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ROUND UP OF RECENT CAVC DECISIONS
Federal Circuit

FEDERAL CIRCUIT WEIGHS IN ON TINNITUS

By Mary Peltzer

Smith v. Nicholson, No. 05-7168, (Fed. Cir. Jun. 19, 2006), on appeal from *Smith v. Nicholson*, 19 Vet.App. 63 (2005). Before Circuit Judges Alan Lourie, William Bryson, and Arthur Gajarsa.

On June 19, 2006, the Federal Circuit issued an opinion in which it reversed the CAVC, finding the CAVC erred in not deferring to VA's reasonable interpretation of its own regulations governing rating of tinnitus claims.

The Federal Circuit had previously remanded this matter to the CAVC in light of the determination in *Wanner v. Principi*, 370 F.3d 1124 (Fed.Cir. 2004), that the CAVC had acted outside its jurisdiction by reviewing Diagnostic Code 6260 for consistency with section 1110 as this amounted to a direct review of content. In April 2005 the CAVC issued another decision with a similar outcome, finding that it had jurisdiction to review VA's interpretation of the regulation in question as this was not a direct review of the content of the rating schedule but rather a review

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MEMORIAL TRIBUTE TO G.V. (SONNY) MONTGOMERY

by William P. Greene, Jr., Chief Judge
U.S. Court of Appeals for Veterans Claims

Veterans lost a great ally on May 12, 2006, when former congressman G.V. "Sonny" Montgomery died at age 85 in Meridian, Mississippi, his hometown. He served in the House of Representatives from 1967 through 1997, and was chairman of the House Committee on Veterans Affairs for 13 years.

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of the interpretation of two regulatory provisions and their interrelationship. 19 Vet.App. 63 (2005). The CAVC held, in pertinent part, that the pre-1999 and pre-2003 diagnostic criteria for tinnitus did not intend for dual ratings to be excluded. Therefore, the CAVC reversed a December 2000 Board decision that bilateral tinnitus may not qualify for two 10 percent ratings and, in part, remanded the matter for determination whether the veteran in the instant case had bilateral tinnitus such that assignment of ratings consistent with the holding could be accomplished.

Upon review, the Federal Circuit agreed that the language of regulations 38 C.F.R § 4.25(b) and the pre-1999 and pre-2003 Diagnostic Code 6260 left "in doubt" whether tinnitus in each ear constituted separate disabilities but did not agree with the CAVC's analysis that dual ratings for bilateral tinnitus was required. As the regulations left in doubt whether tinnitus in each ear can be a separate disability, the regulations were ambiguous and deference had to be afforded to VA's interpretation as there was a lack of evidence in the record that VA's interpretation was plainly erroneous. The Federal Circuit noted in its analysis that contrary to *Chevron* deference which applies to an agency's interpretation of a statute and generally requires relatively formal administrative procedures such as notice and comment rulemaking or formal adjudication, an agency's interpretation of its regulations does not require observance of those formalities in order to be afforded deference. *See Auer v. Robbins*, 519 U.S. 452 (1997).

CLEAR AND UNMISTAKABLE ERROR (CUE): WAS THE EVIDENCE LEGALLY SUFFICIENT TO SUPPORT THE SEVERANCE OF SERVICE CONNECTION?

By Richard C. Thrasher

Waltzer v. Nicholson, No. 05-7125 (Fed. Cir. May 9, 2006), on appeal from *Waltzer v Principi*, No. 01-2086 (U.S. Vet. App. Jan. 19, 2005) (memorandum decision). Before Judges Linn, Lourie, and Rader.

In September 1977, the appellant was awarded service connection for schizophrenia. In July 1978, a rating decision was issued severing service connection on the basis that the appellant's psychiatric condition had existed prior to service and had not been aggravated during service. In February 1979, the Board of Veterans' Appeals (Board) issued a decision upholding the severance of service connection. Thereafter, the Board, in an October 23, 2001, decision, denied a motion for revision of the February 1979 Board decision on the basis of clear and unmistakable error (CUE), finding that the appellant's argument was nothing more than a disagreement as to the weighing of the facts, and therefore was not a valid basis for CUE.

On January 19, 2005, the U.S. Court of Appeals for Veterans Claims issued a decision affirming the Board's decision. In the present decision, the U.S. Court of Appeals for the Federal Circuit dismisses the appeal for lack of jurisdiction.

On appeal to the Federal Circuit, the appellant argued that the evidence relied upon by VA was legally insufficient to constitute clear and unmistakable evidence necessary to sever her award of service connection. As a consequence, she argued that the Veterans Claims Court should have reviewed the evidence de novo to determine whether it was legally sufficient to rebut the presumption of soundness.

In rejecting the appellant's argument, the Federal Circuit observes that a challenge to the legal sufficiency of the evidence tests whether the evidence in question, as a matter of law, is capable of meeting the applicable legal standard. Here, the appellant did not argue either that there was no evidence to rebut the presumption of soundness, or that the evidence relied upon by the Board in 1979 was of such character that it was, as a matter of law, insufficient to rebut the presumption. Thus, regardless of her choice of words in characterizing her claim, the appellant's challenge to the sufficiency of the evidence is not a challenge to the legal sufficiency of the evidence. Instead, she merely is challenging the weight or sufficiency in fact of the evidence required to rebut the presumption of soundness, i.e., the application of law to fact. Because the question of whether the evidence regarding a preservice condition rises to the level of clear and unmistakable evidence involves the application of facts to the legal standard set forth in 38 U.S.C. § 1111, this is a matter the court states it is without jurisdiction to consider.

