VETERANS LAW JOURNAL

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

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ROUND UP OF SIGNIFICANT PENDING CASES Court of Appeals for Veterans Claims

PROPRIETY OF STAY OF TINNITUS CLAIMS

By Mary Peltzer

Ramsey, et al. v. Nicholson, et. al., No. 05-1314. Oral argument held before Chief Judge Greene, and Judges Moorman and Schoelen on September 22, 2005.

The Petitioners petitioned the CAVC for extraordinary relief in the nature of a writ of mandamus, seeking a writ directing a rescinding of VA's stay on the adjudication of certain tinnitus cases. In a memorandum dated April 22, 2005, the Secretary directed the Board to stay action and refrain from remanding until resolution of ongoing litigation all 1) tinnitus claims filed prior to June 13, 2003 seeking a disability rating for tinnitus in excess of 10 percent and 2) all tinnitus service connection claims filed prior to June 10, 1999, in which the basis of denial of benefits was that the veterans' tinnitus was not persistent. In a memorandum dated April 28, 2005, the then Acting Chairman of the Board imposed a stay on the adjudication of tinnitus claims affected by *Smith v. Nicholson*, 19 Vet.App. 63 (2005).

The Petitioners, having claims pending before the

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BAR ASSOCIATION HOLDS ANNUAL MEETING AND PORTRAIT PRESENTATION

By Caryn Graham

On September 29, 2005 the U. S. Court of Appeals for the Federal Circuit hosted the Bar Association's Annual Meeting and the Presentation of the Portrait of the Honorable Donald L. Ivers. One-third of the total membership of the Bar was in attendance.

At the Annual Meeting, outgoing President Bart Stichman noted that the Association had "made a lot

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Former Chief Judge Donald L. Ivers stands beside his portrait at the September 29 Portrait Presentation.

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Board for separate ratings for service-connected bilateral tinnitus, argued that the memorandum directing a stay have delayed their appeals in violation of 38 U.S.C.A. § 7107, alleging that the stays on their appeals are contrary to law because the Board is required to decide appeals in regular order according to their docket number. The law contains exceptions, allowing the Board to 1) advance cases on the docket, 2) postpone an appeal for later consideration if necessary to afford an appellant a hearing, and 3) screen cases for the purposes of determining the adequacy of the record for decisional purposes or the development of a record found to be inadequate for decisional purposes.

The Petitioners argue that the Secretary's memorandum directing their appeals be stayed to "avoid burdens on the adjudication system, delays in adjudication of other claims and unnecessary expenditure of resources through remand or final adjudication of claims based on court precedent that may ultimately be overturned on appeal" is not a legal exception to 38 U.S.C.A. § 7107. As the Respondents refuse to act on their appeals, the Petitioners argue that a writ of mandamus is the appropriate means to compel action.

The Respondents contend that the Petitioners, who carried the burden of proof, did not satisfy the stringent standards required to invoke the Court's mandamus power, citing to *Tobler v. Derwinski*, 2 Vet.App. 8 (1991) as evidence that the Court has long recognized that the Chairman of the Board has the authority to stay administrative proceedings while an appeal is being contemplated. The Respondents highlight that the statutory scheme of chapter 71 of the United States Code acknowledges that management activities of the Board is subject to the direction of the Secretary and that Congress has charged the Chairman with the responsibility of conducting the business of the Board in a proper and timely manner. Furthermore, the original provisions of 38 U.S.C.A. § 7107 predated the advent of judicial review and Respondents submit that the issuance of a stay of cases pending an appeal would not conflict with the original purpose of the provision.

Relying on case law, the Respondents argue that the stay on tinnitus cases is reasonable, in the interest of the uniform administration of justice, avoids disparate treatment of similarly situated veterans, and does not amount to an arbitrary refusal to act. Citing to *Bullock v. Brown*, 7 Vet.App. 91 (1998), the Respondents indicate that while time taken by VA to adjudicate a claim may be frustrating to a petitioner, the delay must be unreasonable before a court will inject itself into an administrative agency's adjudicative process and that the mere passage of time in reviewing a matter does not constitute the extraordinary circumstances requiring the Court to invoke its mandamus power.

