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
Federal Circuit

What is the meaning of "appellate decision" in 38 C.F.R. § 3.156(b)?

By Karissa Wallin

Jackson v. Nicholson, No. 05-7187, on appeal from *Jackson v. Nicholson*, 19 Vet.App. 207 (2005). Docketed Aug. 29, 2005.

On appeal before the CAVC was a January 2003 Board decision that denied entitlement to an effective date prior to October 18, 2000, for the award of service connection for a low back disability. In affirming the Board's decision, the CAVC rejected the appellant's argument that "appellate decision," as referenced in 38 C.F.R. § 3.156(b) could mean a Federal Circuit decision, thus providing the appellant with a possible basis for an earlier effective date. Historically, the appellant attempted to reopen a previously denied claim in September 1996. The RO denied the claim, and in November 1998, the Board did the same. Thereafter, the CAVC and the Federal Circuit affirmed the Board's decision. Prior to issuance of the Federal Circuit decision, in October 2000, the appellant submitted additional evidence to the RO in support of his attempt to reopen the

continued on next page

ANNUAL MEETING AND PORTRAIT PRESENTATION SET FOR SEPTEMBER 29

On September 29, 2005, the U.S. Court of Appeals for the Federal Circuit will host a three-ring event sponsored by the Bar Association. At 1:30 p.m., the Association will hold its annual meeting. The agenda includes the announcement of the results of the election of officers and members of the Board of Governors, an overview of the Association's activities by outgoing President Bart Stichman and incoming President Jennifer Dowd, and a keynote address by he newest Chief Judge of the Court of Appeals for Veterans Claims – William P. Greene, Jr. Chief Judge Greene is expected to discuss the state of the Court and issues that have been raised to the Court by the Bar Association.

Following the annual meeting at 3 p.m., Association members will move to the Federal Circuit's ceremonial courtroom for the presentation to the CAVC of the portraits commissioned by the Association of recently retired Judges Donald L. Ivers and Jonathan R. Steinberg. At the conclusion of the portrait presentation, the Bar Association will host a reception. Association members who wish to attend any of these three events should contact President Elect Jennifer Dowd by September 21, 2005 by writing her at the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, N.W., Suite 900, Washington, D.C. 20004.

INSIDE THIS ISSUE

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

previously denied claim. On appeal, the appellant argued that "appellate decision" as used in 38 C.F.R. § 3.156(b) encompassed a decision of the Federal Circuit. The CAVC rejected what they considered a liberal interpretation of "appellate decision," noting that at the time § 3.156(b) was promulgated; the only appeal available within the veterans benefits system was an appeal to the Board. Thus, CAVC concluded "appellate decision" as used in § 3.156(b), means only a decision of the Board, and as a result, § 3.156(b) provides that the issuance of a Board decision closes the period of time during which evidence submitted after the filing of a claim will be considered as having been filed along with that claim.

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SIGNIFICANT PENDING CASES BEFORE THE CAVC

Clear and Unmistakable Error (CUE)

By Jonathan Kramer

Jarrell v. Nicholson, No. 03-0752. Oral argument was held before Judges Hagel, Kasold, and Lance, on July 19, 2005.

The issue on appeal before the CAVC is whether a January 3, 2003, Board of Veterans' Appeals (Board) decision properly denied the veteran's claim of clear and unmistakable error (CUE) in a 1956 rating decision that denied service connection for a nervous disorder. By order dated April 18, 2005, the CAVC ordered the parties to file supplemental briefs to address the following jurisdictional and procedural issues affecting the appeal: (1) whether the CAVC has jurisdiction to hear an appeal of the Board's denial of CUE when the theory underlying the appeal to the Board differs from the theory underlying the CUE claim adjudicated before the RO; and (2) whether the Board's denial of the appellant's claim for service connection for a "nervous condition," adjudicated as a psychosis, also encompassed and subsumed her other neurotic disabilities, such as a "chronic psychiatric disorder."

The Judges focused much questioning on the jurisdictional issue even though the appellant and the Secretary were in agreement that the CAVC had jurisdiction. The CAVC was concerned that while the Board's decision addressed matters related to the presumption of soundness and aggravation, the RO rating decision denying CUE, dated February 19, 1999, did not. The appellant asserted that by modifying her claim before the Board, she waived initial consideration by the RO, and that any defect resulting from the Board's consideration of the CUE claim was non-prejudicial. The Secretary echoed the appellant's assertion that there was no prejudice to the appellant by the Board's consideration of the expanded theory underlying the CUE claim because the appellant did not assert prejudicial error in this regard.

