VETERANS LAW JOURNAL

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

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FIRST BIENNIAL BAR AND BENCH CONFERENCE HELD IN LANSDOWNE, VIRGINIA

By Louis George

The Lansdowne Resort in Virginia was the setting for the CAVC Bar Association First Biennial Bar and Bench Conference, held on the 29th and 30th of April. The conference's stated goal was to provide an opportunity for dialogue and discussion between the Court and members of the bar to discuss topics of common concern in an attempt to reach consensus and recommend changes in current Court rules of practice and procedures. A two-page photographic pictorial of the conference appears on pages 4-5 of this issue of the *VETERANS LAW JOURNAL* (the Bar Association also prepared a DVD of the conference sessions as well as photographs of the event).

The conference, which commemorated National Law Day, was co-chaired by CAVC Bar Association President Glenda Herl, past president Robert Chisholm, and Randy Campbell, Assistant General Counsel, VA Professional Staff Group VII. Judges Lawrence B. Hagel and Robert N. Davis served in an advisory capacity on behalf of the Board of Judges' Education Committee. The Planning Committee included Norman Herring, Clerk of the Court/Executive Officer, and Ann Olson, Acting Deputy Executive Officer/Financial Manager. The conference attendance was 57, and included six judges of the Court (Chief Judge Greene and Judges Davis, Hagel, Lance, Moorman, and Schoelen) as well as representatives from Veterans Service Organizations and the private bar, as well as VA counsel.

Judge Robert N. Davis, Judge Lawrence B. Hagel, Judge Alan G. Lance, Sr., CAVC Bar Association President Glenda Herl, Chief Judge William P. Greene, Jr., Judge William A. Moorman, Judge Mary J. Schoelen

The conference program included a Sunday evening cocktail reception and subsequent dinner program, which included remarks by Glenda Herl and Chief Judge Greene, and an update on the Court's e-filing initiative presented by Clerk of the Court Norm Herring. The Sunday evening program concluded with

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EXCEPTIONS TO THE "CONTINUOUS COHABITATION" REQUIREMENT: THE FEDERAL CIRCUIT INTERPRETS 38 U.S.C. § 101(3) AND 38 C.F.R. § 3.53(B)

By April Maddox

Alpough v. Nicholson, No. 06-7304 (Fed. Cir. June 18, 2007), on appeal from *Alpough v. Nicholson*, 20 Vet.App. 447 (2006). Before Judges Michel, Dyk, and Garris.

On June 18, 2007 the Federal Circuit vacated and remanded a Court of Appeals for Veterans Claims (CAVC) decision which denied the appellant's claim seeking recognition as the veteran's surviving spouse for purposes of entitlement dependency and indemnity compensation (DIC). Specifically, the CAVC found that "since the appellant [had] explicitly conceded in her brief that [her separation from the veteran prior to his death] 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."

The Federal Circuit found that under a proper interpretation of 38 U.S.C. § 101(3), a spouse can qualify as a surviving spouse if a separation was procured by the veteran even if there was no misconduct by the veteran. Furthermore, under a proper interpretation of 38 C.F.R. § 3.53(b), a separation by mutual agreement, without an intent to desert, does not break the continuity of cohabitation. Thus, the Federal Circuit concluded that the CAVC relied on erroneous interpretations of 38 U.S.C. § 101(3) and 38 C.F.R. § 3.53(b) when it found that the appellant could prevail *only* if her separation from the veteran was caused by his misconduct.

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THE FEDERAL CIRCUIT FINDS THAT IN THE ABSENCE OF AN EXPRESS PROVISION, EXCUSABLE NEGLECT DOES NOT EQUITABLY TOLL A DEADLINE FOR FILING AN APPEAL

By Kerri Millikan Sponsler

Nelson v. Nicholson, No. 2006-7314 (Fed. Cir. June 18, 2007), on appeal from *Nelson v. Nicholson*, 19 Vet. App. 548 (2006). Before Judges Newman, Schall, and Dyk.

On June 18, 2007, the Federal Circuit upheld a CAVC decision dismissing the veteran's appeal and finding that excusable neglect did not equitably toll the 38 U.S.C. § 7266(a) deadline for filing an appeal.

After a 2004 Board decision, the veteran's attorney unsuccessfully attempted to contact another attorney to represent the veteran in the CAVC appeal. Eventually the attorney filed an untimely appeal. CAVC dismissed the case for lack of jurisdiction, finding that excusable neglect did not equitably toll the Section 7266(a) deadline.

