VETERANS LAW JOURNAL

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

SPRING 2007

RECENT CAVC DECISION

UPDATE ON *RIBAUDO V. NICHOLSON*

By Lou George

Ribaudo v. Nicholson, 20 Vet.App. 552 (2007) (Writ of Mandamus granted)
Ribaudo v. Nicholson, 21 Vet.App. 16 (2007) (Motion for Stay granted until further order of Court)

In its January 9, 2007, decision (which is summarized in greater detail in the Winter 2007 issue of the *VETERANS LAW JOURNAL*) the Court granted petitioner Nicholas Ribaudo's petition for a writ of mandamus. The writ was filed in response to BVA Chairman's Memorandum 01-06-24 (September 21, 2006), which imposed a BVA-wide stay on cases potentially affected by the Court's decision in *Haas v. Nicholson*, 20 Vet.App. 257 (2006). The Court ruled that the issuance of Chairman's Memorandum 01-06-24 without prior judicial review of the criteria for taking such action was inconsistent with the Court's prior decision in *Ramsey v. Nicholson*, 20 Vet.Ap. 16 (2006). The Court ordered that Memorandum 01-06-24 be rescinded, and ordered the Secretary to decide Mr. Ribaudo's appeal "in regular order according to its place upon the docket" and apply this Court's decision in *Haas* pursuant to 38 U.S.C. § 7107. *Ribaudo*, 20 Vet.App. at 560-561. Furthermore, the Court set forth

continued on next page

RECENT FEDERAL CIRCUIT DECISIONS

FORFEITURE AND RESTORATION: THE FEDERAL CIRCUIT RECONCILES SECTIONS 6103(a) AND 103(d)(3)

By Donnie Hachey

Flores v. Nicholson, No. 06-7198 (Fed. Cir. Feb. 20, 2007), on appeal from *Flores v. Nicholson*, 19 Vet. App. 516 (2006). Before Judges Gajarsa, Linn, and Moore.

On February 20, 2007, the Federal Circuit upheld a CAVC decision which affirmed the Board's ruling that appellant forfeited her rights to VA benefits pursuant to 38 U.S.C. § 6103(a).

Appellant was granted DIC benefits in September 1955 based on her marriage to a deceased member of the Philippine Army. When VA received correspondence from her deceased husband's father alleging that the appellant had remarried, she promptly provided a sworn statement dated in April 1956 to the effect that she had not remarried, had children with, or lived with any other man since the veteran's death. Based in part on this statement, appellant continued to receive DIC benefits for well over three decades. VA received an unsigned letter in 1989, however, again indicating that appellant had remarried.

During a subsequent VA investigation into her marital status, appellant submitted a second sworn statement admitting that she had been less than truthful in her prior statement, and acknowledging that she had lived with another man "in an open common law relationship" until that man's death in 1988. Nine children were born of the relationship,

continued on page three

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

UPDATE ON *RIBAUDO V. NICHOLSON*

(continued from front page)

a procedure that the Secretary or Board Chairman could use to stay the effect of *Haas*, by filing a motion for stay with the CAVC or the Federal Circuit. *Ribaudo*, 20 Vet.App. at 559-560.

Several motions were filed following the Court's decision of January 9, 2007. The first such motion was filed on January 16, when the Secretary filed a motion for stay the precedential effect of the Court's decision in *Haas* and to stay the adjudication of cases (at the Board and at VA Regional Offices) potentially affected by the Court's decision in *Haas*, until a final judicial resolution of the issues in *Haas*. In his motion, the Secretary argued that (1) there is a strong likelihood of success on the merits of the Secretary's appeal of *Haas*; (2) the Secretary will suffer irreparable harm in the absence of a stay; (3) petitioner Ribaudo will not be adversely affected by the stay; and (4) the public interest favors granting the requested stay.

On January 26, 2007, before petitioner filed his response to the Secretary's motion for stay, the Court issued an Order temporarily staying cases at the BVA and VA regional offices that are potentially affected by *Haas* until further order of the Court. The Court acknowledged that petitioner Ribaudo had not yet filed a response to the motion, but stated that "the Court, in its discretion, has authority to issue this stay pending its decision on the matters before it, and this action should not be construed in any way as a ruling on the merits of the motion." *Ribaudo v. Nicholson*, 21 Vet.App. 16, 17 (2007). The Court indicated that it intended to resolve the matters before it promptly. *Ribaudo*, 21 Vet.App. at 17.

