VETERANS LAW JOURNAL

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RECENT FEDERAL CIRCUIT ORAL ARGUMENTS

FEDERAL CIRCUIT HEARS *HAAS* – DOES "SERVICE IN THE REPUBLIC OF VIETNAM" INCLUDE SERVICE IN THE OFFSHORE WATERS, FOR PURPOSES OF HERBICIDE EXPOSURE?

By Mary Vavrina

Haas v. Peake, Federal Circuit Docket No. 07-7037. Oral argument was held before Chief Judge Michel, Judge Bryson, and visiting Northern District of California Judge Fogel, on November 7, 2007.

On appeal is a September 2006 CAVC judgment which reversed a February 2004 Board decision (denying the appellee's claim for service connection for diabetes mellitus with peripheral neuropathy, nephropathy, and retinopathy claimed as due to herbicide exposure). The Board determined that, although the appellant had served in the waters off the shore of the Republic of Vietnam, such service did not warrant application of the presumption of herbicide exposure because the appellant never set foot on land in that country.

In reversing the Board's decision, the CAVC held that a VA manual provision, VA Adjudication Procedure Manual M21-1, Part III, ¶ 4.08(k)(1)-(2)

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CAVC ELECTRONIC FILING PROJECT UPDATE

By Maureen A. Young

In our last article on e-filing (Winter 2007 edition) at the United States Court of Appeals for Veterans Claims (Court/CAVC) we reported on the Court's plan to adopt a comprehensive case management system that will allow it to maintain electronic case files and offer electronic filing over the Internet, (the Case Management/Electronic Case Files (CM/ECF) system). Well, it has arrived, at least in part. On November 27, 2007 the Court rolled out Phase I of the e-filing pilot program. Phase I requires electronic filing only for the Equal Access to Justice Act (EAJA) Claims. Pursuant to Administrative Order 19-07 all new applications and subsequent responses to applications for attorney's fees and expenses under EAJA must be filed electronically. The second and final phase, which is the requirement for all other cases, filed by an attorney, to be filed electronically is projected for summer 2008. A party filing pro se can still paper-file if needed. All paper filings by a pro se party will be converted to an electronic format by the Court.

Since the introduction of an electronic filing system to the federal courts eleven years ago, the

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REMINDER

Mark you calendar for the April 2008 CLE program. The Association will host a CLE program immediately following the Court's Judicial Conference on April 15, 2008. The planned format will be a lunch, followed by a three hour CLE session. Additional information is found on page three and at www.cavcbar.net.

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

APPRECIATION

BERNIE ENGLANDER, 1947-2007

Bernard "Bernie" Englander, a founding member of the CAVC Bar Association and a participant in the Veterans Consortium Pro Bono Program, died suddenly on December 28, 2007, at the age of 60. His death saddened many who knew him for his enthusiasm and his commitment to his clients.

Born in Poland in 1947, Bernie was a graduate of the University of Rochester and Syracuse University College of Law. He was a member of the District of Columbia and New York state bars, and operated his own law firm in Washington, D.C. after a legal career that included work for the Internal Revenue Service.

Bernie's first veterans case, which he accepted through the Veterans Consortium Pro Bono Program, *Friedsam v. Nicholson*, 19 Vet.App. 555 (2006), placed Bernie in the position of presenting an oral argument before the Court on behalf of his client, a veteran's widow seeking an earlier effective date for Dependents Educational Assistance (DEA). His oral argument, which resulted in the Court's vacating and remanding of the Board's decision, began with a reference to Abraham Lincoln and the "rough sense of justice" that Lincoln, as a trial lawyer, argued on behalf of his client. Bernie had since taken a second veterans case through the Consortium, which he had fully briefed and was awaiting a decision at the time of his death.

Bernie, who had been a founding member of the Bar Association and a regular attendee at Continuing Legal Education and other events, recently joined the Bar Association's Publications Committee. At the time of his death, he had begun working on an article for this issue of the *VETERANS LAW JOURNAL*. The *VETERANS LAW JOURNAL* wishes to extend its condolences to Bernie's family for its loss, and to convey its appreciation for the work he performed on behalf of his clients and for the Bar. – Lou George

CAVC ELECTRONIC FILING PROJECT UPDATE

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move towards digital documents was an inevitable evolution for courts across the country. In fact, in the federal judiciary CM/ECF systems are now in use in 98 percent of the federal courts, 93 district courts, 93 bankruptcy courts, the Court of International Trade, the Court of Federal Claims, the Court of Appeals for the 4th, 6th, 8th, and 10th Circuits, and the Bankruptcy Appellate Panel for the 6th, 8th, and 10th Circuits. Over 30 million cases are on CM/ECF systems, and more than 320,000 attorneys and others have filed documents over the Internet.[1] Most of the courts that have implemented or are in the process of implementing CM/ECF have made the electronic record the official record of the court and expect filings to be made electronically unless good cause is shown.

Implementation of the e-filing system at the CAVC brings the Court into conformity with the advancements in electronic record keeping now underway in the federal court system; and, according to Norman Herring, Clerk of the Court, things are going extremely smoothly. Mr. Herring reported that approximately 150 attorneys have signed up under the pilot program and the response from attorneys who have used the system has been overwhelmingly positive. One feature of the system that appears to be particularly attractive is the ability to file after Court hours.

Mr. Herring says that the initial success of the pilot program can be attributed to the many months of detailed planning, the adequate allocation of resources for the project, a committed staff, the assistance of the United States Administrative Office of Courts and the online training module. In addition, the Court has undertaken a pro-active approach to problem-solving by personally contacting parties who attempt to e-file without success and walk them through the process. They are also providing prompt responds to all questions regarding e-filing.

