COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

NEWS FOR PRACTITIONERS

A Quarterly Publication of the CAVC Bar Association Publications Committee

Winter 2004

SIGNIFICANT PENDING CASES

I. Pending Cases at the Court of Appeals for the Federal Circuit

As of the date of this publication, the following cases are currently pending before the Court of Appeals for the Federal Circuit.

Challenge to VA's rating formula for mental disorders and its application to rating PTSD

***Sellers v. Principi*,** Fed. Cir. No. 03-7070 and ***Hayday v. Principi*,** Fed. Cir. No. 03-7071 (argued December 1, 2003)

(Both cases present essentially identical issues)

Issues Presented: (1) Whether, pursuant to 38 U.S.C. § 7252(b), the Federal Circuit and the CAVC have jurisdiction to consider a challenge to the rating formula for mental disorders in the VA Schedule for Rating Disabilities (codified at 38 C.F.R. § 4.130); and (2) Whether the CAVC correctly interpreted the rating formula for mental disorders (codified at 38 C.F.R. § 4.130, Diagnostic Code 9440).

MESSAGE FROM THE PRESIDENT

Our Bar Association is now in its third year, and we should all be proud of the achievements of the past two years. My goals for this year are two-fold. First, I plan to continue to build on the achievements of the past two years. Veterans law is a dynamic and evolving practice, and this Bar Association can best serve the bar, veterans, and the Bench by promoting professionalism and getting additional positive exposure for our practice in the law schools and in the community. Second, I plan to be accessible, and to seek input and ideas from you as the membership. I will work hard to see that your good ideas are turned from words into reality.

Many of our members have contributed their time and efforts to promote our practice through special events like the oral arguments conducted by the U.S. Court of Appeals for Veterans Claims at law schools, including one just a few weeks ago, and the interesting programs that the association has presented in Arizona, Virginia, and Washington, D.C. Others have contributed by undertaking the critical duties that keep

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The petitioner, John W. Sellers, Jr., appeals the November 26, 2002, order of the CAVC in *John W. Sellers, Jr. v. Anthony J. Principi, Secretary of Veterans Affairs*, Vet. App. No. 00-2311 (Nov. 26, 2002), which affirmed an October 20, 2000, decision of the Board. The Board had denied entitlement to a rating greater than 70 percent for service-connected post-traumatic stress disorder (PTSD). In its decision, the CAVC rejected Mr. Sellers' argument that, because VA has adopted the definition of PTSD contained in the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM-IV), the Board erred in evaluating the extent of his disability based on the factors in VA's general rating formula for mental disorders, codified at 38 C.F.R. § 4.130, that are not included in the DSM-IV diagnostic criteria for PTSD. The second petitioner, Arthur A. Hayday, Jr., appeals the CAVC's decision in *Arthur A. Hayday, Jr. v. Anthony J. Principi, Secretary of Veterans Affairs*, Vet. App. No. 00-2011 (Nov. 26, 2002), which affirmed a June 22, 2000, Board of Veterans' Appeals (Board) decision that awarded him a 50% disability rating for his service-connected post-traumatic stress disorder (PTSD), but denied a rating higher than 50% for that condition.

In both cases, the CAVC noted its holding from *Mauerhan v. Principi*, 16 Vet. App. 436 (2002), (i.e., that the diagnostic criteria for mental disorders listed in DSM-IV do not replace, but instead supplement, the symptoms listed in 38 C.F.R. § 4.130 as a basis for rating the extent of disability attributable to PTSD). In Mr. Sellers' case, the CAVC stated that the Board found that the appellant did not exhibit a single representative symptom listed in section 4.130 that would warrant a 100 percent rating, and that there was no evidence of any other symptom that would equate to the section 4.130 symptomatology.

On appeal in each of their cases, the petitioners argue that the CAVC improperly interpreted 38 C.F.R. § 4.130 by concluding that VA could require proof of symptoms other than those listed in DSM-IV for

MESSAGE FROM THE PRESIDENT (Continued)

our professional association running and connected with its membership. We are all indebted to those who have given generously of their time and talents.

As you read this newsletter, I would ask that you take a moment to reflect on the effort that it took to publish something of substance that would be a real benefit to our members. And as helpful as this newsletter is to those of us practicing veterans law, it is but one of a number of endeavors that Bar Association members have undertaken. As our Bar Association progresses through this third year, we need to keep in mind that the organization is no more than the collective effort of practitioners working together to promote our practice and professionalism at the bar. If you are not already doing so, please make an active contribution to the organization by offering your talents and ideas. If you would like to speak with me, please call me on my direct line at 202-639-4854 or e-mail me at brian.rippel@mail.va.gov. Finally, please encourage your colleagues who have not done so to join the Bar Association and help us to keep building.

Brian Rippel

purposes of diagnosing PTSD to rate the extent of disability attributable to the disorder. They contend that the CAVC's conclusion that the DSM-IV diagnostic criteria for PTSD supplement--but do not replace--the criteria in the formula for rating mental disorders including PTSD, is inconsistent with 38 C.F.R. § 4.130. They further argue on appeal that none of the symptoms of PTSD listed in DSM-IV is included in 38 C.F.R. § 4.130 and that an adjudication denying them a 100 percent rating because they do not have symptoms listed in that regulation, which are unrelated to PTSD, is arbitrary.

VA responds that the Federal Circuit and the CAVC lack jurisdiction to hear this challenge because the statutory scheme of title 38, United States Code, *i.e.*, 38 U.S.C. §§ 502, 7252(b), and 7292(a), and the legislative history of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), establish Congress' intent to preclude judicial review of all issues pertaining to the appropriate content of the VA Schedule for Rating Disabilities, other than constitutional issues. VA contends that the argument (i.e., only DSM-IV criteria, not the factors listed in 38 C.F.R. § 4.130, Diagnostic Code 9440, may be considered in rating a PTSD disability), although couched in terms of a challenge to the CAVC's interpretation of 38 C.F.R. § 4.130, is in actuality a challenge to the substance of the rating schedule for mental disorders--an action that Congress clearly intended to preclude. VA also contends that, by arguing that VA could not require proof of the existence of symptoms of a mental disorder other than the symptoms of PTSD listed in DSM-IV when rating PTSD disability under 38 C.F.R. § 4.130, the petitioners are essentially challenging the content of section 4.130.

