorable decision before the 90-day period expired. It was also not addressing whether

the Board could establish a deadline within the 90-day period after an appellant notifies the Board of his or her intent to submit additional argument – or whether that appellant could waive the remainder of the 90-day period.

Important points to note in this case: First, § 20.1304(a) only applies to legacy appeals. Second, Mr. Bryant did not actually respond to the 90-day notice letter. He informed VA of his intent to submit additional argument in his Substantive Appeal (VA Form 9). There is no indication in this decision that Mr. Bryant ever responded directly to the 90-day letter. And third, the Court relied on extra-record evidence (Mr. Bryant's assertions in his brief, supplemental memorandum, and at oral argument) to find that he had demonstrated prejudicial error.

Amy Kretkowski is an attorney in private practice and Adjunct Professor of Veterans Benefits Law at the University of Iowa College of Law. Anna Lynch and Dakota Wright are third-year law students at the University of Iowa College of Law.

CAVC Panel Holds that Presumption of Regularity May Be Rebutted by Nonspecific Evidence of Irregularity

by Donald M. Badaczewski

Reporting on *Romero v. Wilkie*, No. 2019-3687 (Nov. 20, 2020).

In *Romero v. Wilkie*, the Court of Appeals for Veterans Claims (CAVC) vacated and remanded a May 2019 Board decision that concluded that the appellant did not submit a timely substantive appeal, in a unanimous panel decision issued by Judges Allen, Meredith, and Falvey on November 20, 2020. The CAVC found that the Board correctly determined that the existence of VA's legal duty to mail a Statement of the Case (SOC) caused the presumption of regularity to attach. However, the CAVC found that the Board erred in evaluating the sufficiency of the appellant's rebuttal evidence and determined as a matter of law that the appellant had rebutted the presumption of regularity, based on the Board's favorable factual finding that she had produced substantial evidence of a widespread problem with VA failing to mail correspondence, supported by a statement of nonreceipt submitted by the appellant's representative.

The appellant was represented by Chisolm, Chisolm & Kilpatrick (CCK) in an appeal seeking VA benefits. On November 2, 2017, CCK became aware of an August 16, 2017, SOC while reviewing the appellant's file in the Veterans Benefits Management System (VBMS) and notified VA that it had not been sent a copy of the SOC.
On November 6, 2017, CCK submitted a VA Form 9 substantive appeal and argued the substantive appeal was timely because VA failed to notify CCK of the SOC. CCK alleged ongoing problems with VA's mailing system that called into question the regularity of that system and argued that VA was not entitled to the presumption of regularity.
In December 2017, the VA determined that the VA Form 9 submitted by CCK was untimely. CCK perfected an appeal as to the timeliness of the VA Form 9.

In support of the argument that the presumption of regularity did not apply to the mailing of the SOC, CCK submitted a 2017 U.S. Government Accountability Office (GAO) report and highlighted two sentences in that report: (1) "VA is not managing its mail program effectively, as it lacks key elements of an effective mail management program" and (2) "VA is unable to determine the extent to which its mail operations are efficient and effective."
CCK also submitted a sworn statement from Robert Chisolm, Esq., in which he stated that he was aware of at least 863 instances between July 2015 and May 2018 where VA failed to mail him a copy of a case-related document. He further stated that during a conference call, two VBA employees, one of whom was the Deputy Director of the Office of Business Process Integration, "acknowledged VA's continued failure to consistently mail representatives copies of their claimants' decisional documents as required by 38 U.S.C. § 5104(a) and 38 C.F.R. § 3.103(b)(1), and as reported by CCK and other veterans' representatives." CCK also submitted a sworn

statement of the Executive Director of the National Organization of Veterans' Advocates, Inc. (NOVA), describing NOVA's efforts to inform VA of mailing failures and stating that in late 2017, she became aware of 272 VA mailing failures.

In a May 2019 decision, the Board concluded that the appellant failed to rebut the presumption of regularity by clear evidence and applied the presumption to find that VA had mailed an SOC to CCK. The Board reasoned that CCK's statement nonreceipt alone was not sufficient to rebut the presumption of regularity. In analyzing whether the appellant had rebutted the presumption of regularity, the Board found that "[d]espite the substantial evidence that [CCK] has provided that reflects a widespread problem with VA not mailing correspondence … there is no clear evidence that VA did not mail the actual August 2017 SOC to [appellant] or [CCK] to the addresses listed on the SOC." However, the Board held that the appellant had not submitted evidence that was specific to the appellant's file or the mailing practices as applicable to the handling of the appellant's case, but had instead submitted evidence discussing general VA mailing deficiencies. The Board concluded that this evidence did not clearly rebut the presumption that the August 2017 SOC was mailed, and thus the November 2017 VA Form 9 was untimely. The appellant appealed to the CAVC.

The CAVC held as a matter of law that the presumption of regularity applied in this case. It rejected the appellant's argument that VA was required to produce predicate evidence of sound mailing practices for the presumption to attach. The CAVC explained that once the presumption of regularity has attached, it may be rebutted by clear evidence of irregularity. It explained that while a statement of nonreceipt alone is not enough to rebut the presumption, a statement of nonreceipt coupled with other evidence can be sufficient to rebut the presumption. Other evidence can include, for example, clear evidence to the effect that VA's regular mailing practices are not regular or that they were not followed.

The CAVC then held as a matter of law that the appellant rebutted the presumption of regularity by clear evidence. The CAVC characterized the Board's statement that the appellant submitted "substantial evidence … that reflects a widespread problem with VA not mailing correspondence" as a finding of fact that was favorable to the appellant.

The CAVC then explained that, where the presumption concerns VA's performance of a duty to mail, that the Board's finding is akin to a finding of substantial evidence that "VA's 'regular' mailing practices are not regular," where the presumption concerns the regularity of particular VA mailing practices.
Moreover, the CAVC explained there is no requirement that evidence to rebut the presumption of regularity be specific to the instant case, although what constitutes evidence sufficient to rebut the presumption of regularly is dependent on the nature of the presumption at issue in a given case.

The CAVC emphasized that it did not hold that VA's mailing practices are irregular as a broad, categorical matter, but rather limited its conclusion to holding that the presumption of regularity was rebutted to the present case based on the Board's favorable finding that the appellant had submitted evidence of widespread irregularity in VA's mailing procedures. Accordingly, it reversed the Board's conclusion that the appellant did not rebut the presumption of regularity and remanded the matter to the Board to determine whether the November 2017 substantive appeal was timely.

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

Federal Circuit Gives Further Guidance on Analyzing Petitions for Writs of Mandamus Based on Allegations of Undue Delay

by David R. Seaton

Reporting on *Mote v. Wilkie*, No. 2019-2367 (Fed. Cir. September 28, 2020).

In *Mote v. Wilkie*, the United States Circuit Court of Appeals for the Federal Circuit (Federal Circuit) provided further guidance to the United States Court of Appeals for Veterans Claims (Veterans Court) on how to analyze petitions for writs of mandamus alleging undue delay during administrative proceedings before the Department of Veterans Affairs (VA). Specifically, the Federal Circuit found that, although the Veterans Court correctly identified the six-factor analysis first described in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), as the correct legal framework for considering allegations of undue delay, the Veterans Court failed to actually consider these factors substantively while evaluating the claim for relief. Nevertheless, the Federal Circuit, relying on the Veterans Court's expertise in judicial review of VA claims, found it was necessary to remand the matter back to the Veterans Court for reconsideration, rather than making a finding in the first instance on its own. The Federal Circuit is simultaneously showing a willingness to admonish the Veterans Court while deferring to the Veterans Court's unique concentration in veterans law. Despite the clear legal standard for reviewing claims of this nature, it is less clear how the Federal Circuit will balance these competing strategies of supervision and deference in the future.