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Is Attorney Representing Incarcerated Veteran Entitled to Entire 20 Percent of Past-Due Compensation Award Without Regard to Reduction of Compensation Pursuant to 38 U.S.C. § 5313?

By Jonathan Kramer

Snyder v. Nicholson, No. 04-0381. Oral argument was held before Judges Greene, Kasold, and Davis on Thursday, September 29, 2005

The issue on appeal before the CAVC is whether the Appellant, an attorney who entered into a contingency fee agreement with an incarcerated veteran under 38 U.S.C. § 5904(d), is entitled to 20 percent of VA's past-due compensation award without regard to the reduction of compensation payable to the incarcerated veteran under 38 U.S.C. § 5313.

The Board denied the appellant's claim for payment of attorney's fees in excess of $1,820.45, this amount being 20 percent of the actual lump payment ($9, 102.23) awarded the veteran after service connection was established – by a July 2002 rating decision – for a psychiatric disorder, with a 70 percent evaluation assigned effective in 1994. As the veteran

had been (and continued to be) incarcerated for a felony the entire period that service connection was established, by operation of law (38 U.S.C. § 5313), the amount of compensation actually paid was based on a rate of 10 percent. The appellant essentially argues that the past-due amount of compensation owed, but for the incarceration, was approximately $91,000, and that he was entitled to 20 percent of that amount.

At oral argument, the Appellant asserted that VA unilaterally modified the fee agreement in a manner that contravened the applicable statutes and regulations. The Appellant argued that 38 U.S.C. § 5313, which requires VA to reduce compensation to 10 percent of the actual award for incarcerated veterans, operates independently of 38 U.S.C. § 5904(d), which requires VA to pay the veteran's attorney 20 percent of the actual award, not the award as reduced by 38 U.S.C. § 5313. Therefore, the Appellant argued that he is entitled to 20 percent of the award as if it were not reduced by 38 U.S.C. § 5313 because Congress did not specify that the attorney of an incarcerated veteran would have the contingency fee reduced concomitantly. The Appellant further contended that the applicable regulations, 38 C.F.R. § 20.609, do nothing to implement the statutory scheme consistent with the Board's determination to deny the Appellant's appeal. Although the Appellant conceded that VA had the authority to issue regulations limiting an attorney's contingency to 20 percent of an award reduced under 38 U.S.C. § 5313, it was argued that no such language authorizes that outcome in the text 38 C.F.R. § 20.609.

VA asserted that the statutory and regulatory schemes clearly place attorneys who represent VA claimants on notice that their contingency fee agreements are subject to reduction if the cash payment received by the veteran is less than what the award would have been had the veteran not been incarcerated. VA contended that the private attorney must look at the applicable statutes and regulations and decide, if he or she chooses to represents an incarcerated veteran, whether to opt for a contingency fee arrangement or other fee arrangement. Indeed, VA argued that 38 U.S.C. § 5904(d), 38 U.S.C. § 5313, and 38 C.F.R. § 20.609, when considered in conjunction with each other – as they must be – clearly sets forth that the appellant is entitled only to a 20 percent fee of the cash amount actually remitted to an incarcerated veteran, and that there is nothing that Congress or VA needs to do to clarify the applicable statutes or regulations.

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BAR MEMBERS TO "MEET" JUDGE MOORMAN ON JANUARY 18

In the eighth in a series of "Meet the Judge" programs designed to improve relations and communication between members of the CAVC Bar Association and the judges of the CAVC, Judge William A. Moorman will host an informal meeting with Bar Association members on January 18, 2006, in Judge Moorman's chambers at the Court. Coffee and pastries will be available beginning at 9:30 am (Eastern time), followed by our discussion with Judge Moorman slated to start at 10:00 am. You can either participate in person, or, if you live outside the Washington, D.C. area, by telephone conference.