Kudos to the Court and attorney e-filers for moving forward and making this project a success. ■

[1] US Courts. Case Management/Electronic Case Files (CM/ECF), December 2007. www.uscourts.gov

BAR ASSOCIATION ANNUAL MEETING FEATURES ETHICS PRESENTATION BY FATHER JOHN J. PARIS, S.J., AND E-FILING UPDATE

The DAV Headquarters was the setting for the Annual Meeting of the CAVC Bar Association, held on September 28, 2007. The meeting began with a welcome from Glenda S. Herl, outgoing President of the Bar Association, and then a two-hour Ethics CLE program was presented by Father John J. Paris, S.J., Walsh Professor of Bioethics at Boston College. Father Paris provided his reflections on legal ethics, with a historical background of legal ethics (going back to the 13th Century) and an outline on modern legal ethics culminating in the adoption of the ABA Code in 1969. He provided a discussion on ethics as it relates to medical decisions (bioethics being his specialty).

Following Father Paris' presentation, Executive Officer/Clerk of the Court Norman Y. Herring presented a summary of the E-Filing initiative at the CAVC. In particular, Mr. Herring discussed the initiative's beginning in November 2007, with EAJA applications being the first to use the e-filing system. In addition, Mr. Herring distributed the CAVC E-Filing newsletter, which discussed the initiative and answered common questions regarding the initiative (the E-Filing initiative is discussed earlier in this edition of the *VETERANS LAW JOURNAL*).

Following the CLE Presentation and E-Filing Update, the Bar Association's Annual Meeting took place. The outgoing President, Glenda Herl, reported on the Bar Association's activities from 2006-2007, including election results, presentation of recognition plaques, and report on the Bar Association's standing committees. The annual meeting included the remarks of the incoming President, David Quinn, and provided an update by the outgoing Bar Association treasurer, Landon Overby. The meeting ended with comments by Chief Judge William P. Greene, Jr., who provided an update on the activities of the Court over the past year. The meeting concluded with a members' reception and social hour.

Clerk of the Court Norman Y. Herring discusses e-filing at the First Biennial Bar and Bench Conference in April 2007 (photograph by Romney Hogaboom)

The next Bar Association CLE Program will take place on April 15, 2008, immediately following the Court's Judicial Conference. The planned format will be a lunch, followed by a three-hour CLE session. Further information regarding this program is found at www.cavcbar.net. ■

CAVC Bar Association Activities April 14-15, 2008

- April 14 - Reception following the conclusion of the first day of the Court's Judicial Conference.
- April 15 - CLE Program, 1:00-5:00 p.m. Lunch followed by two panel presentations of approximately one and one-half hours each.
  Panel 1: "Determining What Constitutes an Adequate VA Examination"
  Panel 2: "Lay Evidence: Credibility, Competency, and Probative Value in Light of Recent Case Law"

RECENT FEDERAL CIRCUIT ORAL ARGUMENTS

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(Nov. 1991), created a presumption of herbicide exposure based on receipt of the Vietnam Service Medal (VSM) for purposes of service connection for diseases associated with herbicide exposure. In its holding, the CAVC found the manual provision to be a substantive rule and invalidated a subsequent February 2002 amendment to that provision because VA did not comply with the notice-and-comment requirements of the Administrative Procedures Act (APA) regarding the promulgation and rescission of substantive rules. The CAVC also found that neither the statute nor the regulation governing herbicide exposure claims precludes application of the presumption of herbicide exposure to persons who served aboard ship in close proximity to the Republic of Vietnam. Thus, for the purpose of applying the presumption of exposure to herbicides under 38 C.F.R. § 3.307(a)(6)(iii), the CAVC in Haas held that "service in the Republic of Vietnam" will, in the absence of contradictory evidence, be presumed based upon the veteran's receipt of a VSM, without any additional proof required that a veteran who served in waters offshore of the Republic of Vietnam actually set foot on land.

On appeal before the Federal Circuit, the appellant, argued that under former 38 C.F.R. § 3.311(a)(6) (1986), which § 3.307(a)(6)(iii) was codified to replace, VA presumed that veterans who served in Vietnam during the Vietnam Era were exposed to dioxin, eliminating the need to establish exposure by evidence, and that the presumption of exposure extended to "service in the waters offshore and service in other locations, *if the conditions of service involved duty or visitation in the Republic of Vietnam*." (Emphasis added.) The VA asserted that it has consistently and historically excluded service by veterans who served offshore as not entitled to the presumption of exposure. The VA further argued that Congress did not define what constituted "service in the Republic of Vietnam" in § 1116(a) or (f) and, as such, the CAVC should have deferred to the VA's reasonable interpretation of that term, noting that Congress would not have amended the applicable period to match the dates of potential exposure to encompass only those veterans potentially exposed to Agent Orange based on their dates and locations of service. Finally, the VA asserted that the CAVC exceeded its authority by holding that the appellee was entitled to a presumption of herbicide exposure, because the court's conclusion required factual findings that were not made by VA.

On appeal, the appellee argued that the Federal Circuit should reject VA's argument that it should be accorded deference under the holding in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 849 (1984), because Congress by including non-Hodgkin's lymphoma (NHL) in § 1116(a)(1)(A) expressly included veterans who served in the waters offshore Vietnam within the definition of service in Vietnam, regardless of whether they set foot on the land mass of Vietnam. The appellee also argued that VA's interpretation of § 1116 is not entitled to either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) deference because its interpretation is in conflict with VA's prior consistently held view and because VA's change in interpretation was adopted informally, without following notice-and-comment rulemaking procedures. In its brief, the amicus contended that because (1) international law includes territorial waters in a country's sovereign territory and (2) a report regarding the service of the Australian Navy offshore Vietnam provides evidence that service on ships offshore resulted in exposure to Agent Orange, the appellee must be presumed to have served in the Republic of Vietnam. During oral argument, the VA specifically argued that, as the latter report was not part of the record nor considered by the Secretary, there is no evidence of its reliability or its similarity to the service of U.S. naval personnel and, therefore, the Federal Circuit should disregard the Australian report.

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REOPENED VS. ORIGINAL CLAIMS: "THAT WHICH WE CALL A ROSE BY ANY OTHER NAME WOULD SMELL AS SWEET?"

By April Maddox

Boggs v. Peake, No. 07-7137 (Fed. Cir.) Oral argument was held before Judges Gajarsa, Dyk, and Moran on Thursday, December 6, 2007. Decided March 26, 2008.

