# VETERANS LAW JOURNAL

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

SPRING 2005

## ABA ADOPTS RESOLUTION ADVOCATING REPEAL OF BAR TO ATTORNEY'S FEES IN VA PROCEEDINGS

On February 14, 2005, the House of Delegates of the American Bar Association adopted a resolution supporting federal legislation to repeal the statutory provision preventing veterans from paying an attorney to represent them before the VA on claims for veterans benefits. Currently, 38 U.S.C. § 5904(c) bars attorneys from charging a fee to represent a VA claimant for services provided prior to the date of the first final Board of Veterans' Appeals decision on a case. This no-fee provision replaced the $10 attorney fee limitation that had been in effect since the U.S. Civil War.

The resolution was proposed by the Bar Associations of Pennsylvania, the District of Columbia, and Maryland, the Judge Advocates Association, the ABA Standing Committees on Legal Assistance for Military Personnel and on Delivery of Legal Services, and the ABA Section on Individual Rights and Responsibilities. The resolution was opposed before the ABA Section on Administrative Law and Regulatory Practice by Ronald L. Smith, a member of the Section's Council. He argued that veterans service organizations achieve results before the VA that are "generally equal to or better than those of private attorneys" and "[a]llowing attorneys to charge fees would only shift a portion of a veteran's benefits to attorneys with no corresponding improvement in outcomes."

## BAR ASSOCIATION CLE SEMINAR A SUCCESS!

On May 2, 2005, the Bar Association held its first full-day Continuing Legal Education Seminar at H2O on the Washington D.C. waterfront. Attendance at the event was strong, with 164 attendees, including eight of the Court's nine judges.

After opening remarks by Bar Association President Bart Stichman, the program included practice tips for efficient claims file review and organization, which included presentations by Heather Harter and Jeff Schueler of the BVA, as well as Leonce Wilson of the Veterans Consortium Pro Bono Program and Ted Jarvi of Tempe, Arizona.

*See "Bench Meets Bar" on page six*

*Robert Graham, Alice Kerns, Judge Greene, Lucy Brewer Gray and Lia Neill Wentworth*

**INSIDE THIS ISSUE**



COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

## ROUND UP OF SIGNIFICANT PENDING CASES
## Federal Circuit

### Is a Remand Appealable?

By Laura Eskenazi

***Kirkpatrick v. Nicholson***, No. 04-7135. Oral argument held before Judges Clevenger, Lourie, and Linn on April 4, 2005.

The issues on appeal are: (1) Whether the CAVC has jurisdiction to review a Board order remanding an appeal for evidentiary development; and (2) if so, whether the case is ripe for review. The appellant argues that although 38 U.S.C. § 7266 sets forth time limits for filing an appeal of a *final* Board decision, 38 U.S.C. § 7252 states that the CAVC has jurisdiction to review decisions of the Board, but does not expressly limit that jurisdiction to "final" decisions. The appellant argues that both statutes should be read in a manner that gives effect to each statute. The Secretary argues that a remand order is not reviewable by the CAVC because it is not a decision and it is not final.

At oral argument, the appellant argued that the definition of a "decision" in 38 U.S.C. § 7104 (described as containing "an order granting appropriate relief or denying relief") has no effect on the CAVC's jurisdiction. The Secretary argued that a remand is merely a vehicle to obtain the ultimate benefit, but a remand is not the "relief" sought, and not a decision.

*Counsel for Appellant:*
*Ronald L. Smith, Esq. (202) 314-5233*
*Counsel for the Appellee:*
*Ethan Kalett, Esq. (202) 273-6315*

### Eligibility for award of attorney's fees – is TDIU claim a part of underlying service connection claim?

By Jonathan Kramer

***Lippman v. Principi,*** No. 04-7142, on appeal from *Lippman v. Principi*, No. 03-0511, U.S. Vet. App. (April 6, 2004). Oral argument before Judges Newman, Shall, and Dyk on April 4, 2005.

Only the Secretary was available for argument; the Federal Circuit decided to rule later whether the appellant would be permitted to present oral argument.

