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

CLEAR AND UNMISTAKABLE ERROR AND THE PRESUMPTION OF SOUNDNESS

By Jonathan Kramer

Joyce v. Nicholson, Federal Circuit Docket No. 05-7136. Oral argument took place before the United States Court of Appeals for the Federal Circuit (Court) on February 10, 2006.

This matter came on appeal to the Federal Circiut Court from *Joyce v. Nicholson*, 19 Vet. App. 36, (March 22, 2005). In that decision, the CAVC affirmed that part of the September 2002 Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error (CUE) in the 1955 Regional Office (RO) decision insofar as the RO found that the presumption of soundness was rebutted. However, the CAVC reversed those parts of the September 2002 Board decision that found no undebatable error in the 1955 RO decision insofar as the RO found that the appellant's ulcer condition underwent no permanent increase during service and that the presumption of aggravation had been rebutted. The Court vacated the Board decision's denial of CUE and remanded the matter for readjudication of service-connection question.

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MEET THE JUDGE SERIES

MEET JUDGE MOORMAN

On February 18, 2006, members of the bar association met with Judge Moorman (J. Moorman). A short biography of J. Moorman appeared on page 10 of the Winter 2005 newsletter. During the teleconference, J. Moorman indicated that he reviews every case as soon as it comes into chambers to identify issues. First, he looks at the Board decision, then the briefs, and, if he needs to, he looks at the other evidence of record and the rationale. Then, he gives guidance to the clerk on his own thinking and

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Judge William A. Moorman and Judge Alan G. Lance

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COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

The issues before the court are: 1) whether the Court has jurisdiction to entertain the various issues raised; and 2) whether the CAVC properly interpreted the presumptions of sound condition and aggravation concerning the appellant's CUE claim, as outlined by the law and regulations extant at the time and in compliance with *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

The appellant's service medical records (SMRs) contain an entrance examination report dated in December 1953, which shows no evidence of an ulcer. However, an April 1954 Medical Board report recommended that the appellant should be medically separated from active duty for an ulcer that pre-existed service but was not aggravated by service. In November 1955, the RO denied service connection as not service incurred or aggravated. In February 1997, an RO decision awarded service connection for the ulcer as a pre-existing condition that was aggravated by service. In asserting CUE by the RO in the 1955 denial, the appellant is seeking an earlier effective date for his service-connected ulcer.

The Appellant argues that the CAVC's decision to affirm in part and remand in part is erroneous, and requests that the Court remand and reverse the CAVC's decision. The Appellant contends that the CAVC misinterpreted VA regulations extant at the time of the 1955 RO decision in which CUE is claimed, specifically, Veterans Regulation (VR) No.1(a), Part I, para.1(b) and No.1(a), Part I, para.1(d), and misinterpreted the precedent of *Wagner*. The Appellant's case in chief is that as there is no "clear and unmistakable evidence" of record to rebut the presumption of soundness, the CAVC's decision to uphold the Board decision – finding that there was no CUE in the 1955 decision determining that the ulcer pre-existed service – is erroneous. Indeed, the Appellant claims that the manner of the CAVC's decision in regard the question of whether there was "clear and unmistakable evidence" to rebut the presumption of soundness is in itself improper because it made a *de novo* finding of fact beyond the scope of the CAVC's nature as an appellate body. Additionally, the Appellant argues that because of this determination by the CAVC, the CAVC's remand to the Board to consider whether the presumption of aggravation had been rebutted is doomed to failure, and is therefore also erroneous.

VA argues that the Court does not have jurisdiction to hear the Appellant's appeal to the extent he merely presents fact-based challenges to the CAVC's conclusions that there was no CUE in the 1955 decision with respect to the presumption of soundness. VA further contends that the Court also lacks jurisdiction to the extent the veteran seeks review the portion of the CAVC's remanding for further consideration of his CUE claim based on the presumption of aggravation. While VA concedes that the Court has jurisdiction to entertain the appeal to the extent the appellant asserts the CAVC misinterpreted the presumption of soundness under *Wagner*, VA contends that the Court should affirm the CAVC's interpretation as consistent with Wagner. In the main, VA argues that the Court does not have jurisdiction to consider the Appellant's assertions that the CAVC's evaluation of the evidence in the case is incompatible with the "clear and unmistakable evidence" standard applied by VA in this case as to the presumption of soundness as it relates to the allegation of CUE in the 1955 RO decision.