Veteran Wayne Gary Mote filed a claim for VA disability compensation alleging that his cardiac condition was caused by service. Unfortunately, Mr. Mote passed away during the pendency of the claim, and Eugenia Mote, his surviving spouse, was substituted as claimant. Additionally, Ms. Mote filed a separate claim for dependency and indemnity compensation (DIC). A VA Regional Office (RO) denied Ms. Mote's claims, and, on November 24, 2015, Ms. Mote commenced a timely appeal to the Board of Veterans' Appeals (Board).

After becoming impatient waiting for the Board to dispose of her claims, Ms. Mote filed a petition for mandamus in July 2016, alleging that the Board had unduly delayed adjudication of her claims for relief and requesting that the Veterans Court intervene. VA responded by claiming that the Board's delay in adjudicating Ms. Mote's claim was due to the fact that Ms. Mote had requested a personal hearing and that the Board could not issue a decision before such a hearing was completed. The Veterans Court cited standards outlined in *Constanza v. West*, 12 Vet. App. 133 (1999), stating that a right to a writ of mandamus only exists if VA's delay is so extraordinary as to be considered a refusal by the VA to act. Accordingly, the Veterans Court held that the processing time of Ms. Mote's appeal was shorter than the average processing time for other appeals. As a result, the Veterans Court concluded that the delay in processing Ms. Mote's appeal was not so extraordinary to be considered a refusal, by VA, to act, and Ms. Mote's petition was denied in November 2016.

Ms. Mote appealed to the Federal Circuit, and her case was consolidated with the cases of nine other appellants with similar fact patterns. *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018). Ms. Mote and the other appellants argued that the *Constanza* standard used by the Veterans Court to consider petitions for writs of mandamus based on allegations of undue delay was incorrect, and that the Veterans Court should have adopted the six *TRAC* factors as the appropriate standard for adjudicating writs of mandamus based on allegations of undue delay instead. The six *TRAC* factors are: (1) decision processing times must be based on a rule of reason; (2) timetables provided by Congress provide context for a rule of reason; (3) delays that impact human health and welfare are less reasonable than delays that impact economic regulation; (4) courts should consider the impact

that expediting delayed action would have on higher priority issues; (5) courts should consider the prejudice caused by delay; and (6) courts need not find any impropriety on an agency's part. Agreeing with Ms. Mote and the other appellants, the Federal Circuit adopted the *TRAC* factors as the appropriate framework in these cases and remanded the claims back to the Veterans Court for further consideration.

While waiting for the Veterans Court to reconsider her case, Ms. Mote filed another amended petition for mandamus at the Veterans Court in January 2019 requesting, in addition to her previously-requested relief, that the Board be ordered to issue a decision within 45 days and that VA issue progress reports every 30 days until a decision was issued. Additionally, Ms. Mote was notified that she had been scheduled for a personal hearing before the Board in May 2019.

Upon reconsidering Ms. Mote's case, the Veterans Court noted that the six *TRAC* factors were the appropriate legal framework to consider Ms. Mote's petition for mandamus. Nevertheless, the Veterans Court did not discuss the six *TRAC* factors any further beyond merely mentioning them. Instead, the Court focused on the fact that the Veteran had been scheduled for a personal hearing before the Board in May 2019. Based on this fact, the Veterans Court found that Ms. Mote's requested relief was premature, because she would have the opportunity to present evidence and argument in support of any claim she was pursuing from VA at the personal hearing. The Veterans Court dismissed her petition for mandamus without prejudice.

Ms. Mote appealed again to the Federal Circuit. Prior to the Federal Circuit considering the claim again, Ms. Mote was provided a personal hearing before the Board in May 2019, and, in August 2019, the Board issued a decision remanding Ms. Mote's claims back to the RO for further development. Before the Federal Circuit, however, Ms. Mote argued that the Veterans Court failed to properly apply the *TRAC* factors to her case, and that this failure constituted reversible error. VA countered that: (1) Ms. Mote's petition for mandamus was moot in light of the August 2019 Board decision; (2) that the Veterans Court did not need to apply the *TRAC* factors; and (3) that the Veterans Court correctly applied the *TRAC* factors to Ms. Mote's claim anyway.

In its decision, the Federal Circuit began by addressing VA's argument that the August 2019 Board decision remanding Ms. Mote's claim back to the RO rendered her petition for mandamus moot. Rejecting VA's argument, the Federal Circuit reasoned that the August 2019 Board decision was not a decision for the purposes of mootness, because the practice of the Federal Circuit was to only consider Board decisions as decisions for appellate purposes if they contained an order finally disposing of a claim, which the August 2019 Board decision did not. VA countered, however, that since Ms. Mote did not caveat her prayer of relief by clarifying that she desired a Board decision *disposing* of her claims (as opposed to a Board decision remanding her claims), the Federal Circuit should consider the claim moot anyway. The Federal Circuit rejected this argument as well, because the Federal Circuit's practice did not require Ms. Mote to make such a caveat in her prayer of relief and Ms. Mote's particular circumstances, including filing multiple petitions for mandamus over the course of eight years, were sufficient to conclude that Ms. Mote did not desire anything other than final disposition of her claim. The Federal Circuit found that, in light of the fact that Ms. Mote had not been issued a final disposition, her request for the Board to provide regular status updates was not moot either. Accordingly, the Federal Circuit concluded that "[i]n light of the above, it is clear that the Board's remand did not provide all of the relief Mrs. Mote requested."

The Federal Circuit next addressed VA's argument that the Veterans Court did not need to apply the *TRAC* factors in analyzing Ms. Mote's claim for relief. VA argued that instead of the *TRAC* factors, the proper legal standard for Ms. Mote's claim was the three-prong test outlined in *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 357 (2004) (*Cheney*). In *Cheney,* the United States Supreme Court found that a party must meet the following conditions in order

for a writ of mandamus to be issued: (1) there are no other available means of relief; (2) there is a clear and undisputable right to a writ; and (3) the writ must be appropriate under the circumstances. Specifically, VA alleged that Ms. Mote did not meet the third prong of the *Cheney* test, because it would have been inappropriate for the Veterans Court to order the Board to issue a decision prior to Ms. Mote's personal hearing before the Board where she would be able to offer evidence and argument in support of her claim and, as a result, VA argued that the Veterans Court did not need to apply the *TRAC* factors.

Rejecting this argument, the Federal Circuit reasoned that the *TRAC* factors have emerged over time as useful in analyzing claims based on undue delay. The Federal Circuit conceded that "*TRAC* doesn't 'supplant the entire mandamus analysis' and that satisfying the third *Cheney* factor remains necessary," but still concluded that the *TRAC* factors should be considered. The Federal Circuit further rejected VA's argument that Ms. Mote did not meet the third prong of the *Cheney* test, because the argument ignored the other requested relief, such as progress reports from the Board every 30 days until a decision disposing of Ms. Mote's claims was issued. The Federal Circuit also found that VA ignored that writs of mandamus are based on equitable principles, granting the Veterans Court a great deal of flexibility in how to fashion a remedy.

