VETERANS LAW JOURNAL

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W I N T E R 2 0 0 5

ROUND UP OF SIGNIFICANT PENDING CASES
Federal Circuit

VA Challenges CAVC's Rulings on Duty to Notify and Assist

By Karissa Wallin

Morris v. Nicholson, No. 02-0766 (U.S. Vet. App. *Morris v. Principi,* No. 03-7162, on appeal from Mar. 20, 2003) (memorandum decision). Oral argument held before Judges Bryson, Schall, and Dyk on December 6, 2004.

The CAVC vacated and remanded a Board decision that denied entitlement to service connection pursuant to 38 U.S.C. § 1151, for residuals of a retained flexible tip of guide wire in the perinephic fatty tissue. The CAVC found that there was no evidence that the Secretary ever notified the claimant of who was responsible for obtaining the evidence necessary to substantiate his claim. CAVC also found that there was no evidence that the Secretary had granted the claimant a thorough and contemporaneous medical examination under 38 U.S.C. § 5103A(d)(1). The Board's decision was vacated and remanded for further adjudication.

The Federal Circuit is considering the following: (1) whether a medical opinion obtained under 38 U.S.C. § 5103A(d)(1) must be based on a contemporaneous medical examination; (2) whether CAVC may determine de novo whether an examination or opinion is necessary under that provision to decide a claim; and (3) whether VA has a continuing obligation to notify the claimant regarding evidence needed to substantiate his claim.

The Secretary argues that § 5103A does not require VA to provide both a medical examination and a

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FOUR NEW JUDGES JOIN THE CAVC

Help has arrived. With the recent addition of Robert N. Davis, Alan G. Lance, William A. Moorman and Mary J. Schoelen to the bench, the Court of Appeals for Veterans Claims will operate with nine Judges for the first time in its history.

This expansion will be short lived, however. Once the 15-year terms of Chief Judge Donald L. Ivers and Judge Jonathan R. Steinberg expire in August 2005, the Court will revert back to its normal complement of seven Judges. When this occurs, Judge William P. Greene will become Chief Judge, and he will be the only one among the seven remaining Judges with more than two years of experience on the CAVC.

Prior to the time these four new Judges began their active service on the Court, there were several appeals pending before the Court en banc. Section V of the Internal Operating Procedures of the Court addresses, among other things, whether these four new Judges may participate in appeals or motions for review en banc that were pending before the Court en banc at the time these Judges began their active service.

Brief biographies of the four new Judges appear on page ten.

SAVE THE DATE

On Monday, May 2, 2005, the Bar Association will sponsor a full-day program in Washington, D.C. addressing many topics of current interest to veterans law practitioners. Those attending will be eligible for CLE credits. Further details will soon appear on our website: ***www.cavcbar.org***

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

medical opinion, nor could it reasonably be construed to require that a medical opinion must be predicated upon a contemporaneous examination. The Secretary further argues that CAVC erred by deciding the issue of whether a medical examination was "necessary" because, pursuant to 38 U.S.C. § 7261(a) & (c), it is a fact-specific determination, and CAVC may not make factual determinations in the first instance and may reverse the Board's factual findings only if they were clearly erroneous. With regard to the continuous notice obligation, the Secretary asserts that under the plain language of § 5103A, VA is not required to provide notice when there is no additional evidence for either the Secretary or a claimant to seek.

The Appellee contends that the Federal Circuit lacks jurisdiction over the issues raised on appeal, as they require the application of law to facts. Without waiving his jurisdictional argument, the Appellee asserts that VA's interpretation of § 5103A(d)(1) would allow medical examinations only when VA concluded that an examination would be necessary to make a decision, thereby insulating VA's decision from judicial review. Appellee argues that VA had a continuing notice obligation, and, in his case, VA should have informed him of the opinion that they had obtained and that it would be necessary in order to substantiate his claim for compensation for him to obtain a medical opinion to the contrary. Appellee argues that only then the intent and purpose of § 5103A would have been realized.

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

Clear and unmistakable error (CUE)

By Susan Toth

Hauck v. Nicholson, No. 04-7067, on appeal from *Hauck v. Principi*, No. 02-1299 (U.S. Vet. App. Aug. 26, 2003) (single-judge Order). Oral argument held before Judges Lourie, Prost, and Archer, on December 6, 2004.

The appeal to the CAVC concerned the issue of clear and unmistakable error in a March 1971 VA regional office (RO) decision that denied a claim for service connection for loss of vision. In affirming the Board's decision, the CAVC noted that none of the evidence of record at the time of the RO's 1971 decision undebatably established a nexus between the appellant's service-connected heart disease and his loss of vision.