VA also contends that, to the extent that the argument can be construed as a challenge to the CAVC's interpretation of the regulation, the CAVC's order makes clear that the CAVC correctly recognized that factors other than those specifically listed in section 4.130, Diagnostic Code 9440, may be considered in assigning a disability rating for PTSD and that, in doing so, the CAVC was fully consistent with the plain language of the regulation, which requires that a rating be based on "such symptoms as" those listed in the regulation, but which does not require proof of the specific symptoms listed. Finally, VA also points out that Mr. Sellers' argument was considered and rejected by VA when it promulgated the current rating schedule for mental disorders. 61 Fed. Reg. 52,695, 52,697 (1996).

In the reply brief for each case, the appellants argue that the Federal Circuit has jurisdiction over each appeal, as these appeals do not challenge the percentage ratings for rating mental disorders, nor do they challenge the rating criteria adopted by the VA for evaluating mental disorders. Rather, appellants are challenging whether 38 C.F.R. § 4.130 permits VA to deny appellants an increased rating because they do not have symptoms unrelated to their service-connected PTSD, which the CAVC properly has jurisdiction to review. Appellants Sellers and Hayday also argue that the issue presented is not whether symptoms other than the examples given in the regulation can be considered, but whether the examples can be considered at all.

In addition, appellant Hayday states that he is not challenging the rating criteria adopted by VA, and that he never argued that the DSM-IV should be used to determine the level of functional impairment resulting from mental disorders. Appellant Sellers states that VA's application of 38 C.F.R. § 4.130 is a "textbook example" of arbitrary agency action, in that the Board never considered the severity of appellant's specific PTSD symptoms.

Counsel for appellants: Ronald L. Smith, Disabled American Veterans (202) 554-3501.

Counsel for appellees: Richard Hipolit (VA OGC) (202-273-6330); Michael Bahler (DOJ) (202-307-1011)

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Retroactive benefits/CUE

Sandstrom v. Principi, Fed. Cir. No. 03-7075 (argued December 2, 2003)

**Editor's Note: On February 20, 2004, as this newsletter was going to press, this case was decided by the Federal Circuit. The decision may be found on the Court's website, www.fedcir.gov.*

Issue Presented: Is the Secretary required to pay cost-of-living adjustments (COLA) with retroactive benefit payments when CUE is committed?

This appeal stems from a November 8, 2002, CAVC decision (16 Vet. App. 481). The CAVC affirmed the BVA's April 1999 denial of an adjustment for inflation on a retroactive payment of special monthly compensation (SMC). Before the Federal Circuit is the question of whether the Secretary impliedly waives sovereign immunity under 38 U.S.C. 1114(n) and 5109A(b) when there is a retroactive benefit awarded.

The appellant asserts that for purposes of 38 U.S.C. § 5109A(b), when a benefit awarded is to have the "same effect" as if it was made correctly in 1969, he must receive the "real value that he would have received between 1969 and 1996." He essentially requests that he receive a COLA adjustment on retroactive special monthly compensation awarded under CUE.

The CAVC found that the plain language of section 5109A(b) does not evidence a Congressional intent to require COLA on an award of past-due benefits to account for inflation. The CAVC stated that to interpret section 5109A(b) as appellant suggested,

would violate the strict prohibition against implied waivers of sovereign immunity. The Court cited the Federal Circuit's conclusion in *Smith v. Principi*, 281 F.3d 1384 (Fed. Cir.), *cert. denied*, 123 S. Ct. 99 (2002), that the "same effect" language in 38 U.S.C. § 5109A is not a clear waiver of the rule against interest on retroactive veterans benefits. The CAVC found that this principle is equally applicable to appellant's contention that the same language constitutes a waiver of sovereign immunity for purposes of an increased COLA.

Before the Federal Circuit, the appellant argued that the CAVC misinterpreted the "same effect" language of 38 U.S.C. § 5109A(b). Appellant argued that the 1996 decision cannot have the "same effect" as if the 1969 decision had been correctly decided (if the 1996 payment is not retroactively applied), since inflation has diminished the real value of the 1969-96 compensation amounts. The Secretary, citing *Smith*, argued that the plain language of 38 U.S.C. § 1114(n) does not authorize, and makes no reference to the payment of interest or other inflation adjustment.

In his reply brief, the appellant stated that the plain language of § 1114(n) does not foreclose his argument that he should be paid benefits at the 1996 rate. The appellant also argued that his position did not necessitate retroactive application of the 1996 § 1114(n) benefits, rather, he was arguing that the "the [compensation] rate in effect in June 1996 should have been utilized in a June 1996 adjudication." Finally, the appellant argued that the pro-veteran policy of veterans benefits statutes should be applied in interpreting § 1114(n).

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

Counsel for appellee: Martie Adelman (VA OGC) (202-273-6330); Kenneth S. Kessler (DOJ) (202-307-6288).

Tolling of CAVC appeal period based on mental illness

***Barrett v. Principi*,** Fed. Cir. No. 03-7149 (oral argument held Feb. 3, 2004)

Issues Presented: (1) Whether the CAVC correctly determined that an appellant's mental incompetence does not provide an equitable basis for tolling the 120-day appeal period set forth in 38 U.S.C. § 7266(a); and (2) whether the Federal Circuit has jurisdiction to make a factual determination concerning the appellant's mental capacity during the 120-day appeal period.

The appellant, Larry D. Barrett, appeals the CAVC's order in *Larry D. Barrett v. Anthony J. Principi, Secretary of Veterans Affairs*, Vet. App. No. 02-2382 (June 5, 2003), which dismissed Mr. Barrett's appeal for lack of jurisdiction because he failed to file a timely Notice of Appeal (NOA).