As to the appellant's reliance on *Kent v. Principi*, 389 F.3d 1380 (Fed. Cir. 2004), the court further states that such reliance is misplaced because that decision does not stand for the proposition that questions regarding the sufficiency in fact of the evidence, as opposed to legal sufficiency, are within the Federal Circuit's jurisdiction.

Counsel for Appellant: Kenneth M. Carpenter, Esq. Counsel for Appellee: Michael S. Dufault, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice. ■

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

DOES EVIDENCE OF APPELLANT'S MENS REA CONSTITUTE NEW AND MATERIAL EVIDENCE TO REOPEN A PRIOR FORFEITURE DECISION?

By Lou George

Untalan v. Principi, U. S. Vet. App. No. 03-1628. Oral argument held before Judges Hagel, Kasold, and Schoelen on May 4, 2006.

In *Untalan*, the Court is considering whether the appellant's testimony regarding his mens rea at the time he rendered assistance to the enemy, constitutes new and material evidence sufficient to reopen an October 1976 VA forfeiture decision. The 1976 forfeiture decision had determined that the veteran forfeited his right to VA benefits because he had rendered assistance to an enemy of the United States (in violation of 38 U.S.C. § 3504(a), now 38 U.S.C. § 6104(a)) by serving for 13 months as a member of the Bureau of Constabulary (BC), a component of the Japanese military during their occupation of the Philippines during World War II. The Board, in the June 2003 decision presently on appeal, concluded that the appellant (whose service included prisoner of war status from April 1942 to September 1942, as well as service in the regular Philippine Army from April 1945 to March 1946) had not submitted new and material evidence to reopen the forfeiture decision. In particular, the Board found that the post-1976 evidence, which included additional testimony and statements concerning his motivation for joining the BC (i.e., the need for medical treatment) were cumulative or redundant of evidence previously considered, which included evidence describing the hardships of being a POW and a 1974 deposition in which the appellant explained that he was "forced by necessity to take an oath of allegiance [to the Japanese government]."

The appellant contends that at the time of 1976 forfeiture decision, there was no evidence of record regarding the appellant's *mens rea* when he joined the BC. The appellant explained that during the course of the 1976 proceedings, he did not mention his need for medical treatment at the time of joining the BC, and that the post-1976 evidence explains this motivation for joining the BC. The appellant claimed that because this additional evidence concerned the appellant's mental state at the time he joined the BC, it must be considered new and material under 38 U.S.C. § 5108 and 38 C.F.R. § 3.156(a), and the Court should reverse the Board's finding to the contrary. Furthermore, the appellant argued that the additional evidence of the appellant's state of mind was material because it invoked the defense of necessity, which is available to a former prisoner of war charged with collaboration with the enemy as set forth in *United States v. Fleming*, 7 U.S.C.M.A. 543 (1957).

In response, the Secretary asks the Court to affirm the Board's decision, arguing that the Board's finding that the appellant did not submit new and material evidence was supported by a plausible basis in the record. In response to the appellant's contentions, the Secretary argues that the post-1976 evidence was cumulative and redundant of the evidence of record at the time of the 1976 forfeiture (the Secretary noted that at the time of the forfeiture, the appellant had described the poor conditions affecting POWs, and stated that he was "forced by necessity" to take an oath of allegiance to the Japanese government, which was similar to the contentions he offered post-1976). Regarding the defense of necessity, the Secretary argued that the defense is a criminal defense and inapplicable to the case, and that, in any event, the defendant in *Fleming* was convicted despite his use of the defense.

The case was argued on May 4, 2006, before a panel comprised of Judges Hagel, Kasold, and Schoelen. A decision in this case may provide further elaboration of the Court's position on the kinds of evidence (in this case, *mens rea*) that can meet the threshold of newness and materiality, or, alternatively, that which is considered merely cumulative or redundant.

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Counsel for the appellee: Tracy K. Alsup, Esq. (202) 639-4806

EARLIER EFFECTIVE DATES AND THE DISCHARGE REQUIREMENTS OF SECTION 1218 OF 10 U.S.C.

By William Yates

McGee v. Nicholson, No. 04-0468. Oral argument was held before Judges Hagel, Moorman, and Schoelen, on April 26, 2006.

On appeal in *McGee* is a February 2004 Board decision which denied the appellant's claim seeking an effective date earlier than April 15, 1999, for the grant of service connection for sarcoidosis with chronic obstructive pulmonary disease (COPD).

In this case, the appellant served on active duty in the United States Marine Corps from May 1968 to September 1970. While in the service, he was diagnosed with sarcoidosis with associated ventilatory defect. This condition was given a non-permanent 30 percent disability rating by a Physical Evaluation Board, and the appellant was placed on the Temporary Disability Retired List (TDRL) in September 1970. *See* 10 U.S.C. § 1202.

Generally, TDRL status lasts for a maximum of 5 years after which, if the veteran is deemed no longer fit for service, the disability is considered to be permanent and stable. *See* 10 U.S.C. § 1210. There is no documentary evidence of record referencing the appellant's termination from TDRL status; however, the appellant testified that he was terminated from TDRL status in 1976 and was provided with severance pay. *See* 10 U.S.C. § 1212.

On April 15, 1999, the appellant filed a claim with VA seeking service connection for sarcoidosis. Specifically, the appellant indicated that his lungs were bothering him again. In February 2001, the RO granted service connection for sarcoidosis with COPD, with an effective date of April 15, 1999. Thereafter, the Board denied an earlier effective date for this condition as there was no evidence of a written claim for service connection, formal or informal, prior to April 15, 1999.