On appeal to the Federal Circuit, the appellant argues that (1) the agency failed to provide the reason for its denial in the 1971 notice of the decision as required by 38 C.F.R. §. 3.103 (1971); (2) the Board impermissibly considered a rationale for the 1971 denial that was not of record in the 1971 decision; and (3) the reasonable doubt doctrine required the agency to grant service connection in 1971 as a matter of law because there was favorable evidence of record and no evidence of record that impeached or contradicted that evidence.

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May equitable estoppel be applied to toll the one-year abandonment provision of 38 C.F.R. § 3.158?

By Stephen Eckerman

Jackson v. Nicholson, No. 04-7116, on appeal from *Jackson v. Principi*, No. 01-1975 (U.S. Vet. App. Apr. 16, 2004) (single-judge order). Oral argument held in Los Angeles, California, on December 7, 2004.

In *Jackson*, the CAVC denied the appellant's claim of entitlement to an earlier effective date for service connection for schizophrenia. Specifically, the appellant argued that a letter he submitted in November 1991 constituted an informal claim, and that this claim remained unadjudicated until the RO's May 1999 decision granting service connection because VA failed to forward a formal application to him pursuant to 38 C.F.R. § 3.155(a). The appellant further argued that equitable estoppel should apply to toll the one-year deadline in 38 C.F.R. § 3.158, because a December 1991 letter from the RO failed to notify him that by operation of law his claim would be considered abandoned, and thereby denied, if new

and material evidence were not submitted within a one-year period.

The CAVC rejected the appellant's argument, holding that VA was not required to forward a formal application to the appellant. The CAVC noted that the appellant had previously filed a formal claim for service connection for a nervous condition in September 1981 which had been denied, and that 38 C.F.R. 3.155(a) did not apply because the appellant's November 1991 letter was therefore a claim to reopen and not an original claim. The CAVC further stated that it would not address the appellant's argument that VA should have notified him that his claim would be considered abandoned and would be denied if he failed to submit new and material evidence within one year. The CAVC explained that this argument had been raised for the first time in his reply brief.

The appellant argues that correspondence sent to him in December 1991 was misleading because, as a lay person, he was unfairly lulled into thinking that there was no existing claim, and that he was not notified of the adverse consequences for failing to submit timely evidence. This correspondence had been sent to the appellant in response to his November 1991 letter. It stated that the appellant's claim had been denied in October 1981, and was final, and that he could reopen his claim at any time by submitting new and material evidence, and that upon receipt of such evidence his claim will be reconsidered.

The Secretary argues that the Federal Circuit does not have jurisdiction because the appellant is challenging the application of the legal standard for estoppel to the facts of the case. The Secretary further argues that the elements of equitable estoppel have not been met, to include the argument that VA was not required to inform the appellant that waiting to reopen his claim might have a negative impact on an effective date. Finally, it is argued that equitable estoppel may not be used to award retroactive benefits that are not authorized pursuant to statute or regulation.

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Equitable tolling of mailbox rule

By Maureen Young

Mapu v. Nicholson, No. 04-7088, on appeal from *Mapu v. Principi*, No. 01-2028 (U.S. Vet. App. Dec. 9, 2003) (single-judge order). Oral argument held before Senior Judge Archer and Judges Rainer and Bryson on December 7, 2004.

In *Mapu*, the appellant's Notice of Appeal (NOA) of a decision by the Board was received at the CAVC on the 121st day after the Board's decision was mailed to the appellant. It was one day late. An NOA, inter alia, is considered received by the CAVC on the date of the United States Postal Service (USPS) postmark stamped on the cover in which the notice is posted, if properly addressed and mailed. See 38 U.S.C. §7266(c)(1), (2). Mr. Mapu averred that he attempted to use the overnight service of the USPS, but was advised that overnight service was not available to the Washington, D.C. area because of the anthrax crisis, so he resorted to and sent his NOA to the CAVC via FedEx.

Equitable tolling is a rule of law, which allows courts some latitude in excusing missed filing deadlines. The U.S. Supreme Court in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ruled that equitable tolling may be available against the United States where the claimant actively pursued judicial remedies by filing a defective pleading during the statutory period or where a complainant had been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.

The CAVC noted that neither of the prongs of *Irwin* was applicable in Mr. Mapu's case and it distinguished other caselaw concerning equitable tolling. It further noted that because the cover in which Mr. Mapu's NOA was mailed did not bear a USPS postmark, the postmark rule in section 7266(c) may not be used to establish when it was received by the CAVC. The CAVC observed that Congress has adopted a postmark rule only as to a postmark affixed by the USPS. See *Lariosa v. Principi* 16 Vet. App. 323, 328-29 (2002).