In *Boggs v. Nicholson*, No. 04-0235 (U.S. Vet. App. November 9, 2006) the Court of Appeals for Veterans Claims (CAVC) affirmed a December 12, 2003, decision by the Board of Veterans' Appeals (Board) that, in pertinent part, denied reopening a claim for service connection for left ear hearing loss. The appellant argued that VA erred in construing his claim as one to reopen rather than as an original claim, stating that his most recent claim was distinct from his previous claim for a "left ear condition" because the etiology presented was different from that presented to the RO in 1955. In 1955, the appellant filed a claim seeking service connection for a left ear condition. The RO denied the claim finding that the left ear condition preexisted service and was not aggravated by service. In October 2002, the appellant filed an application for VA compensation alleging that his hearing was "not bad" before service but was "bad" when he came out of service. He attributed the problem to treatment he received in service for left ear drainage.

Before the CAVC, the appellant argued that his sensorineural hearing loss was a separate and distinct disability from that of his conductive hearing loss. The CAVC disagreed, finding the case similar to and controlled by *Ashford v. Brown*, 10 Vet. App. 120, 123 (1997). In *Ashford*, the CAVC held that "notwithstanding the nomenclature and varied etiology attributed to his claim, Mr. Ashford's 'lung condition,' by any name, remains the same." Applying *Ashford*, the CAVC found that despite the difference in etiology, the appellant's hearing loss symptomatology remains the same. Accordingly, the CAVC concluded that the Board did not err in construing the claim as a request to reopen a previously denied claim for service connection for hearing loss.

At oral argument the appellant argued that under *Ephraim v. Brown*, 82 F.3d 399 (Fed. Cir. 1996), when a new diagnosis is presented, VA must treat the subsequent application as a new claim. The appellant also argued that *Ashford* is inapplicable in this case because in *Ashford*, the CAVC held only that when a claimant presents a second application based on a new *theory of etiology* – i.e., a new explanation of how his or her diagnosis is service connected – that application must be treated as an attempt to reopen the original claim (and not as one that is separate and distinct). It said nothing about separate and distinct *diagnoses*. Also, it is the *diagnosis* and not the *symptomatology* that serves as a basis for the grant of service connection.

The appellee argued that although the CAVC referred to the appellant's hearing loss both as his "current disability" and as the "symptomatology" of his disability, its decision cannot reasonably be read to hold that any two conditions sharing similar symptoms are always the same "disability" or components of the same "claim." The appellee also argued that *Ephraim* is distinguishable from this case because in *Ephraim*, two diagnoses in that case reflected two distinct and coexisting disabilities. In this case there is only one disability at issue, hearing loss, and because service connection for this disability was denied in 1955 the issue may be revisited only if the appellant properly reopens the claim.

The Federal Circuit reversed and remanded the CAVC decision. The Court reviewed the legislative history of 38 U.S.C. § 7104(b), that a claim based upon the same "factual basis" may not be considered unless new and material evidence is submitted. The Court held that a claim's "factual basis" is the veteran's disease or injury rather than the symptoms, and that "a properly diagnosed disease or injury cannot be considered the same factual basis as distinctly diagnosed disease or injury." The Court concluded that the CAVC erred as a matter of law and that "claims based upon distinctly diagnosed diseases or injuries must be considered separate and distinct claims."

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RECENT FEDERAL CIRCUIT DECISIONS

SUPREME COURT TAKES CERTIORARI IN RICHLIN – MAY PARALEGAL SERVICES BE RECOVERED AS PART OF "FEES" OR "EXPENSES"?

By Jonathan Kramer

Richlin Sec. Serv. Co. v. Chertoff, 472 F.3d 1370 (Fed. Cir. 2006). This case, which was decided by the Federal Circuit on December 26, 2006, interprets the Equal Access to Justice Act (EAJA) in a matter that had originated before the U.S. Department of Transportation Board of Contract Appeals ("Board"), and concerns how paralegal services may be charged on EAJA fee applications. The Court of Appeals for Veterans Claims (CAVC) relied on *Richlin*, at least in part, in deciding *Aponte v. Nicholson*, 21 Vet.App. 470 (2007), an EAJA case which essentially upheld most of the fees sought by the claimant even though it was claimed as "paralegal work" performed by an attorney. As the Supreme Court recently took certiorari in *Richlin*, a discussion of the Federal Circuit's ruling in *Richlin* is appropriate.

In *Richlin* the Federal Circuit framed the issue as follows: Under EAJA, whether amounts charged for paralegal services may be recovered at market rates as part of "fees" (attorney's fees in particular) or are they recoverable only at cost as part of the recovery of "expenses." *Richlin* at 1374. Under the facts of *Richlin*, the claimant's attorney used paralegals and separately billed the client for their services at market rates, as part of attorney's fees, which began at $50 per hour but gradually increased to $135 per hour. The Board found these fees for paralegal services unreasonable and determined that the actual cost of the paralegals services to the claimant's attorney was $35 per hour, based on taking judicial notice of paralegal salaries in the Washington, D.C. area as reflected on the internet. *Richlin* at 1374.

In upholding the Board's decision and deciding that paralegal services may only be recovered "at cost" as part of expenses and not as attorneys fees, the Federal Circuit observed that since the purpose of EAJA is not to make the prevailing party whole, it would be consistent with that purpose to disallow full reimbursement of paralegal fees. *Richlin* at 1379. Indeed, the Federal Circuit explained that "it would be inconsistent with the purpose of EAJA to reimburse paralegal fees at the full hourly rate charged to the client limited only by the statutory cap on attorney's fees." *Richlin* at 1379. The Federal Circuit thus reasoned that since the rates for attorney's fees are caped to $125 an hour under EAJA, "treating paralegal fees as attorney's fees would distort the normal allocation of work and result in a less efficient performance of legal services." *Richlin* at 1381.

In Aponte, the CAVC took note of the *Richlin* holding that paralegal services are not recoverable as attorney's fees but are only recoverable as expenses at cost to the attorney. However, since the "paralegal work" performed in *Aponte* was actually performed by an attorney and not paralegals, and the attorney reduced the fees charged for the "paralegal work" to $110 per hour, the CAVC found the fees thus charged was an appropriate exercise of reasonable billing judgment.