Finally, the Federal Circuit turned to whether or not the Veterans Court properly applied the *TRAC* factors and ultimately concluded that the Veterans Court failed to properly apply them. VA had argued that – while the Veterans Court clearly did not go step by step through each of the *TRAC* factors – the Veterans Court still addressed the *TRAC* factors. VA argued that the Veterans Court discussed the first factor (decision processing times must be based on a rule of reason), because the Veterans Court gave a reason (the pendency of the May 2019 hearing) for denying relief. VA, for example, also argued that the Veterans Court considered the fifth factor (courts should consider the prejudice caused by delay) as well, because the Veterans Court disposed of the Ms. Mote's petition; and that petition contained allegations that Ms. Mote was prejudiced by agency delay.

The Federal Circuit rejected these arguments, because "a 'rule of reason' requires more than simply identifying the next [procedural] prerequisite . . . it contemplates whether the entire delay was reasonable[;]" and considering the prejudice of delay requires "an analysis of the effect of the delay on a *particular* veteran [or in this case claimant;]" and simply disposing of a petition alleging prejudice does not satisfy the requirement that that disposition contain an analysis of how an individual seeking relief has or has not been prejudiced. Namely, the Federal Circuit held that the Veterans Court listed the *TRAC* factors once, and then failed to otherwise explain how the facts of the case at bar applied to them or otherwise discuss them any further. The Federal Circuit did concede that a step by step walk through of each of the *TRAC* factors by the Veterans Court *may* not always be necessary and that "engag[ing]" with the factors would "illuminate the mandamus inquiry to more reliably reach a sound result." The Federal Circuit did stop short of actually conducting an analysis of the *TRAC* factors in the first instance. Instead, the Federal Circuit deferred to the Veterans Court with its expertise in these matters.

In *Mote v. Wilkie*, the Federal Circuit reaffirmed its preference for the *TRAC* factors in analyzing petitions for mandamus that allege undue delay during the adjudication of VA benefits claims. The Federal Circuit signaled a willingness to flex its muscles if it felt that the Veterans Court was not applying the new *TRAC* standard but continued its deference to the Veterans Court as a tribunal with special expertise in VA claims. Although the legal standard for reviewing allegations of undue delay appears to be well defined, it is unclear whether courts will be more or less deferential to VA's delayed processing times once courts begin applying the *TRAC* factors on the merits.

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

Conferencing with the Court: Past, Present, and Future?

by Andrew Parler Reynolds

Circa 1994, attorneys for the Court's Central Legal Staff (CLS) began mediating primarily two types of conferences: pre-briefing and attorney fee settlements. (CLS paralegals take the lead in handling the Rule 10 record dispute conferences.) Because of the novelty of consistently applying conflict resolution (1) to appellate proceedings, (2) involving the government, (3) in a pro-claimant system, there were few guideposts to follow. CLS staff underwent "certified" mediation training. Otherwise, the only requirement was that there were no requirements. The appellants were not required to submit a Summary of the Issues (SOI) prior to the pre-briefing conference, and the Court did not conduct pre-briefing conferences in every (represented) case. Rather, a hard copy of the veteran's record on appeal along with the Court's "file folder" was stacked outside our offices. The cases were assigned consecutively up and down the hallway. After reading the Board decision and eyeballing the record, you decided for yourself whether to do a mediation conference in that particular appeal. That was it.

When the Court first jumped into the conflict resolution arena, there was greater tension between the parties than today. There were several reasons for this: (1) the parties were venturing into unfamiliar territory; (2) VA attorneys did not know what claims/issues the appellant was going to raise, which created a greater defensive posture; (3) there was less case law, hence, greater disagreement; but primarily, (4) there was inherent distrust in an area of practice where, historically, there was essentially no judicial review of Board decisions. There had been significant disagreement between VA, service organizations, and others as to whether there should be judicial review. To veterans' attorneys who fought for judicial review, the "old ways" were evidenced by VA's policy requiring Board approval prior to VA counsel agreeing to a remand. VA later agreed to change this policy. This backdrop created greater discord.

As with anything new, there was apprehension and doubt. Somewhere along the way, however, everyone helped the process improve itself. Part of the improvement was refining the process via Rule 33 of the Court's Rules of Practice and Procedure (better known as Rule 33 [pre-briefing] Staff Conferences). The significant substantive change was the required submission of SOIs by the veteran's counsel 14 days prior to the pre-briefing conference. In addition, the Court began conducting pre-briefing conferences in every represented appeal. When mediation conferencing first began, however, the Court had a reduced CLS staff that had a greater array and volume of other duties. We were not equipped to conduct the number of mediation conferences we do today. Overall, though, given the greater tension and no SOI requirements, conducting mediation conferences in doses worked for that time period. There will always be hiccups along the way. Truly, though, the parties' ability to come to an agreement in the numbers that they have has always been impressive – even in the beginning.

As an aside, at the time I shared an office with a very good CLS attorney who would generously help with a difficult case/issue I might be struggling with. This attorney also encouraged me to challenge myself and conference, among other things, the more difficult cases and issues, as she did. I could not have had a better mentor at the time. Thank you, Linda Goff.

Of the two primary types of conferencing that CLS attorneys conduct, the term "mediate" more aptly describes attorney fee settlement conferences. Attorney fee applications at the Court are filed pursuant to the Equal Access to Justice Act (EAJA). The Court mediates EAJA fee "disputes" when "reasonableness" of the fees billed is the primary problem between the parties. The subject matter, reasonableness of fees, makes these conferences more aligned with traditional civil mediation issues, i.e. money. Pre-briefing conferences, on the other hand, present more purely legal issues. Although

the Court does not currently utilize "caucusing" as a mediation technique, VA, private practitioners, and the Court may wish to give some thought about authorizing utilization of this technique when mediating EAJA settlement conferences.

Like the pre-briefing conferences, the EAJA mediation settlement conferencing process has likewise been refined. Previously, EAJA mediation settlement conferences occurred after appellant's counsel filed an EAJA Reply. Nowadays, however, EAJA conferences are generally held prior to the EAJA Reply. (My guess is that ninety-nine percent of all EAJA applications are worked-out between the parties themselves without the need for mediation.) Conducting EAJA settlement conferences prior to the filing of an EAJA Reply avoids fees on fees becoming an additional hurdle to an agreement. Occasionally, EAJA conferences are conducted prior to the Secretary's EAJA Response. This may occur in instances where the Secretary files a motion to stay EAJA proceedings pending an EAJA settlement conference. In instances where the motion is granted, CLS requires an email from the Secretary prior to the EAJA conference that lays out VA's concerns regarding reasonableness.

Why conduct an EAJA settlement conference prior to the Secretary e-filing an actual EAJA Response? Because the Secretary may wish to reduce the previous offer if required to put in substantial time drafting an EAJA Response (think of it as having to write another brief – ugh). In some cases, the settlement offer may be significantly reduced because the Secretary has spotted additional concerns with the itemized charges while spending substantial time writing the EAJA Response. A significantly reduced offer creates an additional hurdle to negotiate, if not an unwanted side-wise distraction. The additional hurdle being that, if the parties could not come to an agreement on their own at a higher offer, then negotiating an agreement during a settlement conference starting at an even lower offer makes it that much more difficult to mediate. Put another way, it can be another potential obstacle in reaching an agreement. Second, the unwanted distraction is the management of possible untoward feelings that result from a reduced offer. This matters because, even if the parties come to an agreement, ill feelings can carry over into future dealings between the same attorneys. This is not a secret. However, the goal is to avoid this happening. Hence, the Secretary's motion for a stay can be useful in managing the potential negotiation.