On March 30, 2006, the court dismissed this appeal as the CAVC had not issued a final decision in this matter.

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THE RULE OF PREJUDICIAL ERROR IN A VETERANS CLAIMS ASSISTANCE ACT (VCAA) NOTICE CASE

By Maureen A. Young and Jennifer Wagman

Mayfield v. Nicholson, No. 05-7157 (Fed. Cir. Feb. 6, 2006), on appeal from *Mayfield v. Nicholson*, No. 02-1077 (U.S. Vet. App. Apr. 14, 2005). Oral argument held February 6, 2006 before Chief Judge Michel and Circuit Judges Mayer and Bryson.

In April 2005, the CAVC affirmed a Board of Veterans' Appeals (Board) decision that denied the appellant's claim for service connection for the cause of the veteran's death. At the CAVC the appellant argued that VA failed to fulfill the duty to notify under 38 U.S.C. 5103(a) as amended by the VCAA by not notifying her of the need for medical evidence to

substantiate the causative relationship between the veteran's surgery and his death. Further, that VA failed to advise her who was responsible for obtaining what evidence, and that the Board failed to address adequately under 38 U.S.C. 7104(a) and (d)(1) how VA had complied with those section 5103(a) notice requirements. In the determination of the appeal, the Board found that the issuance of several VA notices over a period of years had satisfied the statutory notice requirement.

The CAVC concluded that the Board had not erred in finding that VA fulfilled its statutory obligation to advise the appellant of the need to substantiate a nexus between her husband's surgery and his death, or to inform her about who should provide what information and evidence and to request her to provide any evidence in her possession. The CAVC stated that, (1) all sections of VA's notice should be construed in connection with each other to determine whether the document, read as a whole, addresses all aspects of the requisite notice, (2) the notice letter must be read in the context of prior relatively contemporaneous communications to the appellant from the Agency of Original Jurisdiction (AOJ) and (3) a complying notice need not necessarily use exact language of VA's regulation, 38 C.F.R. 3.159(b)(1), specifying VA's notice obligations, so long as that notice properly conveys to a claimant the essence of the regulation.

The CAVC applied the rule of prejudicial error in the context of a VCAA notice case. Stating that an error is prejudicial when the error affects a substantial right so as to injure an interest that the statutory or regulatory provision involved was designed to protect such that the error affects the essential fairness of the adjudication. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984).

On appeal to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) the appellant argued that the CAVC's statutory interpretation in Mayfield that the Board or the CAVC can combine several VA notices issued over a period of years to support a conclusion that the Secretary provided adequate VCAA notice, is contrary to the plain and unambiguous language of 38 U.S.C. 5103(a) and 5103(b) and 38 C.F.R. 3.159 (b)(1). The appellant argued further that the CAVC erred when it relied on a March 2001 letter that the Board did not rely upon as evidence to support its decision. The appellant asserts that rather than remanding the appeal, the CAVC reviewed the record *de novo* and concluded that the appellant received adequate VCAA notice, thus, exceeding the authority that Congress has given it under its scope of review statute.

During the oral arguments at the Federal Circuit, the justices focus on the latter issue (exceeding authority) raises a bit of skepticism with regard to affirming the CAVC's ruling in this case.

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

PRESUMPTION OF EXPOSURE TO HERBICIDES FOR CERTAIN U.S. NAVY VETERANS

By Mary Vavrina

Haas v. Nicholson, No. 04-0491, on appeal from a February 2004 BVA decision. Oral argument held before Judges Hagel, Moorman, and Lance on January 10, 2006.

This appeal to the CAVC concerns whether the presumption of exposure to herbicides should be applied to U.S. Navy veterans who served in the waters offshore Vietnam during the Vietnam era, January 9, 1962, through May 7, 1975 (that is, blue-water

veterans). In a February 2004 decision, the Board denied service connection for Diabetes Mellitus Type II (DM) with peripheral neuropathy, nephropathy, and retinopathy, claimed as secondary to exposure to herbicides. Service department records showed that the veteran served on a naval vessel in the waters off the coast of Vietnam, but his service did not involve actual duty or visitation in Vietnam. Appellant admitted that he had never set foot in Vietnam. For this reason, the Board concluded that the appellant did not have "[s]ervice in Vietnam" for the purposes of 38 U.S.C. § 101(29)(A), and as such was not entitled to application of the presumptive provisions of 38 C.F.R. §§ 3.307 and 3.309 relating to herbicide exposure.