In its brief and at the oral argument before CAVC, the appellant argued that the Board failed to consider or apply 10 U.S.C. § 1218 which provides that "A member of an armed force may not be discharged or released from active duty because of physical disability until he – (1) has made a claim for compensation, pension, or hospitalization, to be filed with the Department of Veterans Affairs, or has refused to make such a claim; or (2) has signed a statement that his right to make such a claim has been explained to him, or has refused to sign such a statement." Thus, the appellant argues, the presumption of regularity, combined with the benefit of the doubt rule, establishes that the appellant did file a claim for this condition upon his release from active duty.

In its brief, and at the oral argument before CAVC, VA argued against establishment of an earlier effective date on several grounds. First, VA argued that the appellant had not previously raised this issue, and therefore it should be considered abandoned. The appellant's argument was not presented to or addressed by the Board, nor were facts pertinent to the argument developed in agency proceedings below. If VA had been apprised of this claim at the agency level, efforts could have been made to locate pertinent records, which may indicate compliance by the veteran's military branch of service with the requirements of 10 U.S.C. § 1218, which would moot this appeal. To support its contention, VA cites to a copy of the Veteran's Application for Education Benefits, filed in October 1978, in which the appellant indicated that he had not previously applied for any VA benefits.

VA also argued that CAVC does not have jurisdiction to grant the particular relief sought by the appellant. Specifically, the appellant is claiming that the Board erred by failing to consider provisions of a statute with a burden of execution on the Department of Defense, and particularly the individual branches of the military services. The statute invokes no

requirements by VA. Thus, any failure to comply with 10 U.S.C. § 1218 should fall under the jurisdiction of the Court of Federal Claims, which has the authority to amend a military discharge, and when appropriate, to grant a remedy, such as monetary damages, when military authorities improperly discharge a servicemember or violate the law, as in the case of an improper discharge alleged herein.

Finally, VA argues that despite his argument herein, the appellant failed to file a claim with VA prior to April 15, 1999. Section 5110(a) of 38 U.S.C. mandates that the effective date of an award based on an original claim "shall not be earlier than the date of receipt of application therefore."

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APPROPRIATE LENGTH OF TIME FOR SUBMISSION OF EVIDENCE AFTER A HEARING BEFORE THE BOARD

By Paul Eaglin

Haney v. Nicholson, U.S. Vet. App. No. 04-0325. Oral argument held on May 23, 2006, before Chief Judge Greene and Judges Hagel and Schoelen.

Haney argues error of law when the Board failed to accord him the one-year period of the abandonment-of-claim provision, 38 C. F. R. § 3.158(a), as the deadline by which to submit a nexus letter. In a September 2003 Board hearing on his claim based on new and material evidence, through his counsel he promised to submit a nexus statement by his physician to connect a World War II-era injury to his present condition. The Board decision issued in February 2004 pointedly remarked upon counsel's failure to submit the promised nexus statement by the physician. Because the colloquy between Board judge and counsel at the September 2003 hearing did not specify a deadline, Haney insists that the VA should have observed the timeline of the abandonment regulation. Moreover, he argues that the Board should have followed up with his counsel before issuing its February 2004 decision, presumably either to remind him or to ask his intentions regarding the nexus proof from Haney's doctor. He relies upon the VCAA's statutory provision and regulatory promulgation with respect to the duty to notify. 38 U. S. C. § 5103(a) and 38 C. F. R. § 3.159(b) (2001). Consequently Haney insists that the Board's decision is based on an incomplete record.

The Secretary responded by insisting that the CAVC should affirm because the Board decision is supported by a plausible basis in the record. Specifically pointing to the absence of the nexus letter from the appellate record filed with the CAVC in July 2004, and relying upon the transcript excerpt where Haney's counsel explicitly agreed to provide the letter, the Secretary insists that the allocation of duties to produce, as between the VA and the claimant, was accomplished with a clear understanding at the September 2003 Board hearing.

It is not clear whether there is just one accident at issue. The only time reference in appellant's brief is to an October 1945 motor vehicle accident, while all other references as well as the nexus letter pertain to a 1942 motor vehicle accident. Haney's counsel in his two briefs makes this reference to only one accident during Haney's service from 1940 until discharge in February 1946. "While in service, during October of 1945, Mr. Haney was struck by a car[, …] was hospitalized, and discharged a few months later."

Interestingly, the nexus letter is dated August 2004, eleven months after the September 2003 Board hearing, and indicates that it is a response to counsel's May 2004 request for a letter. Haney's counsel submitted it to the RO in Maine and insisted in his briefing that filing with the RO sufficed for purposes of submission to VA since the Board's decision had already issued. He also attached it to his Reply Brief apparently to establish its existence in response to the Secretary's criticisms about its absence and his failure to comply with the duty to produce.

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"Pending Cases" continues on next page.

REBUTTING THE PRESUMPTION OF AGGRAVATION FOR A PRE-EXISTING CONGENITAL CONDITION

By Mary Vavrina

Stover v. Nicholson, No. 02-1604, on appeal from a May 2002 BVA decision. Oral argument held before Judges Hagel, Davis, and Schoelen, on May 10, 2006.

The appeal to the CAVC concerns whether there was clear and unmistakable evidence rebutting the presumption of aggravation based on two VA medical opinions, which opined that the increase in disability was not beyond the natural progress of the congenital disorder. In a May 2002 decision, BVA denied service connection for a left foot disorder. Service department records show that the veteran had a congenital left club foot and entered service with a medical waiver. Nearly six years later, in March 1994, the veteran struck the inside of his left ankle on a car door frame, resulting in swelling and pain, but no fracture. Six months later, a Physical Evaluation Board found the veteran unfit for service as his foot problems had worsened from a noncompensable to a 10 percent level during service. The veteran was discharged and received disability severance pay.