During oral argument at the Federal Circuit, it was difficult to gauge the direction the Court will take, but, if it applies the doctrine of equitable tolling, it excuses Mr. Mapu's missed filing deadline, it may set a

precedent allowing an NOA received by the CAVC in a cover bearing the date a courier, other than USPS, received the NOA and deem that date to be the "postmark."
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Clear and unmistakable error (CUE) and VA's duty to sympathetically read pleadings

By Laura Eskenazi

Henderson v. Nicholson, No. 04-7112, on appeal from *Henderson v. Principi*, No. 02-0907 (U.S. Vet. App. Feb. 2, 2004) (memorandum decision). Oral argument was held before Judges Mayer, Newman, and Clevenger, sitting in Los Angeles, California, on December 7, 2004.

The appellant alleged that VA committed clear and unmistakable error (CUE) by failing to read his pleadings to include a claim for service connection for residuals of a third-degree burn. In his brief, the appellant sought service connection for third-degree burn residuals, and requested that his other claims then be readjudicated in light of that effective date. In the reply brief and at oral argument, the Secretary argued that the Court was devoid of jurisdiction, as the appellant was challenging factual matters. The Secretary also argued that none of the alleged errors were outcome determinative, as is required for a valid CUE claim. There were very few questions from the bench.
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SIGNIFICANT PENDING CASES BEFORE THE CAVC

Is VA Required Under the VCAA to Obtain Quality-Assurance Records in Connection with a Claim for Benefits Under 38 U.S.C. § 1151?

By Mary Vavrina

***Loving v. Nicholson*, U. S. Vet. App. No. 02-0885.** Oral argument held before Judges Ivers, Steinberg, and Hagel on January 13, 2005.

In *Loving*, a CAVC panel is considering whether: (1) VA's failure to obtain all VA medical treatment or examination records constitutes a violation of the Secretary's duty to assist under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-114 Stat. 2096 (2000); (2) VA's failure to ask for, and provide, quality-assurance records to the appellant and the VA's Adjudication Procedure Manual (M-21-1) provisions instructing adjudicators not to request such records are contrary to law; and (3) the Board of Veterans' Appeals (Board) committed error by failing to make a finding of fact as to whether the appellant's additional disability was the result of "an event not reasonably foreseeable."

Under certain circumstances, compensation shall be awarded under 38 U.S.C. § 1151 for a qualifying additional disability of a veteran in the same manner as if the disability was service connected. To constitute a qualifying additional disability, under the circumstances in this case, the disability: (1) must not be the result of the veteran's willful misconduct, and (2) must be caused by hospital care, medical or surgical treatment, or examination furnished to the veteran by VA and the proximate cause of the disability must be due either (a) to carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing the hospital care, medical or surgical treatment, or examination or (b) to an event that was not reasonably foreseeable. 38 U.S.C. § 1151(a)(1) (West 2002). In determining whether such disability resulted from injury suffered as a result of VA care, the evidence must show actual causation rather than coincidental occurrence. 38 C.F.R. § 3.358(c)(1) (2004). Under 38 U.S.C. § 5705 (a) records and documents created by the Department

as part of a medical quality-assurance program are confidential and privileged and may not be disclosed to any persons or entity except as provided in subsection (b). Subsection (b)(5) provides that medical quality-assurance records may be disclosed "within the Department (including contractors and consultants of the Department)." M-21-2 instructs VA adjudicators that quality-assurance records are confidential under 38 U.S.C. § 5705 and cannot be used in adjudicating claims under section 1151.

In *Loving*, the Board denied the veteran's claim for entitlement to 38 U.S.C. § 1151 benefits for a right knee disability that the appellant claims resulted from VA outpatient medical treatment in July 1999. In particular, the veteran claimed that his right knee disability was related to injuries sustained when a ceiling grate fell onto his knee while he was being examined during a routine examination at a VA outpatient clinic. The Board determined that an intervening event (that is, the falling ceiling grate), not VA hospital care, medical or surgical treatment, VA examination, nor the provision of VA training and rehabilitation services, caused the veteran's right knee injury; thus, barring the award of benefits under section 1151. See *Sweitzer v. Brown*, 5 Vet. App. 503, 505 (1993).

The appellant argues that it is possible that there might be some outstanding VA medical records (e.g., VA quality-assurance records) and, as such, it is VA's duty to obtain them under the VCAA. The Secretary counters that, as there is no evidence to suggest that the falling ceiling grate was in any way associated with the actual provision of outpatient medical care and examination by VA, any additional treatment record, if existent, would not alter the scenario, which is uncontested by the appellant. The appellant contends that, because he was within the "control and authority" of VA, "VA was responsible for taking all reasonable precautionary measures to assure the appellant's safety" and thus he deems anything that might happen after the purely ministerial act of the veteran signing in would be covered under 38 U.S.C. § 1151 and as such VA should provide the appellant with VA quality-assurance records. The Secretary maintains that section 1151 encompasses medical care and examination, not independent actions merely coincidental with such treatment or examination, and that the more appropriate legal recourse for the appellant would be a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346, not a claim under section 1151. Finally, the veteran argues that the Board committed error in failing to make a finding of fact as to whether the veteran's additional disability is the result of an event not reasonably foreseeable. But the Secretary observes that section 1151 encompass only events arising from the treatment or examination itself, not from events unrelated to treatment or examination. *Sweitzer*, 5 Vet. App. at 506.