At oral argument, Appellant asserted that the plain meaning of 38 U.S.C. § 1116 entitled blue-water Vietnam-era veterans to a presumption of exposure to herbicides, as the Republic of Vietnam consists of the land and surrounding territorial waters (then 12 miles offshore). In support, Appellant observed that non-Hodgkin's lymphoma (NHL) was added to the list of presumptive diseases due to exposure to herbicides based upon a Center for Disease Control (CDC) study, which showed a statistical increase in the incidence of contracting NHL among blue-water Vietnam era veterans. Since the veteran had filed his claim before VA changed the applicable VA Adjudication and Procedure Manual M21-1 provision in February 2002, he averred that he was entitled to the more favorable VA Manual provision in effect at the time he filed his claim, which provided for a presumption of exposure to herbicides for those veterans who were awarded the Vietnam Service Medal (VSM). Appellant also argued that the February 2002 rescission of the Manual provision was invalid because time for notice and comment was not given. Although this case does not involve NHL, the appellant contended all the diseases listed in § 1116 should be treated alike. Appellee asserted that 38 C.F.R. §§ 3.307(6)(iii) and 3.313(a) (requiring duty or visitation in Vietnam) are not inconsistent with 38 U.S.C. § 1116. Appellee also contended that if VA's interpretation was incorrect, Congress would have corrected it through legislation, and that there was no indication that § 3.313 was to apply to DM as the CDC study was limited to NHL and they are two distinct diseases.

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SECONDARY SERVICE CONNECTION: EVIDENTIARY BURDENS AND CALCULATING DISABILITY RATINGS

By William Yates

Roper v. Nicholson, No. 04-0491, on appeal from a February 2004 BVA decision. Oral argument held before Judges Hagel, Moorman, and Lance on January 10, 2006.

On appeal in *Roper* is a December 2003 Board decision which denied the Appellant's claims seeking secondary service connection for right knee and left leg disorders. The Board's decision also denied entitlement to a 100 percent disability rating for bilateral hearing loss (instead rated as 50 percent disabling) and depression, which had been granted service connection on a secondary basis and was rated as 50 percent disabling.

The Appellant alleged that his right knee disorder was incurred in January 1976 as a direct result of his not being able to hear a verbal warning concerning a truck which was backing up due to his service-connected hearing loss. The Appellant alleged that his left leg disorder was incurred in March 1991. Specifically, a winch failed while the Appellant was loading a boat onto its trailer, thereby injuring the Appellant's left leg. The Appellant contends that were it not for his service-connected hearing loss, he would have heard grinding noises from the failing winch, as well as a verbal warning from a fellow boater, and thus would have avoided the injury.

In support of his claims, the Appellant submitted statements from witnesses to each of these incidents, as well as a medical opinion linking each of these injuries to his service-connected bilateral hearing loss. In denying these claims, the Board's decision rejected the causation opinions offered by the eye witnesses. The Board found that the witness statements were not competent to show causation, i.e., that the Appellant's hearing loss actually caused the injuries. In discussing the right knee injury, the Board noted that the witness statements acknowledged that they were eventually able to get the Appellant's attention, so that he could move out of the path of the truck and the statements were

written fifteen years after the incident in question. As for his left leg injury, the Board's decision openly questioned whether any warning would have been effective given the speed at which the incident occurred. As noted in the decision, "it appears any warning was nearly simultaneous with the veteran being struck on the leg by the winch handle." Finally, the Board found the medical opinion submitted in this matter to be based solely on the Appellant's reported history, and that it contained factual inaccuracies when compared to the statements offered by the witnesses. The Board's decision also noted that the physician did not personally witness these incidents, and since causation of an accident is a question of fact, the physician is not competent to offer an opinion as to the chain of events leading up to these injuries.

In its brief, and at the oral argument before CAVC, the Appellant argued that the Board's decision improperly rejected the positive evidence submitted in support of his claims, and that a reversal of the decision of both of these issues was warranted. In making this argument, the Appellant stressed that additional development is unnecessary in this case for the simple reason that all of the evidence of record, including eyewitness statements and medical opinions, support the Appellant's claims. Thus, the Appellant alleged, it would be improper to allow for additional development merely to obtain negative evidence.