On February 2, 2007, petitioner Ribaudo filed a response in opposition to the Secretary's motion for stay. The petitioner argued that the Secretary's motion for stay should be denied because the Federal Circuit (not the CAVC) has exclusive jurisdiction over the stay motion since that is the Court where *Haas* is presently on appeal. Furthermore, the petitioner argued that the Secretary's motion should be denied on the merits. Specifically, the petitioner argued that (1) the Secretary has little, if any, chance of success on appeal; (2) the balance of the relative harms to the interested parties tilts strongly in favor of the disabled war veterans in this case (several of whom submitted declarations attesting to hardships caused by a stay); and (3) the public interest strongly favors denial of the requested stay.

In addition to the motion for stay that is still pending at the Court as of the date of publication of this issue of the *VETERANS LAW JOURNAL*, two additional motions, both filed by petitioner Ribaudo and opposed by the Secretary, are pending before the Court. The first is a motion for an order to show cause why the Secretary should not be held in contempt of the Court's Order of January 9, 2007, and the second is a motion to dismiss the Secretary's motion for stay.

Finally, the most recent development in *Ribaudo* took place on March 30, 2007, when the Department of Justice filed a notice of appeal to the Federal Circuit, with respect to decisions entered on January 9 and January 26, 2007.

Since Going to Press

On April 13, 2007, the Court granted in part the Secretary's motion to say, ordering that the adjudication of cases before the Board and VA regional offices affected by *Haas* be stayed until mandate issues in the pending appeal of *Haas* to the Federal Circuit. The Court denied the petitioner's motion for an order that the Secretary show cause why he should not be held in contempt.

Counsel for the petitioner: Barton F. Stichman, Louis J. George, Ronald B. Abrams
(202) 265-8305
Counsel for the appellee: Brian B. Rippel
(202) 639-4854 ■

DOWNSTREAM NOTICE

Hartman v. Nicholson, No. 06-7303 (Fed. Cir. Apr. 5, 2007) on appeal from Hartman v. Nicholson, 19 Vet. App. 473 (2006). Before Judges Newman, Friedman, and Moore.

On April 5, 2007, the Federal Circuit upheld a CAVC decision that held that VA's notice obligation under Section 5103(a) of Title 38 of the United States Code does not apply when a veteran files an appeal of an initial decision denying an earlier date for the commencement of disability benefits.

FORFEITURE AND RESTORATION: THE FEDERAL CIRCUIT RECONCILES SECTIONS 6103(a) AND 103(d)(3)

(continued from front page)

including four prior to the appellant's 1956 statement. Based on this admission, VA determined that appellant had knowingly presented fraudulent information to VA, thus warranting forfeiture of her right to benefits pursuant to 38 U.S.C. § 6103(a).

On appeal to the Federal Circuit, appellant argued that despite the forfeiture provisions of Section 6103(a), she was still entitled to benefits by virtue of 38 U.S.C. § 101(d)(3). The appellant contended that Section 101(d)(3), which allows for restoration of benefits to the surviving spouse of a veteran who ceases living with another and holding themselves out as that person's spouse, entitled her to reinstatement of DIC benefits, her prior fraudulent statements and the provisions of Section 6103(a) notwithstanding.

The Federal Circuit rejected this argument, finding that Section 101(d)(3) was inapplicable, as appellant's benefits were terminated because of her false statements, not because of her relationship with another man after the veteran's death. The Federal Circuit reasoned that Section 101(d)(3) does not serve as a "general grant of amnesty" to all persons whose remarriages have terminated regardless of circumstance. Instead, that section works only to restore benefits that have been lost due to remarriage or cohabitation with another. It will not suffice to reinstate benefits to a person who lost them due to fraud. Accordingly, the Federal Circuit held that the restoration provisions of Section 101(d)(3) cannot rehabilitate a claimant whose benefits have been forfeited under Section 6103(a). ■

CONTRIBUTORS SOUGHT

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 Barbara Cook at bcook@fuse.net for additional information.

RECENT FEDERAL CIRCUIT ORAL ARGUMENTS

RETRO-ACTIVE AWARDS, INCARCERATED VETERANS, AND ATTORNEY FEE AGREEMENTS

By Jonathan Kramer

Snyder v. Nicholson, Federal Circuit Docket No. 06-7239. Oral argument was held before Judges Mayer, Clevenger, and Senior Judge Plager on Thursday, March 22, 2007.

The oral argument was held at the U.S. Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This matter came on appeal from the CAVC decision *Snyder v. Nicholson*, 19 Vet. App. 445, (2006). The appeal concerns the interpretation of 38 U.S.C. § 5904(d), which authorizes VA to directly pay to a claimant's attorney fees consisting of up to 20% of the past-due benefits "awarded on the basis of the claim."