In regard to whether the Board's denial of the appellant's claim for service connection for a "nervous condition," adjudicated as a psychosis, also encompassed and subsumed her other neurotic disabilities, such as a "chronic psychiatric disorder," the appellant asserted that the RO and the Board failed to fully develop the evidence of record for all potential claims related to psychiatric disorders, as required by *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001) and S*zemraj v. Principi* 357 F.3d, 1370 (Fed. Cir. 2004). The Secretary argued that in the context of what a claim for nervous condition meant at the time it was initially adjudicated in 1956, the appellant's claim for nervous condition encompassed other psychiatric disorders reasonably raised by the record.

Concerning the substantive issue of whether CUE was committed in the 1956 RO decision, the appellant argued that VA and the Board misinterpreted 38 CFR § 3.63 (1955), an applicable regulation extant at the time of the RO's 1956 decision. Specifically, the appellant argued that the interpretation of 38 CFR § 3.63(b) by a then extant Solicitor's precedential opinion is in line with the current interpretation under *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). Under *Wagner*, a burden is imposed upon VA of rebutting the presumption of soundness by clear and unmistakable evidence that both the condition noted in service existed prior to service and was not aggravated by such service. In essence, the appellant argues that the Board erred in its conclusion that 38 CFR § 3.63(b) was correctly applied because the

record did not contain clear and unmistakable evidence that the nervous condition was not aggravated by service. The Secretary argues that the Board correctly applied 38 CFR § 3.63(b) and provided adequate reasons and bases for its decision denying CUE, noting that the RO concluded in its 1956 rating decision, after citation to appropriate evidence, that the appellant's nervous condition "was not incurred or aggravated in service."
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38 U.S.C. § 7266, the Common Law Mailbox Rule, and Equitable Tolling.

By Mary Peltzer

Rios v. Nicholson, No. 04-0354;
Collins v. Nicholson, No. 04-1840.
Oral argument was held before Chief Judge Greene and Judges Kasold, and Hagel on June 16, 2005.

In December 2004, the claims of Rafael G. Rios and Johnnie M. Collins were consolidated by order of the United States Court of Appeals for Veterans Claims (Court). Oral arguments were held before Judges Green, Kasold, and Hagel in June 2005.

In *Rios* (Vet. App. No. 04-354), the appellant submitted a letter dated in February 2004 asking the Court to advise him on the status of his appeal. The letter was received by the Court on March 1, 2004, and deemed to be a notice of appeal (NOA) filed more than 120 days after the Board of Veterans' Appeals (Board) mailed its October 16, 2003, decision.

The appellant in *Rios* contends to have timely filed a NOA via his representative. To this end, affidavits from the office clerk of his designated organization have been submitted swearing to the mail procedures of the organization and that a NOA was mailed to the Court on the afternoon of November 6, 2003. Also submitted was a photocopy of the original NOA and a photocopy of a mail log used by the organization as a daily register of the kind of correspondence sent, to whom it was sent, the mode of mailing, and the date it was sent. A mailing address is not specified in the mail log but is noted in the NOA dated in November 2003.

In *Collins* (Vet. App. 04-1840), a NOA received by the Court on October 6, 2004, was deemed to have been received more than 120 days after the Board decision issued on January 5, 2004. To establish that a NOA had in fact been sent to the Court on April 30, 2004, the appellant submitted a copy of the NOA dated in April 2004, the cover letter referring to enclosed filing fee, an affidavit of the legal assistant of appellant's legal counsel that a NOA had been forwarded to the Court in April 2004 by her via the United States Postal Service, and a photocopy of a receipt from the Brentwood, Tennessee, post office dated in April 2004.

The ultimate burden of establishing jurisdiction rests with the appellant. Here, NOAs were not received by the Court within 120 days of decisions issued by the Board. Briefing and oral arguments in this matter addressed whether 38 U.S.C. § 7266 required delivery, if proof of postmark could be accomplished by extrinsic evidence, did 38 U.S.C. § 7266 prevent application of the common law mailbox rule, and did equitable tolling preserve either appeal. 38 U.S.C. § 7266, while not requiring postage, sets out the postmark rule but allows for delivery as an alternative. The common law mailbox rule established that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed that it reached its destination at the regular time and was received by the person to whom it was addressed. The doctrine of equitable tolling requires the filing period to be tolled to preserve the notice from tardiness in certain circumstances based on no fault of the veteran.