VA argued that both of these claims should be remanded to allow the Board to fully consider all applicable provisions of law and provide sufficient reasons and bases for its decision. In doing so, VA conceded that there was no evidence of record to support the Board's theory of other intervening causes leading to these injuries. Nevertheless, the evidence submitted on behalf of the Appellant did contain factual inconsistencies as noted in Board's decision. The Court, at oral argument, questioned whether causation in this case was a factual issue versus a medical issue. When specifically asked whether the Board should be allowed to bring into decisions outside personal knowledge, VA counsel conceded that it was probably not within their power.

The remaining issue in this case concerns the proper calculation of disability ratings for conditions granted service connection on a secondary basis under 38 C.F.R. 3.310(a). Historically, a September 198 Board decision granted service connection for depression, secondary to the Appellant's service-connected bilateral hearing loss. In implementing this decision, VA assigned a 50 percent rating for the depression, which was then combined with the Appellant's service-connected bilateral hearing loss condition, also rated 50 percent disabling, resulting in an 80 percent combined disability rating for compensation purposes.

The Appellant argued that that the plain language of 38 C.F.R. § 3.310(a) instructs that the 50 percent rating for his depression should be directly added to the 50 percent rating assigned for the primary disability of hearing loss. In making this argument, the Appellant relied heavily on the second sentence of 38 C.F.R. § 3.310(a), which states, "When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition."

In opposition, VA argued that the language of 38 C.F.R. §3.310(a) should be interpreted merely for purposes of establishing service connection for the underlying disability, and that the rules for combined ratings for all disabilities are set forth in the regulation on combined ratings, 38 C.F.R. 4.25.

At the oral argument, the Court seemed critical of the Appellant's position, and pointed out that the Appellant's interpretation of the pertinent statutes would result in inconsistent disability ratings being assigned to similarly suited veterans based solely upon whether the conditions were service connected on a direct or secondary basis. Nevertheless, the Court did subsequently request from the parties additional briefing concerning on the regulatory history of 38 C.F.R. § 3.310.

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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 Jennifer Dowd or Mary Peltzer (see page 12 Committee contacts) if interested in contributing in either way.

ROUND UP OF RECENT CAVC DECISIONS

DETERMINING THE PROPER AMOUNT OF RECOUPMENT OF A SPECIAL SEPARATION BONUS

By Caryn Graham

Majeed v. Nicholson, U.S. Vet. App. No. 03-0747 (U.S. Vet. App. Mar. 9, 2006). Oral argument was held before Judges Kasold, Moorman, and Davis on Tuesday, November 15, 2005.

The Appellant had active service from December 1981 to September 1992. He received a special separation bonus (SSB) in the gross amount of $30,049.92. Several readjustments were made to the SSB amount, primarily repayment of a reenlistment bonus for which the veteran had not met his full contractual service obligation. Thus, the total amount he received, before taxes, was $20,755.14. He reentered service for a period of active duty for training from February to July 1993.

In August 1994, the VA Regional Office (RO) in Atlanta, Georgia, granted the veteran service connection for several disabilities, including diabetes mellitus, and he was assigned a combined disability rating of 40 percent. At that time the RO also informed him that his VA benefits would be withheld until all of the $30,049.92 SSB had been recouped. He appealed that decision, and in February 1997 the Board remanded the case for the RO to readjudicate his claim that his VA disability compensation was not subject to recoupment. Thereafter, in April 1998, the Winston-Salem, North Carolina VARO, after contacting personnel at VA's Central Office, determined that $20,755.14 (the amount the veteran received before taxes) was the correct amount to be recouped.

In a July 1998 decision, the Board found that the amount of separation pay to be recouped was not at issue, and declined to make findings in that regard. In Board did determine that the appellant's VA disability compensation was subject to recoupment of separation pay. The veteran appealed. In January 1999, the Appellee filed an unopposed motion for remand, asking the Court to vacate the Board's decision and remand it for consideration of a recent change in the law affecting the amount of separation pay subject to recoupment; more specifically, an amendment to 10 U.S.C.A. §§ 1174(h)(2) that made only the net amount of SSB (after federal taxes) subject to recoupment, rather than the gross amount. In February 1999, the Court granted the motion and remanded the matter to the Board. Thereafter, in April 1999 the Board remanded the matter to the RO.