So where do we go from here? The parties are doing a tremendous job, really. This is evidenced not only by the recent higher rate of agreements, but also by the extensive dialogue occurring during mediation conferences when there is not an agreement. The parties are more willing to discuss more complicated issues at length in an effort to better understand and narrow the issues to make briefing more manageable. Seemingly, the process and the parties have become more collaborative.

Moving forward, perhaps this collaborative spirit can spill over and play a greater part in the Court's newfound jurisdiction over class actions. Recently, National Veterans Legal Services Program (NVLSP) hosted a seminar entitled "The New Era of Class Actions in Veterans Law." One thing the esteemed panel made clear during this panel is that you better pay close attention to the pleading requirements of Rule 23 if you are seeking class certification. Judge Michael Allen synthesized his point by clarifying that you need to tell the judges why they need to certify a class action versus issuing a precedential opinion. Thus, clearly, the initial pleadings are paramount in starting the aggregate action.

Judge Allen also said, however, that figuring out how aggregate actions will take shape at the Court is an ongoing experiment. He referenced co-panelist Loyola Law School Professor Adam Zimmerman's point that there are a lot of challenges in being an appellate court and managing class actions, including procedural aspects of case management alone. Judge Allen noted there was no current system or outlet in place for assistance with such management of class actions either. And finally, Judge Allen mentioned the possibility of hiring Special Masters to handle class actions and figuring out what their roles would be.
As to the roles of Special Masters, given the right cases/facts, it would seem that certain aspects of aggregate proceedings need not always be entirely

adversarial, litigious, and strictly pleading driven -- especially in a pro-veteran system. During the above-referenced panel event, VA Chief Counsel Mary Flynn indicated that VA would potentially be interested in efficiently disposing of a big group of claims when possible. Thus, one can envision where some form of alternative dispute resolution plays a part in class action case management. NVLSP Executive Director Bart Stichman pointed out during the seminar that the Federal Circuit in *Monk v. Shulkin*, 855 F.3d 1312, 1321 (2017), stated that "Class actions can help the Veterans Court exercise [its] authority by promoting efficiency, consistency, and fairness, and improving access to legal and expert assistance by parties with limited resources." Harnessing the parties' collaborative spirit with the collective momentum of the Court, perhaps Special Masters could facilitate achieving "efficiency, consistency, and fairness" while utilizing fewer judicial resources in assisting with the Court's case management of class actions.

Note: After the article was completed but before its publication, a panel of the Court issued an Order directing that Judge Allen would conduct an "informal status conference" in Wolfe v. Wilkie*, No. 18-6091 (November 24, 2020), regarding the pending Opposed Motion of Petitioner for Appointment of a Special Master to Enforce the Court's Judgment, the Secretary's Response in Opposition, and Petitioner's Reply.*

Andrew Parler Reynolds is a CLS attorney for the Court. This article reflects his views alone and does not reflect the views of the U.S. Court of Appeals for Veterans Claims.

Helping the VA Understanding the Consequences of Breathing Dirty Air: A Practitioner's Guide to the Airborne Hazards and Open Burn Pit Registry

by Patrick Doyle*

I. Introduction

The United States military used open-air burn pits to dispose of all waste varieties in Iraq and Afghanistan during the Global War on Terror (GWOT). As outlined in a 2016 article in the Journal of Occupational and Environmental Medicine, numerous academic studies have found active-duty service members and veterans exposed to the fumes and emissions from open-air burn pits may suffer both short- and long-term adverse health effects. In the Dignified Burial and Other Veterans' Benefits Improvement Act of 2012, Congress responded to these health concerns and passed a law requiring the Department of Veterans Affairs (VA) to "establish and maintain an open burn pit registry for eligible individuals who may have been exposed to toxic airborne chemicals and fumes caused by open burn pits." In the same law, Congress also required the VA to develop a public information campaign to proactively inform potentially eligible individuals about the existence of the Registry and how to participate. In response to this law, the VA created the Airborne Hazards and Open Burn Pit Registry ("the Registry"). Veterans' law practitioners should be aware of the Registry's existence, who is eligible, how to enroll, and, most importantly, that participants in the Registry must still file a claim with the VA for burn-pit related disability compensation.

II. Open-Air Burn Pits and Respiratory Health

Some observers and veterans' advocacy groups have called open-air burn pits the "Agent Orange" of the GWOT. In response, the 2010 National Defense Authorization Act (NDAA) banned the use of open-air burn pits by the Department of Defense (DOD) except for contingency operations when no other feasible alternative existed. Then, in 2011, the DOD implemented this portion of the NDAA with DOD

Instruction 4715.19 and made the Combatant Commander the approval authority to allow the use of open-air burn pits. Additionally, the 2010 NDAA required the DOD to report to Congress each year on any open-air burn pits still in operation and the steps the DOD is taking to mitigate their adverse health consequences for service members. Currently, according to a 2019 DOD report to Congress, it has replaced *most* burn pits with more environmentally-friendly incinerators. However, as of April 2019, there were nine open-air burn pits still in operation—seven in Syria, one in Afghanistan, and one in Egypt.

Yet, earlier in the wars in Iraq and Afghanistan before the 2010 NDAA, *everything* was disposed of in open-air burn pits—including but not limited to Styrofoam, plastic, human waste, paint, solvents, metal, aluminum, electronics, tires, batteries, and medical waste. The smoke from these burn pits often contained dioxins, lead, mercury, and other volatile and harmful compounds. In addition to burn pits, veterans of the wars in Iraq and Afghanistan were exposed to other air quality hazards—such as structural fires, explosions, smoke from burning oil wells, dust and sand particles, industrial pollution, and aircraft and military vehicle emissions. Developing countries like Iraq and Afghanistan do not have a Clean Air Act like we have in the United States—making industrial pollution and other airborne hazards an overall under-stated threat to our troops deployed abroad.

Unsurprisingly, GWOT veterans have developed a host of respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), dyspnea (shortness of breath), and higher respiratory infection rates. (*See Airborne Hazards Concerns: Information for Veterans*, War Related Illness and Injury Study Center, DEPARTMENT OF VETERANS AFFAIRS (Nov. 2018) (available at https://www.warrelatedillness.va.gov/education/fact sheets/airborne-hazards-concerns-info-for-providers.pdf#).) The negative health consequences were most significant for those serving within two miles of an open-air burn pit. *(See Airborne Hazards Concerns, supra*.) Here in 2020, unfortunately, these negative health consequences are more important than ever because the COVID-19 virus seems to be hardest on those with compromised respiratory systems—making those veterans exposed to burn pits at exceptionally high risk for serious illness or death from the virus.

III. How to Participate in the Registry

Veterans and active-duty service members (hereinafter "veterans") can sign up for the Registry on the internet. However, first, veterans must check if they are eligible. Eligible veterans include those who deployed to the Southwest Asia theater after August 2, 1990 (which includes Iraq, Kuwait, Saudi Arabia, and several other countries), and those deployed to Afghanistan or Djibouti after September 11, 2011. (*Airborne Hazards and Open Burn Pit Registry Frequently Asked Questions, DEPARTMENT OF VETERANS AFFAIRS (available at https://health.mil/Reference-Center/Publications/2020/03/02/Airborne-Hazards-and-Open-Burn-Pit-Registry-Frequently-Asked-Questions*). Although not the focus of this practice note, based on the covered dates and locations, many Desert Storm veterans could also be eligible for the Registry in addition to GWOT veterans.