On review was the CAVC decision affirming a February 2, 2004, Board decision that denied entitlement under 38 U.S.C.A. § 5904 for payment of attorney's fees in excess of $1,820.45 payable from his client's award of past-due benefits. The CAVC held, that in a case of an incarcerated veteran, who receives a retroactive award with the resultant payment reduced to the 10 percent rating under 38 U.S.C.A. § 5313, calculation of attorney's fees will be based upon the actual payment received by the veteran, rather than the total retroactive award. VA defended this position before the Federal Circuit.

The appellant's position remained that he was entitled to receive a fee of $18,204.46, representing 20 percent (per his fee agreement) of the full retroactive award of $91,022.30, and that he should not be penalized due to the veteran's incarceration. In essence, the appellant contends that a fee agreement entered into under 38 U.S.C.A. § 5904, created a contract between an attorney and VA calling for payment of attorney's fees based upon the total amount awarded to the veteran prior to reduction due to the veteran's resultant incarceration.

The Judges focused questions on whether the phrase "benefits awarded on the basis of the claim"

unambiguously means the amount of benefits the claimant would have received but for incarceration, and how that statute may conflict with VA's enabling regulation (38 C.F.R. § 20.609(h)(3)) requiring that direct payment of attorney fees be based on the "cash payment to a claimant."

Representative of the Appellant:
Kenneth M. Carpenter, Esq.
Representative of the Appellee:
Meredyth Cohen, Esq.

WHAT CONSTITUTES A "SURVIVING SPOUSE"? - AN EXAMINATION OF THE EXCEPTIONS TO THE "CONTNUOUS COHABITATION" REQUIREMENT UNDER 38 C.F.R. § 3.53

By April Maddox

Alpough v. Nicholson, No. 06-7304 (Fed. Cir.) Oral argument was held before Judges Michel, Dyk, and Garris on Thursday, April 5, 2007.

In *Alpough v. Nicholson*, No. 03-0761 (U.S. Vet. App., Jan. 18, 2006) the CAVC affirmed a January 2003 Board decision that denied the appellant's claim seeking recognition as the veteran's surviving spouse for purpose of entitlement dependency and indemnity compensation (DIC). In October 1972 the veteran filed a claim for service connection for stomach problems, including stomach cancer. At that time he indicated that he had been separated from the appellant since 1970 because he could not get along with her. The veteran died of liver cancer in December 1972. In February 1973 the appellant submitted an application for DIC benefits. At that time she confirmed that she and the veteran were separated because they "could not get along as husband and wife." In September 1973 the Regional Office denied entitlement to DIC benefits, finding that the appellant could not be recognized as the legal widow of the veteran because they mutually agreed to live apart and there was no intention to resume their relationship as husband and wife.

The appellant sought to reopen her claim in August 1995, arguing that her separation from the veteran was due solely to the veteran's illness. The Board denied the claim in January 2003, finding that the earlier statements showing no intention to resume the marital relationship were more credible than the recently submitted evidence. The CAVC agreed and found that "since the appellant [had] explicitly conceded in her brief that the separation was by mutual consent without the fault of either party, she cannot prevail because the law and the regulation make an exception *only* for a separation caused by the veteran's misconduct."

At oral argument, the appellant argued the CAVC misapplied the law when they said the appellant could prevail "only" where the separation was caused by the veteran's misconduct. The appellant argued that she is a surviving spouse under 38 C.F.R. § 3.53 because the separation was "procured" by the veteran and the appellant was free of fault. She also argued that because the separation was the result of mutual consent there was no intention that they "desert" one another.

The appellee argued the Federal Circuit did not have jurisdiction to hear this appeal because it is nothing more than a challenge to the way the Board and the CAVC weighed the facts of the case. The appellee also argued the CAVC did address all aspects of 38 C.F.R. § 3.53 but ultimately found that the separation was due to incompatibility and not the veteran's health. Finally, the appellee concluded the appellant's interpretation of 38 C.F.R. § 3.53 evades the intent of the cohabitation rule.

Counsel for appellant: Henry C. Su (650) 798-3528
Counsel for appellee: Claudia Burke (202) 353-9063

EVIDENTIARY BURDEN IN PRESUMPTION OF SOUNDNESS CASES

By William Yates

Leigh v. Nicholson, No. 2006-7169. Oral argument was held before Judges Rader, Gajarsa, and Prost on April 5, 2007.

On appeal in *Leigh* is an October 2005 CAVC decision which affirmed an October 2003 Board decision (denying the appellant's claim for service connection for a back disorder).