This appeal stems from the CAVC's memorandum decision finding that the appellant's attorney was ineligibile for an award of attorney fees. The CAVC found that the underlying decision granting the veteran's TDIU claim was: (1) a separate and distinct claim from the service connection claim (counsel's successful appeal); (2) never the subject of a final Board decision, and (3) not "reasonably raised" in the original claim for benefits. See 38 U.S.C.A. § 5904(c); *Matter of Fee Agreement of Leventhal*, 9 Vet. App. 387 (1996).

The appellant challenges the CAVC's application of the holding in *Leventhal*, asserting that the CAVC's analysis that TDIU is a separate and distinct claim is flawed. The appellant observes that 38 U.S.C.A. § 5904(c) and 5904(d)(1) entitles an attorney to be compensated from the total amount of any past-due benefits awarded on a claim for service connection. The appellant asserts that his compensation should be based on the TDIU award because TDIU is a theory of disability compensation that is necessarily a part of the underlying service-connected claim.

The Secretary contends that application of *Leventhal* is correct and controlling. The Secretary argued that TDIU is a separate and distinct claim which did not come before the Board, and for which the appellant rendered no services. The veteran's service connection claim did not raise the issue of unemployability. Rather, the veteran raised TDIU after the RO assigned him a 70 percent rating, in response to the RO's notification that he may be entitled to TDIU. The Secretary argued that the veteran applied for TDIU by himself, with no assistance from the appellant, and allowing the appellant to be compensated for the TDIU award would undermine VA's non-adversarial system of claims processing and adjudication.

*Representative for the Appellant:*
*Mark Lippman, Esq. (858) 456-5840*
*Representative for the Appellee:*
*Michelle Bernstein, Esq. (202) 273-6315*

**Claims for Attorney Fees under the Equal Access to Justice Act – was VA substantially justified in context of DAV remand?**

By Nancy Fabian

***White v. Principi,*** No. 04-7136, on appeal from White v. Principi, No. 02-1827 (U.S. Vet. App., April 6, 2004). Oral argument held before Judges Mayer, Rader, and Gajarsa on April 4, 2005.

This appeal for attorney fees stems from an underlying CAVC remand pursuant to *Disabled American Veterans, et. al. v. Secretary of Veterans Affairs* (DAV), 327 F.3d 1339 (Fed. Cir. 2003) (invalidation of VA regulations as inconsistent with portions of §§ 5103, 7104 of Title 38).

The appellant, through his attorney, appeals the CAVC's denial of his application for fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA). In a memorandum decision, the CAVC found that although the appellant was a prevailing party in the remanded case, the Secretary's position at the administrative and litigation stages was substantially justified. The CAVC relied upon *Ozer v. Principi*, 16 Vet. App. 475, 478-79 (2002) (per curiam) and *Felton v. Brown*, 7 Vet. App. 276, 283-86 (1994), cases where the Secretary was found to be substantially justified in promulgating regulations that were subsequently found to be in contravention of the plain language of the statute.

The CAVC also relied on *Johnson v. Principi*, 17 Vet. App. 436, 439-42 (2004). In *Johnson* the CAVC specifically held that, in a fact pattern nearly identical to that in *White*, the appellant was not a prevailing party because the CAVC remand was based on the retroactive application of *DAV v. Sec'y* and not on administrative error. The *Johnson* decision further found that, even if the appellant was a prevailing party, the Secretary's position was substantially justified according to the "reasonable basis in law and fact" standard established by the United States Supreme Court. See *Pierce v. Underwood*, 487 U.S. 522, 566 n.2 (1988). Based upon the "totality of the circumstances," the CAVC found that the Secretary was not unreasonable in promulgating 38 C.F.R. § 19.9(a)(2), and that the Board was required to follow the then-controlling law. The CAVC also found that the Secretary's position in litigation was substantially justified because he had timely sought remand of the case following the Federal Circuit's decision in *DAV v. Sec'y*. The CAVC found that "the circumstances of the instant case as to substantial justification warrant the same result as in *Johnson, Ozer, and Felton*."

The appellant contends that the Secretary was not substantially justified in promulgating 38 C.F.R. § 19.9(a)(2) because it was clearly in conflict with the plain language of 38 U.S.C. § 7104(a), and that the absence of any court decision invalidating the regulation at the time of the Board's October 2002 decision is not relevant. The appellant argued to the Federal Circuit that the CAVC erred by shifting the evidentiary burden to the appellant to establish that the Secretary's position had not been substantially justified. The appellant also argued that the EAJA statute requires that eligibility for fees be determined on the "basis of the record," and that the CAVC should have addressed the issue of whether the Secretary's position in promulgating the regulation was substantially justified.