In a July 1999 decision, the Baltimore, Maryland VARO determined that the proper amount to be recouped was $24,039.94 (the gross SSB amount of $30,049.92, less $6,009.98 in federal taxes). In August 2000, the Board agreed that $24,039.94 was the proper amount. The veteran appealed to the Court. In October 2002, the Court remanded the case for the Board to consider the application of 38 C.F.R. § 3.105(h) (applying to reduction or discontinuance of a VA benefit award), 38 C.F.R. § 3.2600(d)(pertaining to review of benefit claims by RO personnel after a notice of disagreement has been received), and 38 C.F.R. § 1.912a (concerning collection by offset from VA benefit payments). The Court was concerned with whether the applicable procedural safeguards had been followed, given the fact that, while the appellant had been in the process of an appeal to *reduce* the amount of SSB subject to recoupment, VA decisions had actually led to an *increase* in that amount.

In March 2003, the Board found that 38 C.F.R. § 3.105(h) was not applicable to the claim on appeal inasmuch as the amount to be recouped was not a reduction or discontinuance of a VA benefit award, but rather a correction in the amount of service department separation pay forming the basis for recoupment. With regard to 38 C.F.R. § 3.2600(d), the Board noted that the regulation was inapplicable because it only affected cases where notices of disagreement were filed on or after June 1, 2001, which was not the case in the matter on appeal. Even assuming the applicability of the regulation, the Board found that correction of the amount to be recouped was necessary because the initial determination by the Winston-Salem VARO that $20,755.14 was the proper amount to be recouped was clearly and unmistakably erroneous. Finally, the Board found that the requirements of 38 C.F.R. § 1.912a had been met, and that $24,039.94 was the proper amount to be recouped.

On appeal to the Court, the Appellant argued that his SSB was not subject to recoupment under 10

U.S.C.A. § 1174(h)(2) because it was a special separation bonus which differed from the terms "severance pay" or "readjustment pay" found in the statute. The appellant also argued that 38 C.F.R. §§ 3.105 and 1.912a applied to his case, and that the Board had provide insufficient reasons and bases with regard to their application.

The Secretary argued that the Board had adequately addressed the issues raised in the Court's October 2002 decision. The Secretary further noted that the appellant had not raised the matter of the applicability of 10 U.S.C.A. § 1174(h)(2) before the Board and that the Court should therefore refuse to consider that argument. In any event, the Secretary argued that the statute was plain on its face and that the veteran's SSB was a type of "separation pay" within the meaning of the statute.

In November 2005, the Court issued an order requesting that the parties be prepared to discuss at oral argument (1) the applicability of 10 U.S.C.A. §§ 1174, 1174(a), and 1175, and any other statutory or regulatory provisions potentially applicable to this case that relate to a grant of separation pay, including whether the Board addressed those statutes adequately in its statement of reasons and bases, or whether a remand is appropriate for consideration of any potentially applicable provisions of law; (2) the impact on this case of the "subsumption doctrine" of a VA regional office decision by a subsequent Board decision in light of the two Court decisions, dated February 1999 and October 2002, that vacated the underlying Board decisions; (3) issues that arise from the application of 38 C.F.R. § 3.700(a)(5)(ii) ("Compensation payable for service-connected disability incurred or aggravated in a *subsequent period of service* will *not* be reduced for the purpose of offsetting separation pay based on a prior service.") (emphasis added), namely (a) whether an assessment of the disability ratings associated with each period of service is required before an offset can be initiated; (b) whether recoupment is precluded entirely if the compensable ratings for the disabilities are due solely to aggravation of the disabilities in a subsequent period of service, and (c) in cases where a disability rating is associated with a first period of service, whether recoupment is precluded from that portion of disability compensation associated with an increase in disability rating arising from a subsequent period of service; (4) the due process procedures, if any, the Secretary has implemented with regard to the offsetting/recoupment of disability payments up to the amount of separation pay received by a veteran; and (5) once separation pay has been fully recouped, the applicability of 38 C.F.R. §§ 1.912, 1.912a, and 3.105(h) to the debt created when the Secretary pays to a veteran monies previously withheld by the Secretary as recoupment but erroneously determined to be in excess of the total amount to be recouped against the veteran's separation pay.

At oral argument, questions by the judges revolved around the issues listed in the Court's November 2005 order, particularly the issue pertaining to the application of 38 C.F.R. § 3.700(a)(5)(ii). The Court issued an opinion on March 9, 2006, by which the Board decision was set aside and remanded. The Court determined that the recoupment of separation pay is tied to whether the disability compensation being paid was associated with the period of service for which separation pay was awarded. While the proper amount to be recouped in the Board decision was not clearly and unmistakably erroneous, the case was remanded so the Board could determine in the first instance whether the veteran's disabilities arose to a compensable level during his first period of service as SSB may not be recouped for disability compensation wholly associated with a different period of service.