The parties agree that the veteran had a pre-existing left club foot disorder upon entrance into service and that his disability increased in severity during service.

At oral argument, the appellant asserted that the Navy award of disability severance pay was tantamount to a finding that the veteran's congenital foot disorder had increased in severity beyond the natural progress of the disorder and, as a line of duty finding under 38 C.F.R. § 3.1(m) was unrebuttable, bound VA to grant service connection due to aggravation. Alternatively, the appellant argued that the medical evidence in the record shows a difference of medical opinions that prevents VA from meeting the clear and unmistakable evidence standard delineated in *Cotant v. Principi*, 17 Vet. App. 116 (2003). The veteran argued that Rota, Spain hospital records show a significant worsening in the veteran's left foot disorder, that a May 1998 VA medical opinion was equivocal, and that a January 2000 VA medical opinion was tainted by the question posed to the examiner.

The appellee argued that a line of duty finding is the starting point in a VA determination of whether service connection is warranted. Under section 3.1(m), a line of duty finding is not binding on VA when it is "patently inconsistent" with the laws VA administers, adding that the service department and VA apply different standards and have different purposes for granting severance compensation and service connection respectively. VA asserted that the Navy's finding of an increase in severity was patently inconsistent with VA laws and regulations as it would create an irrebutable presumption of aggravation and essentially eliminate consideration of 38 U.S.C. § 1153 and its supporting regulations. The appellee maintained that it properly rebutted the presumption of aggravation beyond the natural progress of the disease through its lengthy discussion of the 1998 and 2000 VA medical opinions, as no service medical opinion discussed whether the increase in severity was beyond the natural progress of the disorder.

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Counsel for appellee: Thomas E. Sullivan, Esq. (202) 639-4856. ■

CONTRIBUTORS WANTED

WANTED: the publications committee is looking for new members to contribute to upcoming installments of the Veterans Law Journal.

Participants do not need to be located in the DC area. Please contact Mary Peltzer at mary.peltzer@va.gov or Jennifer Dowd at jdowd@vetapp.gov for additional information.

MEET JUDGE DAVIS

Judge Robert N. Davis

On May 17, 2006, the Bar Association conducted the 10th "Meet the Judge" program, this time with Judge Robert N. Davis. At the outset of the meeting, Judge Davis briefly discussed the process by which he came to be at the Court. He noted that he was initially surprised by the executive-branch interest given that–other than being a veteran of the U.S. Navy–he did not have the background in veterans law or a congressional sponsor that one would think was necessary to warrant consideration. Once acknowledging that, he admitted that his academic background, coupled with extensive experience in alternative dispute resolution and administrative law have come to be invaluable resources to him and to the Court as a whole. He next introduced his chambers staff to the twenty-two members of the Bar Association in attendance, and noted how important their contributions were to his efforts on the Court.

From his official biography, we know that, prior to his judicial appointment, Judge Davis was a full tenured professor of law at Stetson University College of Law. Prior to joining Stetson's faculty in August 2001, he taught for thirteen years at the University of Mississippi School of Law. He has held numerous positions at other universities, teaching constitutional law, administrative law, national/international security law, alternative dispute resolution, terrorism/counter-terrorism, and international and domestic sports law. Judge Davis graduated from the University of Hartford, West Hartford, Connecticut in 1975 and the Georgetown University Law Center, Washington, DC in 1978. He practiced as an appellate attorney for five years with the Commodity Futures Trading Commission, and thereafter spent four years with the Department of Education in the business and administrative law division. Judge Davis is an active member of the U.S. Navy Reserves and was recalled to active duty after the terrorist attacks on September 11, 2001, when he was assigned to the Joint Intelligence Directorate at MacDill Air Force Base in Florida.

When asked how individual cases are managed within his chambers, Judge Davis stated that he reviews each file and discusses the potential issues raised with that case's assigned law clerk. He empathized with attendees from the Board of Veterans' Appeals who noted the difficulty of applying *current* case law to decisions that would not be before the Court for over a year. When reminded of his somewhat critical statements at the Court's Judicial Conference regarding the quality of the parties' briefs, he emphasized the importance of proof reading at all levels – from Board decisions, to briefs, to the deputies editing briefs. He admitted that his position on this matter probably stemmed from his academic background, but at the same time, stressed that the parties needed to recognize that sloppy work could undermine even the best argument. He stated that the best argument should usually be presented first and should be to the point. To the General Counsel's office, he discussed the importance of addressing the arguments raised by the parties, and agreed that, generally, if the appellant does not raise a particular argument, the Court should be disinclined to raise it *sua sponte*.

Attendees also voiced interest in the future of electronic filing, the possibility of a Veterans' Judicial Center, the judges participation at Bar Association sponsored events, and the pending legislation that would allow veteran's to hire attorneys at an earlier stage in the appeals process. Judge Davis was appreciative of the opportunity to hear the ideas and concerns of the Bar Association members, and promised to address some items that were raised with the Board of Judges. He expressed an interest in additional social interaction, and promised to do his part to facilitate dialogue between the judges of the Court and the bar. ■

MEET JUDGE SCHOELEN

On June 21, 2006, the Bar Association conducted the 11th "Meet the Judge" program with Judge Mary J. Schoelen. With this meeting, the Bar Association officially completed the first round of dialogues with the Court's Judges. The program began with then Chief Judge Kramer, and thereafter included Judges Farley, Ivers, Steinberg, (Chief Judge) Greene, Kasold, Hagel, Moorman, Lance, and Davis. The Bar Association is deeply grateful for the Court's participation in this program, and looks forward to working with the Court on continuing the informal format in some alternative capacity.