The Secretary contends that the CAVC considered the totality of the circumstances in denying the appellant's claim for EAJA fees, and did not limit the scope of the record. The Secretary argued that the CAVC did not shift the burden of proof to the appellant, but reiterated its holding in *Johnson* that, "it could not be said that [the Government] was unreasonable in promulgating [38 C.F.R. § 19.9(a)(2)]." The Secretary argued further that the CAVC's reliance on precedential case law, which was directly on point, was sufficient. There was no requirement that the CAVC repeat the analysis applied in *Johnson*, where the CAVC acknowledged that the burden of showing substantial justification was on the Secretary. The Secretary also argued that the appellant's attempt to fuse the substantial justification decision with the litigated issue of the validity of 38 C.F.R. § 19.9(a)(2) was without merit. The Secretary pointed out that case law establishes the standard for determining whether the Secretary's position was substantially justified, i.e., whether the position was reasonable based on the totality of circumstances.

*Counsel for Appellant:*
*Sandra Booth, Esq. (614) 784-9451*
*Counsel for Appellee:*
*Martie Adelman, Esq. (202) 273-6315* ■

## SIGNIFICANT PENDING CASES BEFORE THE CAVC

### Earlier Effective Date for a Grant of Dependency and Indemnity Compensation Benefits – Did the Board err in finding that an original claim for "cancer" did not include a claim for non-Hodgkin's lymphoma?

By Susan Toth

***Bonner v. Nicholson,*** No. 02-0742. Oral argument held before Chief Judge Ivers, and Judges Greene and Hagel, on March 15, 2005.

In a September 2001 decision, the Board denied the appellant's claim for an earlier effective date for a grant of dependency and indemnity compensation (DIC). The veteran, who served in Vietnam, died in August 1975. In February 1976, the RO denied the appellant's September 1975 claim for DIC, finding that service connection was not warranted for the cause of the veteran's death from Hodgkin's disease. The appellant did not appeal. In November 1995, the RO awarded DIC and assigned an effective date of November 1, 1994, one year prior to the application to reopen the claim, pursuant to 38 C.F.R. § 3.114(a)(3) (if a claim is reviewed more than one year after the effective date of a liberalizing law or VA issue, benefits may be authorized one year prior to the date of receipt of claim). The liberalizing VA issue, which was effective in February 1994, added Hodgkin's disease to a list of diseases for which a presumption of service connection is provided based on herbicide exposure in Vietnam.

The appellant argues that the Board erred in finding that the original claim for service connection for cause of death from "cancer" did not include a claim for cause of death from non-Hodgkin's lymphoma and that the appropriate effective date is the date of the original claim. In its decision, the Board found that the evidence in the claims file at the time of the February 1976 rating decision reflected that the veteran died due to Hodgkin's disease. However, in connection with the reopened claim, VA received evidence indicating that the veteran, who had also been exposed to ionizing radiation during service, died of non-Hodgkin's lymphoma (NHL). The Board noted that effective October 13, 1995, VA amended 38 C.F.R. § 3.311 to add "lymphomas other than Hodgkin's disease" to the list of radiogenic diseases. The Board also noted that even if it assumed that the veteran died of NHL, an effective date earlier than November 1, 1994, could not be awarded pursuant to 38 C.F.R. § 3.114(a).

The appellant also argues that an earlier effective date is warranted pursuant to 38 C.F.R. § 3.313, which VA issued in October 1990 and which provides for presumptive service connection for Vietnam veterans who manifest NHL. The effective date of the regulation was retroactive to August 5, 1964, the beginning date of the Vietnam era. In VAOPGCPREC 5-94, VA's General Counsel held that the effective date of service connection for NHL under 38 C.F.R. § 3.313 may generally be based on the date of receipt of an original claim for that benefit filed on or after August 5, 1964, if the claimant was eligible on the date of claim.