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ATTORNEY FEES BASED ON PAYMENTS MADE

By Mary Peltzer

Snyder v. Nicholson, 04-0381 (U.S. Vet. App. Feb. 24, 2006).

On appeal was a February 2004 Board decision by which an attorney's claim for payment of attorney fees in excess of $1,820.45 payable from an award of past-due benefits was denied. Service connection for a bipolar disorder was granted in July 2002 and a 70 percent disability rating for the client-veteran had been assigned. Due to his incarceration, the amount of benefits paid to the veteran was reduced to the

equivalent of a 10 percent disability rating, resulting in the amount of attorney fees payable being reduced from $18,204.46 to $1,1820.45.

The Court affirmed the Board's decision, finding that the recovery for representation must be based upon a veteran's actual receipt of a monetary payment and not simply an adjudication of entitlement. Although the governing statutory provisions of 38. U.S.C. §§ 5313 and 5904 are ambiguous when applied in concert, the Court determined that the Secretary resolved this ambiguity by the promulgation of 38 C.F.R. § 20.609(h)(3). This regulation contemplated payments made rather than an abstract entitlement to an award for the purposes of calculating the amount of attorney fees to be withheld from past-due benefits.

NOTICE AND DOWNSTREAM CLAIMS

By Mary Peltzer

Dingess/Hartman v. Nicholson, Nos. 01-1917 and 02-1506 (U.S. Vet. App. Mar. 3, 2006).

The Court, in this consolidated appeal, addressed whether the notice provisions of 38 U.S.C. § 5103(a) apply to the assignment of an initial disability rating (*Dingess*) and the assignment of an effective date (*Hartman)* associated with an award of VA service-connected disability compensation. The *Dingess* appeal also involves entitlement to a TDIU rating resulting from the service-connected disability.

The Court held that 38 U.S.C. § 5103(a) requires, in addition to the standards applicable to timing, that the content of the notice address all five elements of a claim, specifically 1) veteran status, 2) existence of a disability, 3) a connection between the veteran's service and the disability, 4) evidence necessary to establish a disability rating for each disability contemplated by the claim, and 5) effective date of the disability. Upon application of the holdings and the rule of prejudicial error under 38 U.S.C. § 7261(b)(2), the Court affirmed the Board decision in *Dingess* in relation to the assignment of the initial disability rating but vacated the entitlement to a TDIU rating claim. The Court also found that the Board did not commit prejudicial error in *Hartman*, and affirmed the Board's decision. At the time of press, the Appellant's had filed a motion for reconsideration which had not been ruled upon. ■

MEET THE JUDGE SERIES

(continued from front page)

how to draft a decision. He stressed that he does not want his clerks hampered by preconceived notions and looks for clerks who are not afraid to argue with him and challenge his line of reasoning.

Oral arguments are scheduled at the convenience of everyone involved: the judges and the parties. Now the court sets oral arguments for only two weeks of the month, primarily Tuesdays, Wednesdays and Thursdays, to allow travel days for out-of-town attorneys. If an issue needs to be confronted, an oral argument opens up a dialogue and allows the judges to pick the attorneys' brains. But the question remains whether there is enough benefit to justify an oral argument in light of the fact that the court is getting 3,000 cases a year.

J. Moorman views an oral argument as being generally helpful, if his research points to some issue that needs to be discussed. By the time of the oral argument, the judges have a bench memo, have tabbed the records, have a draft opinion, and a list of questions. Judges are prepared; counsel need to get to the issues and spent less time on what the case is about. If there are some facts critical to an issue, those should be discussed. During an oral argument, the judges ask questions that they want answers to. The more information counsel can give to the panel the better and counsel cannot over prepare for oral argument.

J. Moorman felt that the appellants are judging well when to submit a reply brief. The reply brief is an advocate's tool of engagement on the issues and is warranted when there is new argument by VA or when a different aspect of an issue is to be addressed. There is no rule of thumb. The best brief writers read the BVA decision and march through the process, showing how the process or law has not been met.

J. Moorman stated that the factual background and law are good in most BVA decisions. If there is a place for concern, it is the reasons and basis section. The weakness, if any, appears to be that many Veterans Law Judges (VLJs) think a conclusion is self-evident and do not spent enough time on the reasoning behind their decisions, that is, why the law and the facts result in a peculiar conclusion. A BVA decision needs a good solid rationale. It is clear that the VLJs are thinking

through the issues but just are not putting their rationale in the decision.

