

# VETERANS LAW JOURNAL

A Quarterly Publication of the Court of Appeals for Veterans Claims  
Bar Association

Fall 2004

## Federal Circuit and CAVC Considering Whether BVA May Initially Consider VHA Medical Opinions

In separate lawsuits, both the Federal Circuit and the CAVC are considering challenges to the authority of the Board of Veterans' Appeals to initially consider medical opinions obtained by the BVA from VA physicians employed by the Veterans Health Administration. In the Federal Circuit, the Disabled American Veterans, The American Legion, and the National Veterans Legal Services Program have filed a direct challenge to 38 C.F.R. § 20.901(a) – a final rule promulgated in April 2004 that authorizes the BVA to obtain and consider in the first instance opinions from VHA physicians when, in the Board's judgment, "such medical expertise is needed for equitable disposition of an appeal."

Meanwhile, on September 14, 2004, the Court of Appeals for Veterans Claims agreed to convene en banc in *Padgett v. Principi*, No. 02-2259 to consider whether the BVA had authority to consider in the first instance a medical opinion that the BVA had solicited from the Chief of Staff of the Charleston VA Medical Center. The Order granting en banc review withdrew a July 9, 2004 panel opinion (*Padgett*, 18 Vet.App. 188), which had concluded that the

*See VHA/Padgett – page 3*

## Chief Judge Ivers Addresses Annual Meeting

Just two weeks after replacing retired Chief Judge Kenneth B. Kramer, Chief Judge Donald L. Ivers addressed the CAVC Bar Association at its annual meeting on September 27, 2004. Ivers, who will continue as Chief Judge until his retirement in August 2005 (when Judge William P. Greene, Jr. will replace him) announced that the Court would continue the efforts begun by Chief Judge Kramer to create a Veterans Judicial Center building to house the Court.

*See Ivers – page 4*

## INSIDE THIS ISSUE

Pending Cases at the CAVC.....	2
CAVC Lacks Authority to Review Allegation that Rating Schedule Violates Statutory Provisions.....	5
Flurry of Law Review Articles Appears on Veterans Law in 2004.....	6
News on the Meet the Judge Program.....	8
Veterans Committee Sends Three CAVC Judicial Nominations to Senate Floor.....	9
News from Committees.....	9

Pending Cases at the CAVC

**Presumption of administrative regularity and the mailing of Board decisions**

*Sthele v. Principi*, U.S. Vet.App. No. 03-1632. Oral argument was held before Judges Steinberg, Hagel, and Kasold, on Tuesday, June 29, 2004. The issue on appeal to the CAVC concerned the presumption of regularity that attaches to the mailing of Board decisions. The Secretary moved to dismiss the appeal based on an untimely Notice of Appeal (NOA). The appellant alleges that he did not receive a copy of the Board decision until well after the 120-day time period for filing a timely NOA to the Court. At oral argument, the appellant’s representative challenged the Board’s procedures for mailing Board decisions, and both parties answered questions posed by the Court regarding the presumption of regularity. The Court requested supplementary briefing concerning details pertaining to the Board’s procedures for mailing Board decisions.

*Counsel for appellant:* Sean A. Ravin, Esq. (202-607-5731).

*Counsel for appellee:* Thomas A. McLaughlin, Esq. (202-639-4842).

ARTICLES AND LETTERS TO THE EDITOR WELCOMED FOR FUTURE EDITIONS

The editors expect that future issues of this publication will include articles on veterans law and letters to the editor. Contact Lou George or Michelle Kane (see page 10) if interested in contributing in either way.

**Jurisdiction of CAVC to Review BVA Denial of Motion to Vacate Previous BVA Decision**

*Harms v. Principi*, U.S. Vet.App. No. 03-2038. A panel of the Court of Appeals for Veterans Claims is currently considering whether the Court has jurisdiction to review a decision by the Board to deny a motion filed pursuant to 38 C.F.R. § 20.904 to vacate a prior BVA decision. In *Harms v. Principi*, the Board denied the veteran’s claim for benefits on June 13, 2002, and the veteran did not appeal this decision to the Court within the 120-day appeal period.

