

VETERANS LAW JOURNAL

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

W I N T E R 2 0 0 7

RECENT CAVC DECISION

Court grants petition for extraordinary relief in the nature of a writ of mandamus.

by Lou George

Ribaudo v. Nicholson, U. S. Vet. App. No. 06-2762, Jan. 9, 2007 (en banc).

On September 21, 2006, the Secretary issued a memorandum directing the Board to stay action on and refrain from remanding all service-connection claims affected by this Court's decision in *Haas v. Nicholson*, 20 Vet.App. 257 (2006), that is, claims based on exposure to herbicides in which the evidence did not demonstrate service on the land mass of Vietnam, but rather, service on a vessel off the shore of Vietnam. The same day, the Board Chairman issued Chairman's Memorandum 01-06-24 that ordered such a stay.

On September 28, 2006, veteran Nicholas Ribaudo and The American Legion filed a petition for extraordinary relief in the nature of a writ of mandamus (The American Legion's petition was separated as case number 06-3264, and in a decision dated January 5, 2007, the Court dismissed this petition due to lack of standing). Veteran Ribaudo, whose case was subject to the Board's stay, asserted that the Secretary's/Chairman's memorandum ordering a stay of *Haas*-like cases was sought without judicial approval and therefore violated the Court's decision in *Ramsey v.*

continued on next page



COURT OF APPEALS
FOR VETERANS CLAIMS
BAR ASSOCIATION

Q&A FORUM: CHIEF JUDGE WILLIAM P. GREENE, JR.

by Mary Peltzer

On November 6, 2006, the "Meet the Judge" program evolved into a Question and Answer Forum, with the first installment being with CAVC Chief Judge William P. Greene, Jr. Chief Judge Greene responded to all twelve questions that were submitted.

Regarding any changes he anticipated in the Court's future, Chief Judge Greene responded that if the intake of new appeals continues at the current level of 300 per month, a decision would have to be made whether or not to increase the number of active CAVC judges from seven to nine. The current

continued on page six



Nicholson, 20 Vet.App. 16 (2006). On October 12, 2006, the Court ordered that the Secretary “explain (1) why the relief requested in the petition should not be granted and (2) why, given the clear holding in *Ramsey*, the procedure requiring advanced judicial sanction mandated therein was not followed when the Board Chairman took unilateral action to stay cases that might be affected by this Court’s decision in *Haas*.” The Secretary was also ordered to advise of all other instances in which the Secretary or Board Chairman had issued a stay applicable to a particular class of cases and of the reasons for issuance.

In response to the Court’s Order, the Secretary argued that the Secretary and Board Chairman possessed the authority to stay adjudications before VA pending the outcome of an appeal, and that the Court’s statement in *Ramsey* (regarding seeking advanced judicial approval) was dicta and thus nonbinding and nonprecedential. The Secretary also provided information regarding 12 other instances, between 1992 and 2005, when the Board Chairman issued memoranda staying the processing of appeals in particular classes of cases. In response, petitioner Ribaudó asserted that the Secretary has shown “contempt for the Court” by not following *Ramsey*, and cited past action of the Secretary in another case before the U.S. District Court for the Northern District of California (*Nehmer v. VA*, Civ. No. 86-6160), in which the Secretary moved for a stay of that Court’s dispositive order pending appeal.

Oral argument was held before the en banc Court on December 6, 2006. In its January 9, 2007, decision, the Court granted the writ of mandamus. In its analysis, the Court found that “it is clear to us that the law fails to provide the Secretary and Board Chairman with the authority to unilaterally stay cases before the Board as they see fit because of a disagreement with a decision of this Court or pending an appeal to the Federal Circuit.” The Court noted that in a similar case, the stay on tinnitus cases affected by the Court’s decision in *Smith v. Nicholson*, 19 Vet.App. 63 (2005), the Board lifted the stay in June 2006 after the Federal Circuit reversed the CAVC’s decision and “adopted a position with which the Secretary was in agreement thereby permitting the Secretary to deny claims . . . despite the fact that a petition for a writ of certiorari remained (and remains currently) pending before this U.S. Supreme Court.” The Court observed that the

Board, in staying cases, utilized “no clear standard for determining whether the processing of a class of appeals should be stayed and no consistent approach to staying the processing of such appeals.” In granting the writ, the Court held that the unilateral issuance of Chairman’s Memorandum 01-06-24 without prior judicial review of the criteria for taking such action “flouts the rule of law,” and the “clear central holding in the Court’s March 31, 2006, decision in *Ramsey* – that the Secretary lacks the authority to unilaterally stay the processing of appeals before the Board because of the effect of one of this Court’s decisions – stands as the binding precedent of this Court.”