At oral argument, the appellant's representative admitted that VA had not acknowledged that the veteran's death was caused by non-Hodgkin's lymphoma, and argued that the CAVC should find that VA's finding that the veteran had Hodgkin's disease was erroneous. The appellee argued that even if the Board found that the veteran's death was due to non-Hodgkin's lymphoma, the effective date would still have to be in 1994, based on the date the reopened claim was filed, the fact that the appellant was not eligible for service connection for the cause of the veteran's death due to NHL in 1975, because the appellant originally filed a claim for service connection for cause of death due to "cancer" not due to NHL, and because the evidence of record in 1975 did not support a finding that the veteran died as a result of NHL.

*Counsel for the Appellant:*
*Mark H. Bonner, Esq. (703) 406-8802*
*Counsel for the Appellee:*
*Christine Cote, Esq. (202) 639-4800*

### Clear and unmistakable error (CUE) – does the VCAA require notice with respect to the finality of a prior rating decision?

By Maureen Young

***DiCarlo v. Nicholson,*** No. 03-0629. Oral argument held before Judges Kasold, Hagel, and Lance on April 28, 2005.

In December 2002, the Board failed to find CUE in a September 1973 rating decision. The RO had denied service connection for an acquired psychiatric disability. The appellant contended that evidence at the time of the 1973 rating decision demonstrated service onset of a psychiatric disability. She further contended that the RO's September 1973 notification violated 38 C.F.R. § 3.103(e), because there was no explanation or reason for denial in the notice. Therefore, she argues, the Board's finding that the September 1973 rating decision was final is erroneous. She contended that VA was required to provide notice under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) as to the issue of the finality of the September 1973 decision, and failed to do so.

The appellant also argues that since an earlier Board remand had requested that the RO adjudicate whether the 1973 decision was final, and the RO failed to comply with the notice requirements of 38 U.S.C. § 5103(a), there was no final decision.

The Secretary argues that at the time of the rating decision, the appellant was diagnosed with a personality disorder. According to 38 C.F.R. § 3.303(c), personality disorders are constitutional or developmental abnormalities and not subject to service connection. The Secretary also argues that the RO did provide appellant with the reason her claim was denied, and the VCAA does not apply to CUE claims.

With respect to finality, the Secretary argues that the Board's earlier remand directed the RO to adjudicate the issue of whether there was CUE in the September 1973 rating decision and to address whether that rating action was final. The Secretary maintains that the RO complied with the remand.

*Counsel for the Appellant:*
*Robert V. Chisholm, Esq. (401) 331-6300*
*Counsel for Appellee:*
*Alice M. Szynklewski, Esq. (202) 639-4800*

### Hypothetical Entitlement to DIC – do regulatory revisions to 38 C.F.R. § 3.22 apply to a claim filed before January 2000?

By Vito Clementi

***Rodriquez (Maria) v. Nicholson,*** No. 03-1276. Oral argument held before Judges Steinberg, Green, and Kasold on January 27, 2005.

The issue on appeal to the CAVC concerned the effect of the January 2000 revision to 38 C.F.R. § 3.22, which removed language authorizing dependency and indemnity compensation (DIC) benefits under 38 U.S.C.A § 1318 "for any reason" and which defined "entitled to receive" as being "due solely to clear and unmistakable error" by VA. The regulatory revision was in response to the CAVC's decision in *Green v. Brown*, 10 Vet. App. 111 (1997), which held that under the then-current version, a surviving spouse was permitted to show that the veteran hypothetically would have been entitled to a different decision on a service-connection issue, based upon evidence in the claims folder or in VA custody prior to the veteran's death.

In this case, DIC was denied on the bases that the veteran had no service-connected disabilities rated as 100 percent for at least 10 years immediately prior to his death and a total rating was only in effect for slightly over five years at the time of his death.

Before the CAVC, the appellant argued that 38 C.F.R. § 3.22, as applied by the Board, had an impermissible retroactive effect. She argued that but for the regulatory change, VA would have been obligated to consider such "hypothetical entitlement" to DIC benefits, as the rule was applicable at the time of filing of her claim. Alternatively, she argued that the Board erred by not applying the rule of *Karnas v. Derwinski*, 1 Vet. App. 308 (1991).