Later, the veteran filed a motion with the BVA to vacate its 2002 decision on the ground that there was a violation of due process in the proceedings leading to the 2002 denial of benefits. This motion was filed pursuant to Section 20.904, which provides that

[a]n appellate decision may be vacated by the Board . . . at any time upon request of the appellant . . . on the following grounds:

- (a) Denial of due process. Examples of circumstances in which denial of due process of law will be conceded are:
  - (1) When the appellant was denied his or her right to representation through action or inaction by [VA] or [BVA] personnel,

*See Harms – continued on page 3*

*Harms – continued from page 2*

- (2) When a Statement of the Case or required Supplemental Statement of the Case was not provided, and
- (3) When there was a prejudicial failure to afford the appellant a personal hearing . . .

On October 30, 2003, the Deputy Vice Chairman of the BVA denied the motion to vacate on behalf of the Board, and the veteran sought review in the CAVC within 120 days of the Board’s October 30, 2003 denial.

On May 17, 2004, a panel of the Court composed of Judges Steinberg, Greene, and Hagel ordered the parties to brief the issue whether a decision denying a motion to vacate a Board decision constitutes a final BVA decision subject to CAVC review. The National Organization of Veterans Advocates and the National Veterans Legal Services Program filed a brief as amicus curiae in support of appellant’s position that the answer to this question is in the affirmative, in response to an Order issued by the panel on August 4, 2004 inviting interested amicus curiae to address the question.

If the Court decides that it has jurisdiction to review a Board denial of a motion to vacate a prior Board decision, this would appear to open

the door to VA claimants to employ Section 20.904 to obtain CAVC review of old Board decisions denying benefits on the limited question of whether the proceedings leading to the Board denial violated due process.

*Counsel for appellant:* Kenneth M. Carpenter, Esq. (785-357-5251)

*Counsel for appellee:* Thomas A. McLaughlin, Esq. (202-639-4842)

*VHA/Padgett -- continued from page 1*

BVA could not lawfully consider a VHA medical opinion -- or even an independent expert opinion (IME) from a non-VA physician -- without first remanding for regional office consideration or obtaining the claimant’s waiver of the right to initial consideration by a regional office.

Both the veterans service organization challengers in the Federal Circuit and Mr. Padgett rely heavily on the Federal Circuit’s decision in *Disabled American Veterans, et al. v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), which struck down BVA rules that authorized the BVA to seek and initially consider certain evidence on the ground that they were contrary to the requirement of 38 U.S.C. § 7104(a) that all questions in a matter subject to decision by the Secretary shall be subject to one review on appeal to the BVA. The ultimate outcome of these lawsuits could affect many other cases; in FY 2003, for example, the

*See VHA/Padgett – continued on page 4*

*VHA/Padgett – continued from page 3*

Board secured and initially considered 419 medical opinions from physicians employed by the VHA (as well as 167 medical opinions from non-VA independent physicians).

*Disabled American Veterans and The American Legion and The National Veterans Legal Services Program v. Secretary of Veterans Affairs*, Fed. Cir. No. 04-7117, 04-7128

*Counsel for Petitioner Disabled American Veterans*: Ronald L. Smith (202-202-554-3501); *Counsel for The American Legion and The National Veterans Legal Services Program*: Jeffrey E. McFadden (202-429-8022)

*Counsel for Respondents*: Martin F. Hockey, Jr. (202-327-6288)

*Padgett v. Principi*, Vet.App. No. 02-2259: *Counsel for Appellant*: James W. Stewart and Barton F. Stichman (202-265-8305)

*Counsel for Appellee*: Edward V. Cassidy, Jr. (202-639-4810)

*Ivers--continued from page 1*

Ivers also discussed some of the steps the Court has recently taken to help reduce the backlog of undecided appeals, such as authorizing four law clerks in fiscal year 2005 for each judge and detailing other court personnel to prepare drafts of court decisions in appeals that have been pending in chambers for a long period of time, under the direction of the screening judge. The

Chief Judge indicated that the Court will continue to promote interest in veterans law at law schools and entertain requests from law schools to serve as venues for oral arguments. The Chief Judge said that he did not plan to initiate any changes to the Court rules, including the Internal Operating Procedures.