Next, to participate, eligible veterans log on to a VA website and complete a 40-minute online questionnaire about their service history and airborne hazard exposures. Participants should note the survey might also ask about past hobbies and occupations. This is because some hobbies, such as woodworking, and some occupations, such as construction, could potentially also impact respiratory health.

Finally, participants who complete the questionnaire are eligible for a free, optional in-person medical examination focused on documenting their respiratory health condition. Veterans who have left the service can complete the exam at a VA hospital or clinic. Active-duty service members can complete the exam at their local military hospital or clinic.

IV. What the Registry is NOT

The Registry is *not* a substitute for the VA's disability claim compensation process or the Integrated Disability Evaluation System (IDES). The sole purpose of the Registry is to collect data. The data collected from the Registry feeds medical

research studies into the impact of burn pits and airborne hazards on veterans' health. Participants in the Registry still need to file a claim with the VA if they were exposed to an open-air burn pit or other respiratory hazards. Similarly, active-duty service members still should note exposure concerns during the IDES process.

V. Key Takeaways for Practitioners

1) The Registry is for open-air burn pits *and* other airborne respiratory hazards, such as dust and sand. Dust and sand are ubiquitous in countries like Iraq—so don't assume a veteran isn't eligible just because they don't remember being near any open-air burn pits.

2) Participation in the Registry does *not* automatically make a person eligible for VA disability compensation. The claims process and Registry are separate.

3) You *can* participate while still on active duty.

IV. Conclusion

Veterans' law practitioners should be aware of the Registry's purpose, who is eligible, and how an eligible veteran can enroll. The Registry has provided medical experts and policymakers with multiple years of data on important aspects of GWOT veterans' respiratory health. The data collected will better inform policymakers' decision making when considering legislation to improve healthcare for veterans exposed to the serious hazards posed by the widespread use of burn pits.

Patrick Doyle is a practicing administrative law attorney in the United States Army and completed this article while assigned as a Master of Laws candidate at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. The views presented in this article are those of the author and do not necessarily represent the views of the Department of Defense or its components.

COMMENT: Reimagining Servicemembers' Rights in Post-Secondary Education

by Matthew Feehan, J.D.

Student-Servicemembers (SSM), students with active military obligations, and student-veterans, students with possible active military obligations, lack federal causes of action to bring against their respective colleges and universities when disputes arise.

Federal causes of action are needed because the post-secondary education marketplace – enthralled in a heated battle between private non-profit and for-profit institutions over national declining enrollment – has become inescapably volatile for our brothers and sisters in uniform using federal military benefits. *See*, *generally*, Annie Nova, *Bill would make for-profit colleges ineligible for federal student loans*, CNBC.com (Oct. 23, 2019) (*referencing* The Students Not Profits Act of 2019, H.R.4724).

In addition, the COVID-19 pandemic, combined with nationwide political turmoil and rioting, has illustrated the need for reserve members of the armed forces – some of whom are enrolled in universities – to quickly respond to domestic emergencies. *See*, *generally*, Mark F. Cancian, Use of Military Forces in the COVID-19 Emergency, Center for Strategic & International Studies (www.csis.org) (Mar. 17, 2020).

What do members of the Pennsylvania Army National Guard, for example, tell their respective professors upon receipt of military orders? What do they do if the professor fails them? What recourse does the servicemember have if their university academically withdraws them?

USERRA does not protect students.

For many servicemembers, common knowledge dictates that if one were to deploy, attend a specialized training or extended drill weekend, or respond to a domestic emergency, civilian employment remains secure during and upon

completion of military service. As such, military commanders cite the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) in response to their soldiers' concerns.

In addition, the Employer Support of the Guard and Reserve (ESGR), a Department of Defense program, was established in 1972 to promote cooperation and understanding between Reserve Component Service members and their civilian employers and to assist in the resolution of conflicts arising from an employee's military commitment. *See* About ESGR, https://www.esgr.mil/About-ESGR/Who-is-ESGR. The ESGR refers student complaints to the U.S. Department of Education (DOE).

Also, the U.S. Department of Justice (DOJ) specifically "protects a servicemember's *civilian employment rights* by enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3149 (codified in scattered sections of 38 U.S.C.)." *See*, *generally*, DOJ, Servicemembers and Veterans Initiative, https://www.justice.gov/servicemembers (emphasis added).

However, as powerful of a stick USERRA is for employees, it does nothing to resolve students' missed classes, presentations, or exams due to military obligations "because the educational institution is not the student's employer . . . " *See* Commander Wayne L. Johnson, JAGC, USN (Ret.), Federal and State Laws Protect Students whose Educational Careers Are Interrupted by Military Service, Reserve Officers Association Law Review 13070 (2013); *see also* Johnson, Where to Find Federal and State Laws Online that Protect Students whose Educational Careers Are Interrupted by Military Service, ROA Law Review 19027 (2019).

HEOA does not adequately protect National Guard soldiers.

A lesser known federal law, the Higher Education Opportunity Act of 2008 (HEOA), "provides protections to students who have their education interrupted by a period of voluntary or involuntary uniformed service, mandating that they be readmitted to their educational institution, have their tuition refunded if their education is interrupted, and not receive a failing grade in interrupted courses." *See* Reid W. Seagren, The Call to Serve and the Classroom: Issues Facing National Guard Servicemembers Attending Secondary and Graduate Schools, American Bar Association, www.americanbar.org (June 15, 2013).

"While HEOA did much to ensure that servicemembers called to serve the U.S. government would not have their educational plans dashed by an unexpected call to serve, it did not extend its protections to National Guard servicemembers forced to be absent from class to attend training or perform state duties. In the absence of such protections, National Guard servicemembers, if they receive a call to serve at an inopportune time, could be forced to decide between missing an important test, which could jeopardize not only their grade in a course but their continued enrollment in their educational institution, or risk being discharged from service." *See* Id.

Ironically, 34 C.F.R. § 668.18, governing readmission requirements for servicemembers, includes "service by a member of the National Guard or Reserve, on active duty, active duty for training, or full-time National Guard duty under Federal authority" yet erroneously adds, "for a period of more than 30 *consecutive days* under a call or order to active duty of more than 30 consecutive days." *See* 34 C.F.R. § 668.18(b) (defining service in the uniformed services) (emphasis added). The addition of "30 consecutive days" essentially nullifies any attempt to define members of the National Guard or Reserve and continues to ignore the unique complexities facing part-time members of the military.

To serve or not to serve

For SSM, the situation is a lose-lose: attend an extended Multiple Unit Training Assemblies (MUTA) and miss Thursday's and Friday's classes, or request a MUTA-excusal and miss critical training requirements, i.e., weapons qualifications, physical fitness assessments, or land-navigation assessments.

Servicemembers can lose access to their tuition assistance through their failure to maintain active drilling status by attending classes in lieu of drill—in in addition to many other penalties for being absent

command-authorization. In essence, SSM are forced to choose between two evils merely for serving their Nation.

It is surprising to hear leaders, to this day, cite USERRA in response to their soldiers' academic concerns, given this issue was first raised over 15 years ago by Marcel Quinn, in USERRA – Broad in Protections, Inadequate in Scope, 8 U. Pa. J. Lab. & Emp. L. 237, 2005, and, again, by Konrad S. Lee, in Emerging Limitations of the Uniformed Services Employment and Reemployment Act, 55 Loy. L. Rev. 23, 2009.