The Supreme Court took certiorari in November 2007 (Docket No. 06-1717). Oral argument was held on March 19, 2008. Briefs are available online at www.supremecourtus.gov.

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DETERMINING WHEN VA IS REQUIRED TO OBTAIN A MEDICAL OPINION IN DEPENDENCY AND INDEMNITY COMPENSATION (DIC) CASES

By Caryn Graham

DeLaRosa v. Peake U.S. Fed. Cir. No. 2007-7108, on appeal from *DeLaRosa v. Nicholson*, 2006 App. Vet. Claims LEXIS 1107 (Oct. 6, 2006). Oral argument held before Judges Rader, Prost, and

Moore on Tuesday, January 8, 2008. Decided January 31, 2008.

The benefit at issue in this case is entitlement to service connection for the cause of the veteran's death. The veteran had active service from May 1967 to March 1970, including combat service in Vietnam. In 1993, the veteran had a stroke. Thereafter, it was reported that his mood worsened, and he was more aggressive. The relationship between the veteran and his wife, the appellant, deteriorated. The veteran was arrested for physical abuse, and, in May 1994, the couple separated. The appellant obtained a restraining order against the veteran. In July 1994, the veteran killed his 14-year-old daughter, and then himself, with a firearm.

In 2000, the appellant filed a claim for dependency and indemnity compensation (DIC), asserting that the veteran had post-traumatic stress disorder (PTSD) which led to him killing his daughter and then himself. The appellant provided a medical statement dated in 2000 from a physician, an internist and geriatrician, who stated that he believed that the veteran had undiagnosed and untreated PTSD which began in service and led to his violent behavior. The physician's opinion was based on extensive conversations with the appellant. Service and post-service medical records do not show a diagnosed psychiatric disorder during the veteran's lifetime.

In 2000, the VA Regional Office (RO) denied the appellant's claim for service connection for the cause of the veteran's death finding that there was no confirmed diagnosis of PTSD in his lifetime. In 2004, the Board of Veterans' Appeals (Board) denied the claim, finding that the veteran did not have a service-connected psychiatric disorder that caused or contributed to his suicide and that the "most obvious reasons for the veteran's suicide was the bitter dispute with his wife and his killing of his own daughter." The Board concluded that the medical opinion provided by the appellant was speculative and without probative value. The Board found that the appellant's lay statements suggesting that the veteran's suicide was a result of PTSD was not competent medical evidence. The Board also found that a VA medical opinion was not necessary to decide the claim.

In 2006, the United States Court of Appeals for Veterans Claims (Court) affirmed the decision of the Board. The Court found that VA did not have a duty to obtain a medical opinion in this case because the second requirement of the test outlined in *McLendon v. Nicholson*, 20 Vet. App. 79 (2006) was not met: there was no evidence establishing that an event, injury, or disease occurred in service. The Court also found that the record did not contain a valid diagnosis of PTSD. The Court held that 38 C.F.R. § 3.302 was not for application. Section 3.302 provides that suicide is not willful misconduct where a person of unsound mind commits the act because in such a case the act of self-destruction is not intentional.

On appeal to the United Stated Court of Appeals for the Federal Circuit (Federal Circuit), the appellant argued that she submitted adequate evidence to trigger VA assistance, and she requested that the matter be remanded in order for VA to assist her by obtaining a medical nexus opinion and readjudicating her claim. In particular, she asserted that subsection (a) of 38 U.S.C.A. § 5103A applies to DIC claims, and not subsection (d), the subsection that was applied by the Court. She argues that the Court erroneously required her "to shoulder a much heavier burden to earn the right to VA assistance than section 5103A requires." She also argues that the Court misconstrued 38 C.F.R. section 3.302 to require a prior finding of service connection.

The Secretary argued that the Board properly concluded, and the Court properly affirmed, that the veteran's death was not caused by a service-connected disability. To the extent that the Court erroneously applied subsection (d) of section 5103A, and not subsection (a), such error was harmless, the Secretary argued. The Secretary noted that VA was not required to obtain a medical opinion as part of its duty to assist under section 5103A(a). Further, as the Board found that the veteran's death was due to his own willful misconduct, and a death cannot be service-connected if it is due to willful misconduct, a medical opinion stating that the veteran had a service-connected psychiatric disorder would not have aided the appellant in substantiating her claim. Finally, the Secretary argued that the Court did not misinterpret 38 C.F.R. § 3.302.

In response, the appellant argued that subsection (a) of 38 U.S.C. § 5103A does in fact require VA to obtain a medical opinion in her case. The appellant argues that her position is supported by legislative history; the evolution of the statutory duty to assist; the longstanding canon that when interpreting veterans

benefits statutes, interpretive doubt is to be resolved in the veteran's favor; and the Secretary's post-enactment construction of § 5103A.

At oral argument, questions by Judge Rader revolved around whether the appellant was required to meet an evidentiary threshold prior to obtaining VA assistance. Judge Prost's questions focused on the statutory framework of 38 U.S.C. § 5103A, particularly whether the remaining subsections of the statute would have any significance if the Federal Circuit were to interpret 5103A(a) as the appellant suggested. Judge Moore, noting that the Federal Circuit's jurisdiction was extremely limited, questioned why the Federal Circuit should not send the case back to the Court for application of 38 U.S.C.A. § 5103A(a). Judge Moore also wanted the government to clarify that its argument would not have the effect of excluding assistance in all cases in which a veteran had died with an untreated mental illnesses.

In its January 31, 2008 decision, the Court affirmed the CAVC's decision. The Court agreed with the Secretary that section 5103A(a) cannot be read to require the Secretary to provide a medical examination or opinion, "because that reading would obviate the need for § 5103(d)." The Court held that section 5103A "does not always require the Secretary to assist the claimant in obtaining a medical opinion or examination," and that "the Secretary only needs to make reasonable efforts to assist a claimant in obtaining a medical opinion when such opinion is 'necessary to substantiate the claimant's claim for a benefit.'" Furthermore, the Court concluded that the CAVC's application of section 5103A(d) that a medical opinion was not required (factual findings under the more restrictive section 5103A(d) that the Court was precluded by its jurisdiction from reviewing), was harmless error. Additionally, the Court concluded that the CAVC did not misinterpret 38 C.F.R. § 3.302, holding that the CAVC did not impose a requirement that a determination of service connection for a mental disorder be made prior to the veteran's death to establish service connection for

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RECENT CAVC ORAL ARGUMENTS

Earlier Effective Date and Prior Final Decisions

By Thomas D. Jones

Lamb v. Mansfield, Docket No. 05-3495. Oral argument was held before Judges Hagel, Lance, and Schoelen, on October 24, 2007.