Outgoing President Brian B. Rippel summarized the activities of the Association's various committees over the past year and introduced new President Barton F. Stichman. Stichman announced the results of the Association's annual elections: Jennifer Dowd (of the CAVC) as President Elect; Glenda Herl (of Carpenter Chartered) as Secretary; David Quinn (of the Office of the VA General Counsel) as Treasurer; and Landon Overby (of the Disabled American Veterans) to finish the remainder of the two-year term on the Board of Governors of David Quinn, Marjorie Auer (of the Board of Veterans' Appeals) to a three-year term on the Board of Governors, and Brian Robertson (of the Veterans Pro Bono Consortium) to a three-year term on the Board of Governors.

A reception was held after completion of the business portion of the meeting. The Bar Association expresses its appreciation to the Disabled American Veterans for allowing the Association to use DAV's conference facilities for the conduct of the annual meeting and the reception.

CAVC Lacks Authority to Review  
Allegation That Rating Schedule Violates  
Statutory Provisions

*Wanner v. Principi*, 370 F.3d 1124 (Fed. Cir. 2004). In this case, the United States Court of Appeals for Veterans Claims held that the Diagnostic Code (DC) for evaluating service-connected tinnitus, 38 C.F.R. § 4.87a, DC 6260 (1998), was invalid as being inconsistent with 38 U.S.C. § 1110. *Wanner v. Principi*, 17 Vet. App. 4 (2003). On June 2, 2004, the United States Court of Appeals for the Federal Circuit (Federal Circuit) reversed, finding that the Veterans Court acted outside of its jurisdiction.

The Veterans Court had consolidated two appeals in which the appellants sought compensable disability ratings for tinnitus. One of the appellants also argued that the pre-1999 “trauma requirement” in DC 6260 was unlawful, both as contrary to 38 U.S.C. § 1110 and to the Equal Protection Clause. Addressing the merits of the claims, the Court concluded that the trauma requirement of DC 6260 (pre-1999) was invalid because it violated 38 U.S.C. § 1110, and that DC 6260 was arbitrary and capricious. The Court declined to address the constitutional argument, vacated the Board decisions and remanded for further proceedings.

In reviewing the matter on appeal, the Federal Circuit found that it has jurisdiction to review a non-final order issued by the Veterans Court, based on the exception to finality outlined in *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002). Concerning the Secretary’s argument that the Veterans Court lacked jurisdiction to review DC 6260, the Federal Circuit noted that under 38

U.S.C. § 7252, the Veterans Court “may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.” 38 U.S.C. § 7252(b). Moreover, the Federal Circuit’s own jurisdictional statute, 38 U.S.C. § 7292(a), excepts from the court’s review “a refusal [by the Veterans Claims Court] to review the schedule of ratings for disabilities adopted under section 1155 of this title.” 38 U.S.C. § 7292(a).

Thus, the Federal Circuit found that “[t]he statutory scheme . . . consistently excludes from judicial review all content of the ratings schedule as well as the Secretary’s actions in adopting or revising that content.” Looking at the legislative history, the Federal Circuit pointed out that “[t]he language in the legislative history is not limited to the percentages of the disability ratings, as appellants argue, but matches the statutes in broadly precluding judicial review of the contents of the disability rating schedule in toto.” Consequently, the Federal Circuit concluded the following with respect to judicial review of the rating schedule:

The Secretary’s discretion over the [rating] schedule, including procedures followed and content selected, is insulated from judicial review with one recognized exception limited to constitutional challenges. The review undertaken by the Veterans Court here amounts to a direct

*See Wanner –continued on page 6*

*Wanner – continued from page 5*

review of the content of the rating schedule and is indistinguishable from the review of “what should be considered a disability” that the Veterans Court itself recognized as impermissible. Consequently, we conclude that it is outside of the Veterans Court’s jurisdiction.

Accordingly, the Federal Circuit reversed the decision of the Veterans Court striking the trauma requirement from the pre-1999 version of DC 6260, and remanded for consideration of the previously avoided constitutional question presented by the appellants.

*Counsel for appellant:* Ronald L. Smith (202-554-3401)

*Counsel for appellee:* Jamie L. Mueller, VAGC (202-273-6419)

**Flurry of Law Review Articles Appears on  
Veterans Law in 2004**

In recent months, there has been a flurry of law review articles devoted to veterans law. They include:

***Recent Developments in Administrative Law – Serving Our Veterans through Clearer Rules***, William A. Moorman and William F. Russo, 56 Admin. L. Rev. 207 (2004).

