VETERANS LAW JOURNAL

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

FALL 2006

ROUND UP OF RECENT CAVC DECISIONS

BLUE WATER VETERANS AND APPLICATION OF PRESUMPTION DUE TO EXPOSURE TO HERBICIDES

By Mary Vavrina

Haas v. Nicholson, No. 04-491 (U.S. Vet. App. Aug. 16, 2006).

On August 16, 2006, the Court issued an opinion in which it reversed a Board decision which denied service connection for diabetes mellitus, with peripheral neuropathy, nephropathy, and retinopathy due to exposure to herbicides. The Board determined that, although the appellant had served in the waters off the shore of the Republic of Vietnam, such service did not warrant application of the presumption of herbicide exposure because the appellant never set foot on land in that country.

In reversing the Board's decision, the Court held that a VA manual provision, VA Adjudication Procedure Manual M21-1, Part III, ¶ 4.08(k)(1)-(2) (Nov. 1991), created a presumption of herbicide exposure based on receipt of the Vietnam Service Medal (VSM) for purposes of service connection for diseases associated with herbicide exposure. In its

continued on next page

INSIDE THIS ISSUE

Significant Pending Cases 3

Q & A Forum 5

2006 ANNUAL MEETING

On September 29, 2006, the annual membership meeting was held at which Glenda Herl assumed the helm of the association as president. Also pictured: Jennifer Dowd, outgoing association president.

MEET THE CHAIRMAN

Chairman James P. Terry of the Board of Veterans' Appeals spoke to bar association members on August 23, 2006, about how the Board is structured, how appeals are processed, and the goals of the Board.

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

holding, the Court found the manual provision to be a substantive rule and invalidated a subsequent February 2002 amendment to that provision because VA did not comply with the notice and comment requirements of the Administrative Procedures Act (APA) regarding the promulgation and rescission of substantive rules. The CAVC also found that neither the statute nor the regulation governing herbicide exposure claims precludes application of the presumption of herbicide exposure to persons who served aboard ship in close proximity to the Republic of Vietnam. Thus, for the purpose of applying the presumption of exposure to herbicides under 38 C.F.R. § 3.307(a)(6)(iii), the CAVC in *Haas* held that "service in the Republic of Vietnam" will, in the absence of contradictory evidence, be presumed based upon the veteran's receipt of a VSM, without any additional proof required that a veteran who served in waters offshore of the Republic of Vietnam actually set foot on land.

VA's Office of the General Counsel (OGC) is preparing a recommendation that the Department of Justice (DOJ) appeal *Haas* to the U.S. Court of Appeals for the Federal Circuit. On September 21, 2006, because of the potentially large number of cases on appeal that may be affected by *Haas*, the Secretary issued a memorandum directing the Board to stay action on and refrain from remanding all service-connection claims based on exposure to herbicides in which the only evidence of exposure is the receipt of the VSM or service on a vessel off the shore of Vietnam.

On September 28, NVLSP filed on behalf of The American Legion and veteran Nicholas Ribaudo a petition for extraordinary relief in the nature of a writ of mandamus. The writ petition, No. 06-2762, asserts the Secretary's/Chairman's memorandum ordering a stay of *Haas*-like case, since it was unilateral (that is, the VA did not seek a stay from the Court) and therefore violates the Court's decision in *Ramsey v. Nicholson*, 20 Vet.App. 16 (2006). The Court (Judge Hagel) issued an order on October 12, ordering the Secretary to "explain (1) why the relief requested in the petition should not be granted and (2) why, given the clear holding in *Ramsey*, the procedure requiring advanced judicial sanction mandated therein was not followed when the Board Chairman took unilateral action to stay cases that might be affected by this Court's decision in Haas."

DETERMINING WHEN VA HAS A DUTY TO PROVIDE A MEDICAL EXAMINATION

By Paul Eaglin

McLendon v. Nicholson, 20 Vet. App. 79 (2006). Before Chief Judge Greene and Judges Kasold and Moorman.

The Court engaged in multi-faceted standard of review of Board determination of the requirement for a medical examination under 38 U.S.C. § 5103A. The critical point of analysis was the third step in statutory entitlement to VA medical examination: indication that a current disability may be associated with in-service event. At step one and step two in analyzing 38 U.S.C. § 5103A and its regulatory counterpart, 38 C.F.R. § 3.159(c)(4)(i), the Court applied a clearly erroneous standard of review of the Board factual findings relating to (1) competent evidence of current disability or recurrent symptoms, and (2) establishment of in-service event, injury or disease.