At a minimum, the absence of private causes of action potentially affects over 250,000 SSM. In 2017, the Department of Defense (DoD) reported 255,727 of its members used tuition assistance (TA) benefits at post-secondary educational institutions—563 non-profit, 186 for-profit, and 1,215 public. *See* FY 17-19 Department of Defense (DoD) TA Data derived from www.dodmou.com. TA is a reliable indicator of the number of servicemembers simultaneously maintaining military and educational obligations.

However, the number of SSM is likely much higher because some veterans, using G.I. Bill benefits (not captured by TA above), actively serve and may have conflicting military obligations during their semesters. In 2017, 727,018 Veterans used G.I. Bill benefits at post-secondary educational institutions; the Department of Veterans Affairs (VA) does not report the number of veterans still serving and using educational benefits. In total, between student-veterans and SSM, the absence of federal law potentially affects over 900,000 students.

Provide feedback to the VA & DoD

Currently, the sharpest tools student-veterans and SSM have in their proverbial shed are administrative remedies: (1) to simply provide "feedback" to the VA using its GI Bill School Feedback tool, at www.va.gov/education/submit-school-feedback/introduction or (2) complain to the DoD using its Postsecondary Education Complaint Intake, at pecs.militaryonesource.mil/pecs/dodpecs.aspx. Both tools share data with the VA, DOE, DOJ, and the Consumer Financial Protection Bureau for compliance with Executive Order 13607 and potential enforcement efforts. However, the DOJ does not include educational rights in its Servicemembers and Veterans Initiative.

President Obama's Principles of Excellence

Well-meaning legislators, reacting to the collapse of ITT Technical Institute (a G.I. Bill and TA recipient) in 2016, have specifically and repeatedly targeted for-profit educational institutions with aggressive legislation to limit further abuse to SSM and student-veterans. *See*, *generally*, H.R.4724, Oct. 17, 2019. Such legislation, were it to become law, would obliterate a servicemember's right to choose their intended path of education.

No legislative proposal, at this stage, has included a private right of action for servicemembers against their respective university. It would seem that the DOE and the VA are more in step with prior executive intent, as opposed to current congressional intent, because the only substantive tool that summarily provides for the protection of SSM and student-veterans is an executive order from 2012.

The Principles of Excellence "ensure[] that Federal military and veterans educational benefits programs are providing service members, veterans, spouses, and other family members with the information, support, and protections they deserve." Exec. Order No. 13607, 77 Fed. Reg. 25, 862 (Apr. 27, 2012). Although well-intentioned, EO 13607 fails to provide an enforceable cause of action for servicemembers.

A shareholder learned of EO 13607's subjectivity after alleging violation of federal securities laws in *Rameses Te Lomingkit v. Apollo Educ. Grp. Inc.*, 275 F. Supp. 3d 1139. First, EO13607 does not expressly target for-profit educational institutions, as Mr. Lomingkit argued. The EO requires educational institutions receiving funding pursuant to federal military and veterans' educational benefits programs to adhere to best principles, which is why the EO is titled "Principles of Excellence," not Public Law__. Unbeknownst to many who write in this area, EO 13607 equally applies to private non-profits, private

for-profits and public educational institutions receiving TA and G.I. Bill benefits. As such, those who focus their opposition efforts solely on the recruiting tactics used by proprietary institutions of higher education could benefit from a wider look at the recruiting tactics and business models of all post-secondary educational institutions, regardless of sector.

State Law

"While many states have made laudable efforts to reward and encourage military service, such efforts are wasted if servicemembers are prevented from availing themselves of the benefits they have earned by the very nature of their service." *See* Seagren, American Bar Association (Jun. 15, 2013). In Arkansas, for example, "If a student or student's spouse is activated or deployed during a semester, the student shall not receive more than one (1) semester of free tuition under this subdivision (c)(1)(C)." *See* AR Code § 6-61-112(c)(1)(C)(iii). Fourteen additional states have followed. *See, generally*, Ala. Code 31-12-3; *see also* Fla. Stat. 1004.07; 110 ILCS 305/35; Iowa Code 261.5; La. Rev. Stat. 29:420; M. G. L. C. 15A Sec. 42-44; Minn. Stat. 192.502 and 136A. 125 (2)(B); N.J. Stat. 18A:62-4.2; 51 Pa. Cons. Stat. Sec. 7313; S.C. Code 59-101-395; Tenn. Code Sec. 49-7-2305; Tex. Educ. Code 54.006 and 51.9111; W. Va. Code Ann. 15-1F-1(a); and Wis. Stat. 36.11 and 39.48.

With scant case law, it is difficult to ascertain the success of states' efforts to protect their servicemembers.

Notably, University of Arkansas at Little Rock, a public research university, deliberately and conspicuously shared on its webpage its SSM and student-veteran policy. *See* UA Little Rock, Pol. 501.9 (Sep. 17, 2001) https://ualr.edu/policy/home/student/students-called-to-military-duty/ (citing Arkansas Code, Title § 6-61-112). UA Little Rock's efforts are commendable, but, unfortunately, not standard throughout the post-secondary education marketplace. Most universities, regardless of sector, continue to define their *military friendliness* by citing third-party marketing companies, a practice carefully watched by the Federal Trade Commission.

State Attorneys General

Private, non-profit educational institutions are equally capable of prohibited actions against SSM and veterans. National Graduate School of Quality Management (NGS) had received $599,041.56 in veterans benefits from the VA in 2014, the same year its Chief Executive Officer, Robert Gee, was sued by Massachusetts Attorney General Martha Coakley for allegedly collecting excessive compensation.

FTC Actions

In addition, NGS had been named a *Military Friendly School* by G.I. Jobs magazine, owned by Victory Media, Inc. (VM). The FTC recently decided against VM, also doing business as G.I. Jobs, and Military Friendly.

In its decision, the FTC ordered VM "directly or through any corporation, partnership, subsidiary, division, or other device, in connection with paid promotional content regarding postsecondary schools, must not make, or assist others in making, any misrepresentation, expressly or by implication: A. Regarding the scope of the search conducted by any search tool, including, but not limited to whether any such tool searches only through schools Respondent or others have designated as military friendly; B. Regarding any material connection between Respondent and any school; or C. That paid commercial advertising is independent content." *See* In the Matter of Victory Media, Inc., 2018 FTC (Initial Decision, 2017).

An astonishing number of private, non-profit universities and colleges boast their G.I. Jobs or Military Friendly certifications and representations on their respective military and veterans advertising mediums, i.e., pamphlets, posters, and webpages, seemingly unaware of the FTC's recent decision.

Legal professionals seeking to protect SSM and student-veterans should do just that, and not use them as leverage within a tangential, larger debate about the role of for-profit educational institutions in the U.S.

Federal Securities Laws

Mr, Lomingkit may have had a better chance articulating, to the court's satisfaction, why

University of Phoenix's statement [purporting to conform with EO13607] was false and misleading if EO13607 included objective, actionable language, as opposed to its subjective language like, "(c) *end fraudulent and unduly aggressive recruiting techniques* on and off military installations, as well as misrepresentation, payment of incentive compensation, and failure to meet State authorization requirements, consistent with the regulations issued by the Department of Education (34 C.F.R. 668.71-668.75, 668.14, and 600.9)" (emphasis added). Complaint, at 8.

Between the public, private for-profit, and private non-profit sectors, receiving billions in federal military benefits, a single educational institution would be hard-pressed to define "unduly aggressive recruiting techniques" without inadvertently articulating its own organic recruiting efforts used in an increasingly competitive post-secondary education market hampered by nationwide declining enrollment. *See*, *generally*, e.g., Michael T. Nietzel, *College Enrollment Update: Undergraduates Down 4.4%; Graduate Students Up 2.9%*, Forbes (Nov. 12, 2020) https://www.forbes.com/sites/michaeltnietzel.