The Court, however, set forth a procedure that the Secretary or Board Chairman may use to stay the effect of *Haas*. Specifically, the Secretary must file with the CAVC, or the Federal Circuit, a motion to stay the effect of the Court’s decision. The grant of the stay must satisfy the four criteria set forth in *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990).

In conclusion, the Court ordered that Memorandum 01-06-24 be rescinded, and ordered the Secretary to decide Mr. Ribaudó’s appeal “in regular order according to its place upon the docket” and will apply this Court’s decision in *Haas* pursuant to 38 U.S.C. § 7107. Judge Kasold dissented in part on the basis that the discussion in *Ramsey* regarding the authority of the Secretary to stay the processing of cases at the RO or the Board was “neither essential to nor a basis for the Court’s disposition,” and therefore was dicta and not binding.

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

NOTE

Federal Circuit Rule 32.1, effective December 1, 2006, allows the citations of nonprecedential dispositions issued after January 1, 2007.

ROUND UP OF SIGNIFICANT PENDING CASES Federal Circuit

NOVA III - VA'S DIC REGULATIONS

by April Maddox

National Organization of Veterans' Advocates, Inc. v. Nicholson (NOVA III), No. 05-7052 (Fed. Cir.) Oral argument was held before Judges Clevenger, Newman, and Dyk on Monday, December 4, 2006.

In January 2000 VA promulgated a final rule revising 38 C.F.R. § 3.22 which restricted the award of dependency and indemnity compensation (DIC) benefits to survivors of deceased veterans to cases where the veteran (during his or her lifetime) had established a right to receive total service-connected disability compensation for the period of time required by 38 U.S.C. § 1318, or would have established such right but for clear and unmistakable error (CUE) in the adjudication of the veteran's claim. The new regulation specifically indicated that "hypothetical entitlement" was not an additional basis for establishing eligibility under § 1318. The National Organization of Veterans' Advocates (NOVA) challenged this rule.

In *NOVA I*, 260 F.3d 1365 (Fed. Cir. 2001) the Federal Circuit found that the revised regulation was inconsistent with 38 C.F.R. § 20.1106, that interprets a virtually identical veterans benefits statute, 38 U.S.C. § 1311(a)(2), and that VA failed to explain its rationale for interpreting these virtually identical statutes (1311 and 1318) in conflicting ways. Thus, the case was remanded for expedited rulemaking.

In *NOVA II*, 314 F.3d 1373 (Fed. Cir. 2003) the petitioner challenged the validity of § 20.1106 as revised by VA in April 2002 in response to the Court's remand order in *NOVA I*. *NOVA II* resulted in a second remand by the Federal Circuit for further rulemaking proceedings. The Federal Circuit directed VA to reconcile § 1311 and § 1318 and explain why reopenings based on new and material evidence (NME) are excluded.

In December 2005 VA promulgated a further amendment to 38 C.F.R. § 3.22, specifically § 3.22(b), which in part added that service department records that existed at the time of a prior final VA decision but were not previously considered by VA may support a

finding that the veteran was "entitled to receive" compensation at the time of death for a disability that was rated totally disabling for the specified period.

At oral argument the appellant argued that the new rule unreasonably limited the definition of NME to support a basis for DIC claims. The appellee responded that the legislative intent behind DIC benefits was to continue benefits after a veteran's death in certain situations and that Congress did not intend to begin paying benefits after the veteran's death unless the reason for non-payment prior to death was the result of government error.

Counsel for appellant: Michael P. Horan, Esq. and Kenneth M. Carpenter, Esq.

Counsel for appellee: Russell A. Shultis, Esq.

The Duty to Assist and the Board's Requirement to Consider All Relevant Evidence of Record

by Sonnet Bush

Harper v. Nicholson, No. 06-7167, (Fed. Cir. Dec. 5, 2006), on appeal from *Harper v. Nicholson*, 20 Vet.App. 226 (2005). Oral argument held before Circuit Judges Alvin A. Schall, Timothy B. Dyk, and Richard Linn on December 5, 2006.

On appeal in *Harper* is an October 2005 CAVC affirmance of a September 2003 Board decision which denied the appellant's claims of entitlement to service connection for the cause of the veteran's death and entitlement to DEA benefits. In this case, service connection for malaria was in effect at the time of the veteran's death in May 1998. He died as the result of myocardial infarction.