On appeal, the veteran asserted that *Pioneer Investment Services Company v. Brunswick*, 507 U.S. 380 (1993), which found that excusable neglect equitably tolled a deadline, should be read in conjunction with *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990), which held that excusable neglect did not equitably toll a statute, to permit equitable tolling of the Section 7266(a) filing deadline due to excusable neglect. The Federal Circuit rejected that argument, distinguishing *Pioneer* because the relevant statutory scheme expressly provided for equitable tolling due to excusable neglect. The Federal Circuit held that because Section 7266(a) and CAVC rules did not expressly provide for equitable tolling by excusable neglect, no such provision would be inferred.

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FEDERAL CIRCUIT HOLDS THAT THE COMMON LAW MAILBOX RULE AND STATUTORY POSTMARK RULE CO-EXIST

By Jonathan B. Kramer

Rios v. Nicholson, No. 2006-7352 (Fed. Cir. July 11, 2007), on appeal from *Rios v. Nicholson*, 20 Vet. App. 104 (2006) (en banc). Before Judges Michel, Archer and Dyk.

The issue on appeal concerns whether the Appellant timely filed a Notice of Appeal (NOA) with the CAVC to an October 16, 2003 Board decision that denied restoration of a total schedular rating for a service-connected disability, in accordance with 38 U.S.C.A. § 7266(c)(2). The Appellant appealed the CAVC's decision in *Rios v. Nicholson*, 20 Vet. App 104 (2006) (en banc), which held the following: (1) 38 U.S.C.A. § 7266(c)(2) and (d) do not authorize the application of the common law mailbox rule to create a presumption that the appellant timely filed the NOA; (2) 38 U.S.C.A. § 7266(c)(2) does not authorize the use of extrinsic evidence to show that the appellant's NOA was timely filed, and (3) the circumstances of the case do not warrant the application of equitable tolling. The Federal Circuit opinion reverses and remands the CAVC's en banc decision, which had dismissed the appellant's appeal as untimely filed.

The Federal Circuit ruled that the CAVC erred by not applying the common law mailbox rule as an alternative to the statutory postmark rule under the circumstances of this case. The statutory "postmark rule" of 38 U.S.C.A. § 7266(c)(2) and (d) states that the NOA is deemed received by the Court on the date of the United States Postal Service (USPS) postmark stamped on the cover in which the notice is posted, as long as the notice is properly addressed to the Court and is mailed and the USPS postmark is legible. The common law mailbox rule, however, states that, "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884).

The Federal Circuit ruled that the common law mailbox rule and statutory postmark rule co-exist, and that the CAVC should have considered this common law mailbox rule in assessing whether the veteran's NOA was timely filed. Specifically, the Federal Circuit held that the statutory postmark rule applies when the NOA is mailed before the deadline but received by the Court after the deadline for filing, while the common law mailbox rule applies when the Court alleges that it never received the petitioner's

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UPCOMING ORAL ARGUMENTS AT THE CAVC – OCTOBER/NOVEMBER 2007

Turk (Vet.App. No. 06-0069)	October 10, 10:00 a.m. (Kasold, Hagel, Davis)
Huffman (Vet.App. No. 05-1953)	October 23, 10:00 a.m. (Greene, Kasold, Schoelen)
Lamb (Vet.App. No. 05-3495)	October 24, 10:00 a.m. (Hagel, Lance, Schoelen)
Vigil (Vet.App. No. 05-3246)	October 25, 10:00 a.m. (Kasold, Lance, Schoelen)
Harrison (Vet.App. No. 05-2588)	November 8, 10:00 a.m. (Greene, Hagel, Lance)
Palaske (Vet.App. No. 06-0601)	November 28, 10:00 a.m. (Lance, Davis, Schoelen)
Davis (Vet.App. No. 06-3352)	November 29, 10:00 a.m. (Kasold, Davis, Schoelen)

BAR AND BENCH CONFERENCE

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a presentation recognizing the past presidents of the Bar Association: Jack Thompson, Robert Chisholm, Brian Rippel, Bart Stichman, and Jennifer Dowd.