After the attendees introduced themselves at the start of the meeting, Judge Schoelen briefly discussed her personal and professional background, including the various positions which led to her appointment to the Court. From her remarks and from her official Court biography, we learn that Judge Schoelen was born in Spain, where her father was stationed as a U.S. Navy officer. After earning her undergraduate degree from the University of California at Irvine, she moved to Washington, D.C., to attend the George Washington University Law School. While in law school, she worked as a law clerk for the National Veterans Legal Services Project (NVLSP). In 1994, she began working on various issues related to veterans benefits claims as an intern for the U.S. Senate Committee on Veterans' Affairs. Soon thereafter, she worked as an attorney for the Vietnam Veterans of America's Veterans Benefits Program. From 1997 to 2001, she served as Minority Counsel for the U.S. Senate Committee on Veterans' Affairs; from March to June 2001 as Minority General Counsel; from January 2003 to December 2004 as Deputy Staff Director for Benefits Programs; and from January 2003 to December 2004 as General Counsel under Chairman and Ranking Member John D. Rockefeller IV and Ranking Member Robert Graham. She was appointed as a judge of the CAVC in December 2004.

Judge Schoelen stated that she initially reviews each case that comes into her chambers to identify the pertinent issues. She generally assigns cases that appear complex to her senior law clerk, although she noted that most cases involve some complexity. She acknowledged how valuable the experience of her law clerks has been to her transition as a judge. Her clerks include a former NVLSP attorney, two former interns for the VA Office of Regulation and Policy, and a former law clerk to Judge Steinberg.

Judge Mary J. Schoelen with Brian Rippel, Gayle Stommen, and Kathy Lieberman

In response to a question about oral argument, she said that she found them "universally helpful" and informed participants that the Court's technology department was in the process of making them available on the Court's website. She also noted that "pre-argument" conferences among the empaneled judges were becoming popular as a means of focusing on the particular issues germane to the case before the Court. She agreed that pre-argument orders directing the parties to particular cases or issues was a useful tool for practitioners, but also noted that the parties' briefs are often sufficient.

Regarding the future of electronic filing, Judge Schoelen said that her previous professional experience gave her insight into how useful and efficient going to an electronic system would be. However, she acknowledged that the high number of pro se appellant's would require duplicate systems, and that until VA and the Federal Circuit utilized similar systems, the benefits would be limited. When asked about the biggest challenge facing the Court, Judge Schoelen reiterated the comments from the Court's Judicial Conference, and agreed that "volume" was the

Court's biggest current concern, or specifically, "how to maintain high quality in a high volume world." She welcomed suggestions and ideas for how the Court could better manage the high number of filings, and expressed empathy to practitioners, VA General Counsel's Office, and the Board attendees who were similarly situated. When asked what she saw as the biggest challenge facing VA, she opined that the situations in Iraq and Afghanistan would result in a large increase in the veteran population. More significantly, evidence suggests that those veterans may present with a high number of psychiatric complaints that would likely not be seen by the agency for some time to come.

Judge Schoelen thanked the attendees for the opportunity to exchange ideas in the informal setting, and assured the Bar Association of her commitment to supporting our efforts. She expressed a personal interest in expanding the study of veterans' law through law schools and continuing education programs. ■

TRIBUTE TO G.V. MONTGOMERY

(continued from front page)

He was Committee chair during the crafting and eventual passage of the Veterans Judicial Review Act, which created the U.S. Court of Appeals for Veterans Claims (initially named the U.S. Court of Veterans Appeals). He was also co-sponsor of the 1988 law that transformed the Veterans Administration into a cabinet-level Department of Veterans Affairs, so that, as he said, "Veterans will no longer have to go through the back door to the White House."

Throughout his chairmanship, he sponsored significant authorizing legislation substantively affecting veterans benefits. His former legislative director identified the Montgomery G.I. Education Bill as the legislation that Congressman Montgomery considered his "signature achievement in Congress." Each fiscal year he voiced strong support for providing the Court sufficient resources to carry out its mission. He also worked assiduously in support of adequate funding for VA.

Congressman Montgomery leaves behind devoted relatives, as well as many close friends and associates. To them, we express our condolences, and we share their sense of loss; but we are comforted by knowing that his infectious spirit and patriotism will live on. Before he retired from Congress, he presented the Court with his portrait. It is prominently displayed to keep fresh the memory of Congressman Montgomery's great service to our nation and its veterans. ■

MEET THE CHAIRMAN OF THE BOARD OF VETERANS' APPEALS

In August 2006, members of the Bar Association are invited to Meet the Honorable James Terry, the Chairman of the Board of Veterans' Appeals. 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.