In 2017, the non-profit sector raked in $1,358,435,655 in veterans' educational benefits, not far behind its competitor, the for-profit sector, at $1,672,756,457. *See* VA releases data of educational organizations receiving GI Bill payments, VA (Mar. 12, 2018) www.blogs.va.gov.

Many non-profit colleges and universities individually invest millions of dollars towards advertising and promotion, amounts that very likely include military-specific promotions. *See*, *generally*, Internal Revenue Service Form 990; *see also* e.g., Institute for Veterans and Military Families, Syracuse University & Student Veterans of America, Student Veterans a Valuable Asset to Higher Education 5 (Syracuse 2019) (illustrating an Army Sergeant First Class, without glasses, wearing the Army dress uniform, transitioning – in four stages – to civilian business casual, with glasses).

DoD Memorandum of Understanding

Well-meaning regulators, implementing DOD Instruction (DoDI) 1322.25, Voluntary Education Programs, created the DoD Voluntary Education Partnership Memorandum of Understanding (MOU) between DoD Office of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and educational institutions.

However, no MOU includes a private right of action for servicemembers to bring against their respective university. Rather, the sharpest language in the MOU is a frail threat of a letter of warning, denial of new programs, removal from DOD installation, and withdrawal of approval of TA.

It is a frail threat because most non-profits receive the majority of their revenue through real estate gains, investments, and grants, not tuition and fees. For example, one private, non-profit educational institution, Boston University (BU), received approximately $4,914,493.00 in combined federal military benefits in 2017. This amount reflects approximately 1.85 percent of its net $264,980,719.00 revenue. Hypothetically, if BU were to breach its MOU, and, at worst, lose its federal military benefits, the school's business model and its $2,128,183,005.00 endowment would barely be fazed.

Therefore, the DoD's threat of denying access to military funds is rather empty for most non-profits, and, ironically, hurts SSM and veterans more than institutions because it invalidates their military benefits and limits choice.

Conclusion

In conclusion, a right without a remedy is not a right. Telling SSM and veterans they have the right to provide "feedback" is not a right, unless SSM and veterans have a remedy. Without a cognizable, actionable, and, most importantly, individual right for SSM and veterans to hold, as they do with USERRA against employers, they are powerless to effectuate the highly inequitable business relationship that treats SSM and veterans as walking dollar signs.

Matthew Feehan is a member of the United States Army Reserve, temporarily assigned to the South

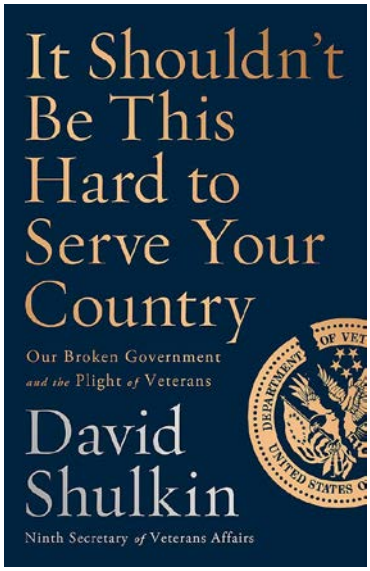
Pacific Border District, U.S. Army Corps of Engineers. His views are his own and in no way reflect official U.S. Department of Defense policy or position. Matt is a former infantry officer with the Massachusetts Army National Guard and served as a boatswain's mate with the United States Coast Guard Reserve, Port Security Unit 301, before he earned his commission from Boston University's Reserve Officer Training Corps. He later served as a summer law intern and honors law clerk for the Department of Justice, Executive Office for Immigration Review. He deployed to the Northern Sinai in support of the Multinational Force and Observers mission as a force protection platoon leader. As a graduate of Western New England University School of Law, he is currently focusing his research and writing on servicemembers' rights within academia. He is not a licensed attorney.

Book Review: *It Shouldn't Be This Hard to Serve Your Country: Our Broken Government and the Plight of Veterans*, David Shulkin (PublicAffairs, 2019), 384 p.p.

by Aaron Moshiashwili

This is the memoir of David Shulkin, former undersecretary of health at VA under President Obama, made secretary of the VA by President Trump, and then fired via tweet. Fair warning – this book will probably offend your political sensibilities before you're past the introduction, regardless of what those political sensibilities are. While Shulkin makes zero bones about the fact that the Trump administration was utterly chaotic, and favored political loyalty over…well, basic competence (trust me, I'm not editorializing there…), he also argues that under Trump, elevation in position aside, he had more ability to make real change. Obama, as a policy wonk, had a tendency to analyze everything to death. Trump was both more aggressive and less hands-on, allowing Shulkin to be more flexible – in fact, the language he uses sounds surprisingly like Mark Zuckerberg's famous edict to "move fast and break things." Given today's polarization, it's likely that your hackles will be raised by the compliment paid to one president and the knock at the other.

Politics aside, I've got a confession. I didn't actually read the book I'm reviewing. (Let me explain…) I recently went on my first family vacation in some time, and downloaded the audiobook version to listen to in the car. The last audiobook I listened to was long enough ago that it came on cassette (Patrick Stewart's one man show of *A Christmas Carol*!). Listening rather than reading was an interesting experience. Shulkin himself read the introduction, as well as a closing author's note, but aside from that, a narrator read the book. The dramatist in me preferred Shulkin's reading – he put significantly more emotion into the book – but at the same time the professional narrator's calm and even (bordering on boring) tone made it easier to focus on the content rather than the "show."



There was an unexpected result of the audiobook format. I got it for the portions of the car ride where the kids were asleep, but my older son (age 11, last seen in these pages reviewing *The Harlem Hellfighters)* not only stayed awake, but actually got into the book. The book is cleverly structured – it front-loads Trump's "interview process," which kicks off the book with a heap of intrigue. Then, it rewinds back to the Obama confirmation process and goes through Shulkin's career as Undersecretary for Health, but by that point you're so into the story that you don't really even notice that it's slipped from high drama to the nitty-gritty of improving a government-run healthcare system. Before long, my son was asking cogent questions about the VA and rooting for Shulkin's various initiatives.

In the end, my son said that if he were president, the first thing he'd do would be to make Shulkin secretary again. Well done, Secretary Shulkin – hang on for at least another 24 years and you may have a second shot at the job. (On the flip side, the next Presidential initiative my son proposed was a 5% price reduction on Legos. He clearly recognized that this would be improperly using Presidential powers for personal gain, as he agonized over the exact percentage before settling on such a small number.)

I'm not just including this because I think it's funny. I think it really speaks to how well Shulkin lays out the issues – an attorney solidly steeped in the workings of the VA can get deeply into it, but at the same time the narrative lays out the problems and responses clearly enough that it didn't lose a sixth-grader. It gives the reader a perfect mix of deep policy debates, political maneuvering, and personal anecdotes, while grounding it all deeply in both the veteran experience at VA as well as Shulkin's.

I'm never without my criticisms, and this book is certainly no different. The section about the new medical records system repeats the rationalizations Shulkin made at the time – and, now as then, I find them unconvincing. Shulkin says that he "doesn't understand why the VA should be in the software business," and my response remains that if he doesn't understand the arguments for it, he didn't study the issue well enough. He repeats his claim that most people agreed with him, and those that didn't were simply unwilling to face change. This didn't seem to reflect reality in 2017 and still doesn't. But we'll see – ten years and $16 billion dollars from now – whether he made a good choice.