The Court's decision in this case could have far reaching ramifications with regard to compliance with the duty-to-assist provisions of the VCAA and what constitutes medical treatment/examination in section 1151 cases. In a decision in this case, the Court could spell out the meaning of the statutory language -- "an event not reasonably foreseeable" -- which has been applied to section 1151 cases filed since October 1997.
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Does the CAVC Have Jurisdiction to Review a BVA Denial of a Motion to Vacate?

By Mary Vavrina

***Harms v. Nicholson*, U. S. Vet. App. No. 02-0885.**
Oral argument was held before Judges Steinberg, Hagel, and Greene, on Monday, December 6, 2004.

The issue on appeal is whether the Court of Appeals for Veterans Claims (CAVC) has jurisdiction to review a decision by the Board of Veterans' Appeals (Board or BVA) to deny a motion filed under 38 C.F.R. § 20.904 to vacate a prior BVA decision.

The veteran did not appeal the June 2002 BVA denial of his claim for benefits within the statutory 120-day appeal period. However, on May 9, 2003, the appellant filed a motion with the Board to vacate the June 2002 decision, under 38 C.F.R. § 20.904, on the grounds that there was a violation of due process in the proceedings leading to the 2002 denial of benefits. On October 30, 2003, the Deputy Vice Chairman of the Board denied the motion to vacate; and the veteran sought review in the CAVC within 120 days of the October 2003 denial. In January 2004, CAVC

directed the appellant to explain why the appeal should not be dismissed.

The appellant argues that the October 2003 denial of the motion to vacate the June 2003 BVA decision is not a denial by the Chairman of reconsideration under 38 U.S.C. § 7103 and 30 C.F.R. § 20.1000 and, as such, the decision in *Mayer v. Brown*, 37 F.3d 618 (Fed. Cir. 1994) (holding that an action by the Chairman is not a decision of the Board), does not apply. Instead, the appellant contends that the October 2003 denial is a BVA decision within the jurisdiction of the Board under 38 U.S.C. § 7104 and constitutes a final decision of the Board and not an exercise of administrative control and supervision over the Board by the Chairman. Thus, the question presented is whether a denial of a motion to vacate brought under 38 C.F.R. § 20.904 is a final decision of the Board, which implicates CAVC's jurisdiction to review under 38 U.S.C. § 7252(a). The appellant argues that it is. The appellant also contends that *Browne v. Principi*, 16 Vet. App. 278 (2002), does not apply because the context in that case revolved around determining the timeliness of a notice of appeal.

The Secretary maintains that the October 2003 denial of the motion to vacate is neither a final decision subject to CAVC's jurisdiction nor a denial of reconsideration under 30 C.F.R. § 20.1000. Instead, a motion to vacate under 38 C.F.R. § 20.904 is a collateral attack on a final BVA decision, which the Board may grant based on the limited grounds of denial of due process or the use of fraudulent evidence to obtain an award of benefits. Because a ruling on a motion to vacate does not address the merits of an underlying claim, it does not disturb the finality of the underlying BVA decision and therefore is not subject to CAVC's review under 38 U.S.C. § 7252(a). As such the holding in *Mayer* applies here, because ruling on a motion to vacate is not a final adverse decision on a claim subject to review by CAVC. A review of a motion to vacate, like a review of a motion to reconsider, is a review of the same record that was before the agency when it rendered its original decision and, thus, a denial of either motion is not itself reviewable as it merely denies rehearing of the prior decision. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 280 (1987). In *Browne*, CAVC noted that VA regulations distinguish between vacatur and reconsideration of appellate decisions only with respect to identifying what constitutes a successful petition for either. Unlike *Browne*, the motion in this instance was not filed within the statutory 120-day period following issuance of the Board decision and thus, the Secretary maintains denial of the motion is not subject to review by CAVC.

Both parties agree that 38 U.S.C. § 7102(b) prohibits the Chairman from acting on a motion to vacate on his own; he may participate only as a member of a panel. And both parties point out that the Deputy Vice Chairman, who signed the October 2003 denial, was not acting on behalf of the Chairman; rather he was acting in his capacity as a Member of the Board. The Secretary concedes that there is no express authority to delegate to the Deputy Vice Chairman a motion to vacate a decision decided by a different Veterans Law Judge (VLJ). But BVA Directive 8430 authorizes the Chairman to assign a motion to a different VLJ, where a VLJ is unable to serve or to facilitate timely review because of the absence of, or existing workload of, the VLJ who rendered the original decision.