In presenting argument to the Federal Circuit, counsel for the appellant focused on a 1953 medical affidavit that noted a diagnosis of chronic malaria. Counsel argued that since all VA examiners failed to consider this pertinent piece of evidence in rendering medical opinions as to the cause of the veteran's death, VA's duty to assist was not fulfilled and the Board should have remanded the claim for an additional medical opinion. Citing to 38 U.S.C. § 7261, counsel for the appellant then insisted that CAVC illegally made its own finding of fact when it determined that the VA examiners, though failing to

mention the 1953 affidavit in question, had considered the document in rendering their opinions. Finally, counsel for the appellant argued that CAVC failed to consider any type of indirect causation between the veteran's service-connected malaria and his fatal heart disease.

In responding to the appellant's arguments at the Federal Circuit, counsel for VA argued that CAVC was not making its own findings of fact, but instead reviewing findings of fact made by the Board, which determined that reasonable medical evidence had been acquired in order to render a decision on the merits. VA urged that the 1953 medical affidavit in question was not material to the appellant's claim, as it did not involve a relevant period of time. Therefore, the VA examiners were justified in not mentioning the document in their opinions, and the Board's silence as to the relevance of the 1953 document was justified in its decision. Counsel emphasized that the Board's only concern was whether the 1953 record showed the onset of fatal heart disease, and such was not the case. Additionally, counsel for VA insisted that VA did, in fact, consider any theories of indirect causation. In closing, pointing to *Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002), VA argued that a CUE standard should be employed in reviewing this case.

Counsel for the appellant: Sandra W. Wischow, Esq.
(804) 783-1162

Counsel for the appellee: James W. Poirier, Esq.
(202) 307-6288

COMING SOON

by Caryn Graham

JANUARY 2007 UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS (CAVC) ORAL ARGUMENTS

10:00 a.m. January 10:

Daves v. Nicholson, No. 05-0189

At issue are claims of entitlement to service connection for the cause of the veteran's death and entitlement to dependency and indemnity compensation (DIC) pursuant to the provisions of 38

U.S.C.A. 1318 (Section 1318) where the veteran died alone in his car and the certificate of death listed the immediate cause of death as unknown.

10:00 a.m. January 23:

Chisholm v. Nicholson, No. 05-0769.

The issue is the propriety of denying the appellant-attorney's 20% fee because it was used to pay a pre-existing debt of the veteran.

1:30 p.m. January 25:

Van Valkenburg v. Nicholson, No. 04-1036.

At issue is entitlement to an earlier effective date for Section 1318 DIC where the question is whether and if so, when, the appellant applied for widow's benefits from the Social Security Administration (SSA).

ADDITIONAL SCHEDULED CAVC ORAL ARGUMENTS

10:00 a.m. February 22:

Lippman v. Nicholson, No. 04-0812.

The issue in this case is the eligibility for payment of attorney fees for past due benefits where the attorney-client relationship was terminated.

10:00 p.m. March 7:

Crecco v. Nicholson, No. 04-1174.

The *Crecco* case involves the question of whether representation by a national service organization is the equivalent of representation by counsel for purposes of gaining a sympathetic reading of the pleadings. Several national service organizations have filed amicus briefs. DAV says, for example, that a veteran's pleadings should be read sympathetically all the time. VA OGC has not taken a position as yet on the question.

JANUARY 2007 UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ORAL ARGUMENTS

2:00 p.m. January 9, Courtroom 201:

Albert v. Nicholson, No. 06-7045.

The issue is whether there was clear and unmistakable error (CUE) in an October 1970 Regional Office (RO) decision that assigned a noncompensable rating for the postoperative residuals of an arthrotomy for removal of the medial meniscus. The appellant has argued that the RO failed to consider the correct diagnostic code when it rated the disability in 1970.

10:00 a.m. January 10, Courtroom 201:

Vincent v. Nicholson, No. 06-7166.

The issue is entitlement to Section 1318 DIC and whether VA's application of the amended 38 C.F.R. § 3.22 to the widow's claim would have a prohibited retroactive effect. Relying on the decision of *Rodriguez v. Nicholson*, 29 Vet. App. 275, 278 (2005), the CAVC found that the appellant had "a substantive right to pursue dependency and indemnity compensation based on a hypothetical theory of entitlement" because her claim was pending before the amendment to § 3.22 was promulgated.

10:00 a.m. January 10, Courtroom 203:

Messier v. Nicholson, No. 06-7202.

The issue is entitlement to service connection for a skin disorder, including as due to herbicide exposure where the credibility and weight to be given the evidence is questioned.