Relying on *National Organization of Veterans' Advocates Inc. v. Secretary of Veterans Affairs*, 314 F.3d 1373 (Fed. Cir.), *cert. denied*, 538 U.S. 924 (2003), the Secretary argued in response that the regulatory changes were interpretative of existing agency practice, and only clarified existing practice. As to the appellant's assertion that the ruling in *Karnas* applied,

*continued on page eight*

## PHOTOS FROM THE MAY 2 CONTINUING LEGAL EDUCAT

*Landon Overby and Jennifer Dowd*

*Judge Greene and Amanda Meredith*

*Judge Steinberg*

*continued from page one*

All of the individuals provided their own perspective as to how best to approach a claims file, including a presentation by Ted Jarvi regarding the use of computer scanning, which was particularly helpful for those of us who are "technologically challenged."

A presentation on EAJA applications (including analysis of sample EAJA entries in the wake of the *Andrews* decision) drew some lively debate between panelists Carolyn Washington of VA and Richard Cohen of Morgantown, WV, as well as from the audience. Panelists Ron Abrams, Robert Chisholm, Barbara Cook, Ethan Kalett, and Tom McLaughlin provided timely information regarding recent Court decisions, including the recent opinions in *Mayfield* and *Duenas*. Finally, a presentation on ethics in the area of veterans law by Chris Clay, General Counsel of DAV, discussed the duty of candor in *ex parte* proceedings such as those before VA, as well the dilemma when faced with a client the attorney believes may be lying.

After the program's conclusion, DAV hosted a reception to welcome Judges Davis, Lance, Moorman, and Schoelen. Thanks go to the Bar Association Programs Committee and all those who helped make the event a success!

*Judge Davis and Judge Lance*

# EETS BAR

TION SEMINAR ~ PHOTOGRAPHS BY MONIQUE CERUTI

*Judge Lance, Judge Greene, Diane O'Brien Holcomb, Judge Steinberg and Kristin Neilson*

*Chief Judge Ivers and Judge Moorman*

*Barbara Cook and Judge Schoelen*

*Joseph Violente*

the Secretary argued that as the regulatory revisions were interpretative in nature, there was no "new" law to apply and *Karnas* was inapplicable.

The CAVC requested supplementary briefing as to the impact on this case of its opinion in *Cole v. West*, 13 Vet. App. 268 (1999).

*Counsel for Appellant:*
*Kathy A. Lieberman, Esq. (202) 776-0646*
*Counsel for Appellee:*
*Thomas J. Kniffen, Esq. (202) 639-4800*

**Does VCAA require notification regarding the production of lay evidence?**

By Paul Eglin

***Washington v. Nicholson***, No. 03-0773.
Oral argument to be held before Judges Greene, Moorman, and Hagel on May 26, 2005.

This case presents the question of the sufficiency of notice to a veteran to produce lay evidence within the meaning of the VCAA's allocation of production between the VA and the veteran. Specifically, did VA satisfy its VCAA obligation when its notice to the veteran did not address lay evidence and does the veteran's burden extend to production of lay evidence under 38 U.S.C. § 5103(a).

The veteran contends that VA's duty to notify him of "what is needed" was not met because the notice addressed the necessity of medical evidence while neglecting to mention lay evidence production. Under proper circumstances, lay evidence may suffice to establish entitlement to service connection, he argued. Because of its probative impact, the veteran contends that the duty to notify is not satisfied where the notice omits mention of or is inaccurate with respect to the evidentiary potential of lay evidence.

The Secretary argued that the Board's denial of the veteran's two claims should be affirmed because the record provides plausible grounds to support the decision. More specifically, the Secretary argued that the Board correctly relied on pre-VCAA precedent, *Hickson v. West*, 13 Vet. App. 1 (1999), and that the veteran failed to satisfy the requirements of *Hickson:* (1) injury or aggravation during service; (2) current disability; and (3) nexus between the two.