The all-day program on Monday morning, which was moderated by meeting facilitator Tom Newcomb, focused on the proposed Court rule regarding the Designation of the Record and the Joint Appendix to the Briefs. A panel discussion was comprised of Joan Moriarty, Chair of the Rules Advisory Committee, and Ron Smith speaking on behalf of the appellant's bar and Paul Hutter speaking on behalf of VA. There were a number of comments and suggestions presented during the presentation (on suggestion of members of the Court present, the Bar Association submitted written comments based on the discussion, on May 7).

The second conference topic, Alternative Dispute Resolution (ADR), was opened by Judge Robert N. Davis. The conference participants were divided into three breakout groups, which reconvened later in the afternoon to discuss the topics discussed, which included the staff conference, post-briefing conferences, and use of staff conferences for EAJA disputes. The lunch-time speakers on Monday were Randy Campbell and Kenneth M. Carpenter, who spoke regarding the subject of summary dispositions on the merits as a way to resolve appeals of relative simplicity.

The Bar Association hopes that this Bar and Bench Conference will be the first of many and will serve as a regular forum for the Court as well as those who practice before it to meet and discuss current topics of interest and work to resolving common issues confronting it. The conference was a significant undertaking and thanks go to all those who planned it, executed it, and participated.

Past presidents of the CAVC Bar Association (left to right) Robert Chisholm, Brian Rippel, Bart Stichman and Jennifer Dowd with current President, Glenda Herl

2006-2007 Board of Governors and Officers of the Association at the Conference (from left to right) Louis George, Brian Robertson, Barbara Cook, Glenda Herl, Jennifer Dowd, Chris Wallace, Nicole DeGraffenreed, David Quinn and Mary Peltzer

Chris Wallace

Ken Carpenter

Judge Alan G. Lance, Sr., and Mrs. Lance, Judge Lawrence B. Hagel, Andy Reynolds and Nicole DeGraffenreed

Chief Judge William P. Greene, Jr. and Glenda Herl

Judges Lawrence B. Hagel and Alan G. Lance, Sr., and Chief Judge William P. Greene, Jr.

Randy Campbell, Robert Chisholm, Glenda Herl, and meeting facilitator Tom Newcomb

Anne Stygles, Brian Robertson, and Ron Smith

Ken Carpenter, Richard Cohen, Brian Robertson, and Carol Scott

RECENT FEDERAL CIRCUIT DECISIONS

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NOA. In the latter circumstances, receipt of the NOA would be presumed by demonstrating that the appellant placed a properly addressed and stamped NOA in the USPS in time for it to have been received by the CAVC within the 120-day filing deadline. As the appellant asserted just that, and presented evidence supporting his argument, such evidence should have been considered in conjunction with the common law mailbox rule.

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RECENT CAVC DECISION

ADEQUACY OF VA HEARING EXAMINATIONS IN LIGHT OF 38 C.F.R. § 4.10

By Donnie Hachey

Martinak v. Nicholson, No. 05-1195. Oral argument was held before Judges Kasold, Lance, and Moorman on June 14, 2007. Decided August 23, 2007.

On appeal in *Martinak* is a January 2005 Board decision that denied an initial compensable evaluation for bilateral hearing loss. In denying the claim, the Board relied on a November 2001 VA audiological examination which revealed puretone threshold averages of 40 percent for the right ear and 65 percent for the left, with speech discrimination scores of 96 percent, bilaterally. Mechanically applying the rating schedule, the Board determined that a noncompensable evaluation was in order.

In his brief and at oral argument, appellant argued that the November 2001 VA examination ran afoul of 38 C.F.R. § 4.10 in that the examiner failed to document the effect of the veteran's hearing loss on his ability to function under the ordinary conditions of daily life, including his ability to engage in employment. Appellant also noted that, like all audiometric testing conducted using VA's standard procedures, the testing conducted during the November 2001 VA examination was administered in a sound-controlled room. A sound-controlled room, the appellant argued, is not "equivalent to the sounds and noises experienced" under the ordinary conditions of life. In a similar vein, appellant also contended that referral for an extraschedular evaluation was in order because any reliance on audiometric testing conducted in a sound-controlled room renders impractical the regular schedular standards.