In this case, the appellant served on active duty for a seven-month period in the mid 1960s. His entrance examination into the service noted that his spine and

musculoskeletal system were normal. Subsequent service medical records revealed treatment for low back pain, which eventually resulted in a medical board recommending his discharge from the service by reason of a physical disability which existed prior to service and was not aggravated therein. Thereafter, the first post service evidence of a back disorder is dated in the mid 1980s, and includes references to post-service back injuries.

The Board had determined the presumption of soundness under 38 U.S.C. § 1111 applied to the appellant's claim, but was rebutted by clear and unmistakable evidence which demonstrated that the appellant had a pre-existing back condition (spina bifida) that did not undergo an increase in severity during service. BVA's decision further held that there was no competent evidence of record establishing a link or nexus between the appellant's current back disorder and a disability incurred or aggravated during service.

In October 2005, the CAVC affirmed the Board's decision in a memorandum decision, holding that there was no competent nexus evidence of record linking the appellant's current back disorder to a disability incurred or aggravated during service. The CAVC also determined that because there was no competent nexus evidence of record, it need not address the sufficiency of the evidence of record to rebut the presumption of soundness. In making this determination, the CAVC noted that the presumption of soundness, if not rebutted, establishes only in-service incurrence or aggravation of a disease or injury. There still remains a requirement of competent evidence of a nexus between the claimed in-service injury and the present back condition.

In his brief and at the oral argument before the United States Court of Appeals for the Federal Circuit (Federal Circuit), the appellant argued the CAVC misinterpreted the presumption of soundness contained in 38 U.S.C.A. § 1111 by holding that when the presumption is not rebutted by VA, a veteran only establishes the element of in-service incurrence of a disease or injury and not service connection. The appellant argues that the proper interpretation of 38 U.S.C.A. § 1111, if the evidence does not rebut the presumption of soundness, requires a finding that the disease or injury was incurred in service and is therefore service connected. *Citing to Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004). Once service connection is established, then the remaining elements of the claim are the degree of any resulting disability. Thus, the appellant contends, medical nexus determinations only come into play once service connection is established.

In support of his argument, the appellant cites to 38 U.S.C.A. § 105(a), which he argues stands for a presumption of service connection for a disability first manifested or aggravated during active duty. *Citing to Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004). Thus, VA's failure to rebut the presumption of soundness under 38 U.S.C. § 1111, would entitle the appellant to service connection through the utilization of 38 U.S.C. § 105(a) and 38 U.S.C. § 1111. In the appellant's view, medical nexus evidence only becomes relevant once the veteran has crossed the threshold of service connection, and is seeking disability compensation.

In its brief and at the oral argument before the Federal Circuit, VA argued that the CAVC correctly decided that even if the appellant was entitled to presumptions under 38 U.S.C. § 105(a) and 38 U.S.C. § 1111, neither statute relieved him of the need to demonstrate a medical nexus between the veteran's service-incurred injury and his present back disability. The VA contends that each of these statutes creates a presumption that the servicemember incurred an injury or disease during service, but neither statute provides a nexus between that inservice disease or injury and a current disability.

In support of its argument, VA noted that while the *Shedden* Court stated that the phrase "in the line of duty" as used in § 105(a) is identical in meaning to the term "service-connected", the *Shedden* Court also added that a disability is service-connected only if a nexus is established between the current disability and the injury incurred in-service. The VA also noted (as had the CAVC) that the appellant's reliance of specific language in *Wagner v. Prinicipi*, 370 F.3d 1089 (Fed. Cir. 2004) was taken out of context.

Counsel for the appellant: Robert V. Chisholm, Esq. (401)331-6300
Counsel for the appellee: Robert E. Chandler, Esq. (202) 514-4678 ■

RECENT CAVC ORAL ARGUMENTS

GRANTING A STAGED RATING ON APPELLATE REVIEW AND THE APPLICABILITY OF 38 C.F.R. § 3.105(e)

By Jonathan Kramer

O'Connel v. Nicholson, No. 04-1751.
Oral argument was held before Judges Hagel, Moorman, and Davis on Thursday, March 22, 2007.

The appellant appealed a Regional Office (RO) decision in December 1997 that granted service connection for PTSD and assigned a 30 percent evaluation, effective June 22, 1994. The issue on appeal before the CAVC is whether a June 23, 2004, Board decision, which increased this initial rating to 100 percent for the period from June 22, 1994, to February 22, 2000, and then adjusted the rating to a 50 percent disability rating since February 23, 2000, was proper. Specifically, the question presented is whether the Board's assignment of the 50 percent rating from February 23, 2000, was a reduction in compensation evaluation under 38 CFR § 3.105(e).