2:00 p.m. January 10, Courtroom 201:

Beene v. Nicholson, No. 06-7237.

The issues are entitlement to service connection for post-traumatic stress disorder (PTSD) and for alcohol abuse secondary to PTSD where there is a question of compliance with the notice provisions of the Veterans Claims Assistance Act. Mr. Beene will argue that under the correct interpretation of 38 U.S.C. § 5103(a), notification from VA must be specific to the claim made by the individual claimant.

10:00 a.m. January 11, Courtroom 201:

Reeves v. Nicholson, No. 06-7240.

The issue is whether there was CUE in a September 3, 1971, RO decision and whether the Board of Veterans' Appeals (Board) lacked jurisdiction to consider that claim. The CAVC found that the jurisdictional question had been resolved in a joint motion and that this question was no longer open for review under the "law of the case" doctrine. ■

Top 10 Reasons Why Briefs Are Rejected by the U.S. Court of Appeals for the Federal Circuit

Source: www.fedcir.gov, October 26, 2006

1. A proof of service does not accompany the Appendix. *Fed. R. App. Proc. 25(d)*.
2. Footnotes are not printed in the same size font as the text of the brief. *Practice Note to Rule 32*.
3. The brief does not contain a certificate of interest. *Fed. Cir. R. 28(a)(1)*.
4. The cover of the brief does not follow the official caption provided by the Clerk. *Fed. R. App. Proc. 32(a)(2)(A – D)*. A copy of the official caption should be received with the notice of docketing.
5. The brief contains an impermissible addendum. Excluding the required addendum in the Appellant or Petitioner's brief, an addendum attached to any other brief is acceptable if it contains only statutes, rules, regulations, etc. *Fed. R. App. Proc. 28(f)*.
6. The table of contents of any non-confidential brief or appendix must describe the general nature of the confidential material that has been deleted. *Fed. Cir. R. 28(d)(1)(B) and Fed. Cir. R. 30(h)(1)(B)*; *Example in Practice Note 28*.
7. The Appellant or Petitioner's brief does not contain the judgment, order, or opinion in question as an addendum placed last within the brief. *Fed. Cir. R. 28(a)(12)*.
8. The brief does not contain a statement of related cases. *Fed. Cir. R. 28(a)(4)*.
9. The appendix must begin with a table of contents identifying the page at which each part begins. *Fed. R. App. Proc. 30(d)*.
10. When the brief and appendix are combined, the cover must so indicate. *Fed. Cir. R. 30(d)(1)*.

Q&A FORUM *(continued from front page)*

Court location at 625 Indiana Avenue in Washington, DC would not accommodate chambers for a nine-judge bench. This, coupled with the lease for the current location ending in 2010, means a potential Veterans Courthouse and Justice Center is an important consideration in the next few years.

In response to an inquiry regarding the Court's backlog, the Chief Judge discussed the Court's understanding of the importance of timeliness of decisions and emphasized that the judges have a sense of urgency to decide a case but added that urgency had to be tempered by the time required to ensure that decisions are fair and correct. He also answered that reply briefs were not appropriate for introducing new arguments but were important to respond if the Appellee mischaracterized fact or raised an argument not originally addressed by the Appellant. Chief Judge Greene also discussed the Court's attempts to make the website more informative and user friendly. The new website, which rolled out in early January 2007, now allows for audio downloads of oral arguments that in future should be available within 24 hours of the argument. ■

SAVE THE DATE

CLE PROGRAM: ENHANCING THE PROCESS AND EFFECTIVENESS OF JUDICIAL REVIEW

When: Monday, February 12, 2007

Where: Hyatt Arlington Hotel
1325 Wilson Blvd.
Arlington, VA 22209

Time: 7:30 a.m. Registration
8:25 a.m. Welcome Remarks

Cost: \$200 members
\$250 non-members

The program will also be broadcast in two sessions from 8:30 a.m. to Noon and from 1:30 p.m. to 5 p.m. The cost for each session is \$100 for bar association members, \$125 for non-members.

Please email carpgh@mindspring.com for further information.

CAVC Question and Answer Forum: VA's C&P and OFO

by Jonathan Kramer

On December 6, 2006, the CAVC Bar Association organized the second installment of the Q&A Forum with a panel composed of officials serving in VA's Compensation and Pension Service (C&P) and the Office of Field Operations (OFO). The forum was held in a conference room provided by the Board of Veterans' Appeals. The panel consisted of the following VA personnel: Steve Simmons, Deputy Director of C&P; Al Bocchicchio, Executive Management Officer, OFO; and Michele Katina, Chief, Legislative & Policy Staff of C&P.