In response, appellee argued that the CAVC need look no further than its prior decision in *Lendenmann v. Principi,* 3 Vet. App. 345 (1992), for resolution of the matter on appeal. In *Lendenmann,* the Court determined that assignment of disability ratings for hearing loss are derived by the simple mechanical application of the rating schedule to the numeric designations assigned after audiometric evaluations are performed. Appellee also contended that what constitutes an adequate description of the impact of disability on ordinary activity depends on the type and nature of the condition. In some instances, such as with hearing loss, a specific measure of the level of disability will be adequate. In other instances, such as mental impairment, a more detailed description may be needed. Appellee also maintained that appellant's attack on VA's standard procedures for conducting hearing examinations was tantamount to an attack on the rating schedule itself, and that the CAVC is precluded from exercising jurisdiction over such challenge.

Finally, with respect to extraschedular consideration, appellee argued that if audiometric testing conducted in a sound-controlled room renders impractical the regular schedular standards, then each veteran filing an increased rating claim for hearing loss would be entitled to extraschedular referral – a clearly absurd result.

In its decision affirming the Board's decision as to the bilateral hearing loss claim, the Court held that the Secretary's policy for conducting audiological examinations in a sound-controlled room is valid. Specifically, the Court concluded that "[t]he appellant has not shown that the Secretary's policy is a plainly erroneous interpretation of § 4.85(a) or that it is otherwise inconsistent with VA's medical examination

regulations." With respect to the examination itself, the Court further held that the appellant's VA audiological examination was adequate, and finally, the Court rejected appellant's argument concerning referral for extraschedular consideration.

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RECENT FEDERAL CIRCUIT ORAL ARGUMENT

The Duty to Notify and Findings of Actual Knowledge

By Dorilyn Martz Ames

Newhouse v. Nicholson, Fed. Cir. No. No. 06-7302, on appeal from *Newhouse v. Nicholson*, 2006 WL 829557 (Vet.App.) (No. 03-0224). Oral argument held before Circuit Judges Richard Linn, Alan D. Lourie, and Kimberly Moore on July 13, 2007.

On appeal in *Newhouse* is a March 2006 CAVC affirmance of a December 2002 Board decision which denied the appellant's claim for an increased disability evaluation for bilateral hearing loss. In this case, the appellant's counsel argued that the Board erred prejudicially because it failed to address his July 2002 statement summarizing an audiologist's report and the results of a July 1985 audiology examination. He also asserted that VA did not provide adequate notice because the appellant did not know how the Board would weigh the evidence he submitted.

When presenting the appellant's case, counsel argued that it is VA's burden to show non-prejudice, and that the CAVC erred by concluding that the appellant had actual knowledge of what evidence was needed to substantiate his claim. Counsel argued that actual knowledge was a legal, not factual, determination because the notice provided to the appellant did not inform him what types of evidence were needed to substantiate his claim, or what constituted competent evidence. Counsel for the appellant concluded his argument by stating that there should be a standard for finding whether an error was prejudicial, and it should be clear and unmistakable evidence that the veteran was not prejudiced.

In response to the appellant's arguments, counsel for VA argued that notice under the Veterans Claims Assistance Act is intended to inform the veteran of what types of evidence are needed, as opposed to providing an outline of what evidence VA will review. Counsel argued that the VCAA does not require VA to pre-adjudicate the evidence.

Judge Moore expressed concern that the CAVC was making a finding of fact in the first instance, thus violating the *Chenery* doctrine, which states that a court may not sustain an agency's ruling on a ground different than that invoked by the agency. *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87; Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196. Counsel for VA replied that the Board made all factual determinations with regard to actual knowledge, and therefore the CAVC was not making a finding of fact in the first instance. Further, in this case, unlike the Court's decision in *Mayfield v. Nicholson*, 444 F.3d 1328, *Chenery* is not involved because the CAVC did not affirm the Board's decision, as opposed to affirming it on different grounds. *Chenery* does not preclude prejudice analysis because by statute, the CAVC is required to apply the rule of prejudicial error. 38 U.S.C. §7261(b)(2).

During the rebuttal period, counsel for the appellant disagreed with VA counsel's assessment of whether the *Chenery* doctrine applied in this case. Counsel for the appellant argued that there are two situations where the CAVC may find prejudicial error: (1) when the Board has already found it or (2) when the Board made findings of fact that would support a CAVC finding of prejudicial error. The appellant's counsel concluded the rebuttal by stating that the appellant's evidence did not meet VA's procedural requirements and that he should have been given an opportunity to remedy the incompetent evidence and submit it a second time.

Editor's Note: On August 10, 2007, after this article was written but before going to press, the Federal Circuit affirmed the CAVC's decision.

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