In an amici curiae brief, the National Organization of Veterans Advocates and the National Veterans Legal Services Program argue that a decision denying a motion to vacate is a decision of the Board within the meaning of 38 U.S.C. § 7252(a) and therefore subject to review by CAVC. They also maintain that the right to judicial review is favored and there is no clear evidence that Congress intended to forbid review of the October 2003 decision in issue.

The oral argument focused on the statutory basis for motions to vacate filed under 38 C.F.R. § 20.904, whether the motion in question was a valid motion for vacatur, where the authority for the Deputy Vice Chairman to act on such motions arises, and whether motions and proceedings should be treated differently for purposes of appellate review.

A decision that the CAVC has jurisdiction to review a Board denial of a motion to vacate a prior Board decision could have far-ranging impacts as it could permit the CAVC to review the finality of a Board decision regardless of whether a notice of appeal is filed within 120 days of the BVA decision.

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May a Judicial Interpretation of a Statute Be Retroactively Applied so as to Form the Basis for Clear and Unmistakable Error?

By Kathleen Gallagher

***Joyce v. Nicholson*, No. 03-0059.** Oral argument was held before Judges Steinberg, Greene, and Hagel on October 6, 2004.

On appeal in *Joyce* is a September 2002 decision in which the BVA concluded that a final VA regional office (RO) decision issued in November 1955, which had denied service connection for a duodenal ulcer because the condition was not shown to be aggravated by service, did not contain clear and unmistakable error (CUE).

In June 2004, the CAVC ordered the parties to submit supplemental briefing on the relevance, if any, of the following to this appeal: (1) the holding of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004); (2) the applicability of the Court's holding in *Jordan v. Principi*, 17 Vet. App. 261 (2003); and (3) the 1944 VA Solicitor's opinion (72 Op. So. 298 (Feb. 7, 1944)) discussed in VAOPGCPREC 03-2003 at para. 8 (July 16, 2003).

In response to the Court's order, a principal issue detailed in the parties' briefs and argued before the Court during the October 2004 oral argument concerned the retroactive application of judicial interpretation of a statute. Specifically, this case concerned whether the interpretation, affirmed in *Wagner*, of 38 U.S.C. § 1111 as requiring, for the purpose of rebutting the presumption of soundness, that VA show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service, may be applied retroactively so that it could be concluded that the RO, in 1955, should have applied that interpretation of the antecedent version of section 1111 and that its failure to do so was CUE. Citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994), the appellant contended that, consistent with Supreme Court jurisprudence regarding the retroactive application of statutory interpretation, "judicial construction of a statute is an authoritative statement of what the statute meant before, as well as after, the decision of the case giving rise to that construction" and that such a construction is the court's "understanding of what the statute has meant continuously since the date when it became law." Appellant argued that, consequently, the holding in *Wagner* must be applied by the Court retroactively, because the Federal Circuit's interpretation of section 1111 was valid from the date of its enactment by Congress. To the contrary, the appellee argued in his supplemental brief that, because *Wagner* was not decided in the context of a claim of CUE in an earlier decision, it had no bearing on the case at hand. Appellee noted that, although the decision of the Federal Circuit supported VA's analysis of how the statute is best interpreted, VA did not have the benefit of that interpretation in 1955.

At oral argument in October 2004, the Court noted that in two of its decisions, *Smith (Rose) v. West*, 11 Vet. App. 134, 137 (1998), and *Berger v. Brown*, 10 Vet. App. 166, 170 (1997), it held that a change in interpretation of a law subsequent to a decision being assailed for CUE could not be the law that existed at the time of that decision and noted that 38 C.F.R. § 20.1403(e) provides essentially the same thing with regard to allegations of CUE in a Board decision. The appellant argued that, because the Federal Circuit had ruled that section 1111 was plain on its face, the holding in *Wagner* was not a change in interpretation of the statute but rather an articulation of what the law had always said and had always been since its enactment. The appellee argued that, even though the Federal Circuit ruled that the statute was plain on its face, there had been some ambiguities regarding its meaning in the past as shown by the VA's interpretation of it in a regulation, VA Regulations and Procedures § 1063, which was issued subsequent to the VA Solicitor's Opinion in 1944 and which was at variance with the Solicitor's Opinion. The appellee indicated that the RO in 1955 would have properly followed the interpretation of the statute as set forth in such a regulation.

At oral argument, the Court observed that in a unpublished, nonprecedential decision in *Patrick v. Principi*, No 03-7003 (Fed. Cir. July 2, 2004), the Federal Circuit had remanded where the Court had

affirmed a Board decision that determined that a 1986 Board decision did not contain CUE because the Federal Circuit found that the Court had applied an incorrect legal standard in determining that the presumption of soundness had been rebutted by finding only that clear and unmistakable evidence showed that the disease preexisted service and not also finding that clear and unmistakable evidence showed that the disease was not aggravated by service. The Court noted that it was curious that the Federal Circuit would remand the matter in *Patrick* for application of the *Wagner* interpretation of section 1111 if that interpretation did not apply in a CUE context.
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CAVC Considers Notice and Downstream Elements

By Mary Peltzer

Hartman v. Nicholson, No. 02-1506, and ***Dingess v. Principi***, No. 01-1917. En banc oral argument held on December 2, 2004.