If you wish to register for this program, please e-mail Bar Association President Jennifer Dowd at Jdowd@vetapp.gov, no later than Tuesday, January 10th, 2006. Leave your name, e-mail address, telephone number, and please indicate whether you wish to participate in person or by telephone. After registration closes, the Bar Association will determine whether the event is oversubscribed (space is limited due to the size of Judge Moorman's chambers). If so, participants will be randomly selected. By Thursday, January 12th, 2006, all participants will be confirmed, with directions to the Court or dialing/telephone instructions for those who are participating by conference call.

Duty to Assist in PTSD Claims Based on Sexual Assault

By Caryn Graham

Forcier v. Nicholson, U. S. Vet. App. No. 03-1208. Oral argument was held before Judges Hagel, Moorman, and Davis on Tuesday, August 16, 2005.

In August 2001, the Board denied a claim of entitlement to service connection for post-traumatic stress disorder (PTSD) based on sexual assault. The veteran appealed, and the parties to the appeal filed a joint motion asking the Court to vacate the Board's decision and remand it for further adjudication. It was suggested that the Board had failed to assist the veteran in attempting to verify the claimed stressor once the veteran had provided the name of the alleged assailant. It was also suggested that the Board had failed to address the factors contained in the VA Adjudication and Procedures Manual M21-1 regarding claims for service connection based on personal assault. In August 2002, the Court granted the motion and remanded the matter to the Board.

In June 2003, the Board again denied the veteran's claim, finding that no additional development was warranted. The Board pointed out that the veteran had not told anyone of the assault at the time of its occurrence or during the many years that followed, and indicated that it would not engage in tracking down the alleged assailant some 46 years after the alleged crime was committed. The Board cited *Gobber v. Derwinski*, 2 Vet. App. 470 (1992), for the proposition that the duty to assist was not a license for a "fishing expedition" to determine if there might be some unspecified information which could possibly support a claim. The Board also noted that it was "ethically problematical" whether any government agency should request that a person incriminate himself in order to verify the inconsistent and less than persuasive claim of another individual.

As for the Manual M21-1 provisions, the Board addressed those factors and determined that the veteran's behavioral changes and alcohol abuse—some of the factors listed in the Manual—pre-existed service and/or were related to things other than sexual assault, such as a documented lack of aptitude. The Board also pointed out several inconsistencies in the veteran's statements regarding the assault, and concluded that his assertions as to the assault in service were self-serving and entirely incredible. Further, the Board found that the diagnosis of PTSD had not been confirmed.

On appeal to the Court, the appellant argued that the Board had not carried out the terms of the joint motion. The appellant asserted that the Board should have remanded the case in an attempt to verify the claimed stressor once the veteran provided the name of the alleged assailant; should have performed a field investigation with regard to the events surrounding the reported personal assault; and should have gotten an additional medical opinion as to diagnosis. The Secretary argued that no specific action had been mandated by the joint motion and that, in any event, there had been substantial compliance with the motion.

With respect to the matter of diagnosis, the appellant contended that there was medical evidence of a current diagnosis of PTSD which was provided by a licensed mental health counselor and endorsed by a physician. The Secretary, on the other hand, argued that the medical opinion relied upon by the appellant did not meet the criteria of the regulation, 38 C.F.R. § 4.125(a).

At oral argument, questions by the judges revolved around the scope of the original joint motion. More specifically, the CAVC appeared to have some concerns about the clarity of the motion. The judges noted, and the appellant acknowledged, that the directions given to the Board in the joint motion consisted only of non-specific instructions to re-examine the evidence of record, seek any additional evidence deemed necessary, and make a timely decision. At the same time, the judges also noted that the Secretary had signed the joint motion, thereby acknowledging that there had been a violation of the duty to assist that required additional development. *See* 38 U.S.C.A. §5103A.

As to the broader question of whether the duty to assist required VA to do more in this case, the judges questioned whether the duty to assist requires that the Board provide more development regardless of a veteran's credibility. Other questions concerned whether further development for an additional medical opinion was warranted. The judges questioned whether VA could rely on a finding of no diagnosis of PTSD in a situation where all the evidence had not been obtained.

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Clear and unmistakable error (CUE): Did VA properly apply the presumption of soundness in 1969?