The appellant appealed a June 1996 rating decision by a VA Regional Office (RO) which awarded the veteran a 10 percent rating for post-traumatic stress disorder (PTSD), effective from December 11, 1995. The veteran had previously been awarded within a September 1952 rating decision service connection for anxiety reaction, with a 10 percent initial rating. In April 1954, the RO noted the veteran's change of address. In July 1957, the RO sent the veteran notice of a VA psychiatric examination that same month. This notice was returned marked unclaimed. A subsequent August 1957 letter, also unclaimed, informed the veteran that his award would be discontinued based on his failure to report for examination. The compensation award was thus suspended that same month. In December 1995, the veteran filed an increased rating claim. Upon receipt of the June 1996 rating decision restoring his 10 percent rating, he disagreed with the effective date of December 11, 1995, initiating this action.

The appellant argued in his brief that the August 1957 rating suspension was not final, as it violated the Due Process clause of the U.S. Constitution. Specifically, appellant charged the RO failed to make reasonable efforts to contact the veteran, including sending notice to prior addresses and/or the address of the veteran's parents, before suspending his award. This failure on the part of VA resulted in finality not attaching to the August 1957 rating reduction. The appellant also asserted that if the August 1957 action was found to be final, it should be found to contain clear and unmistakable error. While VA Regulation 1251(A), in effect in 1957, authorized suspension of compensation "upon the failure of a veteran without good reason to report for physical examination", VA had clear evidence that the veteran had good reason

not to report for examination – he was never made aware of the examination date, as the notice letter had been returned to VA as unclaimed. Thus, suspension of the veteran's compensation was clearly inappropriate.

In the appellee's brief, the Secretary, while not conceding that appellant's due process rights had been violated, nonetheless found that the Board's reasons and bases for denying the due process argument were inadequate.

At oral arguments, appellant's counsel argued again that the August 1957 action was either clearly and unmistakably erroneous, or a violation of due process. In questioning, Judge Schoelen wondered whether the Court had jurisdiction over any alleged due process violations in the August 1957 action, especially where the rating action on appeal was rendered in June 1996. Appellee's counsel argued that the 1957 action was final because VA took all appropriate actions to provide notice to the veteran of that decision. The judges questioned appellee's counsel why, if the veteran's award was suspended and not severed in 1957, he was not eligible for retroactive benefits when his award was restored in 1996.

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The Application of *Bowles v. Russell* on Equitable Tolling at the CAVC

By Dorilyn Martz Ames

Henderson v. Peake, Vet. App. No. 05-0090. Oral argument held before Chief Judge Greene and Judges Hagel and Schoelen on November 16, 2007.

In a March 14, 2006 decision the Court dismissed the appellant's appeal as untimely after determining that equitably tolling the 120 day appeal period for filing a Notice of Appeal under 38 U. S. C. § 7266(a) was not warranted. While the matter was on appeal, the Supreme Court of the Unties States decided *Bowles v. Russell*, which held that the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement" and Federal courts have no authority to create equitable exceptions to jurisdiction requirements. *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007). On August 3, 2007, the Court ordered the parties to prepare supplemental memoranda of law to discuss what effect *Bowles* had on the line of cases currently allowing equitable tolling of the time limitations set forth for filing an appeal under 38 U. S. C. § 7266(a).

When presenting the appellant's case, counsel argued that *Bowles* did not disturb the precedents set forth in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (*en banc*), or *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (*en banc*), which permit equitable tolling under 38 U. S. C. §7266(a). Counsel argued that *Bowles* did away with the doctrine of unique circumstances, which extended the time period for filing a Notice of Appeal, rather than doing away with equitable tolling. Appellant's counsel also argued that *Bowles* did not overrule *Irwin v. Department of Veterans Affairs*, 498 U. S. 89 (1990), (stating that equitable tolling applied in suits against the government) because *Irwin* was not explicitly mentioned in the decision.

In response to the appellant's arguments, counsel for VA argued that the holding in *Bowles* meant that equitable tolling could no longer be applied to excuse untimely filing of notices of appeal before the Court. Counsel for VA argued that the CAVC is a Federal court with jurisdiction conferred upon it by Congress. Jurisdiction cannot be expanded beyond what is conferred by law. *Martinak v. Nicholson*, 21. Vet. App. 447, 450 (2007). The impact of *Bowles*, counsel for VA argued, is that equitable tolling cannot be used to extend jurisdiction beyond what was explicitly provided by Congress.

Counsel for VA also argued that *Bowles* overruled *Irwin*, or alternatively, that *Irwin* does not apply because *Bailey* misconstrued *Irwin* and applied it too broadly.

Chief Judge Greene and Judge Schoelen both noted that the VA system is unique, in that Congress designed it be paternalistic and benevolent towards its veteran claimants. Both Judges whished to know whether the unique nature of the VA system affected the impact of *Bowles*. Counsel for the appellant argued that Congress' intent was very clear: that the

system was supposed to be benevolent and paternalistic, and that equitable tolling should be available to veterans. Congress' intent was not found in legislative history, but in Congress' response to Federal Circuit and Supreme Court decisions. Congress had opportunities to make equitable tolling unavailable and chose not to do so. Counsel for VA replied that the CAVC is an independent Federal court of appeals and that the Federal Circuit has lost sight of that fact when it refers to the CAVC as being part of the VA system. The Supreme Court held that the judiciary cannot presume Congressional intent when there is none.