These are two consolidated cases concerning the notice provisions of 38 U.S.C.A. § 5103(a) and application to "downstream" elements of a claim raised for the first time in the claimant's notice of disagreement. In *Hartman*, the "downstream element" was the effective date assigned in a decision granting service connection, and in *Dingess*, the "downstream element" was the disability rating assigned in a decision granting service connection.

Both *Hartmen* and *Dingess* had been remanded from the Federal Circuit for further proceedings consistent with *Conway v. Principi*, 353 F.3d 1369 (Fed. Cir. 2004). It is therefore no surprise that many questions raised by the en banc Court at oral argument involved the rule of prejudicial error. Questions by the judges also elicited responses regarding what constitutes a "claim" for the purpose of pre-adjudication notice; should 38 U.S.C.A. § 5103 and 38 U.S.C.A. § 7105 be read together or separately; the level of prejudice suffered by a claimant in the downstream scenario; and which party carries the burden regarding prejudicial analysis.
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Counsel for appellee: David L. Quinn, Esq. (202-639-4817)

Timely filing of Notice of Appeal (NOA) and the mailbox rule

By Jonathan Kramer

Rios v. Nicholson, No. 04-0354. Pending before panel consisting of Judges Greene, Kasold, and Hagel. Oral argument to be announced at a later date.

The issue on appeal concerns whether the Appellant timely filed a Notice of Appeal (NOA) with the CAVC in accordance with 38 U.S.C.A. § 7266(c)(2), which provides a statutory mailbox rule that deems an NOA to be received by the Court "on the date of the United States Postal Service postmark stamped on the cover in which the notice was posted…"

On March 4, 2004, the CAVC received from the Appellant a letter dated February 25 and postmarked March 1, 2004, stating that he had submitted to the CAVC on November 6, 2003, a Notice of Disagreement (NOD) to an October 16, 2003, Board decision. The CAVC had no record of receiving the November 6 NOD, but construed the February letter to be a NOA from the October 16 Board decision; it was filed, effective the date it was postmarked, March 1, 2004. Because this letter was received and filed by the CAVC more than 120 days after the Board mailed its decision, the CAVC ordered the appellant to show cause why his appeal should not be dismissed for lack of jurisdiction.

In response, the Appellant submitted a copy of the November 6 NOD, a copy of a "Page of Registry of Sent Correspondence," maintained by the Puerto Rico Public Advocate for Veterans Affairs (PRPAVA), and two affidavits from an employee of the PRPAVA who is responsible for logging and handling the mail. The employee attests that she personally mailed the Appellant's NOD by placing it in the U.S. Mail on November 6, 2003, and that she logged-in the mailing of this document on the registry. The employee further states that a copy was also sent to the VA Office

of General Counsel. The registry reflects that the mailings to the CAVC and VA Office of General Counsel were logged in.

By Order dated October 28, 2004, Judges Greene, Kasold, and Hagel ordered supplemental briefing on the applicability of 38 U.S.C.A. § 7266(c)(2) and that the Clerk of the Court set the matter for oral argument, in consideration the fact that the original NOA and its mailing cover may have been lost in the mail, and to determine whether the statutory provision supercedes or otherwise precludes the applicability of the common-law mailbox rule under which a properly directed letter mailed through the post office creates the presumption that it is received by the addressee.

While the Appellant is pro se, Robert V. Chisolm, Esq., has entered his appearance on behalf of the Appellant for the purpose of filing an Amicus Curiae brief only.

Representative for the Appellee, Gabrielle L. Clemons (202) 639-4812

Hatch Decided – CAVC Holds That VA General Counsel Erroneously Rejected Hix II in Precedential Opinion

By Kerry Loring

***Hatch v. Principi*, U.S. Vet.App. No. 03-1282. (Dec. 2, 2004)**

The BVA denied Appellant's claim for enhanced DIC as a matter of law because the veteran was service-connected for only PTSD, effective from June 6, 1994, and was assigned a 100 percent rating effective only from July 27, 1998. The veteran died on December 23, 2001, and the Board therefore found that he did not meet requisite 8-year continuous period requirement, nor did the evidence establish that he was hypothetically entitled to a total rating for the 8 years preceding his death.