The appellant asserted that he should have been afforded the procedural rights under 38 CFR § 3.105(e) for VA to propose a reduction of compensation benefits. As the appellant was not afforded the procedural rights for reduction, the appellant requested that the Court reverse the Board's decision, to the extent the veteran's disability rating was changed from 100 percent to 50 percent because the Board should have remanded the case to the RO for proposed rating reductions. The Appellant further argued that the Board decision's reference to the application of 38 CFR § 3.343 and 3.344 shows that the Board in fact reduced the veteran's rating.

VA asserted that 38 CFR § 3.105(e) is not for application because this is not a rating reduction case. Rather, as the Board was reviewing the assignment of an initial disability rating, the Board properly treated the matter as a staged rating under the precedent of Fenderson v. West, 12 Vet. App. 119 (1999). Essentially, VA contended that the purpose of proposing a reduction in benefits is to afford the recipient notice of the upcoming reduction benefits and to allow time for adjustment. As the Board actually increased the appellant's rating beyond the 30 percent initially assigned by the RO, VA argues that there was no reduction within the meaning of 38 CFR § 3.105(e).

VA conceded that there may arise initial rating cases that involve the reduction of benefits, but this was not one of those cases as the circumstances here did not meet the requirements of 38 CFR § 3.344 and 3.345 (i.e., the veteran was not assigned a 100 percent rating for a 5 year period).

The Judges queried the appellant on the applicability of the staged ratings under *Fenderson* in view of his arguments that the Board's assignment of an initial 50 percent should be treated as a rating reduction. The Appellant responded that Fenderson was only applicable in cases where there was an increase in disability ratings; but when initial ratings are reduced, the appellant submitted that claimants are entitled to the reduction of benefits procedures under 38 CFR § 3.105(e).

Representative of the Appellant:
Landon E. Overby, Esq.
(202) 554-3501, Disabled American Veterans
Representative of the Appellee:
Tracey K. Alsup, Esq. (202) 639-4806

THE *INGRAM* CONUNDRUM: WHETHER A REASONABLY-RAISED CLAIM REMAINS "PENDING" FOR THE PURPOSE OF ESTABLISHING AN EARLIER EFFECTIVE DATE

By Sonnet Bush

Ingram v. Nicholson, No. 2006-7169.
Oral argument was held before Judges Rader, Gajarsa, and Prost on April 5, 2007.

In *Ingram*, the Secretary for VA has asked that the Court reconsider its prior determination in *Ingram v. Nicholson*, which held that a claim "remains pending until there is an explicit adjudication of the claim or an explicit adjudication of a subsequent 'claim' for the same disability."

In this case, the appellant submitted an initial formal application for VA benefits in May 1986. On his compensation and pension application he

indicated that his right lung was removed at the VA Hospital in Salt Lake City, Utah. In August 1986, the RO denied a claim for non-service-connected pension benefits. The appellant did not appeal that decision, and it became final. He was eventually awarded benefits pursuant to 38 U.S.C. § 1151 for the right lung removal, and was assigned an effective date of April 15, 1992. The appellant disagreed with the effective date assigned and argued that the above-referenced May 1986 application was an informal claim for 1151 benefits that remained pending. The Court agreed with the appellant and remanded the case to the Board.

In presenting argument to the CAVC, counsel for VA argued that the appellant's May 1986 claim was one "single" application for VA benefits that was denied by the RO and impliedly inclusive of the 1151 issue. Therefore, should the appellant wish to apply for an earlier effective date, his appropriate remedy would be through a CUE motion. *See Deshotel v. Nicholson*, 457 F.3d 1258 (Fed.Cir.2006); *see also Andrews v. Nicholson*, 421 F.3d 1278 (Fed.Cir.2005). Judge Moorman noted his concern with "fundamental due process," noting that the appellant would be forced in these situations to file an NOD for a failure to adjudicate the 1151 claim so as to preserve the issue on appeal. Judge Schoelen commented on the increased evidentiary burden that the appellant would have to face were he required to pursue a CUE claim as suggested by counsel.

Counsel for the appellant distinguished the facts of the *Deshotel* case, noting that the case involved an implied TDIU claim. Moreover, unlike the instant case, the appellant was provided with notice as to the denial of the TDIU claim in *Deshotel*. Addressing VA's contention for the "single application" rule, Judge Schoelen presented the situation where one claim was granted, one denied, and another unadjudicated. She inquired as to whether the unadjudicated claim would be considered a denial or a grant. Counsel for the appellant noted that in such a situation a determination as to the fate of the unadjudicated claim would be impossible, thus demonstrating the fallacy in VA's logic for the "single application" rule.

Counsel for the appellant: Arie M. Michelsohn, Esq. (202) 408-4180
Counsel for the appellee: Jeffrey J. Schueler, Esq. (202) 639-4849

INTERPRETING ATTORNEY FEE AGREEMENTS: DOES FEDERAL OR STATE LAW APPLY?