This law review article describes the three phases of the Regulation Rewrite Project – an initiative of Department of Veterans Affairs Secretary Anthony J. Principi to reorganize and rewrite in plain language VA regulations for all compensation and pension benefit programs.

Phase I: This first phase began in the spring of 2002 and entailed a systemic review of the 276 regulations contained in 38 C.F.R. Part 3 (Adjudication) to identify any gaps to be filled, ambiguities to be resolved, redundancies to be eliminated, and any need for organizational change. Based on that review, it was determined that a majority of the regulations contained legal jargon, confusing cross-references, and language that sounded adversarial to the veteran. Hence, it was decided that those regulations needed to be rewritten in plain language. The Rewrite Project Teams documented all needed changes.

Phase II: The second phase was completed during Fiscal Year 2003 and resulted in a draft revision of 228 of the 276 regulations contained in Part 3 in a logical, claimant-focused, and user-friendly format.

Phase III: The final phase involves seeking public input on all of the rewritten regulations by publishing them for comment in twenty separate proposed rulemaking packages. The first package of proposed changes was published in the Federal Register on January 30, 2004. (Later packages of the proposed regulations were published on July 27, 2004 and October 1, 2004 – ed. note).

*See Flurry –continued on page 7*

*Flurry – continued from page 6*

***Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis, Sarah M. Haley, 56 Admin. L. Rev. 535 (2004).***

In the Veterans' Judicial Review Act of 1988, Congress gave the CAVC authority to decide appeals by single judge, rather than by a panel of three judges, as has been the tradition for federal appellate courts. During three recent fiscal years, 93 percent of all the appeals terminated by the CAVC were disposed of by a single judge – and thus were unpublished and nonprecedential.

In this 40-page article, the author canvasses CAVC decision-making and concludes that in many cases the CAVC has circumvented the criteria governing whether an appeal should be decided by a single judge or a panel of three, as set forth in *Frankel v. Derwinski*, 1 Vet.App. 23, 26 (1990). This lack of fidelity to *Frankel* has dangerous adverse consequences, the author maintains, undermining the common law doctrine of stare decisis and resulting in inconsistent, and an inferior quality of decision-making.

**8 Kansas Journal of Law and Public Policy (Spring 2004)**

Four articles in this edition of the Journal emanated from a symposium conducted by the Journal in 2003, entitled *The Veterans Benefit System: Is It Broke and Can It Be Fixed?* These articles are:

***The Administration of Single-Judge Decisional Authority by the United States Court of Appeals for Veterans Claims, Ronald L. Smith***

Mr. Smith calls for the study of the exercise of single-judge decisional authority in the CAVC to decide whether it should be expanded to other federal appellate courts. If expansion is not desirable, the author recommends that Congress consider why the claims of veterans and their dependents should be subject to single judge review, rather than the federal appellate tradition of review by a panel of three.

***Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants, Kenneth M. Carpenter***

Mr. Carpenter writes that while paternalism in the development and initial adjudication process of the VA inures to the benefit of claimants, paternalism in the review of regional office denials of benefit claims is detrimental to VA claimants. The author compares the rights available to Social Security disability claimants with the constraints that flow from the paternalistic process by which VA claims denials are reviewed.

***Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System, Richard E. Levy***

The general thesis of Professor Levy in this article is that the criticism that has been leveled against the Veterans Benefits Administration and the BVA for lengthy

*See Flurry – continued on page 8*

*Flurry – continued from page 7*

delays in claims processing, inadequately developed records, and unfair or arbitrary decisions is a result of the system's uneasy mixture of two basic models of government benefits. The veterans benefits system emerged during the time when the "charity" model of government benefits prevailed, and the current system maintains many of the features of this model. Other government programs such as Social Security, Welfare, and Medicare or Medicaid now operate under the "social insurance" model, which involve entitlements subject to legal protections involving procedural due process and independent adjudication that are not present in the current VA benefits system.

***Deconstructing and Reconstructing the Veterans Benefits System, William F. Fox, Jr.***

Professor Fox concludes that the current system for administering compensation benefits is excessively cumbersome and unwieldy. The author maintains that although few people believe that the current system is working properly, the makeup of the various constituencies in the system – and the awesome power that some of them exercise in Congress – has prevented, and will likely continue to prevent a needed comprehensive restructuring.