At step three, the standard of review became more searching as the Court considered not merely a Board factual finding, but whether the facts found comported with the statute. Explaining that the application of facts to the law implicated *de novo* review, the Court reviewed under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. 38 U.S.C. § 7261(a)(3)(A). The Board had not addressed the third element, the Court explained, when it determined that two treating doctors' opinion letters were insufficient medically to establish nexus.

Absence of evidence does not prove the non-existence of a necessary fact. Here, the two doctors' letters were insufficient to establish nexus but they were not insufficient to satisfy the "low threshold" required to establish whether any evidence "indicated" that in-service injury "may be associated" with current disability. The Board failed to recognize that the opinions did not establish that there was no medical nexus, the Court explained. In doing so, it relied on a dissent by Chief Judge Mayer and Judge Newman in an *en banc* Federal Circuit decision in which they argued that absence of actual evidence is not substantive negative evidence. *Forshey v. Principi*, 284 F.3d 1335, 1363 (Fed. Cir. 2002) *(en banc)* (Mayer, C.J., and

Newman, J., dissenting) (distinguishing between the existence of negative evidence and the absence of actual evidence and noting that "[t]he absence of actual evidence is not substantive 'negative evidence'").

McLendon's claim was remanded for review in light of the statutory interpretation of 38 U.S.C. 5103A and related provisions and judicial precedents pertaining to the analytical steps of the VA medical examination statute. Since the Board had not addressed the third element but instead had substituted its medical judgment improperly to determine absence of nexus, the claim was remanded to be reviewed under proper standards. ■

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

EARLIER EFFECTIVE DATES FOR TDIU AND INCREASED RATING CLAIMS AND APPLICATION OF THE COMBAT PRESUMPTION

By April Maddox

Dalton v. Principi, No. 04-1196 (U.S. Vet. App.) Oral argument was held before Judges Moorman, Lance, and Schoelen on Thursday, September 14, 2006.

On appeal in Dalton is a May 2004 Board decision which denied service connection for the residuals of a back injury and denied effective dates prior to June 20, 2000 for a grant of a 70 percent rating for post-traumatic stress disorder (PTSD) and for a grant of a total disability rating based on individual unemployability (TDIU).

ARE APPLICATIONS FOR TDIU ORIGINAL CLAIMS GOVERNED BY 5110(A) OR INCREASED COMPENSATION CLAIMS GOVERNED BY 5110(B)(2)?

In a July 2006 order, the Court requested supplemental briefing to address whether an application for an award of TDIU should be considered an original claim governed by section 5110(a), or if it is more appropriately considered a claim for increased compensation governed by the exception provided in 5110(b)(2).

In June 1995, the RO granted service connection for PTSD and assigned a 50% disability rating with an effective date in January 1995. Starting in 1996 the veteran filed a claim for an increased rating each year until 1999, and in each instance, the 50% rating was continued.

On June 20, 2000 the RO received a claim for TDIU based on the veteran's PTSD. Thereafter, VA provided the appellant with a VA medical examination which revealed that the veteran's PTSD symptoms had worsened and that the veteran was unemployable due to his PTSD.

In January 2001, the RO increased the veteran's PTSD rating to 70% and awarded TDIU benefits effective June 20, 2000, the date of the claim for TDIU. The veteran appealed the effective date of the award and the May 2004 Board decision denied an effective date prior to June 20, 2000.

In his brief and at the oral argument before the Court, the appellant argued that the Board failed to consider or apply 38 U.S.C. § 5110(b)(2) which provides that, "The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date." Thus, the appellant argued that a remand is required to ascertain whether the "one year look-back" should be applied to this claim.

In its brief, and at oral argument, VA argued that while the Board had not cited specifically to 5110(b)(2) in its May 2004 decision, they did cite to 5110 generally and did in fact address the "one year look-back" provision. The May 2004 decision noted that while the evidence showed that the veteran was unemployable prior to June 20, 2000, the veteran's unemployability was due to a non service-connected back disorder rather than his service-connected PTSD disorder. VA also argued that while 5110(b)(2) was correctly applied to the facts in this case, it should not necessarily be applied to all TDIU claims.