In response, the veteran argues that proper notification as to lay evidence production could result in triggering VA's obligation to assist. Because the notice was fatally defective by failing to mention lay evidence, he lost the opportunity to trigger VA's obligation to obtain medical evidence such as by conducting a medical examination. The veteran's position on notification is reminiscent of the two principal cases on which he relies, *Quartuccio v. Principi*, 16 Vet. App. 183 (2002), and *Charles v. Principi*, 16 Vet. App. 370 (2002). Interestingly, it is also reminiscent of *Morris v. Nicholson*, which was summarized in the ***Veterans Law Journal***, Winter 2005, pages 1-2. In that March 2003 memorandum decision by Judge Ivers, the potentially decisive lay evidence was the veteran's subjective pain symptoms, which Judge Ivers determined to be potentially more probative than opinion evidence based on mere interpretation of medical records by a non-examining VA physician. Had the lay evidence received appropriate weight, *Morris* noted that it could have properly triggered VA's duty to assist by, among other things, conducting a proper medical examination, which corresponds to the veteran's argument in this appeal. As noted in our last issue, Judge Ivers' memorandum decision in *Morris* is before the Federal Circuit, No. 03-7162, where it was argued on December 6, 2004, before Judges Bryson, Schall, and Dyk.

*Counsel for Appellant:*
*Louis J. George, Esq. (202) 265-8305*
*Counsel for Appellee:*
*David L. Quinn, Esq. (202) 639-4800* ■

## 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 Committee contacts) if interested in contributing in either way.

## Arbas Decided – Federal Circuit Holds that an Appellant's Impaired Physical Condition May Be Sufficient to Toll the Time Limitation for Filing a Notice of Appeal to the CAVC

**By Paul Eglin**

***Arbas v. Nicholson,*** No. 04-7107
(Fed. Cir., April 13, 2005)

The Federal Circuit held that an appellant's impaired physical condition may be sufficient to toll the requirement to file a Notice of Appeal (NOA) within 120 days as required by 38 U.S.C. § 7266(a). By permitting tolling based on impaired physical condition, the Federal Circuit extended the rule of *Barrett v. Principi*, 363 F.3d 1316 (Fed. Cir. 2004) (mental illness may toll the NOA 120-day requirement), and *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (equitable tolling applicable to 38 U.S.C. § 7266(a). The Federal Circuit noted that the CAVC did not have the benefit of *Barrett* at the time of its January 6, 2004, decision in *Arbas*.

The Federal Circuit remanded the case to the CAVC to determine whether equitable tolling was justified in the case of Ms. Arbas, who was pursuing benefits to which she claimed entitlement as the widow of a World War II Philippine freedom fighter. She pursued her claims *pro se* during the course of which she says she became impaired due to her heart condition. After the Board denied her claim in August 2002, she was several months late in submitting her NOA to the CAVC.

The Federal Circuit held that the issue of whether the limitations period should be tolled should be based on guidelines recognized in *Barrett*. Consideration must be given to whether the applicant's infirmity prevents the person from engaging in rational thought or deliberate decision making, or renders the applicant incapable of handling her or his own affairs, or renders them unable to function in society. The Federal Circuit stated that its role was not to engage in such fact finding, and remanded the case to the CAVC for review of the circumstances of the appellant's tolling request.
*Counsel for Appellant:*
*Eusebia R. Arbas, pro se*
*Counsel for Appellee:*
*Gregory T. Jaeger, Esq.*

## Smith Decided – CAVC Holds That Dual Ratings for Tinnitus Not Precluded by Pre-1999 and Pre-2003 Diagnostic Criteria

**By Mary Peltzer**

***Smith v. Nicholson,*** No. 01-623
(U.S. Vet.App., Apr. 5, 2005).

Before IVERS, Chief Judge, and STEINBERG and KASOLD, Judges. Judge Steinberg filed the opinion of the Court. Chief Judge Ivers filed an opinion concurring in part and dissenting in part.

For consideration of the CAVC was a December 2000 decision in which the Board determined that an initial compensable evaluation for service-connected tinnitus was not warranted under pre-1999 regulations as the medical evidence established that the veteran's tinnitus was not persistent and that a single 10 percent evaluation was warranted thereafter due to a regulatory change in the schedular criteria.

This appeal had previously been before the CAVC and had been reversed in part, vacated in part, and remanded. *Smith v. Principi*, 17 Vet.App. 168 (2003). Following an uncontested motion from the Secretary to vacate, the CAVC decision was reversed and remanded by the Federal Circuit in an August 2004 unpublished order. The Federal Circuit determined that *Wanner v. Principi*, 17 Vet.App 4 (2003) *(Wanner I), rev'd in part*, 370 F.3d 1124 (Fed.Cir. 2004) *(Wanner II)*, was applicable to the instant appeal. In *Wanner II*, the Federal Circuit determined that the CAVC had acted outside its jurisdiction by reviewing Diagnostic Code 6260 for consistency with section 1110 as this amounted to a direct review of content. The Federal Circuit noted that the Secretary's discretion over the rating schedule, including content and procedures, was insulated from judicial review with one recognized exception limited to constitutional challenges.