J. Moorman does not expect a *pro se* claimant to be as good at identifying issues as VA, but he has been surprised by *pro se* appellants' ability to identify the issues. The judges can correctly decide cases on behalf of veterans, who are *pro se*. J. Moorman spends more time to make sure no disservice is done to the claimant in *pro se* cases.

In response to a question about swearing in of new attorneys, J. Moorman could not see why the court would not be amenable to a separate swearing in outside of an oral argument.

J. Moorman acknowledged that a court remand slows down the process but when a legal issue is sent back to the BVA, it is a case-by-case determination. It is difficult to decide whether the court needs to have BVA reassess an issue. The closer the issue of law is, the easier it is for the court to decide it.

MEET JUDGE LANCE

On March 15, 2006, the Bar Association conducted the 9th "Meet the Judge" program, this time with Judge Alan G. Lance. At the outset of the meeting, Judge Lance introduced his chambers staff to the twenty-one members of the Bar Association in attendance, and noted how important their contributions were to his efforts on the Court. He then provided a brief synopsis of his life, both personal and professional. Of note, he mentioned that his undergraduate studies were completed at South Dakota State University, and he obtained his law degree from the Toledo College of Law in Ohio. He served in the U.S. Army, Judge Advocate General Corps from 1974 to 1978, and received the Army Commendation Medal. He served two terms in the Idaho House of Representatives, and later served as Idaho's Attorney General from 1995 to 2003. He also served as the National Commander of the American Legion from 1999 to 2000.

When asked how individual cases are managed within his chambers, Judge Lance stated that he reviews each file and discusses the potential issues raised with his senior law clerk. He acknowledged that there has been much discussion about the overall increase in appeals at both the Board and the Court, and admitted that the Court as a whole was taking steps to address "backlog" problems. When asked

Judge Lance talks with Bar Association Members.

about single-judge versus panel dispositions, he opined that, should the Court move to panels only, the process would further slow down.

By way of advice, he told Bar Association members that the worst thing they could do in a brief or oral presentation to the Court was to obfuscate the issues or facts. He said that too much verbiage in a brief suggested to him that the representative may be hiding something. He emphasized that the best argument should always be presented first and should be to the point. He declined to generalize about the quality of briefs submitted to the Court, or BVA decisions, instead recognizing the many constraints and limitations all the parties faced.

Members of the Bar Association expressed interest over the recent introduction of legislation which would allow for attorney representation upon the filing of a Notice of Disagreement. Judge Lance admitted he had many concerns, and while not expressing opposition to that possibility, he acknowledged that veteran's law was a unique area in which most attorneys were not trained. He suggested that the Bar Association should take a preeminent role in developing law school curriculum and veterans' representative training to ensure that lawyers venturing into this realm of practice are well prepared. Attendees also voiced interest in the future of electronic filing, the possibility of a Veterans' Judicial Center, and the judges participation at Bar Association sponsored events. ■

By Mary Vavrina

BAR ASSOCIATION TO HOLD CLE PROGRAM IMMEDIATELY FOLLOWING COURT'S 9TH JUDICIAL CONFERENCE

On Monday and Tuesday, April 24-25, 2006, the Court of Appeals for Veterans Claims is holding its Ninth Judicial Conference. The event will take place at the Washington Grand Hyatt, 1000 H Street NW, located at Metro Center, and begins at 7:45AM each day.

The first day will consist of a morning plenary session, including a discussion about trends and observations in the jurisprudence of veterans benefits, and three breakout seminars that will be repeated, allowing all participants to attend each. The breakouts include a case law debate, examining the Court's decisions to refer cases to a panel, and obtaining and evaluating medical evidence. At the close of Monday's program, the Bar Association will host a reception, providing an opportunity for attendees to mix informally with the judges and the Court staff.

On Tuesday, the Conference begins with a discussion of ethical considerations for appellate lawyers, presented by Jack Marshall, the President of ProEthics, Ltd. Following Chief Judge Greene's "State of the Court" address, the conference concludes with an "Ask the Judge" session during which the CAVC judges will answer questions submitted beforehand by conference attendees. This session will be moderated by CAVC Bar Association President, Jennifer Dowd.