By Susan Toth

Paige v. Nicholson, No. 04-7002 (Fed. Cir. Oct. 7, 2005), on appeal from *Paige v. Principi*, No. 01-1046 (U.S. Vet. App. Aug. 22, 2003). Oral argument was held before Judges Rader, Linn, and Prost, on October 5, 2005.

In April 2001, the Board determined that VA did not commit CUE in a July 1969 rating decision that denied service connection for a psychiatric disorder. On appeal to the CAVC, the appellant argued that the record did not contain clear and unmistakable evidence in July 1969 to rebut the presumptions of sound condition and aggravation. The CAVC, however, affirmed the Board's decision as the appellant did not demonstrate how the asserted errors, had they not been made, would have been outcome determinative.

On appeal to the Federal Circuit, the appellant argued that the Board did not consider whether there was clear and unmistakable evidence of record to rebut both prongs of 38 U.S.C. Sec. 1111. Accordingly, the Federal Circuit should reverse the CAVC and hold that the Sec. 1111 presumption of soundness is rebutted only when VA establishes by clear and unmistakable evidence that an injury or disease preexisted the veteran's examination for induction to service and was not aggravated by service.

The Secretary argued on appeal that the appellant's legal challenge had already been addressed in *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005). In *Jordan*, the Federal Circuit considered whether the RO's reliance on 38 C.F.R. Sec. 3.304(b), which failed to properly implement 38 U.S.C. Sec. 1111 by not requiring clear and unmistakable evidence to rebut the presumption of aggravation, constituted CUE. The Federal Circuit held that even though the regulation did not properly interpret the statute, the RO's reliance on that regulation, prior to its invalidation, could not provide the basis for a CUE claim. In the appellant's case, as in *Jordan*, the regulation that was in effect in July 1969 did not require clear and unmistakable evidence to overcome the aggravation prong of the presumption, as was required by the controlling statute. However, the RO was still required to follow the regulation in effect at the time.

On October 7, 2005, the Federal Circuit issued a per curiam order affirming the CAVC decision.
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PVA ANNUAL LEGAL WRITING COMPETITION 2005-06

The Paralyzed Veterans of America (PVA) has announced its annual legal writing competition for 2005-06. Through these competitions, which are open to all law students and attorneys, PVA hopes to generate discussion on issues that affect today's veterans. The topic of this year's competition is "Should the U.S. Court of Appeals for Veterans Claims Adopt a Mediation Program for Claims Appealed from the Department of Veterans Affairs." A first prize of $1,250 and a second prize of $750 will be awarded. All submissions must be received no later than April 28, 2006. Winners will be notified by June 15, 2006. For more information on how to enter the competition and the specific rules, please visit the PVA Web site ***www.pva.org*** and click on "Legal Writing Competition." All entries and any questions regarding the Writing Competition should be addressed to:

Ronda L. Whichard, Legal Executive Assistant
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ANNUAL MEETING *(continued from front page)*

of progress" in the past year, and he recognized the leaders of the Association's various committees for advances like a substantially expanded website and the first stand alone, full-day continuing legal eduction (CLE) program in May 2005. He noted that the Court had responded "quite well" to a letter from the Association which had expressed the hope that the members of the Court would become more involved in Association activities, citing the fact that six out of nine judges attended the CLE program. He presented plaques for retiring members of the Board, including Ron Smith, Jeff Luthi, and Jeany Mark. He also announced the results of the election of officers and members of the Board of Governors. The President-Elect is Glenda Herl, the Secretary is David Quinn, and the Treasurer is Brian Robertson. Louis George was elected to fill Mr. Robertson's remaining two-year term on the Board of Governors and Barbara Cook, Bill Putchnick, and Chris Wallace were the other newly elected members of the Board of Governors.

Incoming President Jennifer Dowd presented a plaque to outgoing President Bart Stichman for his leadership and stated that as President she would continue the work of her predecessors to work towards the best and most efficient legal system for veterans. She noted that April 24 and 25, 2006 were the dates for the Court's next biannual meeting and that there would be a CLE program in connection with that event. She stated that she would continue the "Meet the Judge" program with Judges Moorman, Lance, Davis, and Schoelen in the coming year. She stated her belief that her proximity to the judges, as a CAVC attorney, would be a great asset to the bar, and she urged members and judges to continue their involvement in the Association and its programs.