Arguments and questions by the judges revolved around what "received" meant under 38 U.S.C. § 7266, did the amendment of 38 U.S.C. § 7266 to incorporate the postmark rule from the previous statutory requirement of actual receipt of NOA exclude the mailbox rule, did the presumption of regularity apply to business entities, and what evidentiary requirements were necessary for both the mailbox and postmark rules.
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Andrews Decided – Federal Circuit Holds that Roberson requires the VA to fully and sympathetically develop pro se CUE filings.

By Mary Vavrina

Andrews v. Nicholson, No. 04-7155, (Fed. Cir. Aug. 17, 2005)

The appeal to the CAVC concerned the issue of clear and unmistakable error (CUE) in a July 1983 rating decision, in which the VA regional office (RO) granted service connection for post-traumatic stress disorder (PTSD) and assigned an initial 10 percent disability rating, and in a January 1985 rating decision that increased the rating assigned for PTSD from 10 to 30 percent. In affirming the September 1998 Board decision which did not find CUE, the CAVC rejected the appellant's argument that a *de novo* standard of review is for application. Instead, the CAVC held that the proper standard of review when reviewing Board decisions determining whether CUE had been committed in previous RO decisions is whether that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." CAVC noted that it was not until February 1990 that ROs were required to include in their decisions a summary of the evidence considered, thus silence in final RO decisions before then cannot be taken as showing a failure to consider evidence of record. Moreover, the appellant neither asserted that his CUE motions raised any additional claims not related to the final RO decisions nor that VA failed to give a sympathetic reading to his CUE motions. Finally, CAVC rejected the appellant's argument that its review would necessitate a remand for reconsideration due to intervening amendments made to 38 U.S.C. §§ 7261(a)(4) and (b)(1) (West 2002), as the standard of review in this case is based upon § 7261(a)(3)(A), which was not amended.

On appeal to the Federal Circuit, the appellant argues that CAVC misinterpreted § 7261(a)(1) and wrongfully dismissed his appeal. The appellant contended that a CUE claim adversely decided by the agency should be the subject of a non-differential *de novo* review by CAVC. At oral argument, the appellant argued that pro se appeals should be reviewed more sympathetically. The parties were asked whether a total rating due to individual unemployability (TDIU) claim is implied in every claim, particularly those involving PTSD. The judges noted that the appellant could have raised a TDIU claim on appeal before CAVC but did not, thereby waiving consideration of this issue.

The Court, in a decision written by Judge Dyk, affirmed the CAVC's decision. Initially, the Court held that the CAVC had jurisdiction to consider the Board's decision, stating that the VA's failure to consider a TDIU claim in the manner it did was properly challenged through a CUE motion, which the Board decided. Turning to the standard of review, the Court held that the CAVC's standard of review was appropriate.

Turning to the merits, the Court held that the CAVC's interpretation of *Roberson* was erroneous, and that *Roberson* requires the VA to "fully and sympathetically develop" all pro se pleadings, including pro se CUE motions. The Court did point out that although *Roberson* applies to all pro se CUE motions, it does not apply to pleadings filed by counsel. The Court noted that this requirement did not contravene the Supreme Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000). Although the CAVC misunderstood its holding in Roberson, its error was harmless since appellant Andrews filed its CUE motion through counsel.

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Voracek Decided – Federal Circuit affirms CAVC decision and holds that it has de novo review to consider what qualifies as new and material evidence.

By Laura Eskenazi

Voracek v. Nicholson, No. 05-7060 (Fed. Cir. Aug. 22, 2005)

Oral argument was held on July 7, 2005, before Judges Michel, Lourie, and Prost. The issues on appeal concern: (1) Whether the Federal Circuit has jurisdiction to address an effective date issue, when an underlying key factual finding was affirmed by the CAVC; and, (2) The proper interpretation of "new and material evidence" and "appeal period" as set forth in 38 C.F.R. § 3.156(b).