On December 21, 2002, more than 120 days after the Board issued its August 15, 2002, decision, Mr. Barrett filed an NOA to the CAVC. The Secretary filed a motion to dismiss the appeal because the CAVC does not have jurisdiction over appeals filed more than 120 days after the issuance of a Board decision. Mr. Barrett asserted that his mental illness prevented a timely filing and requested that the CAVC toll the statutory appeal period. The CAVC noted that, under current law, it could toll the 120-day appeal

period in cases where VA misled or induced an appellant into allowing a filing deadline to pass. However, it held that "ill health has not been adopted as a basis for such tolling." Accordingly, the CAVC refused to toll the appeal period and dismissed Mr. Barrett's appeal as untimely.

On appeal, Mr. Barrett contends that he was incapacitated by mental illness during the 120-day appeal period and did not recover until December 21, 2002, the day that his attorney filed his NOA. Mr. Barrett essentially argues that *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), does not limit application of equitable tolling to cases involving either the filing of a defective pleading within the statutory period or inducement by one's adversary. He asserts that the doctrine should be extended beyond the confines of *Irwin, Bailey v. West*, 160 F.3d 1360, 1364 (1998) (*en banc*) (claimant induced into allowing filing deadline to pass), *Jaquay v. Principi*, 304 F.3d 1276, 1289 (2002) (*en banc*) (defective pleading filed during statutory appeal period), and *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002) (same), to include cases where a veteran is incapacitated by mental illness and consequently files an untimely notice of appeal.

In response, VA contends that the CAVC properly held that mental incapacity is not a recognized basis for equitable tolling of the 120-day appeal period set forth in 38 U.S.C. § 7266(a), and that nothing else in this appeal suggested that tolling of the 120-day appeal period would be appropriate. The Federal Circuit has interpreted Supreme Court precedent and section 7266(a) as allowing equitable tolling only where a claimant has filed a defective pleading within the appeal period or has been induced by VA into missing the filing deadline. Assuming for the sake of argument that mental incapacity is a proper basis upon which to equitably toll the 120-day appeal period set forth in 38 U.S.C. § 7266, the Federal Circuit lacks jurisdiction to make the requisite factual determination regarding Mr. Barrett's alleged mentally incapacity during the statutory appeal period.

In his reply brief, the appellant argued that the question of whether the doctrine of equitable tolling provides a basis to extend the NOA filing period is a question of law subject to the Court’s jurisdiction, but that the Court could not review the factual question of whether the doctrine should be applied in the present case. The appellant argued that the CAVC decision should be vacated and remanded for additional development.

Counsel for appellant: Mark R. Lippman (858) 456-5840; argued by Michael Leonard.

Counsel for appellee: David McLenachen, (VA OGC) (202-273-8688); David B. Stinson (DOJ) (202-307-1011).

II. Cases Pending Before the Court of Appeals for Veterans Claims

Does a Board remand constitute an appealable decision?

Breeden v. Principi, U.S. Vet. App. No. 01-2095 (argued before Chief Judge Kramer and Judges Farley and Ivers on November 17, 2003)

The appellant filed a claim of entitlement to service connection for post-traumatic stress disorder (PTSD), asserting that he had PTSD as a result of participating in combat and witnessing several stressors during service in Vietnam. In July 2000, after several remands, the Board denied the veteran's claim. The veteran appealed, and the parties subsequently submitted a Joint Motion for Partial Remand and to Stay Proceedings (Joint Motion), requesting the Board to make a finding as to whether the veteran participated in combat, and to address the Veterans Claims Assistance Act. In January 2001, the Court vacated and remanded the Board's July 2000 decision in accordance with the Joint Motion. In August 2001, the BVA remanded the claim for development pursuant to the Joint Motion and the Court's January 2001 Court Order.

In its August 2001 remand, the Board directed the RO to undertake additional development, to include obtaining treatment records and affording the veteran a psychiatric examination. The Board's remand indicated that it had determined that the veteran did not participate in combat and that only one stressor had been verified. Several other stressors were allowed on a conditional basis only.

In December 2001, the appellant sought to appeal the Board's August 2001 remand. The appellant argues that the Court has jurisdiction over the appeal because the Board's August 2001 remand is a final and adverse decision, and that an exception to the finality standard as set forth in a Federal Circuit case should be applied. He argues that the denial of combat status in the remand alters the evidentiary burden and bars the presentation of evidence as to the unverified stressors. The appellant further argues that, as an appealable decision, the Board's determinations that the veteran did not participate in combat and that certain claimed stressors had not been verified are contrary to case law and are otherwise in violation of a January 2001 Joint Motion.

The Secretary argues that the Court does not have jurisdiction because the Board's August 2001 remand is not a decision, that the appellant has not exhausted his administrative remedies, and that there is no applicable exception to the jurisdictional requirement of a final disposition.

Counsel for appellant: Barbara Cook (513) 977-4213.

Counsel for appellee: Christine D. Senseman (VA OGC) (202) 639-4855.

Did Board misconstrue statute in determining that there was no "actual contract" between VA and private facility in reimbursement case?

Cantu v. Principi, U.S. Vet.App. No. 02-0682 (submitted to Judges Farley, Steinberg and Greene; oral argument to be scheduled).

In a January 2002 decision, the Board denied payment of medical expenses

incurred during hospitalization at a private facility in 1993. After presenting to a VA outpatient clinic, the veteran was transferred to a private emergency room and then hospitalized for observation. The VA records indicated that the veteran was notified that the hospitalization was not at government expense due to non-service connected status. Hand-written notes added that the veteran was told that the hospitalization and ambulance service were at his expense, but that he disagreed.