Appellant argued that she was entitled to enhanced DIC benefits, and that the Board committed error in not considering evidence she submitted indicating that her husband had been entitled to a 100 percent rating 8 years prior to his death, or, that he was hypothetically entitled to a total disability rating. She asserted that the Board did not correctly apply the holding in *Hix v. Gober*, 225 F.3d 1377 (Fed.Cir. 2000), and that the "entitled to receive" provision of § 1311(a)(2) requires the Board to include the new evidence she presented in its de novo determination of the veteran's disability. See Hix, 225 F.3d at 1380-81.

The Secretary argued that the Board's decision should be affirmed because Appellant's claim for enhanced DIC was barred as a matter of law. The Secretary argued that it was undisputed that the veteran did not meet the 8-year requirement, and that VA did not recognize hypothetical entitlement either when Appellant filed her claim, or when the Board issued its decision in May 2003. The Secretary asserted that the hypothetical entitlement concept was created by the Court in *Hix*, and then overruled in *Nat'l Org. of Veterans' Advocates, Inc., v. Sec'y of Veterans Affairs*, 314 F.3d 1327 (Fed.Cir. 2003) (*NOVA II*). The Secretary interpreted the holding of *NOVA II* to allow VA to bar hypothetical entitlement claims when no claim had been filed during the veteran's lifetime, or the claim had been denied and was not subject to reopening.

In its December 2, 2004 precedential decision, the CAVC noted that, during oral argument, counsel for both parties agreed that Appellant's claim was not an attempt to reopen her husband's claim; rather, it was an independent claim of her own, and thus *NOVA II* didn't apply. The Court agreed with the parties that, for the reason they submitted, the proceedings were not subject to a *NOVA II* stay.

The Court went on to find that the VA General Counsel Precedential Opinion (VAOGCPREC 9-2000) (Dec. 8, 2000), which the Board relied upon in denying Appellant's claim, was invalid and without force or effect. In that regard, the Court stated that the VA General Counsel erroneously rejected the holding of *Hix v. Gober*, 225 F.3d 1377 (Fed. Cir. 2000) (*Hix II*) as dictum. The Court held that "the requirement of Hix II that VA adjudicate a claim for enhanced DIC based on a review of the evidence of record, 'including any new evidence presented by the surviving spouse,' cannot be dictum." *Hatch v. Principi*, __ Vet.App. __, No. 03-1282, slip op. at 7 (Dec. 2, 2004).

The Court further noted that although the Board is bound by the precedent opinions of the VA General Counsel, the Court is not, and reviews the Secretary's interpretation of law de novo. See *Butts v. Brown*, 5

Vet.App. 532, 539 (1993) (en banc). Thus, since the precedent opinion was rendered invalid, the Board's decision in reliance upon it could not stand. However, the Court refused to reverse the Board and award enhanced DIC benefits, but rather determined that remand was the appropriate remedy. The Court held that the Secretary had not addressed the "quintessential question of fact" whether the evidence contained in the newly submitted medical report was sufficient to establish hypothetical entitlement to a 100% service-connected disability rating for the entirety of the eight years immediately preceding his death. The Court found that this was a factual determination that must be made by the Board, and remanded the case for readjudication consistent with its opinion.

Counsel for Appellant: Kenneth M. Carpenter, Esq. (785-357-5251)
Counsel for Appellee: Erika Liem, Esq. (202-639-4867) ■

PVA SECOND ANNUAL LEGAL WRITING COMPETITION

The Paralyzed Veterans of America (PVA) has announced its second annual legal writing competition. 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 a Veteran be Entitled to Retain a Lawyer for Adjudication of Claims before 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 March 1, 2005. Winners will be announced during PVA Awareness Week, April 10-16, 2005. 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 should be addressed to:

Office of General Counsel,
Paralyzed Veterans of America,
801 Eighteenth St., NW,
Washington, DC 20006

Questions about the contest should be directed by email to GeneralCounsel@pva.org or by phone to (202) 416-7793. ■

FOUR NEW JUDGES *(continued from front page)*

JUDGE ROBERT N. DAVIS

Judge Davis was appointed a Judge of the United States Court of Appeals for Veterans Claims in December 2004. Prior to his appointment, Judge Davis served as Professor of Law at Stetson University College of Law in Gulfport, Florida. Earlier in his career, he served as Special Assistant to the U.S. Attorney for the District of Columbia and as General Attorney for the U.S. Department of Education. Mr. Davis currently holds a commission in the United States Navy Reserve Intelligence Program. He is a graduate of the University of Hartford and earned his law degree from the Georgetown University Law Center.

JUDGE ALAN G. LANCE

Judge Lance was appointed a Judge of the United States Court of Appeals for Veterans Claims in December 2004. Prior to his appointment, Judge Lance served as the Attorney General of Idaho from 1994 until January 2003. He was a member of the Idaho House of Representatives from 1991 to 1994, and he was an attorney in private practice from 1978 to 1994. Mr. Lance was also the National Commander of The American Legion from 1999 to 2000. He is a former member of the United States Army and a graduate of South Dakota State University and University of Toledo College of Law.