SUMMARY OF PLENARY SESSIONS

On April 24, 2006, the Solicitor General of the United States spoke to the judicial conference attendees at lunchtime

The Honorable Paul D. Clement, confirmed as the 43rd Solicitor General for the United States in June 2005, spoke of the importance of oral advocacy. He highlighted the importance of knowing the court members in front of whom you are appearing and knowing what is important and appeals to them. He also highlighted the moot court process as a necessary step in the preparation process for oral arguments. The moot court process utilized at the Department of Justice includes two "types" of attorneys: attorneys who have no factual areas of expertise but have a sense of the questions that will be asked by the judges and attorneys for the agency in question who have a factual knowledge of how a program works and what is important to the client. The moot court process allows the appellate attorney to create a good presentation that combines law, factual concerns, and the court members themselves. He also discussed the importance of the written appellate briefs and that a good appellate attorney works to win cases in the briefing process. Briefs can also serve to narrow questions at oral arguments to a field of question for which the appellate has answers. Also of note, he highlighted the importance of reading an entire case and not making selective citations of case law that does not in fact stand for the point you are making. He also noted that it was important to understand the theory of your case well enough so that you do not make concessions during oral argument that are detrimental to your case.

First Plenary Session: "The Law of Veterans Benefits: Trends and Observations"

Michael P. Allen, an associate professor of law at Stetson University College of Law in Gulfport, Florida, conducted an overview of significant developments in case law over the past two years. Professor Allen, after actually reading two years of case law, presented on three main areas to judicial conference attendees: 1) major areas of development in veterans law, 2) decisions of the CAVC that had significant impact on veterans law or the practice of veterans law, and 3) what lessons could be drawn from the CAVC's overall role in veterans benefits matters. He highlighted that the theme of the court could be "new beginnings" with six of the seven court members being new to the CAVC bench. Professor Allen also discussed that significant decisions of the past two years involved jurisdictional matters, the doctrine of equitable tolling both through CAVC and Federal Circuit case law, and the impact of the rule of prejudicial error. Also discussed were the dual roles of the CAVC as error corrector and law giver and the impact of a large number of single-judge decisions could have on the latter role.

Bar Association President-elect Glenda Herl, current President Jennifer Dowd, and Board of Governors member Marjorie Auer.

Second Plenary Session: "Communicating with the Public: Web Page, E-Filing, and Rules of Practice"

Norman Y. Herring, Clerk of Court/Executive Officer of the CAVC, announced a new website design for the CAVC. He also discussed the future of electronic filing at the court. Electronic filing, which would only apply to represented veterans, is important

Seated: Past and present Chief Judges of the CAVC (Ivers, Greene, Nebeker). Standing: past and present judges of the CAVC (Davis, Hagel, Moorman, Kasold, Farley, Holdaway, Schoelen).

as the court is running out of storage space in light of the growth of appeals being filed.

Third Plenary Session: "Ethical Considerations for the Appellate Lawyer"

Facilitated by Jack Marshal, president and founder of ProEthics Ltd., along with guest artist David Jourdan on guitar, the third plenary session saw a change of pace with the introduction of music and sing-alongs to discuss ethical concerns faced by judicial conference attendees. Topics of discussion: how rationalizations can impede ethics, different ethical tools such as seeking local legal ethics opinions, can conflicts be waived, a lawyer's obligation regarding the discovery of client fraud after a proceeding, and the trend for unbundled legal services.

SUMMARY OF BREAKOUT SESSIONS

By Jonathan Kramer

First Breakout Session:
"What Were They Thinking?"

This session, which focused on discussing some recent developments in the case law, was moderated by Barton Stichman, Co-Director of the National Veterans Legal Services Program (NVLSP). The other panelists were Bill Mailander, General Counsel for the Paralyzed Veterans of America (PVA), and Ethan Kalett, an attorney at the Department of Veterans Affairs Office of General Counsel, Professional Staff Group 2.

Mr. Mailander provided a review and interpretation of *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005) and *Padgett v. Nicholson*, 19 Vet. App. 334 (2005). Mr. Kalett provided a review and interpretation of *Marsh v. Nicholson*, 19 Vet. App. 381 (2005) and *Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005).

The presentations elicited much discussion amongst the panelists and the audience. One area of significant discussion concerned the holding of the *Andrews* case, and whether it was consistent with the precedent of *Roberson v. Principi*, 251 F.3d 1378 (Fed Cir. 2001), which requires VA to consider claimants pleadings sympathetically.

Second breakout Session:
"How Fickel Is *Frankel?*"

This session concerned the effect of the CAVC's authority to issue single-judge, non-precedential decisions. The session was moderated by Barbara Cook, a private practitioner. The other panelists were: former Judge Kenneth Kramer, who served as Chief Judge of the CAVC from 2000 until 2005; Richard Cohen, a private practitioner; and Richard Mayerick, Deputy Assistant General Counsel, Department of Veterans Affairs Office of General Counsel, Litigation Group VII.

The criteria for assigning cases to a single judge for a non-precedential decision is set forth in *Frankel v. Derwinski*, 1 Vet App. 23 (1990). The panelists discussed the concern of many practitioners, as espoused by Mr. Cohen, that the *Frankel* criteria are hard to apply. Mr. Cohen suggested that there should be less single-judge non-precedential decisions because of the potential for inconsistent results, and that the nature of some of single-judge decisions coming out of the CAVC should have precedential effect. But Chief Judge Kramer opined that because of the vast

numbers of appeals that the CAVC must handle, a large number of single-judge decisions are necessary. He also suggested that more precedential panel decisions would not necessarily create more consistency. Mr. Mayerick suggested that non-precedential single-judge decisions gives the CAVC the flexibility to render decisions faster, which is advantageous to veterans.

The panelists and the audience discussed the advantages and disadvantages of suggested solutions, such as: eliminating single-judge decisions; make single-judge decisions precedential; establishing more stringent control of the *Frankel* criteria; granting CAVC Judges settlement authority; and restructuring the adjudication process at the Regional Office and Board of Veterans' Appeals levels in manner that would limit the jurisdiction of the CAVC, thereby reducing the amount of appeals to the CAVC.