In the current *Smith* decision, the CAVC noted that almost three weeks after the *Wanner II* decision, the Federal Circuit issued a decision in which the CAVC was found to have jurisdiction to review the interpretation of a regulation. Specifically, the CAVC had jurisdiction to review the relationship of the *Diagnostic and Statistical Manual of Mental Disorders IV*

with the perambulatory language of 38 C.F.R § 4.130. *Sellers v. Principi*, 372 F.3d 1318 (Fed.Cir. 2004). Based on *Sellers*, the CAVC determined it had jurisdiction to review the Board's interpretation of "persistent" in pre-1999 regulations as requiring that tinnitus have an element of constancy in order to be compensable. While the CAVC determined that it had jurisdiction to review this matter, the matter was remanded so that the Board could provide an adequate statement of reasons and bases.

The CAVC also determined that it had jurisdiction to review the matter of whether the appellant was entitled to dual ratings for bilateral tinnitus based on *Sellers*, as this was not a direct review of the content of the rating schedule but rather a review of the interpretation of two regulatory provisions and their interrelationship. The CAVC concluded that, utilizing the canon of construction to look to the plain text of a regulation, the pre-1999 and pre-2003 diagnostic criteria for tinnitus did not intend for dual ratings to be excluded. Therefore, the CAVC reversed the December 2000 Board decision, in that it concluded bilateral tinnitus may not qualify for two 10 percent ratings, and remanded the matter for determination whether the veteran in the instant case had bilateral tinnitus such that assignment of ratings consistent with this holding could be accomplished. Furthermore, the decision invalidated VA's Office of General Counsel Opinion, 2-2003, to the extent that it is inconsistent with 38 C.F.R § 4.25(b) and the pre-2003 diagnostic schedular criteria reviewed by the CAVC.

Chief Judge Ivers dissented in part with the majority's decision. He disagreed with the decision to remand the question of the appellant's entitlement to a compensable rating under the pre-1999 schedular criteria as this was outside of the CAVC's jurisdiction. Chief Judge Ivers wrote that while the majority "cloak[ed] their actions in the reasons-and-bases rubric, the majority here dives directly into the content of the ratings schedule" by evaluating the meaning of the schedular criteria of "persistent" and "recurrent".

Pending resolution of VA's recommendation to the Department of Justice that the decision be appealed to the Federal Circuit, the Secretary signed a memorandum on April 22, 2005, imposing a stay on VA's adjudication of cases affected by the *Smith* decision.

*Counsel for appellant:*
*Ronald L. Smith, Esq. (202) 314-5233*
*Counsel for appellee:*
*John D. McNamee, Esq., (202) 639-4800* ■

## COMMITTEE CONTACTS

**CONSTITUTION AND BYLAWS COMMITTEE**
**Brian Robertson, Chair**
**brianr@vetsprobono.org**

**LAW SCHOOL EDUCATION COMMITTEE**
**Randy Campbell, Chair**
**randy.campbell@mail.va.gov**

**MEMBERSHIP COMMITTEE**
**Glenda Herl, Chair**
**carpgh@mindspring.com**

**NOMINATIONS COMMITTEE**
**Bart Stichman, Chair**
**bart_stichman@nvlsp.org**

**PORTRAIT COMMITTEE**
**Dave Myers, Chair**
**davidm@vetsprobono.org**

**PROGRAMS COMMITTEE**
**Jennifer Dowd, Co-Chair**
**jdowd@vetapp.gov**
**Heather Harter, Co-Chair**
**hjharter@mail.va.gov**
**Ted Jarvi, Co-Chair**
**theodore.jarvi@azbar.org**
**Landon Overby, Co-Chair**
**loverby@davmail.org**
**Kenneth Walsh, Co-Chair**
**kenneth.walsh@mail.va.gov**

**PUBLICATIONS COMMITTEE**
**Lou George, Co-Chair**
**louis_george@nvlsp.org**
**Michelle Kane, Co-Chair**
**michelle.kane@mail.va.gov**