**News on the Meet the Judge Program**

On May 19, 2004, the Bar Association presented the second "Meet the Judge" program of the year. This program was hosted by Judge Farley, and was held in his chambers. Twenty-two members of the Bar Association participated (six private practitioners, seven attorneys from VAGC, three attorneys from the CAVC, and six attorneys from the BVA). Six of the participants were from outside the D.C. metropolitan area, and participated by teleconference. During the discussion, Judge Farley responded to questions concerning a number of areas, such as challenges that the Court faces, reforms to the veterans claims system that he believes are needed, the system by which the Court renders decisions, and tips for successful advocacy before the Court. Like the prior program with Chief Judge Kramer, this session was a great success and our members seem very enthusiastic about continuing this program.

On November 19, 2004, the Programs committee will be sponsoring its third "Meet the Judge" program, a breakfast with Chief Judge Ivers in his chambers. Invitations to this program were e-mailed to members on October 22.



### Veterans Committee Sends Three CAVC Judicial Nominations to Senate Floor

On October 6, 2004, the Committee on Veterans' Affairs reported the following nominations to the full Senate with the recommendation that they be confirmed.

- Robert N. Davis, of Florida, to be a Judge of the United States Court of Appeals for Veterans Claims for the term prescribed by law, vice a new position created by Public Law 107-103.
- Mary J. Schoelen, of the District of Columbia, to be a Judge of the United States Court of Appeals for Veterans Claims for the term of fifteen years, vice John J. Farley, III, term expiring.
- William A. Moorman, of Virginia, to be a Judge of the United States Court of Appeals for Veterans Claims for the term of fifteen years, vice Kenneth B. Kramer, term expired.

### News from Committees

#### **Membership Committee:**

The Membership Committee sent out renewal invoices for membership since the fiscal year for the CAVC Bar Association ended September 30, 2004. If you have an updated address, please notify the Membership Committee at [carpgh@mindspring.com](mailto:carpgh@mindspring.com). Historically, the Bar Association membership totals are as follows: 2001-2002 - 301 members; 2002-2003 - 250 members, and 2003-2004 – 253 members. The Board of Governors voted at

a recent meeting to modify the dues structure. All members renewing their membership will be charged \$75.00 for dues for this fiscal year.

#### **Portrait Committee:**

The Portrait Committee is pleased to announce that on November 17, 2004, at 4:00 p.m., there will be a presentation of portraits in honor of retired Chief Judge Kenneth B. Kramer and retired Judge John J. Farley, III. The ceremony, which will be by invitation, will be followed by a reception. Invitations were scheduled to be sent out the week of October 25<sup>th</sup>. Questions may be directed to Jeff Lüthi, who may be reached at (202) 501-5906.

#### **Programs Committee:**

On Tuesday, November 16, 2004, the Programs Committee will be conducting an "AM Law program" event in conjunction with the University of Baltimore. The program runs from 8-9 am and is designed to provide local practitioners in Baltimore some information about how the practice of veterans' law impacts their individual respective practices. There will be two speakers, one from the private bar and one from VA, who will share their knowledge and experiences, and, hopefully, open some new doors with the attendees and veterans in Baltimore. Admission is free. For more information, contact [david.quinn@mail.va.gov](mailto:david.quinn@mail.va.gov)

*See Committees – continued on page 10*

*Committees – continued from page 9***Publications Committee:**

The Publications Committee is committed to producing more frequent issues of its newsletter. If you are aware of any pending cases at the CAVC or Federal Circuit that should be profiled, or if you would like to contribute to the next issue, please contact Lou George at [louis\\_george@nvlsp.org](mailto:louis_george@nvlsp.org) or Michelle Kane at [michelle.kane@mail.va.gov](mailto:michelle.kane@mail.va.gov) - we welcome any suggestions!

**JOIN A COMMITTEE**

The vitality of the Bar Association depends upon the participation of its members. We have a variety of committees that need your help. I urge you to pick a committee on which you would like to volunteer time and contact the Chair by e-mail. See the right-hand column for their addresses.

*Bart Stichman, President*

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