The newest Chief Judge of the U. S. Court of Appeals for Veterans Claims, the Honorable William P. Greene, Jr., presented the keynote speech and discussed the state of the Court and issues that had been raised by the Bar Association. He stated that he was "having lots of fun" as the newest Chief Judge and that he was "very, very pleased" that a "member of the Court family" was in the position of Bar Association President. He assured President Dowd that the Court and its staff would work alongside her. He noted the new composition of the Court and stated that the judges had had a "very successful" retreat earlier in the year in Williamsburg, Virginia, to engage in dialogue about where the Court should be going, as well as to discuss the challenges of the Court's increasing caseload. In that regard, he noted that in the last five months, the Court had been receiving an average of 300 cases per month. By comparison, the Court had received cases at the rate of only 200 cases per month during the preceding five years. He said that the Court was dedicated to decreasing its backlog and noted that the Court's budget request, which included a request for an increase from three to four clerks per judge, was pending in Congress. Due to the length of time it is taking for cases to get out of chambers, he implored attendees to work within their allotted time.

Judge Greene noted that the Court had significantly increased the number of oral arguments it heard in 2005. He also noted that the Court had asked for

Judge Ivers' wife with Bar Association President Jennifer Dowd

Judge Ivers addresses the audience at the portrait presentation.

VA General Counsel Tim McClain, Judge Lawrence Hagel, and Dave Myers of the Veterans Consortium Pro Bono Program

Ron Smith of DAV, Bar Association President Jennifer Dowd, and outgoing Bar Association President Bart Stichman.

The Judges of the Court of Appeals for Veterans Claims in the Ceremonial Courtroom of the Court of Appeals for the Federal Circuit.

additional funding to hold oral argument at other locations, and noted that Duquesne University and the University of Florida had requested to host such arguments. He further noted that a feasibility study was currently underway with regard to the proposed veteran's courthouse and justice center.

At the conclusion of the annual meeting, Bar Association members moved to the ceremonial courtroom for the presentation of portraits commissioned by the Association of the recently retired Judge Donald L. Ivers. (The presentation of the portrait of recently retired Judge Jonathan R. Steinberg was postponed to a later date.) Judge Ivers was accompanied to the event by his wife, Monica, and daughter, Serena. Judge John J. Farley (retired) in his remarks noted Judge Ivers' distinguished military service, his commanding presence, and the "glint in his eye" that revealed Judge Ivers' great sense of humor. He observed that Judge Ivers was a man "who has served and continues to serve and to love his family, the law, and veterans." Jennifer A. Dowd, President of the Bar Association, presented the portrait to the CAVC, noting that Judge Ivers had "touched many lives" and that the portrait would serve as a constant reminder of his legacy. In response, Judge Ivers thanked Judge Farley for his kind words and his fellow judges for their support and friendship. He thanked his wife and daughter for their love and support, and he also recognized the members of the Court family and his former law clerks. He stated that his 15 years on the bench "seems to have gone so fast." Chief Judge Greene provided closing remarks, and at the conclusion of the presentation the Association hosted a reception in the Dolley Madison House. ■

News from Committees

Law School Education Committee
The Law School Education Committee is contacting law schools inside and outside Washington D.C. (including Arizona State University, the University of Florida, and Duquesne University) as possible locations for on-campus oral arguments. For more information, contact ***randy.campbell@mail.va.gov***.

Membership Committee
The Membership Committee reports that currently there are 219 members of the Bar Association.

Programs Committee
On Wednesday, March 15, 2006, the Programs Committee will be holding a "Meet the Judge" program with Judge Lance. Please watch your e-mail for information regarding this program. Bar Association members may participate in person, or, for those living outside the Washington, D.C. area, by telephone conference.

Publications Committee
If you are interested in contributing to the next issue of the Veterans Law Journal, please contact ***mary.peltzer@va.gov***. In addition, any questions or suggestions regarding the Association's website may be directed to ***mauer@mail.va.gov***.

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