The Board denied the claim finding that there was no "actual contract" between VA and the private facility for the veteran's care; that the private hospitalization did not fit any of the approved circumstances where payment of private care is authorized; that the veteran was not transferred to the private facility for treatment of a medical emergency; and that he was hospitalized for treatment of a nonservice-connected disability. On appeal to the Court, the veteran argues the Board did not consider 38 U.S.C. § 1710, which requires VA provide hospital care to a veteran for a nonservice-connected disability if the veteran is unable to defray expenses of necessary care. The Secretary argues the statute does not provide reimbursement for services rendered at a non-VA medical facility, so any error by the Board in not addressing this statute was harmless. The veteran also argues his hospitalization was for an emergency and that the Board misconstrued 38 U.S.C. § 1703 in discussing whether there was an "actual contract" between VA and the private medical facility.

Counsel for appellant: Sandra E. Booth (614-784-9451).

Counsel for appellee: Nicole M. DeGraffenreed (VA OGC) (202-639-4814).

Is a home-schooled child a "child" for VA purposes?

Theiss v. Principi**,** U.S. Vet.App. No. 01-0906 (argued before Chief Judge Kramer and Judges Steinberg and Greene on September 9, 2003).

The appellant is a veteran seeking additional compensation or pension for a home-schooled son over the age of 18. VA ended the additional payment that Appellant had been receiving before the son reached that age. The veteran sought the continuation of the payment for a time period during which the son was 18 years old, but was pursuing a high school course of instruction through home schooling in Wisconsin. The instruction ended before the son completed the course, so the time period was finite and the actual amount at issue is about $160.

The law at issue involves the definition of "child" under 38 U.S.C. § 101(4)(A)(iii), which provides that a "child" is "a person who is unmarried and . . . who after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution . . . ." Also, 38 U.S.C. § 104(a) grants the Secretary of Veterans Affairs the authority to "approve or disapprove such educational institutions."

The appellant contends that "institution" under the statute encompasses a home school course of instruction that is conducted in accordance with the laws of

the State of Wisconsin. He has also put forward Constitutional arguments under the Free Exercise clause and the fundamental right to educate one's child. VA has taken the position that this case does not involve any restriction on a Constitutional or fundamental right—rather, VA maintains that while home schooling is permitted in Appellant's State, it is not an "educational institution." Hence, VA argues that Appellant is not entitled to the additional payment for the period in which his 18 year-old son was being home schooled.

Counsel for appellant: James R. Mason, III (540-338-5600).

Counsel for appellee: Kathy A. Banfield (VA OGC) (202-639-4800).

Separate disability ratings/ CAVC jurisdiction

Jones v. Principi, U.S. Vet. App. No. 01-0291 (submitted to Chief Judge Kramer and Judges Ivers and Steinberg for decision without oral argument).

The veteran has appealed an October 16, 2000, Board decision which denied entitlement to a disability rating in excess of 10 percent for residuals of a gunshot wound to the right chest, involving injury to Muscle Group I. Appellant argues that the Board erred by not awarding separate ratings for injury to Muscle Groups I and II under 38 C.F.R. §§ 4.25(b), 4.55, 4.73 (Diagnostic Codes 5301, 5302). He also argues that the Board erred by not awarding separate 10 percent ratings for each of his three scars under 38 C.F.R §§ 4.25(b), 4.118 (Diagnostic Code 7804), and he contends that the rating criteria under Diagnostic Code 7804 is ambiguous.

The Secretary argues that the appellant's argument is raised for the first time on appeal before the Court and that, while the Court has jurisdiction to entertain the argument, it should decline consideration in favor of exhaustion of administrative remedies. In addition, the Secretary contends that the Court should affirm the Board's decision denying entitlement to separate ratings for residual scars because such determination is supported by a plausible basis in the record.

In his reply brief, the veteran argues that the Court has the discretion to exercise its jurisdiction even though Mr. Jones did not present his arguments to the Board and that the Court should do so in this case because the veteran's argument involves issues of statutory and regulatory interpretation. He argues that the Secretary wrongly implied in his brief that resolution of the veteran's assignments of error would improperly require the Court to make factual determinations in the first instance.

Counsel for appellant: Landon Overby, Disabled American Veterans (202-314-5233).

Counsel for appellee: Debra L. Bernal (VA OGC) (202-639-4837).

III. *Pelegrini* Decided; VA Moves for Reconsideration, Full Court Review, and Stay.

On January 13, 2004, the CAVC issued its decision in *Pelegrini v. Principi*, Vet.App. No. 01-0944. The decision, which involved the applicability and notice requirements of the VCAA, vacated the underlying BVA decision and remanded the case for readjudication. On February 3,

2004, the Secretary filed a motion for reconsideration and for full court review. Two days later, the Secretary filed a motion to stay, to which the appellant filed a written opposition on February 12. The Court's decision and post-decision pleadings are summarized below.

**Editor's Note: On February 19, 2004, the Court ordered appellant to respond to the Secretary's motion for reconsideration/ full court review by March 11, allowed the Secretary to file a response by March 23, and invited any interested amicus curiae to respond to both of the Secretary's motions.*

Pelegrini v. Principi, U.S. Vet.App. No. 01-0944 (January 13, 2004).

In a decision dated April 30, 2001, the Board denied reopening of a claim for service connection for a soft tissue lung mass, claimed as due to exposure to Agent Orange or other herbicides. The veteran appealed to the United States Court of Appeals for Veterans Claims (Court).

On appeal, the veteran contended that, under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, VA was obligated to assist him in reopening his claim, pursuant to 38 U.S.C. 5103A, and that this included obtaining a medical opinion concerning service connection for his condition. The Secretary maintained that the obligation to assist the veteran was more limited with regard to the attempt to reopen his claim. The Secretary argued that in the absence of new and material evidence, the obligation to provide a medical opinion did not apply retroactively to the veteran's claim to reopen because it was submitted before August 29, 2001.