By April Maddox

Lippman v. Nicholson, No. 04-0812 (U.S. Vet. App.) Oral argument was held before Judges Kasold, Moorman, and Schoelen on Thursday, February 22, 2007.

On appeal in *Lippman* is a January 2004 Board decision which denied the appellant attorney's claim for attorney fees from past-due benefits. In April 2000, the Board denied the veteran's claim to reopen service connection for post-traumatic stress disorder (PTSD). In July 2000, the veteran and the appellant attorney entered into a contingent fee agreement allowing for a 20 percent attorney fee for any past-due benefits awarded in the underlying PTSD claim. In March 2001, the veteran's case was remanded by the Court so the Board could address VCAA notice compliance. Thereafter, the veteran discharged the appellant attorney and entered into a contingent fee agreement with a different attorney, counsel for the intervenor in this case. Ultimately, the veteran's service connection claim was granted, and the veteran received $202,587.78 less $40,519.56 which had been withheld pending a determination as to eligibility for the payment of attorney's fees. Thereafter, the appellant sought payment for attorney's fees under the July 2000 fee agreement.

In its January 2004 decision, the Board determined that because the attorney fee agreement was executed in Colorado, Colorado law applied. Pursuant to Colorado law, when an attorney and a client have a contingency fee agreement and the attorney is subsequently discharged, any recovery of an attorney's fee is to take place on a *quantum meruit* basis. Colorado law further provides, however, that notice must be expressly provided in the contingent fee contract advising the client of the attorney's right to seek *quantum meruit* recovery. In the appellant's contract, there was no express provision advising the client of the attorney's right to seek *quantum meruit* recovery. Relying upon Colorado law, and *Scates v. Principi*, 282 F.3d 1362 (Fed. Cir. 2002) (holding that implicit in a contingency fee arrangement is the understanding that the attorney's right to receive

continued on page 10

MORNING SESSIONS

By Paul Eaglin

On Monday, February 12, 2007, the Court of Appeals for Veterans Claims Bar Association held a continuing legal education (CLE) program at the Hyatt Hotel in Rosslyn, Virginia. The morning portion of this all day program included presentations by panelists from VA's Board of Veterans' Appeals (Board) on the subjects of "Preparation of Board Decisions," and "Quality Control in Board Decisions" and presentations by panelists on "Improving Legal Writing at the Veterans Court."

Veterans Law Judge Barry Bohan addressed the topic of "Preparation of Board Decisions." Judge Bohan discussed the internal organization of the Board and the general process for decision preparation. He explained how he approaches his review of the record on appeal, including making determinations as to jurisdiction and whether the case can be decided on the record presently before the Board or whether it must be remanded for further development. Judge Bohan then addressed how a Board decision is prepared, including the general format of Board decisions. He described what generally goes into the reasons and bases section of a Board decision, namely: all contentions raised by and on behalf of the appellant and an analysis of the credibility and probative weight of the evidence, including the medical evidence. Judge Bohan emphasized the importance of specifically including in the Board decision a discussion of any and all evidence favorable to the appellant.

The second morning session was a presentation by Richard C. Thrasher, the Board's Chief Counsel for Policy, entitled, "Quality Control in Board Decisions." Mr. Thrasher described how cases are selected for review by the Quality Review section of the Board. The process entails sampling a select percentage of cases from original claims as well a slightly larger percentage of cases on remand from the Court of Appeals for Veterans Claims. While trying to resist the temptation to second-guess the decisionmaker, the Quality Review attorneys strive to implement four review criteria. The first two criteria are substantive: assessing the propriety of the legal authority utilized and examining whether the record supports the rationale provided for the decision. After those substantive elements are assessed, two stylistic factors are considered: whether the writing style is acceptably clear and, finally, whether the Board's preferred format is followed. The most common errors noted by the Board's Quality Review group include: articulation of controlling law; inadequate explanations; and duty to assist and notify errors.

The morning session concluded with a panel presentation entitled, "Improving Legal Writing at the Veterans Court", which featured accomplished appellate practitioners, including Barbara Cook, Esq. from private practice; Joan Moriarty, VA Deputy Assistant General Counsel, Professional Staff Group VII; Diane O'Brien-Holcomb, Senior Law Clerk for Judge William A. Moorman; and the Honorable Bruce E. Kasold, Judge, U.S. Court of Appeals for Veterans Claims. Ms. Cook, Ms. Moriarty, and Ms. O'Brien-Holcomb offered helpful suggestions concerning brief writing. They also emphasized the importance of being concise and to the point and suggested numerous hints: eliminating or reducing string citations, eliminating needless dates, use of word exchange to achieve brevity, and eliminating phrases with "that." Word limits for legal briefs are not objectives to achieve but are merely limits on verbosity. One can look to accomplished writers and appellate advocates like the panelists in an effort of

(L-R) John Thompson and Honorable William A. Moorman

self improvement with the objective of advancing one's client's position concisely, with clarity, all of which will necessarily bring about greater impact from the written word.