The forum began with presentations by Mr. Simmons and Mr. Bocchicchio concerning the purpose, duties, and responsibilities of C&P and OFO within VA. Mr. Simmons explained that C&P service and OFO are agencies that operate within the Veterans Benefits Administration (VBA). VA's 57 Regional Offices (RO's) organizationally are a part of VBA, which has the main responsibility for administering veterans' benefits, including the adjudicating veterans' claims for benefits. In regard to adjudicating claims, Mr. Simmons explained that most of the claims fall into a basic claims process: the determination of whether service connection is warranted and if service connection is granted, what is the appropriate disability rating and effective date. Mr. Simmons further commented that the most difficult task is gathering evidence. Mr. Bocchicchio, together with Mr. Simmons, explained further details of how a RO adjudicates a claim. It was further explained that OFO has line authority over the RO Directors, answers questions that come in from the field, and provides guidance to achieve consistency throughout VA.

After the presentation, a wide range of interesting questions were fielded by the panelists. The questions concerned, but were not limited to, the following topics: claims processing time; employee training; the regulation rewrite project; VA examinations; extra-schedular ratings; and the Appeals Management Center. ■

CAVC Electronic Filing Project

by Maureen A. Young

The CAVC has begun revving the engines of the Case Management/Electronic Case files (CM/ECF) project. Norman Y. Herring, Clerk of Court/Executive Officer of the CAVC has expressed much enthusiasm about this project. The Court, he says, has already purchased the hardware to be used with the CM/ECF system. Training has begun for the technical staff; the arrival of software to start the process of creating screens for an internal case management system is imminent. Members from the Department of Veterans Affairs, Veteran Service Organizations, the appellate bar, Court staff and a representative judge have already been selected to serve in an advisory capacity to work with the Court in implementing e-filing.

The CAVC's planned CM/ECF system will mirror the e-filing methods now in use in most federal courts. This advancement *et.al*, will allow the record to be electronically filed and available on-line to the parties (all hard copy filings will be converted to electronic records by scanning). A test run of the CAVC's planned CM/ECF system is tentatively scheduled for Fall 2007. The plan will allow *pro se* filings to be by hard copy. The vision, however, is to have all attorneys file electronically within twenty-four months of implementation of the project. ■

Source of Information: Norm Herring, Clerk of Court/Executive Officer, CAVC

Top 10 Reasons Why Motions Are Rejected by the U.S. Court of Appeals for the Federal Circuit

Source: www.fedcir.gov, October 26, 2006

1. The motion does not include a certificate of interest. *Fed. Cir. R. 27(a) and 47.4).*
2. The person signing the motion has not entered an appearance, or, there is no declaration of authority. *Fed. Cir. R. 47.3(d) and 27(a)(6).*
3. The Official Caption or abbreviated caption is incorrect. *Fed. Cir. R. 27(a)(2).*
4. Not enough copies are provided with the motion, response or reply. *Fed. Cir. R. 27(j) and Fed. R. App. P. 27(d)(3).*
5. A proposed order is not attached where the parties have consented to the motion for a procedural order. *Fed. Cir. R. 27(a)(9) and 27(a)(5).*
6. The motion does not state grounds for an enlargement of time. *Fed. R. App. P. 27(a)(2)(A) and Fed. Cir. R. 27(a)(4).*
7. The motion does not contain a statement of consent. *Fed. Cir. R. 26(b)(3) and 27(a)(5).*
8. No copy of the decision or order is attached to the motion. *Fed. R. App. P. 27(a)(2)(B)(iii).*
9. The title of the response does not reflect a request for further relief. *Fed. R. App. Proc. 27(a)(3)(B).*
10. The movant does not include an affidavit or declaration required by *Fed. Cir. R. 26(b)(5) and 26(b)(1)(B).*

News from Committees

Programs Committee:

Upcoming Forums

February - Q&A with the CAVC Clerk's Office and CLS

March - Q&A with OGC Group II

April - Q&A with Veterans Service Organizations

May - Q&A with DVA Regulation Rewrite

Law School Education Committee:

The Ad Hoc committee is in the initial planning stages of developing a law school curriculum module for veterans' law.

New Membership Benefit:

In conjunction with the availability of the online audio of oral arguments, the Bar Association will be providing an additional benefit to its membership. Electronic copies of the oral argument briefs will be made available to members of the bar association on the secured area of our website. The briefs will be collected directly from the parties and posted in PDF format. If your case is set for oral argument, we ask your cooperation in responding to our e-mail requesting you provide a copy of your brief.

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