In a March 1993 rating decision, the appellant was awarded service connection for post-traumatic stress disorder (PTSD), rated as 10 percent disabling. In March 1994, the appellant submitted a statement indicating that he wished to reopen his PTSD claim because his condition had worsened. The regional office treated this statement as a new claim, and in a June 1996 rating decision, assigned a 100 percent rating effective from March 1994. The appellant appealed the effective date of the 100 percent rating to the Board, claiming that the proper effective date should be September 1992, the date of his original claim. Although the Board granted an effective date of March 1993, the Board disagreed with the appellant's argument for a September 1992 effective date, finding that the March 1994 statement was a new claim and not a Notice of Disagreement (NOD) with the March 1993 rating decision. That decision was affirmed by the CAVC.

On appeal to the Federal Circuit, the appellant argued that VA improperly treated the March 1994 statement as a claim for an increased rating, rather than an NOD. The appellant also argued that, under 38 C.F.R. § 3.156(b), the March 1994 statement should have been considered "new and material evidence" received during the "appeal period" (i.e. the one-year period following the March 1993 rating decision), thus warranting an effective date back to the date of the original claim in September 1992. The Secretary essentially argued that the court had no jurisdiction to hear this appeal because the question as to whether the March 1994 statement was a claim for increase or an NOD is a factual matter. Additionally, the Secretary emphasized that in the absence of a timely NOD, the March 1993 rating decision became final, and could only be challenged with a claim to reopen or a claim for clear and unmistakable error. The Secretary argued that by characterizing the March 1994 statement as "new and material evidence," the appellant was attempting to create a third method of collateral attack upon a final rating decision.

The Federal Circuit decided that it had jurisdiction over Voracek's appeal, stating that it had de novo review to review whether evidence was "new and material" under 38 U.S.C. § 3.156, as it was a question of law subject to de novo review. The Court was not persuaded by Voracek's argument that the CAVC misinterpreted § 3.156(b) to require proof other than an appellant's own statement, and that the definition of "new and material" found in § 3.156(a) applied to § 3.156(b). The Court found that Voracek's statement that his condition "worsened" without any supporting evidence submitting during the one-year period failed to meet the definition of materiality set forth in § 3.156(a).

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Bingham decided – Federal Circuit holds that failure to apply all applicable laws in the adjudication of a claim for service connection for hearing loss did not constitute an unadjudicated, pending claim.

By Maureen Young

Thomas L. Bingham v. R. James Nicholson, No. 05-7022 (Fed. Cir. Aug. 29, 2005).

The issue in this case is whether VA 's failure to apply all applicable laws in the adjudication of a claim for service connection for hearing loss constitutes an unadjudicated, pending claim for the purpose of assigning the effective date from the date of filing of the pending claim.

The veteran filed an initial claim for service

connection for hearing loss in 1949, which was adjudicated only on the basis of direct service connection, and it was denied. That decision became final. In 1991 his claim was reopened and again denied by the Agency of Original Jurisdiction (AOJ). In February 2000 the veteran prevailed on appeal to the Board of Veterans' Appeals (Board). The Board granted service connection for total hearing loss, on a presumptive basis. An effective date of April 1991 (date of the initial reopened claim) was assigned by the AOJ. The veteran disagreed with the April 1991 effective date and subsequently appealed the determination to the Board. The appeal was denied and the veteran ensued further appeal to the CAVC.

The veteran argued that he is entitled to an effective date for his service connected hearing loss disability earlier than April 1991 because the Board granted service connection for hearing loss on a presumptive basis in February 2000, and at that time, his 1949 claim for hearing loss was still pending because the VA adjudicated the 1949 claim only on a direct basis and failed to adjudicate the claim on a presumptive basis. The appellant relies on 38 C.F.R. 3.103 and applicable caselaw (See *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)) which requires VA to adjudicate a claim based on all applicable law. The appellant asserts that VA's failure to adjudicate his 1949 claim on a presumptive basis results in an unadjudicated, pending claim.

The CAVC determined that the appellant's service-connected claim for hearing loss was not an unadjudicated, pending claim at the time of the Board's February 2000 determination. It held that a request for service connection based on the incurrence of a disability in service, and a request for service connection for the same disability based on a presumption that the disability was incurred in service, are two theories by which service connection may be proven and do not constitute separate claims upon which an effective date may be based.

The CAVC also addressed the issue of finality in this case. It noted that Sections 7103(a) and 7104(a) of title 38, United States Code makes clear that decisions of the Board are final except in two specified circumstances, neither of which is based on an alleged breach of the obligation to adjudicate a claim based on all applicable law.