Politically, Shulkin casts himself as a complete babe-in-the-woods, and it gets grating. I get that he has his own self-image to present, and I *absolutely* get that Trump's "process" could leave anyone confused as to what's going on. But the statement "Next time you see this guy, you might be calling him Mr. Secretary!" is not some inscrutable pronouncement. (The point was clear to the 11-year-old listening, at least.) Shulkin hides his own ambition and personal goals, and, because he does so, at other points in the book where his motivations or goals are unclear, it left me unwilling to give him the benefit of the doubt. (A feeling former Secretary McDonald apparently shared when he found out about Shulkin's appointment.)

But with or without the benefit of the doubt, the book certainly confirmed what I already knew – that Shulkin cares deeply about the mission of the VA, weathered difficult political headwinds through two administrations, and never stopped fighting to improve the VA for veterans. I started this review by saying that Shulkin finds something praiseworthy about both presidents – but please don't take that to mean that he found their approaches balanced or appreciated them equally. The picture he paints of the Trump administration is of a completely disorganized group, not only lacking basic knowledge about the agencies they were now in charge of, but completely uninterested in learning about them. An administration where the Secretary of Veterans Affairs was made to answer multiple phone calls a day from a billionaire donor who had never set foot in a VA and whose only qualification to be an "advisor" to the Secretary was that he was a member of the President's club. And an administration for whom politics always, *always* came before the mission of caring for veterans.

Aaron Moshiashwili made a big mistake when writing this review. Please read the next article.

Book Review: The Second Half of *It Shouldn't Be This Hard to Serve Your Country: Our Broken Government and the Plight of Veterans* David Shulkin (PublicAffairs, 2019), 384 p.p.

by Aaron Moshiashwili

I screwed up.

At the end of two long car rides worth of listening to *It Shouldn't Be So Hard To Serve Your Country*, I

knew that the narrative was almost at the end of Secretary Shulkin's term. The chapter titles had crept into the mid-twenties. Shulkin made his case. All that was left, I assumed, was a few chapters which would include the grisly details of Shulkin's firing and maybe a wrap-up chapter or two. So, feeling guilty that I hadn't finished 100% of the book, I wrote the positive review of *It Shouldn't Be So Hard To Serve Your Country* that you just read.

I should have listened to that guilty feeling and listened on. I not only wasn't near the end of the book – I hadn't yet even hit the halfway point. And the second half of the book is a different experience, both tonally and narratively. So different that I didn't think I could write a review in the space I had which would cover both how much I enjoyed and appreciated the first half of the book, and how much I completely disdained the second half.

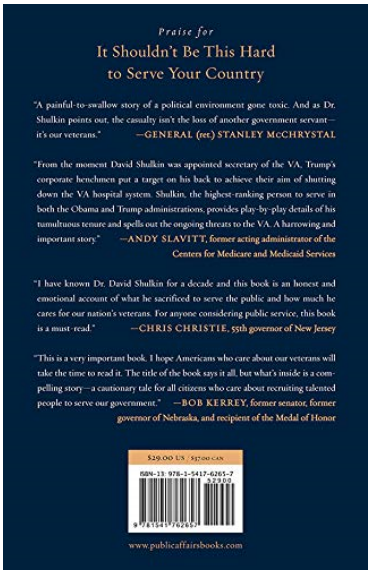
So here we are.

The first half of the book is the story of a dedicated public servant working for America's veterans. The second half is that of an ineffective bureaucrat, incapable of navigating the political waters he finds himself in. It's written by someone who never quite seemed to understand that he was no longer the main administrator of a medical system, he had become a politician, and it wasn't enough for him to keep his head down and propose policy changes – he had to actively manage his department against people who opposed him.

In a different reality, the second half might be an exciting narrative where he learns the political lessons he needs and eventually overcomes the obstacles in his way. Instead, it is a litany of complaints from Shulkin about all the things that went wrong, leading to his firing by tweet. (As a side note, the Justice Department has recently argued that the President's tweets don't have the force of law—so was Shulkin properly relieved of his position?)

The ostensible reason for his removal was related to a travel scandal – a third-tier scandal, compared to other Trump appointees, but one which made the news because it fit the broader narrative. Shulkin spends a few pages on the topic and clears his good name, discussing the details of what happened and making it clear that neither he nor his family did anything untoward or received any private benefit.

And then, in case you were unclear from the concise version, he repeats every single one of those details again. He complains about "the media" picking up a story leaked as a smear against him. He talks about "the politicals" – a cadre of Trump political appointees working against him at the agency – and talks about how they were not only behind the leaks, but that they also took over the VA's press shop and prevented him from responding to journalists trying to investigate the story.



Shulkin did a good job of improving the delivery of health care at the VA. But the politicals didn't want VA healthcare improved, they wanted it privatized. So they fired Shulkin's people and replaced them with unqualified political loyalists drawn from the ranks of organizations hostile to the VA, like the Koch brothers' Concerned Veterans of America. They leaked damaging (or false) information to the media, until the buzz was so hostile that Shulkin's media-sensitive boss fired him.

And yet, at the end of it all, Shulkin still plays the ingénue. "I don't understand why these people made the changes they did. It was like they didn't understand at all the policy, and just wanted to carry out their political goals." WELL, DUH. That naiveté wasn't charming at the beginning of the book; at the end, it's obvious he's either being disingenuous or is a complete idiot. Neither is an appealing prospect. His Trump-like piling on the media, when he knows the problem was that official sources were feeding the media false information, doesn't make sense.

And then, in case you weren't clear that he didn't do anything wrong during the travel scandal, he explains everything again. The second half of the book badly needed a stronger editor's hand.

The natural question is "Why didn't Shulkin instead fire the people causing all these problems? Wasn't he the Secretary?" And incomprehensibly, this question is never answered. Someone at the White House tells Shulkin he can't, but that person seems to have no authority to make that pronouncement. General Kelly, Trump's chief of staff, tells Shulkin to fire them if he has to. The President tells Shulkin that there would be fallout, but if he needed to, fire them.

Instead of doing that, Shulkin meekly sits back as The Politicals dismantle his team, destroy his department's morale, and attack his reputation. He never explains why he doesn't bypass the VA's hostile press shop and go to reporters directly, or barge into John Kelly's office and demand that he speak to the president. Or, basically, why he doesn't do anything at all. By the time he is fired, it is almost a relief.

And then, in case you weren't clear that he didn't do anything wrong during the travel scandal, he explains everything yet again, and talks about how other secretaries do the exact same thing.

Shulkin clearly cares deeply about the VA and its mission. (Although, with his background in health care, he is almost exclusively focused on VHA; the benefits side gets little mention.) He stood as a bulwark against privatization despite the pressure on him and forces arrayed against him. These things are absolutely worth lauding. I just don't know if they're worth sitting through the hundreds of pages of self-serving whining that is the second half of the book.

Aaron Moshiashwili is considering letting his 11-year-old consult on ALL his projects from now on.

HELP WANTED

Attorney Robert Walsh seeks paid assistance with completion of a law review article regarding denial of due process in the adjudication of VA disability benefits claims. The article is slated for submission to the American Bar Association Administrative Law Review upon completion. Open to students with law review credentials. Please contact Mr. Walsh at robert@robertpwalsh.com or 269-962-9693.