Judge Hagel noted that the Supreme Court's language indicating that time limits established by Congress are jurisdictional, was very clear. Counsel for the appellant responded that the Supreme Court has made a distinction between statutes which govern a period of appeal from a district to intermediate court and a statute of limitations or appeal period where an individual brings a claim for judicial review for the very first time. *Bailey* and *Jaquay* provide that when there is no built in safety valve allowing for an extension of time, Congress intended equitable tolling to be available.

Counsel for the appellee: Richard Mayerick, Esq., (202) 639-4800
Counsel for the appellant: Thomas W. Stoever, Jr., Esq., (303) 863-1000

Where service connection has been awarded based on a finding of clear and unmistakable error (CUE), must the Secretary obtain a retrospective medical opinion concerning the appellant's level of disability throughout the entire period being rated?

By Richard Thrasher

Chotta v. Peake, Vet. App. No. 05-3204. Oral argument held before Chief Judge Greene and Judges Kasold and Lance on November 28, 2007. Decided on March 11, 2008.

In a March 14, 2006 decision the Court The appellant, Thomas P. Chotta, appeals that part of an October 7, 2005, decision of the Board of Veterans' Appeals (Board) that denied his claim for an initial disability rating in excess of 50 percent prior to January 20, 1999, for service-connected post-traumatic stress disorder (PTSD). The United States Court of Appeals for Veterans Claims issued a memorandum decision on July 25, 2007, affirming the Board's decision. Subsequently, the Court issued an order granting the appellant's motion for reconsideration and assigned the case to a panel for consideration. Oral argument was held before Chief Judge Greene, and Judges Kasold and Lance, on November 28, 2007. The matter remains pending before the Court.

The veteran's claim for service connection for PTSD was granted by an April 1999 rating decision, effective from April 30, 1997. Subsequently, the Board, in a separate matter, issued a decision in May 2001 finding no CUE in May 1946 and November 1947 rating decisions that had denied service connection for a psychiatric disorder. This decision was appealed to the Veterans Claims Court. In March 2003, the parties entered into a stipulation agreement in which it was agreed that the effective date for the grant of service connection for PTSD would be changed to September 27, 1947, and that the appropriate disability rating would be decided by the Agency of Original Jurisdiction (AOJ) and subject to appeal. Thereafter, a June 2003 rating decision assigned a 50 percent rating from September 27, 1947, to January 19, 1999, and a 70 percent rating from January 20, 1999, onward.

The appellant argues on appeal that, in assigning a rating following the settlement agreement, VA failed to develop the medical record to determine whether he was entitled to a staged rating of 70 or 100 percent from March 1986 to August 1997, as required by *Hines v. Principi*, 18 Vet. App. 227 (2004). While a CUE motion with respect to a service connection determination must be based on the evidence of record at the time of the decision in question, the appellant contends that, once service connection has been granted, VA is obligated to obtain appropriate medical opinions and other evidence to address the level of disability during the relevant time period in question.

The Secretary argues, in response, that there is a plausible basis in the record for the Board's finding that the appellant was not entitled to a rating in excess of 50 percent for PTSD prior to January 20, 1999. Because the appellant has not identified any additional

medical evidence that could be obtained, the Secretary contends that the duty to assist has been satisfied in this case. In addition, the Secretary asserts that there is no "extra duty" to obtain medical evidence not identified by the veteran other than by way of a vague duty to assist contention.

In its March 11, 2008 decision, the Court vacated and remanded the Board's decision. In addressing the issue presented, the Court held that a retrospective medical opinion may be necessary to determine the appellant's level of disability between 1947 and 1997. The Court also required the Board, on remand, to weigh and assess the probative value of the lay testimony concerning appellant's psychiatric disability during this time period.

Counsel for appellant: Mark R. Lippman, Esq., (858-456-5840)
Counsel for appellee: Tracy K. Alsup, Esq., (VA OGC) (202-639-4806) ■

RECENT CAVC DECISIONS

DETERMINING THE SCOPE OF 38 C.F.R. § 3.655 IN FAILURE TO REPORT CASES

By Donnie Hachey

Turk v. Nicholson, No. 06-0069. Oral argument was held before Judges Kasold, Hagel and Davis on October 10, 2007. Decided January 31, 2008.

On appeal in *Turk* is a September 2005 Board decision that denied an initial rating in excess of 50 percent for post-traumatic stress disorder (PTSD). The Board relied heavily on 38 C.F.R. § 3.655 in denying the claim, finding that the appellant failed without good cause to report for multiple VA psychiatric examinations. The Board also found the existing medical evidence of record, which consisted primarily of reports from the appellant's private psychologist, inadequate to properly decide the claim.

At oral argument, the appellant acknowledged that he lacked good cause for failing to report for the scheduled VA examinations, but argued that the Board's reliance on § 3.655 to deny the claim was misplaced. The appellant reasoned that while § 3.655 may be used to deny an increased rating claim where a claimant fails to report for VA examination, it may not be used to deny "an appeal of an original decision." For appeals of original decisions, § 3.655 commands that the claim be rated based on the evidence of record regardless of the claimant's failure to report for VA examination.

The appellant argued that because his claim involved the assignment of an initial rating, it was "an appeal of an original decision." The appellant therefore argued that the Board erred by denying the claim outright, rather than rating it based on the evidence of record. In this regard, the appellant contended that the private medical evidence he submitted supported a higher rating and was adequate to rate the veteran's PTSD without resort to a VA psychiatric examination.

Counsel for the Secretary conceded at oral argument that § 3.655 could not be used to deny "an appeal of an original decision," even where a claimant fails to report for scheduled VA examination(s) without good cause. Counsel for the Secretary instead argued that the case did not involve "an appeal of an original decision," and that, as such, outright denial under § 3.655 was proper. Because the appeal involves the assignment of an initial rating, the Court essentially rejected this theory from the bench at oral argument.

Counsel for the Secretary also contended that the Board had not relied solely on § 3.655 to deny the claim, but had decided in the alternative that the evidence already of record was insufficient to warrant a higher rating. In support of this argument, the appellee pointed to language in the Board's decision which called into question the sufficiency of the private medical evidence and suggested that such evidence by itself did not support a rating in excess of the 50 percent.