The Federal Circuit held that a purported failure to evaluate a service connection claim under "all applicable law" – the various theories of entitlement authorized by statute – was not a legal error precluding final adjudication of a claim for the purposes of establishing an effective date under 38 U.S.C. § 5110(a).

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Thomas Decided – Federal Circuit holds that in willful misconduct determinations, clear and convincing evidence is not required to rebut the presumption of service connection.

By Susan Toth

Thomas v. Nicholson,
No. 05-7019 (Sept. 9, 2005)

In a January 2000 decision, the Board determined that injuries sustained by the appellant were the result of willful misconduct. During a period of active duty for training, the appellant's Platoon Sergeant restrained a serviceman who was running toward the appellant in a threatening manner and ordered the appellant three times to return to his barracks. The appellant contends that his shoes came off as he attempted to leave and the serviceman was thus able to strike him in the mouth. In an August 1993 memorandum, the commander of the appellant's unit concluded that both parties were intoxicated, that the appellant provoked the assailant, and that the appellant disobeyed a direct order. The Board determined that the preponderance of the evidence showed that the appellant disobeyed the Platoon

Sergeant's orders to return to the barracks, with the knowledge that his presence was a trigger for the assailant. In April 2004, the CAVC affirmed the Board's decision finding that there was a plausible basis in the record for the Board's conclusion.

At oral argument, held before Judges Clevenger, Gajarsa, and Prost, the appellant argued that Congress created a statutory presumption of service connection in 38 U.S.C. Sec. 105 that VA has to rebut with clear and convincing evidence. Once VA has rebutted the presumption, the benefit of the doubt doctrine can be applied. Judge Clevenger questioned how the benefit of the doubt doctrine could be applied if VA rebutted the presumption of service connection. The Secretary argued that the provisions of 38 U.S.C. Sec. 5107(b) and 38 C.F.R. Sec. 3.102 provide a general evidentiary standard (preponderance of the evidence) that is applicable to most VA factual determinations, including determinations on the issue of willful misconduct.

In the written briefs, the appellant also argued that the VA hearing officer had a duty to ask the appellant at his personal hearing how much time the appellant had to respond to the three orders from the Platoon Sergeant. The Secretary argues that nothing in the language of the regulation imposes a duty on a VA hearing officer to ask questions concerning every potential issue that might be related to a claim. Furthermore, the evidence of record adequately established the nature of the appellant's conduct and, therefore, the hearing officer did not err by failing to ask a particular question about the timing of the orders.

The Federal Circuit affirmed the CAVC's decision, holding that the preponderance of the evidence was the proper evidentiary standard used to rebut the presumption of service connection set forth in 38 U.S.C. Sec. 105. In making this determination, the Court found that Congress did not specifically set out a higher standard to rebut the presumption of service connection in the case of willful misconduct or the abuse of alcohol.

Concerning the appellant's argument that 38 C.F.R. § 3.103(c)(2) required the hearing officer to question him on any particular theory in support of the case, the Court disagreed, holding that the questioning sought by the appellant was not required by § 3.103(c)(2), inasmuch as the questioning was not needed to "[t]o assure clarity and completeness of the hearing record."

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BAR MEMBERS TO "MEET" JUDGE HAGEL ON SEPTEMBER 21

In the seventh 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 Lawrence Hagel will host an informal meeting with Bar Association members on September 21, 2005. The meeting, which will be held at the Court, will begin at 9:30 a.m. with coffee and pastries, followed by a discussion slated to begin at 10 a.m.

Although registration for this program is completed, please watch your e-mail for information regarding subsequent "Meet the Judge" programs. Bar Association members may participate in person, or, for those living outside the Washington, D.C. area, by telephone conference.

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

News from Committees

Membership Committee

The Membership Committee will be sending out renewal notices in September for the 10/1/05 - 9/30/06 fiscal year. Our current membership total as of now is 250. The annual meeting, which we urge members to attend, will be held on September 29, 2005. The annual meeting is discussed on page 1 of this issue.

Law School Education Committee

The oral argument, to be held in the case of *John R. Ramsey, et al. v. Nicholson*, No. 05-1314, will be held before Chief Judge Greene and Judges Moorman and Schoelen on September 22, 2005, at 10:30 a.m., at the George Washington University Law School. The school's address is 2000 H Street, N.W. (corner of 20th and H), Washington, D.C. If you have any questions regarding this or other activities of the Law School Education Committee, please contact Randy Campbell, Chair, at randy.campbell@mail.va.gov.

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