Third Breakout Session:
"Is There A Doctor In The House?"

This session concerned the importance medical evidence in the adjudication of veterans' claims and appeals. The panel was moderated by Brian Rippel, Deputy Assistant General Counsel, Department of Veterans Affairs Office of General Counsel, Litigation Group VII. The other panelists were: Patrick Joyce, Director of Occupational & Environmental Health and Chief Physician of the Compensation and Pension Clinic, VA Medical Center in Washington, DC; Bradley Flohr, Chief of Compensation and Pension Service's Judicial/Advisory Review Staff, Veterans Benefits Administration; Richard Thrasher, Chief Counsel for Policy at the Board of Veteran's Appeals; and Ronald Smith, Deputy General Counsel for the Disabled American Veterans.

Mr. Patrick discussed the certain details relating to when and how compensation and pension examinations were conducted, how the program for Veterans Health Administration (VHA) opinions and independent medical examinations (IMEs) is administered, and when such evidence obtained. Mr. Flohr discussed the requirements of the Veterans Claims Assistance Act (VCAA) in relation to when VA should obtain a medical opinion in a particular claim. Mr. Thrasher discussed the nuances of evaluating medical evidence, particularly the "battle of the experts," which he observed to be more common now than ever before. Mr. Smith discussed the manner in which VA adjudicators assess the credibility and weight of medical evidence. ■

Fed. Circuit Judge Alan D. Lourie with former Chief Judge Frank Q. Nebeker during the judicial conference.

Board of Governs member Landon Overby, former CAVC Judge Donald Ivers, and Amanda Meredith, counsel to the US Senate Committee on Veterans Affairs

VETERANS LAW CONTINUING LEGAL EDUCATION PROGRAM

By Caryn Graham

On April 25, 2006, the CAVC Bar Association presented a professional development/continuing legal education program in veterans law at The Grand Hyatt in Washington, D.C. immediately following the U.S. Court of Appeals for Veterans Claims 9th Judicial Conference.

The half-day program began with a luncheon and was followed by two educational sessions. The luncheon speaker was the esteemed former CAVC Judge, John J. Farley, III. Judge Farley presented a moving and informative talk on his work with the young military men and women who are recent amputees as a result of combat in Afghanistan and Iraq. Judge Farley himself is an amputee from wounds received during combat in Vietnam. He shared his experiences as an Amputee Coalition of America daily peer visitor at the Walter Reed Army Medical Center (Walter Reed).

Walter Reed uses the sports model for rehabilitation purposes. Lower extremity amputees receive computerized legs which contain computer chips to train the artificial limb to match the unique natural gait of each individual. The goal is to enable the servicemember to choose whether to remain in the service at the end of the rehabilitation process. Judge Farley's presentation included photographs of many of the men and women undergoing rehabilitation, all of whom he knew personally. It was a powerful message about the great strides made in amputee rehabilitation practices since the Vietnam era and the challenges recent amputees continue to face.

Following the luncheon, the first educational seminar, entitled "More Than Just the Scars of Battle: Anatomy, Rating and Legal Issues Germane to Gun Shot and Other Foreign Missile Wounds," was moderated by Heather Harter, Esq., of the Board of Veterans' Appeals (Board). The presenters were: Audrey Tomlinson, D.O., J.D., U. S. Army Physical Disability Agency; Gayle Strommen, Esq., VA General Counsel Group VII; and Landon Overby of the Disabled American Veterans. Dr. Tomlinson discussed what types of injuries she is seeing in her work at Walter Reed with returning soldiers who have sustained gunshot and other foreign missile wounds. She discussed particularly challenging fact patterns and provided the most recent draft of the explosion injury worksheet used by clinicians who prepare reports for the Army Physical Disability Evaluation System. The worksheet is used in evaluating soldiers who have suffered explosion injuries to ensure that the Physical Evaluation Board receives complete medical information so that soldiers receive accurate disability determinations.

Mr. Overby noted the importance of referring to the specific rating criteria in Board decisions which adjudicate gunshot and missile wound claims. He also stated that VA's 1997 regulatory changes regarding muscle group injuries were substantive, and did not simply update medical terminology, as suggested in the prefatory remarks to the regulatory changes. He suggested that VA should make further amendments to these regulations in order to eliminate the conflicts that he believes exist in the current version of the regulations.

The adjudication of gunshot and foreign body injuries was discussed by Ms. Strommen. She stressed the particular importance of service medical records in these types of cases as current ratings are based, in part, on the history of the injury, particularly the treatment provided just after the wound was received. She addressed how to choose the most applicable Diagnostic Code, as well as the limits on ratings in these cases, namely the prohibition against pyramiding and the amputation rule. Finally, she noted the importance of a having medical examiner assess every disability caused by the gunshot or foreign missile.

The second educational session was "Tackle, Punt, or Set Aside: Remands and the CAVC." It was moderated by Rosalind Mailander, Esq., a Staff Attorney with the CAVC. The panel included R. Randall Campbell, Esq., Assistant General Counsel, VA General Counsel Group VII; Robert V. Chisholm, Esq.

and Susan J. Janec, Esq., Supervising Attorney for the Board's Litigation Support Group.