In its January 31, 2008 decision, the Court affirmed the Board's decision. The Court found that it was "clear error" for the Board to classify the veteran's claim as an increased rating claim and summarily deny the claim under the second sentence of 38 C.F.R. § 3.655(b), and should have instead treated the claim as an original claim. However, the Court found that the Board's legal error was nonprejudicial, since the Board

made findings and determinations explaining why the medical evidence of record did not support a higher disability rating, therefore satisfying the "evidence of record" standard of the first prong of section 3.655(b).

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Counsel for Appellee: David J. Lowenstein, Esq.
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DOES 38 U.S.C § 1162 ALLOW FOR SEPARATE CLOTHING ALLOWANCES FOR MULTIPLE SERVICE-CONNECTED DISABILITIES?

By April Maddox

Sursely v. Nicholson, No. 05-2194 (U.S. Vet. App.) Oral argument was held before Judges Green, Lance, and Schoelen on Wednesday, September 26, 2007. Decided December 21, 2007.

In *Sursely* the veteran, a service-connected triple amputee, sought payment of more than one annual clothing allowance, due to the fact that his separate and distinct service-connected disabilities wore and tore both his shirts and his pants. In the course of the development of the claim, the RO submitted the question of a second clothing allowance to the Director of Compensation and Pension (C&P) Service for an advisory opinion. In a July 2003 letter, the Director of C&P noted that the authority for a clothing allowance was provided by statute at 38 U.S.C.A. § 1162 and implemented by regulation found at 38 C.F.R. § 3.810. The statute provided for payment of "a clothing allowance," and the regulation provided for payment of "an annual clothing allowance." In its May 2005 decision, the Board found the advisory opinion persuasive, and finding no other entitlement under law, denied the request for payment of more than one annual clothing allowance.

At oral argument, the appellant argued that on its face, 38 U.S.C § 1162 allowed for two separate clothing allowances in his case because his service-connected disabilities wore and tore both his shirt and pants. Alternatively, he argued that the 38 U.S.C § 1162 is vague and thus, VA is required to liberally construe the statute in favor of the veteran. VA argued that, on its face, 38 U.S.C § 1162 authorizes only one clothing allowance pointing to legislative history supporting this argument and noting that the statute is entitled "clothing allowance" rather than "clothing allowances." VA also noted that the appellant's only recourse in this case is to petition congress to change the law.

In its December 21, 2007 decision, the Court affirmed the Board's decision. The Court held that the statutory language was clear (and the regulatory language indistinguishable), and concluded that the law bars receipt of multiple clothing allowances. The Court concluded by stating that "[t]he Court sympathizes with the appellant's condition and his efforts to seek the greatest possible recompense," but stated that "given the limits of the statutory language governing the benefit he seeks, the Court is unable to grant the appellant the relief he requests."

Counsel for appellant: Landon E. Overby –
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Counsel for appellee: Kenneth A. Walsh
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UPCOMING ORAL ARGUMENTS AT THE CAVC MAY 2008

Fagre (Vet.App. 07-1000)	Kasold, Hagel, Lance May 8, 10:00 a.m.
Faunce (Vet.App. No. 06-0461)	Greene, Hagel, Davis May 20, 10:00 a.m.
Barela (Vet.App. No. 06-0336)	Greene, Lance, Davis May 21, 10:00 a.m.

TIMELINESS OF REQUESTS FOR WAIVER OF INDEBTEDNESS

By Lou George

Shirley A. Edwards v. Peake, Vet. App. No. 05-3546. Oral argument held before Judges Kasold, Lance, and Schoelen on September 25, 2007. Decided January 30, 2008. Motion of appellant for a panel decision filed on February 20, 2008.

At issue in this case was the timeliness of a request by Ms. Edwards, the widow of veteran Luther Edwards, Jr., concerning a waiver of asserted indebtedness in the amounts of of $12,347, and $2,366, representing an overpayment of non-service-connected death pension benefits. In her initial brief, the appellant argued that the Board had correctly concluded that Ms. Edwards had requested a waiver of the $12,347 debt to VA, but that the Board incorrectly held ruled that her request was untimely. The appellant argued that the Board erroneously presumed that VA notified Ms. Edwards' of the asserted debt more than 180 days before Ms. Edwards requested a waiver, and that there was no notification letter found in the VA's file and no other evidence that Ms. Edwards was notified of the debt at the time. The appellant argued that the Board misapplied the presumption of regularity of official acts set forth in *Gold v. Brown*, 7 Vet.App. 315, 319 (1995), and also rendered null a portion of the waiver statute and violated Ms. Edwards' due process rights. With respect to the $2,366 debt, the appellant argued that the Board erroneously concluded that Ms. Edwards' submissions to VA concerning the second asserted debt of $2366 did not qualify as a request for a waiver of indebtedness under 38 U.S.C. § 5302(a). The appellant argued that the Court should vacate the Board's decision and remand the case to the Board for adjudication of the waiver requests on the merits.

In his brief, the Secretary argued for affirmance of the Board's decision, on the basis that the appellant did not submit timely requests for waiver of recovery of the either overpayment. The Secretary argued that with regard to the first overpayment, appellant was notified that she owed the agency $2,366, and she did not contend that she did not receive the notice. The Secretary argued that the appellant, in subsequent statements, did not mention the word "waiver" or request a waiver of recovery of the overpayment. Regarding the second overpayment, the Secretary argued that while the agency did not keep a copy of the July 2000 notice, VA's Debt Management Center (DMC) database showed that such a letter was mailed and the contemporaneous evidence demonstrated that appellant received it. The Secretary argued that after this notice, the appellant filed an untimely waiver request in August 2001.

In her reply brief, the appellant argued that the Board erred in presuming that she was notified of the asserted $12,347 overpayment. Appellant argued that the Board's ruling concerning the presumption of administrative regularity presented a legal issue subject to de novo review (rather than clearly erroneous review of findings of fact, as argued by the Secretary), and there was no evidence that VA provided appellant with the required notice in July 2000 or at any time prior to February 23, 2001 (the 180-day deadline for filing the waiver request). Concerning the $2,366 overpayment, the appellant argued that the VA erred in concluding that her May 2000 submissions did not constitute a request for waiver. The appellant argued that the VA failed to give her the benefit of the doubt and construe her May 2000 submissions liberally and in favor of securing her benefits, and asked that the Court reverse the Board's decision and order the Board to instruct the VA to consider the appellant's waiver request on the merits.