Chief Judge Kramer and Judge Steinberg, with Judge Ivers concurring in part and dissenting in part, vacated and remanded the Board's decision. The Court addressed matters related to the timing and content of the VCAA notice requirement. The Court held that a VCAA notice must be provided to a claimant ***before*** the "initial unfavorable [agency of original jurisdiction (AOJ)] decision on a service-connection claim." The Court went on to state that providing such notice *after* a claimant has already received an initial unfavorable AOJ determination, i.e., a denial of the claim, would largely nullify the purpose of the notice and prejudice the claimant by forcing him or her to overcome an adverse determination. The opinion did not address, however, whether and how VA could properly cure any defects in the timing of the VCAA notice and remanded the case to the Board based on lack of adequate reasons and bases as to how the veteran had not been prejudiced by the timing of the VCAA notice in this case. However (perhaps as a cautionary note), the Court noted the VA's amendment of 38 C.F.R. § 19.9 to permit the Board to provide notice and develop evidence in the first instance, and the Federal Circuit's invalidation of part of the regulation in the *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003).

As for the content of the VCAA notice requirement, the Court held that a notice consistent with 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) must: (1) inform the claimant about the information and evidence not of record that is necessary to substantiate the claim; (2) inform the claimant about the information and evidence that VA will seek to provide; (3) inform the claimant about the

information and evidence the claimant is expected to provide; and (4) request or tell the claimant to provide *any evidence* in the claimant's possession that pertains to the claim, or something to the effect that the claimant should "give us everything you've got pertaining to your claim(s)."

The Court also held that the BVA improperly adjudicated appellant's claim as a claim to reopen, rather than an original claim. The Court stated that the addition of respiratory cancers to the list of diseases presumptively related to Agent Orange exposure constituted the creation of a "substantive right" in accordance with *Spencer v. Brown*, 4 Vet.App. 283, 288 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994).

Judge Steinberg expressed his separate views regarding which VA entity may provide the requisite notice to an appellant on remand, and which VA entity may readjudicate the claim subsequent to that notice. Judge Ivers, concurring in part and dissenting in part, stating that since the Court decided that the appellant was entitled to a remand pursuant to *Spencer*, nothing further was necessary. Judge Ivers went on to state his belief that "the majority opinion here is dicta . . . its direction to the Secretary amounts to little more than an advisory opinion and should be given the precedential value appropriate to that category of judicial utterance."

In the motion for reconsideration and panel decision, the Secretary argued that the Court misinterpreted the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), regarding what is a prohibited retroactive application of a statute. In addition, the Secretary argued that post-adjudicatory notice did not automatically prejudice claimants, arguing that "an initial adverse decision actually helps crystallize the issues and helps illuminate what is missing from the claim." Finally, the Secretary argued that the Court misapplied the rule of prejudicial error by shifting the burden to demonstrate prejudice on the appellee rather than on the appellant, in contravention to case law of the Federal Circuit.

In his motion for stay, the Secretary discussed the difficulties in implementing the Court's decision, and requested that the Court "preserve the status quo" until the Court ruled on his motion for reconsideration and full court review. In opposition to the stay, the appellant stated that the Secretary's motion was not contemplated by the Court's rules, and the Court could not stay the precedential effect of *Pelegrini* due to *Tobler v. Derwinski*, 2 Vet.App. 8 (1991) and *Richardson v. Gober*, 10 Vet.App. 546 (1997) (per curiam order). Furthermore, the appellant argued that the Secretary's recitation of statistics regarding the effects of *Pelegrini* are outside of the record and should not be considered as required by 38 U.S.C. § 7252(b). Finally, the appellant stated that any adverse impact on the VA adjudication process was self-inflicted.

Counsel for appellant: Kenneth Carpenter (785-357-5251) and Sean Kendall (303-449-4773).

Counsel for appellee: R. Randall Campbell; Mary Ann Flynn; John McNamee (202-639-4844).

IV. Breaking News - Recent Decisions of Note – Federal Circuit

The following decisions were recently issued by the Court of Appeals for the Federal Circuit. They are being included for informational purposes and in view of the fact that for several cases, the time period in which to request panel rehearing or en banc review has not yet expired.

CAVC consideration of prejudicial error when evaluating VCAA compliance

Conway v. Principi, Fed Cir. No. 03-7072 (January 7, 2004). *****Note:*** On the same day, the Court issued non-precedential decisions in two similar cases, *Patranella* and *Dingess*, in which the Court vacated and remanded the CAVC's decision.

The Federal Circuit found that the CAVC had improperly created a rule of law that its consideration of whether VA has complied with the VCAA notice requirements of section 5103(a) is exempt from the statutory requirement in 7261(b)(2) that it give due consideration to the rule of prejudicial error. The background of the case follows.

The appellant, Anthony J. Principi, appealed the November 20, 2002, order of the CAVC in *Henry L. Conway, Jr. v. Anthony J. Principi, Secretary of Veterans Affairs*, Vet. App. No. 01-107 (Nov. 20, 2002), that vacated and remanded a December 6, 2000, decision of the Board of Veterans' Appeals (Board). The Board had denied a claim for service connection for post-traumatic stress disorder (PTSD). The CAVC vacated the Board decision based on its finding that there was no evidence that VA notified Mr. Conway of who is responsible for obtaining the evidence necessary to substantiate his claim, i.e., in violation of *Quartuccio v. Principi*, 16 Vet.App. 183 (2002). Of note, however, Judge Ivers' order stated that "the value to the veteran of a remand for readjudication due to what appears to be, at most, a de minimis notice error, will be of questionable value" because: (1) it appears that the record has been fully developed; (2) the veteran twice requested that the claim be decided based on the evidence of record; and (3) it is difficult to discern what additional guidance VA could have provided to Mr. Conway regarding what further evidence he should submit to substantiate his claim.