Ms. Mailander opened the discussion, which focused on how the Court decides whether to address issues that are raised before it. She reported that the CAVC judges were tackling issues in the first instance more and more often. This belief was confirmed earlier in the day when, during the Judicial Conference, Judge Schoelen stated that the Court will be addressing more issues. Ms. Mailander noted that *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed.Cir.2000) was cited twice as much when the Court takes an issue on in the first instance. In *Maggitt*, the U. S. Court of Appeals for the Federal Circuit (Federal Circuit) found jurisdiction to hear a veteran's claim that the Court abused its discretion under § 7252(a) when it declined to remand a case to the Board for further consideration in light of a decision, also by the Federal Circuit, revising the applicable legal standard.

Mr. Campbell stated that issue exhaustion rules differ in different contexts and that it is a balancing test. He noted that the Court will remand if the issue was not raised below, as opposed to telling an appellant "you blew your chance." Considerations include the need for an orderly procedure and good administration, including the Congressional mandate that a final Board decision is a prerequisite to Court involvement; the fact that VA, not the Court, has specialized agency knowledge or practice; the concept that the agency should correct its own errors; and the belief that, where there are many decisions every year, a court could get overwhelmed if the appellants believed they could "skip over" the agency process.

The Board's representative, Ms. Janec, stated that the system works best when the Board decides cases in the first instance. That way, there is a "clear roadmap" for the Court to review. Mr. Chisholm argued that the system works best when the Court decides an issue. He noted that when a case is returned to the Board, only to again be appealed to the Court, the process becomes too lengthy. He also suggested that inconsistency was a problem because when the Court remands a case under *Maggitt*, it returned to the Board where Veterans Law Judges decide cases differently from one another.

The panel was also to address the significance of the term "set aside," a term that had recently been appearing in CAVC Orders instead of "vacate." Some Veterans Law Judges at the Board had found the "set aside" language ambiguous. It was noted that when a Court order says "vacate" it is clear that the entire decision is vacated. "Set aside," however, suggests that perhaps only a finding of fact or conclusion of law is affected. This issue was essentially resolved in the Judicial Conference when the judge who used the term "set aside" in his orders stated, in essence, that he found no significant distinction between the two terms. Further, it was noted that a party can always move for clarification of a Court order.

TOWN HALL MEETING AND MEMBERSHIP VOTE ON ISSUE OF ATTORNEY REPRESENTATION

Back in March 2006, a congressional staffer inquired whether the CAVC Bar Association had a view on pending legislation to amend 38 U.S.C. § 5904. Specifically, on March 9, 2006, Congressman Lane Evans and Congresswoman Shelley Berkley introduced H.R. 4914. It is cited as the "Veterans' Choice of Representation Act." In essence, the legislation proposed to amend title 38, of section 5904 of the United States Code by permitting paid attorney representation upon the filing of a Notice of Disagreement, i.e., earlier in the process than is now currently allowed. A majority of the Board of Governors of the Bar Association, decided to put the issue to the membership for a vote, and in the interest of discussing the issues in an open forum, on April 25, 2006, hosted a "town hall" discussion regarding the issue (specifically H.R. 4914). The positions that members had indicated warranted consideration were presented by two volunteers. As of that date, no member had outwardly endorsed taking a position in opposition to the proposed legislation and, therefore, that position was not included in the April 25th

CAVC Bar Association members Jennifer Dowd, Bill Puchnick, and Jeff Luthi

discussion. A transcript of the April 25th discussion can be found on our website at www.cavcbar.net.

First, Landon Overby, a non-attorney practitioner and appellate counsel for the Disabled American Veterans, argued that the Bar Association should not take any position on the legislation. He emphasized that the purpose of the Association was to "facilitate administration of justice before the U.S. Court of Appeals for Veterans Claims" and in furtherance of that goal, our mission should focus on education and outreach, not lobbying Congress." He noted that our Association is comprised of very distinct groups: private practitioners, veterans service organizations, VA General Counsel attorneys, Board of Veterans' Appeals attorneys, and Court employees. As such, Mr. Overby noted that taking a position on legislation as inherently divisive as that at issue would only serve to force apart our membership.

Next former CAVC Bar Association President and private practitioner Robert Chisholm initially argued that the Association should support the measure. He pointed out that every other Bar Association in the country that had taken a position, including the ABA, had supported the change to allow earlier paid attorney representation. Mr. Chisholm acknowledged the Association's distinct makeup, and suggested that, short of taking a supporting or opposing position, it would be in the Association's best interest to inform Congress of our collective thoughts regarding the pros and cons of the legislation considering our unique posture and perspective.

At the time of the town hall, there had been discussion that a similar bill would be introduced on the Senate side. Thereafter, on May 2, 2006, Senator Larry Craig and Senator Lindsey Graham introduced the "Veterans' Choice of Representation Act of 2006." As with the House version, the proposed legislation would amount to a departure from the current version of 38 U.S.C. § 5904, which essentially requires a "final" Board of Veterans' Appeals decision prior to allowing paid attorney representation before VA.

On May 18, 2006, ballots were distributed to all voting members of the Bar Association with directions that votes must be post-marked by June 2, 2006, in order to be counted. The results are as follows:

- 53% of votes received were in favor of advising Congress that we support efforts to allow paid-attorney representation before VA at an earlier time in the claims adjudication process than is now currently permissible.

- 5% were in favor of advising Congress than we oppose efforts to allow paid-attorney representation before VA at an earlier time in the claims adjudication process than is now currently permissible.

- 20% votes were in favor of not adopting any position regarding when paid-attorney representation before VA should occur.

- 22% of the voting membership abstained from participating in this vote.

The Board of Governors is currently preparing a letter to the Senate and House Veterans Affairs Committees indicating that a majority of voting members support the measure. Once it is sent, a copy of the letter will be made available on the website. ■

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