In its January 30, 2008 decision, the Court remanded the matter for further adjudication. With respect to the $2,366 indebtedness, the Court stated that there was no dispute that appellant's May 2000 submissions were received within 180 days of notification of the debt. The Court stated that although the Board stated that the appellant did not use the word "waiver" or other words that could be construed as a synonym of waiver, "the Board provided no analysis regarding the timing of the submissions (just prior to expiration of the 180-day appeal period)," or other "possible indicia of a request for a waiver" found in the appellant's submissions. The Court found that since the waiver of indebtedness related to VA benefits, and the VA's duty to sympathetically read pro se pleadings applies, at a

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CONFERENCE AGENDA

Tenth Judicial Conference of the U.S. Court of Appeals for Veterans Claims

MONDAY, APRIL 14, 2008

APRIL 14, 2008

REGISTRATION/CONTINENTAL BREAKFAST

CALL TO ORDER
The Honorable Lawrence B. Hagel, Judge, USCAVC
The Honorable Robert N. Davis, Judge, USCAVC

PRESENTATION OF THE COLORS
American Legion Post 177, Fairfax, VA

NATIONAL ANTHEM
Patty Trujillo, Staff Attorney
Department of Veterans Affairs,
Washington Regional Counsel Office

WELCOMING REMARKS
The Honorable William P. Greene, Jr., Chief Judge, USCAVC

PANEL: THE COURT'S CREATION, EARLY CHALLENGES, AND KEY DECISIONS
Moderator: The Honorable Frank Q. Nebeker, Judge, Retired, USCAVC
Panel Members:
The Honorable Kenneth B. Kramer, Judge, Retired, USCAVC
The Honorable Ronald M. Holdaway, Judge, Retired, USCAVC
The Honorable Donald L. Ivers, Judge, Retired, USCAVC
The Honorable John J. Farley, III, Judge, Retired, USCAVC

REVIEW OF KEY DECISIONS OF THE PAST YEARS AND SIGNIFICANT TRENDS OF THE PAST 20 YEARS
Michael P. Allen, Professor of Law
Stetson University College of Law, Gulfport, FL

LUNCH

THE VALUE OF SERVICE
Helen Thomas, Syndicated Columnist, Hearst Newspapers, Former White House Bureau Chief, United Press International

ADMINISTRATIVE ANNOUNCEMENTS

THE CLERK'S REPORT: E-FILING, RULE CHANGES
Norman Y. Herring, Clerk of the Court/Executive Officer, USCAVC
Anne P. Stygles, Chief Deputy Clerk of Operations, USCAVC

REPORT ON COURT'S MEDIATION PROGRAM AND PREPARATION FOR MEDIATION
A VIEW FROM THE APPELLANT
A VIEW FROM THE SECRETARY
A VIEW FROM THE MEDIATOR
Moderator: Cynthia M. Brandon-Arnold, Esq., Senior Staff Attorney, Central Legal Staff, USCAVC
Panel Members: Glenn R. Bergmann, Esq., Bergmann & Moore, LLC, Bethesda, MD
Thomas E. Sullivan, Esq., Senior Appellate Attorney, Department of Veterans Affairs

SUMMARY DISPOSITION: SHOULD THE COURT ADOPT A SUMMARY DISPOSITION RULE?
Moderator: Joan E. Moriarty, Esq., Chair, USCAVC Rules Advisory Committee
Panel Members: The Honorable William B. Traxler, Jr., Judge, U.S. Court of Appeals for the Fourth Circuit
The Honorable Frank Q. Nebeker, Judge, Retired, USCAVC
Martha J. Tomich, Director, Legal Services Division, Office of the Clerk, U.S. Court of Appeals for the District of Columbia Circuit

RECEPTION Sponsored by CAVC Bar Association

CONFERENCE AGENDA
Tenth Judicial Conference

TUESDAY, APRIL 15, 2008

BRIGHT IDEAS BREAKFAST (by invitation)

CONTINENTAL BREAKFAST

THE AMERICAN ANTHEM

STATE OF THE COURT
The Honorable William P. Greene, Jr., Chief Judge, USCAVC

ETHICS
Monroe H. Freedman, Esq., Professor of Law, Hofstra University School of Law, Hempstead, NY

CEREMONIAL ADMISSION
David L. Quinn, Esq., President, Court of Appeals for Veterans Claims Bar Assocation

ASK THE JUDGES
Moderator: David L. Quinn, Esq., President, CAVC Bar Association

CLOSING REMARKS
The Honorable William P. Greene, Jr., Chief Judge, USCAVC

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION
Luncheon and Meeting

RECENT CAVC DECISIONS
(continued from page thirteen)

minimum, to pleadings related to VA benefits, the Court remanded the matter for sympathetic reading of the pleadings. The Court did not find it necessary to determine "if the duty to assist applied to a request for a waiver or if the duty to sympathetically read pleadings applies to any and all pro se submissions to the Secretary, as opposed to those submissions that are related to VA benefits."

Concerning the $12,347 indebtedness, the Court noted that at oral argument, the Court sua sponte raised the question as to whether the appellant's May 2000 submissions could also be construed as waiver requests for that debt (the appellant argued that her May 2000 submissions should, if found to be requests for waiver on remand, be considered as a waiver request for the entire debt). The Court found that this question was interrelated with the remanded matter (as the question of whether the appellant's May 2000 submissions could be considered a waiver request for both debts becomes relevant if and only if they are deemed a request for waiver). Accordingly, the Court remanded the matter to the Board for adjudication in the first instance. Judge Lance, concurring in part and dissenting in part, explained that he concurred with the result concerning the $2,366 indebtedness, but he believed that the Court should affirm the Board's decision with regard to the second, $12,347 debt, since the debts arose from two separate and distinct time periods.

On February 20, 2008, the appellant filed a motion for panel reconsideration. As of the date of this writing, the motion is currently pending.

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