Before the Federal Circuit, VA argued that the CAVC's interpretation of 38 U.S.C. § 5103(a) was not consistent with the plain language or the legislative history of the VCAA. With regard to notice of the evidence necessary to substantiate the claim, VA argued that the CAVC has interpreted section 5103(a) as requiring a degree of specificity not intended by Congress. With regard to the requirement that VA notify the claimant of which evidence, if any, it will obtain and which evidence, if any, the claimant must obtain, VA contended that the CAVC had overlooked Congress' recognition that such notice is not required where no further evidentiary development is warranted. Also of note, VA contended that the CAVC erred by failing to take due account of the rule of prejudicial error as required by 38 U.S.C. § 7261(b)(2).

Mr. Conway responded that there was no basis in the record on which to conclude that the CAVC did not take due account of the rule of prejudicial error. He also contended that the Secretary waived his right to contest

the CAVC's interpretation of 38 U.S.C. §§ 5103(a) and 7261(b)(2) because he failed to present these issues to the CAVC. Finally, he contended that the Federal Circuit lacked jurisdiction to review the CAVC's decision regarding prejudicial error because it required application of law to the facts of his case.

To the extent VA argued that the CAVC had erroneously interpreted the requirements of section 5103(a), the Federal Circuit concluded that it did not have jurisdiction to address this contention since its consideration of these arguments would require review of the CAVC's application of law to fact. The CAVC had merely stated that section 5103(a) had not been properly administered "in this case"; it did not announce an interpretation of section 5103(a).

However, the Federal Circuit stated that even though the CAVC "unquestionably does not have an obligation to expressly discuss the rule of prejudicial error in each and every opinion," it cannot refuse to consider the rule of prejudicial error if section 7261(b)(2) applies to a particular case, such as the notice provisions in section 5103(a). The Federal Circuit went on to state:

> we hold that there is no implicit exemption for the notice requirements of section 5103(a) from the general statutory command in section 7261(b)(2) that the Veteran's Court shall "take due account of the rule of prejudicial error." Section 7261(b)(2) is plain on its face. It applies to all Veteran's Court proceedings, and nothing in the VCAA even hints that Congress intended to exempt section 5103(a) from that general scheme.

The Federal Circuit noted that it was not expressing an opinion either on what it means for the CAVC to "take due account" of the rule of prejudicial error or on whether Mr. Conway suffered prejudicial error in this case. The case was vacated and remanded to the CAVC.

Counsel for claimant-appellee: Kenneth M. Carpenter (785-357-5251).

Counsel for respondent-appellant: Richard Hipolit and Martie S. Adelman (VA OGC) (202-273-6330); Martin Hockey (DOJ) (202-307-6288).

Whether consideration of "unusual physical or mental effects in individual cases" is required in evaluating a TDIU claim under 38 C.F.R. § 4.16

Davis v. Principi, No. 03-7044 (nonprecedential decision issued February 3, 2004).

In *Davis v. Principi*, No. 01-122 (U.S. Vet. App. Aug. 27, 2002) (memorandum decision), the United States Court of Appeals for Veterans Claims (CAVC) affirmed an October 13, 2000, Board of Veterans' Appeals (Board) decision that denied entitlement to a total disability rating based on individual unemployability (TDIU). Although the veteran's combined disability ratings met the percentage requirements for a TDIU rating under 38 C.F.R. § 4.16, the Board found that the veteran's unemployability was not due to his service-connected disabilities. The CAVC

rejected the veteran's argument that the Board failed to follow 38 C.F.R. § 4.15, which requires consideration of "unusual physical or mental effects in individual cases" when evaluating TDIU cases.

On appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit), the appellant argued that the CAVC implicitly misconstrued 38 C.F.R. § 4.15 as not applying to the adjudication of a veteran's entitlement to TDIU under section 4.16. According to the appellant, section 4.15 must be applied to a section 4.16 TDIU analysis because, by its terms, it defines specific factors that VA must evaluate in reaching a decision as to whether TDIU is warranted. In his brief, the Secretary agreed that section 4.15 applied to the veteran's TDIU claim.

In the February 3, 2004 decision, the Federal Circuit characterized the issue before it as "whether consideration of a veteran's entitlement to benefits under section 4.16 can be considered without also considering the individual requirements of section 4.15. The Court vacated and remanded the CAVC's decision, holding that the CAVC erred by suggesting that the individualization requirements of section 4.15 were independent of the TDIU criteria set forth in section 4.16. The Court found that in view of the CAVC's case law, the regulatory scheme governing total ratings, and opinions of the VA General Counsel, "section 4.15 contains corollary factors that must be considered in conjunction with any request for TDIU benefits."

Counsel for the appellant: Sandra Booth, Esq. (614-784-9451)

Counsel for the appellee: David McLenachen (VA OGC) (202-273-8688); Peter Keisler, Elizabeth Candler (DOJ)

Federal Circuit jurisdiction to review a CAVC decision affirming the BVA's factual findings/Is the Secretary required to "stop" development at a certain point?/Does 38 CFR 4.2 apply to claims for service connection?

Shoffner v. Principi, Fed. Cir. No. 03-7064 (December 9, 2003).

In an unpublished decision, the Federal Circuit affirmed the CAVC according to Rule 36 (judgment of affirmance without opinion). Since we reported on the CAVC's holding in our Spring 2003 issue, we will be necessarily brief here.

The CAVC upheld the BVA's denial of service connection for a heart condition as secondary to pneumonia during service, in *Shoffner v. Principi*, 6 Vet. App. 208 (2002). The appellant argued before the Federal Circuit that the CAVC erroneously rejected his assertion that the evidence before the RO in 1996 supported that his claim for service connection was warranted, and that the claim was "overdeveloped," particularly when BVA sought an independent medical opinion. He also maintained that the CAVC misinterpreted the "benefit of the doubt doctrine" of § 5107(b); that § 7261 does not limit the CAVC's ability to review VA decisions regarding claims development; and, that 38 CFR § 4.2 applies to service connection determinations.

The Secretary argued that the Court lacked jurisdiction to decide the appeal since appellant sought review of factual

determinations made by the Board and the CAVC. Alternatively, the Secretary argued that the CAVC correctly found that the BVA's decision was plausible under the facts found and under its legal authority to obtain independent medical opinions. With regard to 38 CFR 4.2, the Secretary asserted that the CAVC correctly held that 4.2 was not applicable to service connection claims, but to questions of disability after service connection is granted.