Judge Kasold addressed the topic of appellate writing from the perspective of the bench. Using the humorous 17th century example of Sweden's King Gustavus Adolphus' warship *Vasa*, which sunk before leaving the harbor on its maiden voyage because, in an effort to build the mightiest warship of all time, the ship was topheavy and overloaded, Judge Kasold noted the importance of communication, expertise, oversight and review. He endorsed the KISS principle, "keep it simple, stupid" in legal writing, and he provided some examples of citation, grammar, and substantive errors.

Honorable Robert N. Davis

Presenter Barbara Cook

AFTERNOON SESSIONS

By Richard C. Thrasher

The afternoon portion of the Court of Appeals for Veterans Claims Bar Association CLE program included a luncheon address by Chief Judge William P. Greene, Jr., and presentations by panelists on the subjects of "Improving Oral Argument to the Court," and "Preparation and Writing A Court Decision."

During his luncheon address, Chief Judge Greene provided an interesting and informative update on the state of the court. He discussed the challenges being presented by the increasing workload at the court, and the initiatives that are being undertaken to address this challenge. Some of those initiatives include recalling retired judges, changing the record designation process by establishing a Joint Appendix, a new court website, moving towards electronic filing, and finding a new courthouse. Chief Judge Greene thanked the Bar Association for putting on the day's event, and observed that the high quality and scale of the program addressing all aspects of good appellate advocacy was reflective of the maturing of the association. On a personal note, he shared that he was waiting to hear imminent news about the expected birth of a grandchild, and later in the day reported the good news about the child's safe arrival.

With respect to the "Improving Oral Argument to the Court" panel presentation, the presenters included Kenneth M. Carpenter, Esq., Brian B. Rippel, VA Deputy Assistant General Counsel, and the Honorable Robert N. Davis, Judge, U.S. Court of Appeals for Veterans Claims. Both Mr. Carpenter and Mr. Rippel discussed how they approach and prepare for oral argument before the Court of Appeals for Veterans Claims from the perspective of an advocate. Judge Davis addressed the subject of appellate advocacy from the perspective of the bench. From an advocate's perspective, the need to closely review the case to obtain a "fresh perspective" and to look at the matter anew in order to prepare for oral argument was stressed by the speakers. Judge Davis noted that oral argument provides an opportunity for all parties involved to engage in an enlightening and respectful conversation about the case. All of the speakers further emphasized that good appellate advocacy requires a significant level of preparation.

The afternoon session concluded with a panel presentation entitled, "Preparation and Writing A Court Decision." The panelists for this presentation included Alice Kearns, Executive Attorney to Chief Judge Greene, and the Honorable William A. Moorman, Judge, U.S. Court of Appeals for Veterans Claims. Ms. Kearns discussed the role of the law clerk in the preparation and writing of judicial opinions.

continued on page 11

Q&A WITH GROUP 7

By Sonnet Bush

On January 29, 2007, the Court of Appeals for Veterans Claims Bar Association held a Question and Answer Forum in the main courtroom of the Court of Appeals for Veterans Claims. The forum was led by a three-member panel from Professional Staff Group VII of VA's Office of the General Counsel. The presenters included Randy Campbell, VA Assistant General Counsel, Carolyn Washington, VA Deputy Assistant to the General Counsel, and Leslie Rogall, VA Senior Appellate Attorney, Early Intervention Team.

Prior to fielding questions from the audience, Mr. Campbell provided some statistics as to the volume of work performed by Professional Staff Group VII. He informed those in attendance that Professional Staff Group VII handled 5,000 cases last year and filed 27,000 pleadings. He reported that they had been deluged with new cases—a tripling of their normal caseload—and that the Office of General Counsel was responding by expanding its staff in an attempt to expeditiously handle the increased workload.

Ms. Washington informed the audience that attorneys in Professional Staff Group VII control their own calendars and that deadlines for briefs and other filings are calculated by a computerized tracking system. She explained that it would not be feasible for VA's Office of General Counsel to provide a website which indicated where a claims folder was located at all times due to time management constraints.