**SUBCOMMITTEE ON BAR ASSOCIATION'S WEBSITE**
**Marjorie Auer, Chair**
**Contact us at: www.cavcbar.net**

# R. James Nicholson Sworn in as Secretary of Veterans Affairs

R. James "Jim" Nicholson was sworn in as Secretary of Veterans Affairs (VA) on February 1, 2005. He mostly recently served as U.S. Ambassador to the Vatican. Before that, he served as chairman of the Republican National Committee (RNC) from 1997 to 2001; vice-chairman of the RNC from 1993 to 1997; and a committeeman from Colorado from 1986 to 1993. His brother served as VA Under Secretary for Memorial Affairs from 2003 to 2004.

After graduating from West Point in 1961, Secretary Nicholson served 8 years on active duty, including combat duty in the Republic of Vietnam, and 22 years in the Army Reserve, retiring with the rank of colonel. He earned a master's degree from Columbia University in New York and a law degree from the University of Denver.

During testimony at his confirmation hearings, Secretary Nicholson stated, "I have seen both the horrors of war and the heroes of America making the greatest sacrifices of military service on behalf of their comrades and our nation." He emphasized that he will work closely with the Department of Defense to ensure a seamless transition for servicemembers returning from the wars in Afghanistan and Iraq, adding: "The manner in which the VA supports the transition of today's servicemembers into veterans, especially those who are injured or became ill as a result of their service in combat areas, will define the Department for them."

Secretary Nicholson pledged to build on the strides VA made in health care, benefits delivery, and memorial affairs during former Secretary Principi's tenure. He said, "I will strive to move the Department to another level, by building on all that has been put in place and improving upon those areas that remain a challenge." Secretary Nicholson will focus much of his attention on VA's 230,000 employees, stating, "I am deeply committed to earning the respect, trust, and following of the men and women of the VA who have made service to veterans their life's calling. . . . an enormous reservoir of dedicated, committed talent that must be put to its best possible use."

The Secretary promised to hold himself and his leadership team accountable for ensuring and harnessing VA employees' best efforts. He stated, "It will be my job and my privilege to lead and harness this awesome force of talented people so that all of us have the same focus: our veterans. It is critical that we honor America's debt to those who have served us so faithfully."

# News from Committees

**Law School Education Committee**
The Law School Education Committee has been contacting law schools inside and outside Washington, D.C., so as to interest these schools in inviting the Court to hold oral argument on their campuses. The Court has been invited to conduct an oral argument at George Washington University's law school for the Fall 2005 semester. The committee expects a similar invitation from the University of Florida's law school for the Spring 2006 semester, and the committee is working with the moot court program at the law school to enable a student to participate in briefing and arguing a case when the Court visits the school. In addition, Cliff Olson of the Board of Veterans' Appeals is leading a newly-established work group, whose primary mission is to prepare a module on veterans benefits law that can be easily presented to a law school class or otherwise incorporated into an existing curriculum. For more information, contact **randy.campbell@mail.va.gov**.

**Membership Committee**
The Membership Committee reports that currently there are 231 members of the Bar Association.

**Programs Committee**
On Wednesday, June 22, 2005, at 9:30 a.m., members of the Bar Association will meet informally with Judge Kasold of the Court of Appeals for Veterans Claims. This is the next in a series of "Meet the Judge" programs designed to improve relations and communications between members of the Bar Association and the judges of the CAVC. Participation may be in person or by telephone conference (for those living outside the Washington, D.C. area). About a month before the event, an e-mail with registration information will be sent to members. Should you require additional information, please contact Bart Stichman at **bart_stichman@nvlsp.org**.

**Publications Committee**
The Publications Committee intends to meet in May 2005 to plan the next issue of the *Veterans Law Journal*. 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 Louis George at **louis_george@nvlsp.org** or Michelle Kane at **michelle_kane@mail.va.gov**. In addition, if anyone has questions or comments regarding the website (which is currently up and running), please use the "Contact Us" link on the Bar Association's website: **www.cavcbar.net**.

COURT OF APPEALS
FOR VETERANS CLAIMS
BAR ASSOCIATION

Ben Franklin Station • P.O. Box 7992 • Washington, D.C. 20044-7992