Counsel for appellant: Sandra E. Booth and Daniel Wedemeyer

Counsel for appellee: Martin Sendek, VAOGC; Christian Moran, DOJ.

CUE claim and alleged failure of VA to develop claim fully/interpretation of *Roberson v. Principi*

Szemraj v. Principi**,** Fed. Cir. No. 03-7047 (February 5, 2004)

Issue Presented: Whether the CAVC misinterpreted *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001), in holding that *Roberson* does not requires readjudication of a clear and unmistakable error (CUE) claim based on an alleged failure of the Board to fully and sympathetically develop a claim to its optimum.

The petitioner, James E. Szemraj, appealed the CAVC's decision in *James E. Szemraj v. Anthony J. Principi, Secretary of Veterans Affairs*, No. 00-1349 (Vet. App. October 30, 2002)). In that decision, the CAVC affirmed an April 14, 2000, Board decision which determined that an August 1989 Board decision denying him service connection for an acquired psychiatric disorder was not the product of CUE. The CAVC stated that the Federal Circuit reversed the CAVC "decision in *Roberson* to permit VA to develop 'a non-CUE claim that was still open and pending before VA.'" The CAVC noted that Mr. Szemraj had raised no argument concerning a pending non-CUE claim and had not argued that his claim was not fully developed. Accordingly, the CAVC found that remand was not required. In response to Mr. Szemraj's argument that the Board failed to correctly apply the presumption of service connection in 38 C.F.R. §§ 3.307 and 3.309, the CAVC stated the following:

> Those regulations require that if a veteran manifests a psychosis to a compensable degree within one year of separation from service, the psychosis shall be presumed to have been incurred in service. The regulation does not provide for such a presumption for depression or for obsessive-compulsive disorder, which are not psychoses. The appellant points to no evidence before the Board at the time of its decision (or, incidentally, since its decision), that indicates that the appellant suffered from, or was diagnosed with, a psychosis within one year of separation from service.

In dismissing Mr. Szemraj's request that the CAVC consider an August 1987 note made by a psychology intern stating that Mr. Szemraj appeared to have characteristics of paranoid schizophrenia, the CAVC stated: "[A]s the Board indicated, that note was made over two years after the appellant had separated from service and reflected his then-current symptoms." Regarding Mr. Szemraj's argument that the August 1989 Board decision failed to correctly

apply 38 C.F.R. §§ 3.303 and 3.304(b), relating to the presumptions of soundness and aggravation, the CAVC stated:

> [N]othing in the August 1989 Board decision indicates that the Board did not apply a presumption of soundness in the appellant's case. Indeed, the Board stated that the appellant's own testimony and statements from those who knew him, along with the appellant's entrance examination, indicate that the appellant was psychologically healthy prior to service. The appellant points to nothing in those regulations with which the Board conceivably did not comply.

On appeal, Mr. Szemraj argued that the CAVC misinterpreted *Roberson* as permitting VA to develop a non-CUE claim that was still pending before VA. He alleged that, contrary to the CAVC's conclusion, *Roberson* addressed a specific CUE allegation. Mr. Szemraj also noted that a psychology intern noted possible characteristics of paranoid schizophrenia in 1987 and asserted that VA breached a duty under *Roberson* by failing to reconcile conflicting evidence on that point by furthering evidentiary development before adjudicating the claim. Mr. Szemraj asserted that the Federal Circuit's "Hodge analysis in *Roberson* was directed toward the specific CUE allegation," and that *Roberson* is relevant to his case "because the development of [his] case before the 1989 [Board] decision did not satisfy the Hodge standard."

VA responded that the Federal Circuit should conclude that the CAVC did not abuse its discretion in determining that this Court's decision in *Roberson* did not require a remand of Mr. Szemraj's case. VA argued that the CAVC properly interpreted *Roberson* in determining that that decision did not require remand of Mr. Szemraj's claim of CUE. *Roberson* did not recognize any duty on the part of VA to assist in claim development apart from that explicitly provided by statute. Further, Mr. Szemraj's CUE claim related solely to an alleged failure by VA to fulfill a duty to assist in evidentiary development, a contention that cannot support a claim of CUE.

In the February 5, 2004 decision, the Federal Circuit held that the CAVC misconstrued its decision in *Roberson*, because contrary to the CAVC's determination that *Roberson* was inapplicable, "the VA has a duty to sympathetically read a veteran's allegations in all benefit claims, regardless of the existence of a pending non-CUE claim."

Notwithstanding its holding that the CAVC misconstrued *Roberson*, the Federal Circuit rejected the appellant's request to remand the case to the CAVC to correctly interpret *Roberson*. The Court found that CAVC's misinterpretation of *Roberson* constituted harmless error. In making this determination, the Court stated that it had jurisdiction "to consider whether the legal requirement of the statute or regulation has been correctly interpreted in a particular context where the relevant facts are not in dispute, that is, whether there is an error of law. . ." The Court found that *Roberson* had no application to the circumstances of the case.

Counsel for Appellant: Kenneth M. Carpenter (785-357-5251)

Counsel for Appellee: Richard J. Hipolit, Jamie L. Mueller (VA OGC); Michael S. Dufault (DOJ).

ANNUAL BAR ASSOCIATION MEETING

On September 12, 2003, the U.S. Court of Appeals for Veterans Claims (CAVC) Bar Association held its annual meeting, and, in conjunction with the National Organization of Veterans Advocates, presented a continuing legal education program addressing various perspectives on the Federal Circuit's decision in *Disabled American Veterans (DAV), et al. v. Principi*, 327 F.3d 1339 (Fed. Cir. 2003).