The role of the Early Intervention Team in Professional Staff Group VII was described by Ms. Rogall. She stated that the Early Intervention Team was composed of more experienced attorneys who provided an initial screening of cases. This initial screening process attempts to improve efficiency in case management by identifying at the outset cases that have obvious errors and jurisdictional problems. Ms. Rogall recommended certain actions appellant's counsel could take that would help cases be resolved more efficiently, such as: resolving issues early, supporting arguments in pleadings with case citations, and acknowledging receipt of a copy of the claims folder. She also discussed training of Professional Staff Group VII attorneys, indicating it consisted of both formal and informal components. Examples included participation in training sessions at the Board of Veterans' Appeals and attendance at newly-instituted brownbag lunches.

RECENT CAVC ORAL ARGUMENTS *(continued from page seven)*

past-due benefits arises only if he continued as the claimant's attorney until the case was successfully completed), the Board denied the appellant's claim for past-due benefits.

At oral argument, the appellant argued that federal and not state law should have been applied and that the appellant is entitled to a 20 percent fee based on the March 2001 Court remand. VA also argued that federal and not state law should have been applied. However, VA also argued that a remand was necessary to consider whether it would be reasonable to give the appellant any portion of the 20 percent fee contemplated in the fee agreement. The intervenor argued that state law was appropriate in this case, that the appellant was compensated for his time with payment under the Equal Access to Justice Act (EAJA), and that the appellant did not deserve any part of the 20 percent fee based on the work he had done in the case.

Counsel for appellant: Mark R. Lippman
(858) 456-5840.
Argued by Ari Michaelson, Esq.
Counsel for appellee: Thomas Sullivan, Esq.
(202) 639-4856
Counsel for intervenor: John Howell, Esq.
(202) 408-8900 ■

Q&A WITH CLERKS AND CLS

By Barbara Cook

The April 3, 2007, Q & A panel included CAVC Clerk Norm Herring, Ann Stygles (Chief Deputy Clerk of Operations, CAVC Clerk's Office), and Cynthia Brandon-Arnold (Senior Staff Attorney, CAVC's Central Legal Staff). About 20 members attended in person, and 9 attended via webcast. The panel members answered numerous questions submitted by Bar members.

Norm Herring and Ann Stygles indicated that the large number of filings preclude calling individuals if there is a problem with a pleading. (Most common problem: non-compliance with 26(b)). Ms. Stygles noted that her staff spends about 6 hours per day on the phone, and asked that people only call if it is critical. Mr. Herring's top advice for new practitioners was to get a mentor while Ms. Stygles highlighted the importance of reading the rules carefully. Mr. Herring also described that the rules are an effort to get the cases ready pursuant to the Court's grant of authority. This includes the Clerk's "3 day to GC" and "20 day to appellant" orders, which he explained took the GC's presence in the building into account.

Ms. Brandon-Arnold indicated that each CLS attorney decides when to schedule pre-briefing conferences, how to conduct conferences, and how to prioritize cases. Writing opposing counsel before a conference, and copying CLS, helps in this process. Litigants can request conferences and can file motions to expedite (even after briefing) when the veteran's health is an issue. CLS believes that too many motions for reconsideration/panel review are being filed.

CONTINUING LEGAL EDUCATION PROGRAM *(continued from page nine)*

She provided an interesting and enlightening perspective on the process the court goes through in preparing an opinion. Judge Moorman shared that it is the court's goal to be clear and concise in its decision writing. He noted that doing so is especially important given the high rate of unrepresented veterans who appear before the court, and the process for circulating single judge decisions for review and comment by each judge prior to release. With respect to appellate advocacy in general, Judge Moorman emphasized that there is no substitute for preparation. He observed that the overarching goal is to make it easy for the court to draft the decision you would like to see in all aspects of your advocacy. ■

NOTE

On April 6, 2007, the CAVC issued an order, Misc. No. 10-07, by which the Court published for public comment proposed changes to its Rules of Practice and Procedure. Specifically, the Court is proposing to eliminate the need to create a Certified List and tab the documents relied upon by the Board for the final VA decision. Instead, only the records from the claims file that would be reviewed by the Court would be ones cited by parties in their briefs and would be included in a Joint Appendix to the Briefs. The creation of the Joint Appendix would differ depending on whether the appellant was represented.

Public comment must be received by the Clerk of the Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950, on or before May 7, 2007.

SAVE THE DATE

April - Q&A with OGC Group II

May - Q&A with Veterans Service Organizations

June - Q&A with DVA Regulation Rewrite

COMMITTEE CONTACTS

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

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

MEMBERSHIP COMMITTEE
Glenda Herl, Chair
carpgh@mindspring.com

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

PORTRAIT COMMITTEE
Dave Myers, Chair
davidm@vetsprobono.org

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

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

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

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

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