JUDGE WILLIAM A. MOORMAN

Judge Moorman was appointed a Judge of the United States Court of Appeals for Veterans Claims in December 2004. Prior to his appointment, Judge Moorman served as Acting Assistant Secretary for Management in the Department of Veterans Affairs (VA), to which he was appointed on August 5, 2004. In this position, he was responsible for planning, managing, coordinating and overseeing all financial, budgetary, acquisition and logistics policies, systems and operations for the federal government's second largest department.

Judge Moorman previously served as Assistant to the Secretary for Regulation Policy and Management since March 2003. He was responsible for oversight and coordination of all VA regulations. Under his guidance, the office initiated an effort to rewrite the department's compensation and pension regulations with the goal of making them easier to read and understand.

Prior to joining VA in July 2002, Judge Moorman served as the Judge Advocate General of the U.S. Air Force, responsible for 1,400 military and civilian attorneys and all Air Force legal matters. Judge Moorman began his military career in 1971 as a Second Lieutenant. He served as the first staff judge advocate of the U.S. Strategic Command and became the first judge advocate to serve as the Airborne Emergency Operations Officer in charge of the national military airborne command post.

Judge Moorman is a graduate of the University of Illinois College of Law, the National War College and the Air Command and Staff College. He is the recipient of the Albert M. Kuhfeld and Stuart R. Reichart Awards as an outstanding junior and senior lawyer in the Air Force. He retired from the Air Force in April 2002 as a Major General.

Judge Moorman's military decorations include the Distinguished Service Medal with oak leaf cluster, the Legion of Merit with oak leaf cluster and the Defense Meritorious Service Medal.

JUDGE MARY J. SCHOELEN

Judge Schoelen was appointed a Judge of the United States Court of Appeals for Veterans Claims in December 2004. Prior to her appointment, Judge Schoelen served as Minority General Counsel and Deputy Staff Director for Benefits Programs for the Committee on Veterans' Affairs of the United States Senate.

Judge Schoelen was born in Rota, Spain, where her father, a career Naval officer, was stationed. She earned a Bachelor of Arts degree from the University of California at Irvine in 1990 and received a J.D. from the George Washington University Law School in 1993. During law school, she worked as a law clerk for the National Veterans Legal Services Program, representing appellants at the Board of Veterans' Appeals. In 1994, she interned with the U.S. Senate Committee on Veterans' Affairs, working on various issues pertaining to adjudication of veterans benefits claims. In November 1994, she began working as a staff attorney for Vietnam Veterans of America's Veterans Benefits Program.

Judge Schoelen rejoined the U.S. Senate Committee on Veterans' Affairs staff in March 1997, where she was responsible for development and implementation of policy pertaining to veterans benefits, as well as oversight of the implementation of that policy. She served as Minority Counsel from March 1997 to March 2001, as Minority General Counsel from March 2001 to June 2001, as Deputy Staff Director for Benefits Programs and General Counsel from June 2001 to January 2003, and Deputy Staff Director for Benefits Programs and General Counsel from January 2003 to December 2004 under Chairman and Ranking Member John D. Rockefeller IV and Ranking Member Bob Graham. ■

BAR MEMBERS TO "MEET" JUDGE STEINBERG IN FEBRUARY

In the fourth 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 Jonathan R. Steinberg will host an informal meeting with Bar Association members at 1:00 pm on February 23, 2005. The meeting will take place at the Court and Bar Association members can either participate in person, or, if they reside outside the Washington, D.C. area, by telephone conference.

Since space is limited, members must register by e-mailing sally_ray@nvlsp.org (there's an underscore between sally and ray) or calling (202) 265-8305, extension #112, and leaving your name, e-mail address and telephone number and whether you wish to participate in person or by telephone. Members who registered for a previous Meet the Judge program and were not selected due to oversubscription should let us know that you were bumped.

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

News from Committees

Law School Education Committee:

The Law School Education Committee is contacting law schools inside and outside the Washington, D.C. area, so as to interest these schools in inviting the Court to hold oral argument on their campuses. So far, the committee has contacted George Mason University, George Washington University , University of the District of Columbia, Duquesne University, the University of Virginia, the University of Florida, and Touro College. The committee is also exploring with the Court the idea of adopting procedures to permit law students to participate in oral arguments. For more information, contact randy.campbell@mail.va.gov.

Membership Committee:

The Membership Committee reports that currently there are 225 members of the Bar Association.

Publications Committee:

The Publications Committee is committed to producing quarterly issues of this newsletter, and beginning with this issue is mailing the newsletter as well as sending it to members electronically. 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, the Subcommittee on the Bar Association's Website is presently working on improvements to the Association's website. Any questions or suggestions may be directed to Marjorie Auer at mauer@mail.va.gov.

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