The Bar Association was pleased to welcome Chief Judge Kenneth B. Kramer as the luncheon speaker. Among other things, the Chief Judge discussed the Court's current efforts towards procuring a new building with the goal of establishing a Veterans Law Center; recent measures taken to ensure the safety of the judges and court personnel in light of heightened security concerns in Washington, D.C.; and his frustration with the stalemate on Capitol Hill that is preventing the appointment of new judges to the Court. (For biographical information on the four candidates awaiting confirmation at the time of the Chief Judge's remarks, see the Spring 2003 issue of *News for Practitioners*). Following Chief Judge Kramer's remarks, Bar Association President Robert Chisholm, Esq., opened the meeting and presented a summary of each committee's activities over the last year. He then introduced Brian B. Rippel, Esq., as the newly elected president for 2003-04, who announced the election results, offered welcoming remarks, and presented plaques of recognition to past officers and members of the Board of Governors. After closing the meeting, the continuing legal education program commenced.

As noted, the subject of the program was the Federal Circuit's decision in *DAV, et al. v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003). That opinion essentially held that 38 C.F.R. § 19.9(a)(2) was invalid because it allowed the Board to consider additional evidence without remanding the case to the regional office and without obtaining an appellant's waiver, and held that 38 C.F.R. § 19.9(a)(2)(ii), which provided an appellant only 30 days to respond to a VCAA notice, was invalid. That part of the regulation was found to be misleading because it may have led claimants to believe that the newly requested evidence had to be supplied within 30 days, notwithstanding the 1-year period mandated by 38 U.S.C. § 5103(b).

The program's first speaker was Ron Scholz, Esq., Special Assistant to the Vice Chairman of the BVA and Senior Counsel, who discussed how the BVA has reacted in light of *DAV*. Mr. Scholz noted that the Board began independent development on claims on February 25, 2002, with the goal of reducing remands to the RO. After pointing out that the objective had been essentially accomplished, he said that following *DAV*, BVA development was discontinued effective April 30, 2003. While the Board is not recalling any decisions where the evidence had been developed by the Board, he emphasized that the Board is no longer beginning new development.

The second speaker was Keith Wilson, who was named Acting Director of the VA Appeals Management Center (AMC) in July 2003. The AMC acts substantially as would a regional office, however its jurisdiction is limited to remands from the BVA. He noted that any remand requiring a hearing would go back to the RO of original jurisdiction. Mr. Wilson's presentation was peppered with numerous questions from the audience that voiced concern over whether the AMC would only further muddle an already confusing appeals process.

The final presentation was a panel consisting of David Barrans, Esq., Office of the General Counsel, Professional Staff Group II, Mary Ann Flynn, Principal Deputy Assistant General Counsel, Professional Staff Group VII, and Randy Campbell, Esq., Assistant General Counsel, Professional Staff Group VII. Mr. Barrans discussed recent General Counsel opinions on *DAV* and 38 U.S.C. § 1111, including a detailed summary of the historical background by which VA determined that the Board was permitted to develop its own evidence.

In all, the presentations were informative and worthwhile, and provided a venue for practitioner questions and concerns. The speakers were knowledgeable and amenable to questioning. The Program Committee should be congratulated for organizing the speakers and topic.

JOIN A COMMITTEE!

The following is a listing of CAVC Bar Association Committees. Please contact the individuals listed for information regarding the committee:

Constitution and Bylaws Committee:
Brian D. Robertson
brianr@vetsprobono.org

Law School Education Committee:
Randy Campbell, Chair
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David Quinn, Chair
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COMMITTEE NEWS

The following is a listing of upcoming Committee events.

Law School Education Committee:
The Law School Education Committee is helping to coordinate and sponsor an oral argument to be conducted by the Court of Appeals for Veterans Claims at the Howard University Law School on March 10, 2004, at 12:00 noon (the case argued will be *Acosta v. Principi*, No. 01-1489). This will be the fourth in the series, and follows oral arguments held at the law schools of American University, the University of Baltimore, and Georgetown University over the last two years. Also, the committee is in the process of coordinating another such oral argument that will hopefully be held at the University of Maryland Law School this autumn. Finally, the committee has obtained professionally-printed materials regarding the Court, veterans law, and the Bar Association, which it is sending to law schools throughout the country.

Programs Committee:
The Programs Committee is planning a program to coincide with the Court's Judicial conference. The program will be held on Friday, April 23, 2004, at the conclusion of the 8th Judicial Conference. The Judicial Conference is being held at the new D.C. Convention Center. The program will begin at 2:00 pm (with registration beginning at 1:30). From 2:00 to 3:20 pm, a panel consisting of a Federal Circuit judge (to be announced), Judge Ronald Holdaway (retired), Ronald L. Smith (DAV's Chief Appellate Counsel) and Professor Richard Levy (Kansas University School of Law). This panel will discuss single-judge review in decisions by the CAVC. The second part of the program is dedicated to Ron Henke as the guest speaker. He will address the Federal Circuit's decision in *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs,* 345 F.3d 1334 (Fed. Cir. 2003), and the subsequent legislative amendment to 38 U.S.C. § 5103(a) contained in the Veterans Benefits Act of 2003 (concerning timelines for veterans submitting evidence and VA adjudicators rendering decisions before the lapse of the one-year period). Future programs will be planned once we are close to wrapping this event up.

Portrait Committee:
The Portrait Committee has made arrangements for an artist to paint portraits for the upcoming retirements of Chief Judge Kramer and Judge Farley. The Committee is also coordinating the fundraising efforts to pay for those portraits. Also, the committee is assisting with an initiative to begin a Bench-Bar quarterly dialogue, where Bar Association members will have an opportunity to meet and speak with judges from the Court.

Publications Committee:
The Publications Committee will meet in early March to plan the next issue of its newsletter, NEWS FOR PRACTITIONERS. 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.

CONTRIBUTORS TO THIS ISSUE

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The views expressed by the authors are their own and should not be attributed to be the views or opinions of the law firms, agencies, or Courts with whom such persons are employed, nor of the CAVC Bar Association.