ABSENT CORROBORATING SERVICE DEPARTMENT EVIDENCE OF COMBAT EXPERIENCE, IS A VETERAN ENTITLED TO THE COMBAT PRESUMPTION UNDER 1154(B)?

In June 2000 the veteran submitted a claim for service connection for a back disorder. The veteran

was afforded a VA spine examination in April 2003. During this examination, the veteran stated that he injured his back in an ammo dump explosion while serving in combat. Based on an examination of the veteran and the absence of a back injury in his service medical records the examiner found there was no nexus between the veteran's back disorder and service. In May 2004 the Board denied service connection for a back disorder.

The appellant argued the Board failed to apply the combat presumption of 38 U.S.C. § 1154(b) which provides that satisfactory lay evidence consistent with the circumstances and hardships of combat service triggers a presumption of in-service incurrence. The appellant argued that the veteran's lay statement alone, without corroborating service department records, entitled the veteran to the combat presumption.

VA argued the combat presumption was rebutted when the veteran denied any back disorder upon separation from service. VA further argued that the April 2003 VA examiner took into account the veteran's history of a back injury in service and still concluded that there was no nexus between that alleged injury and service.

Counsel for appellant: Kenneth M. Carpenter, Esq. (785) 357-5251
Counsel for appellee: Pamela M. Nash, Esq. (202) 639-4855

DUE PROCESS CHALLENGE OF THE FINALITY OF A REGIONAL OFFICE DECISION BASED UPON INADEQUATE NOTICE

By: William Yates

Edward v. Principi, No. 04-1104. Oral argument was held before Judges Moorman, Lance, and Schoelen on September 12, 2006.

On appeal in *Edwards* is a January 2001 Board decision which denied the appellant's claim seeking an effective date earlier than January 14, 1997, for the grant of service connection for a psychiatric disorder.

The appellant served on active duty for training from October 1977 to April 1978. In 1979, the appellant filed a claim seeking service connection for a psychiatric disorder. In July 1981, a rating decision was issued in which the appellant's claim was denied; however the appellant's complete service medical records were not obtained or considered. The appellant did not file a timely appeal of this decision, and it became final.

In July 1987, the appellant filed to reopen his claim seeking service connection for a psychiatric disorder. The appellant's service medical records were obtained and he was scheduled for a VA psychiatric examination. The appellant's service medical records revealed psychiatric treatment, including a diagnostic impression of severe inadequate personality with schizoid tendencies, which under further stress could worsen to a more serious mental illness. The appellant failed to attend the scheduled VA examination. In March 1988 the appellant's claim was denied. *See* 38 C.F.R. § 3.655(b).

On January 14, 1997, the appellant filed another claim seeking service connection for a psychiatric disorder. In March 1999, new and material evidence was found to have been presented by the appellant, and upon *de novo* review of the evidence of record, service connection was established for schizophrenia and a 50 percent disability rating was assigned, effective from January 14, 1997. The appellant timely appealed this decision seeking an effective date prior to January 14, 1997, for the grant of service connection for a psychiatric disorder.

In his brief and at the oral argument before the Court, the appellant argued that the March 1988 rating decision was not final as a result of a due process violation and/or equitable tolling. Thus, arguing that under 38 C.F.R. § 3.156(c) (new evidence received from service department) an effective date going back to the appellant's April 1978 discharge is warranted.

In support of his argument, the appellant claimed that the Federal Circuit in *Cook v. Principi,* 318 F.3d 1334 (Fed.Cir. 2003) (en banc), recognized a third exception to the rule of finality in situations where VA failed to provide a claimant with information or material critical to the appellate process. The appellant argued the notice of the March 1988 decision was defective and misleading, and had the effect of extinguishing his right to appeal. The appellant claimed the notice provided was inconsistent and incomplete, and that VA was aware

of his diminished mental capacity at the time notice was provided. The appellant further argued that all of these facts support an argument for equitable tolling of the March 1988 rating decision.

During the course of this appeal, the Court ordered supplemental briefing as to whether there are any constitutional procedural due process requirements to warn a claimant of the risk of loss of retroactive benefits and finality of abandonment, whether such notice must be particularly tailored toward a claimant with a documented mental disability, and finally, whether any such requirement must, may or should be applied retroactively. *See* 38 C.F.R. 3.158; *Gonzalez v. Sullivan,* 914 F.2d 1197 (9th Cir. 1990)(notice of the right to file another application without explaining the failure to appeal a decision would have res judicata effect on the payment of retroactive Social Security benefits violated a claimant's right to procedural due process).