Immediately following the Court's conference at 12:15PM, the Bar Association is conducting a two-session CLE program. The event begins with a luncheon featuring former CAVC Judge John J. Farley III, as our speaker. Following fifteen years of dedicated service to the CAVC, Judge Farley's "retirement" was short-lived. An amputee himself after meritorious service in Vietnam, Judge Farley began visiting and then working with the returning Iraq and Afghanistan theater soldiers who had also lost limbs. Judge Farley will share his insights, experiences, and reflections regarding his current activities with our newest veterans, and his remarks will likely be a poignant reminder of the importance of our work in veterans' law.

Following the luncheon portion, the first session involves gunshot and other foreign missile wounds. The panel will first discuss the actual physical repercussions of foreign missile injury sustained in

combat, including the potential involvement of several anatomical systems. Next, they will address the common and historical issues faced by VA adjudicators in determining the appropriate rating to be assigned. The panel will touch on the challenges that such injuries and their rating have posed to the VA and to the CAVC, and how the Court has handled them.

In the second session panelists will discuss the practical effects concerning several CAVC remand practices, including exercising discretion (pursuant to *Best v. Principi*, 15 Vet.App. 18 (2001), *Mahl v. Principi*, 15 Vet.App. 37 (2001)), not to address arguments briefed by the parties, and remanding under *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000), in order to provide the BVA with the "first bite at the apple" when an argument is raised for the first time before the CAVC. The representative from the BVA will also address some of the resultant difficulties raised by the Court's remand practices.

For a PDF file of the brochure outlining the Bar Association's Program and the Court's Conference, visit the Bar Association's website at www.cavcbar.net. Click on the "Coming Events" link on our home page and scroll down for the "registration form" for the Judicial Conference. ■

COURT HOLDS ORAL ARGUMENT AT UNIVERSITY OF FLORIDA

A panel of the Court (Judges Kasold, Moorman, and Lance) along with additional Court staff, recently traveled to the University of Florida, Gainesville, for an oral argument held on March 21, 2006. This was the first time that the Court ventured to a law school outside the Washington, DC metropolitan area, although it has heard oral arguments at many of the local law schools in conjunction with the Bar Association's Law School Outreach Committee. The case was *Vahey v. Nicholson*, U.S. Vet. App. No. 04-2395 (E). Yvette White represented the Secretary, and Landon Overby represented the appellant. The argument involved the *Equal Access to Justice Act*, 28 U.S.C. § 2412, specifically the issues of prevailing party and substantial justification. The Secretary argued that the remands pursuant to the Court's decision in *Smith v. Nicholson*, 19 Vet.App. 63 (2005), on the issue of bilateral tinnitus did not confer "prevailing party" status on the appellant. The appellant asserted that under *Halpern v. Principi*, 384 F.3d 1297 (Fed.Cir. 2004), and *Former Employees of Motorola Ceramic Products v. United States,* 336 F.3d 1360, 1363 (Fed.Cir. 2003), the remand by the court materially altered the legal relationship between the parties, and accordingly conferred prevailing party status on the appellant. As of the date this issue went to print, the Court had not issued a decision. ■

CALL FOR QUESTIONS AND SUGGESTIONS

The Court has asked attendees of the Judicial Conference to submit questions for the "Ask the Judges" plenary session. Bar Association members are urged to submit all appropriate questions along with their registration materials to insure that the session is topical, informative, and useful to members of our association. This program provides a terrific opportunity to have pertinent issues, concerns, and questions addressed by the Court's judges.

Similarly, conferees are invited to submit suggestions that they believe might assist the parties' representatives in discharging their obligations to the Court, improve Court efficiency, speec decision making, or enhance the Court's public image. The authors of some of the submissions will be invited to the "Bright Ideas Breakfast" to personally present their suggestions to the Court.

Questions and suggestions can also be submitted directly to smontrose@vetapp.gov.

MEET THE JUDGE PROGRAM CONTINUES

In May 2006, members of the Bar Association will participate in the next installment of the "Meet the Judge" program. First, members will meet CAVC Judge Robert N. Davis. In June 2006 they will meet CAVC Judge Mary J. Schoelen. The program series is designed to improve relations and communication between members of the CAVC Bar Association and the judges of the CAVC, and has by all accounts been extremely successful. The judges will share insights into the running of their chambers, working for the CAVC, and the practice of veterans' law generally. Further information will be available 2-3 weeks prior to the event, and Bar Association members will be invited to register at that time. For further information, contact Jennifer Dowd at jdowd@vetapp.gov.

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