In response to the Court's order, the appellant argued that due process principles require that notice of appellate rights must not be misleading, and that such notice of rights must be tailored toward a claimant with a documented mental illness. He argued that the notices at issue herein had the effect of extinguishing his right to appeal. The appellant also argued that this requirement should be applied retroactively as it would not establish a new principle of law, would further the purposes of VA, and would not produce inequitable results. See *Chevron Oil Co. v. Hudson,* 404 U.S. 97 (1971).

In its brief, and at the oral argument before Court, VA argued against establishment of an earlier effective date on several grounds. First, VA argued that the Board's determination of the proper effective date was a finding of fact, and that the CAVC's review of Board findings of fact are under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4). VA further argued that even if there had been faulty notice of the March 1988 rating decision, there would be no impact on the finality of the determination. In its view, the Federal Circuit's decision in *Cook* clearly stated that there were only two exceptions to the rule of finality, including: (1) reopening of a claim based on new and material evidence; or (2) based on a finding of clear and unmistakable error. Finally, VA argued that the appellant's allegation of faulty notice of the March 1988 decision was without merits. Specifically, under the regulations in effect at that time, the VA had a regulatory duty to inform the claimant of his right to appeal, which was met in this case.

As for Court's request for supplemental briefing, VA argued against the application of a *Gonzalez*-type test in this matter. Specifically, the appellant had not asserted or proven any harm as a result of the alleged inadequate notice. VA also argued that the notice itself was not deficient, and that mental status should not be considered as there is no rule of law that requires individualized notice. Finally, VA argued that the appellee had shown sufficient sophistication to understand the notice which was given. As for equitable tolling, VA contends that this concept has only been applied to toll the time to appeal to a court, and not to agency proceedings. Finally, as to retroactive application, VA argued that the Court's application of *Gonzalez* would clearly be a new principle of law, and as such, should not be applied retroactively.

Counsel for the appellant: Mark R. Lippman, Esq. (858)456-5840
Counsel for the appellee: Mark M. McNabb, Esq. (202) 639-4843 ■

Q&A FORUM: CHIEF JUDGE WILLIAM P. GREENE, JR.

On Monday, November 6, 2006, a forum will be held at the CAVC in Washington, DC (625 Indiana Avenue, NW) at which Chief Judge William P. Greene, Jr. will graciously take questions. Coffee and pastries will be provided beginning at 9:30 a.m. EST and the discussion will begin at 10:00 a.m.

Register with Glenda Herl via e-mail at carpgh@mindspring.com. Phone participation is available for members located outside of the Washington, DC area.

COMMITTEE CONTACTS

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

LAW SCHOOL EDUCATION COMMITTEE
Pamela Nash, Chair
pamela.nash@va.gov

MEMBERSHIP COMMITTEE
Glenda Herl, Chair
carpgh@mindspring.com

NOMINATIONS COMMITTEE
Glenda Herl, Co-Chair
carpgh@mindspring.com
David Quinn, Co-Chair
david.quinn@va.gov

PORTRAIT COMMITTEE
Dave Myers, Chair
davidm@vetsprobono.org

PROGRAMS COMMITTEE
Robert Chisholm, Co-Chair
rchisholm@cck-law.com
Kenneth Carpenter, Co-Chair
carpgh@mindspring.com
Ron Garvin, Co-Chair
ron.garvin@va.gov
Gayle Strommen, Co-Chair
gayle.strommen@va.gov
Glenda Herl, Co-Chair
carpgh@mindspring.com
Chris Wallace, Co-Chair
cwallace@vetapp.gov

PUBLICATIONS COMMITTEE
Mary Peltzer, Co-Chair
mary.peltzer@va.gov
Barbara Cook, Co-Chair
bcook@fuse.net
Lou George, Co-Chair
louis_george@nvlsp.org

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

COURT OF APPEALS
FOR VETERANS CLAIMS
BAR ASSOCIATION
Ben Franklin Station • P.O. Box 7992 • Washington, D.C. 20044-7992

First Class
U.S. Postage
PAID
Washington, DC
Permit No.827