VETERANS LAW JOURNAL

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

SPRING 2011

Supreme Court Reverses *Henderson*

by Aaron Moshiashwili, Esq.

On March 1, a unanimous Supreme Court reversed the Federal Circuit Court of Appeals in *Henderson v. Shinseki*, finding that the language of 38 U.S.C. § 7266(a) was not a limit on the jurisdiction of the Court of Appeals for Veterans Claims (CAVC). Justice Alito wrote the decision. He is one of the Court's three members who has served in the military, as a Captain in the U.S. Army Signal Corps.

The appellant, David Henderson (deceased, represented in this case by his wife, Dorothea), was a Korean War veteran with a 100% disability rating from the VA for paranoid schizophrenia. His application for supplemental benefits for in-home care was denied by the VA and subsequently appealed to the CAVC. The CAVC eventually found that it did not have jurisdiction, citing *Bowles v. Russell*, 551 U.S. 205 (2007) (28 U.S.C. § 2107, *Time for appeal to court of appeals*, is jurisdictional, and therefore not subject to equitable tolling.) The Federal Circuit affirmed.

The Supreme Court opinion started with a recent history of its jurisprudence in this area, and a brief explanation of its jurisprudential aims. Jurisdictional rules are powerful; they can never be waived, can be brought up at any time during or even after trial, and courts even have a responsibility to raise such rules sua sponte. Because of this power, the Supreme Court has "tried . . . to bring some discipline to the use of this term" (slip op. 5) by making sure that mere "claims-processing rules" such as filing deadlines are not interpreted as jurisdictional. However, the Supreme Court recognized that Congress is under no obligation to follow its opinions as to what types of rule carries what weight, and Congress can certainly

choose to imbue a law the Supreme Court might otherwise prefer to call claims processing with the full force of a jurisdictional rule. Congress, however, must be clear when it does so — merely using mandatory language is not enough. *Arbaugh v. Y & H Corp*, 546 U.S. 500, 510 (2006).

Henderson, continued on page 11.

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COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Message from the President

As color returns to the outside landscape, we enter spring with renewed energy. The Bar Association has been off to a running start since the New Year. In January, we hosted members of VA's Regulation Rewrite Project. William Russo, Randy McKevitt, and William Pine introduced the attendees to their work on revising Part III, Title 38 C.F.R., into a better organized, easy-to-understand Part V. The event was enthusiastically received by our members, who filled the courtroom to near capacity (and included over a dozen telephone attendees). The program concluded with a question and answer session followed by a small reception. In response to the overwhelming positive feedback from this event, we have invited our guests back for a follow-up program later this spring. Part two of the series — which is tentatively scheduled for April — will highlight some of the specific changes to regulations that practitioners use every day. Be on the lookout for more information regarding this event!

In February, we took a break from our educational emphasis to hold a social event. A Happy Hour social was held on February 24 at the Occidental Grill - Truman Bar (1475 Pennsylvania Ave., N.W.). A short tribute was paid to Chairman James P. Terry, who had recently retired after six years of distinguished service as Chairman of the Board of Veterans' Appeals. In comments that followed his tribute, Chairman Terry briefly reflected on his tenure at the Board. He also thanked the Bar Association, the Court, and his VA colleagues for their continued efforts in serving the needs of veterans and their families. We wish Chairman Terry all the best as he turns this page in his professional career.

Later this month, on Wednesday, March 30, at 1:00 P.M., we will be hosting a panel discussion highlighting some of the significant changes to the Court's Rules. As many of you know, the Court recently issued revisions to its Rules of Practice. On February 10, 2011, pursuant to Miscellaneous Order No. 03-11, the Court published its proposed revisions to the Rules with a provision for 60 days of public comment. You will find the Proposed Revised Rules, along with rationales for the revisions on the Court's website, www.uscourts.cavc.gov. The comment period will close on April 12. The program will feature two members of the Court's Rules Advisory Committee, who will discuss the Rule changes from the perspective of both VA Group VII and the private bar. The purpose of this program is to raise awareness regarding the nuances of the revised Rules, and also to promote discussion and encourage the submission of comments to the Court. Time will be set aside for questions and perspectives from the audience. Attendees can enjoy light refreshments immediately following the program in the Judges' Conference Room. For those who are not able to attend in person, teleconferencing will be available. I strongly encourage everyone to give the proposed Rule revisions thoughtful consideration and to submit comments. The Court has expressed an eagerness to consider all comments and suggestions.

In May, we hope to honor Judge William P. Greene with the official unveiling of his recently-commissioned portrait. I am proud to report that the membership eagerly answered the call for donations to our portrait fund. Within a very short time, we have come within striking distance of our goal. If you have not yet had a chance to give to this fund, I encourage you to do so. Details may be found on our website. Additional information regarding this worthy event will be communicated to our members as it becomes available.

Once again, on behalf of our Board of Governors, thank you for your continued support of our Bar Association. We look forward to a fresh new offering of events and programs designed to engage and educate our membership further in the coming months. As always, your input is welcomed and encouraged.

Glenn R. Bergmann
President, CAVC Bar Association

A Message from the Clerk

by Gregory O. Block

Greetings from the Office of the Clerk. The Court's Bar continues to keep us busy, and I continue to appreciate your meaningful suggestions and encouragement.

I would be remiss if I did not mention the Court's ongoing effort to update its Rules of Practice and Procedure. Specifically, the Court will be accepting comments on its proposed Rule revisions issued February 10, 2011 (Misc. No. 03-11), for only 3 more weeks, until April 12, 2011.

Highlights of some of the more significant proposed revisions include the following:

- A change in the permitted number of motions for extensions of time, which should ease compliance and promote efficiency, is provided in **Rule 26.**
- Expanded guidance for amici curiae is detailed in **Rule 29**.
- The integral steps and related requirements of the conferencing process are set out in **Rule 33**.
- The requirements of representation and the importance of clear documentation are clarified in the proposed reorganization and revision of **Rule 46**.

In addition to the revisions highlighted above, the proposals include several alternative procedures affecting the post-staff conference briefing schedule (Rules 31 and 33) and applications for attorney fees and expenses (Rule 39). Revisions and updates to comport with electronic filing have been proposed as well. Overall, the proposed revisions simplify compliance by streamlining practices and procedures before the Court, and by providing more specific guidance.

To review a complete copy of the proposed revisions, visit the Court's Web site at www.uscourts.cavc.gov and select the flashing notice on the home page.

Comments may be submitted to the Clerk of the Court (by April 12, 2011) at comments@uscourts.cavc.gov or 625 Indiana Avenue, N.W., Suite 900, Washington, DC 20004. ■

Gregory O. Block is the Clerk of the CAVC.

*** Mark Your Calendar !!!!! ***

A Discussion of the Proposed Changes to the CAVC's Rules of Practice and Procedure

When: Wednesday, **March 30, 2011**, at 1:00 p.m.

Where: The courtroom of the CAVC on the 11th Floor of 625 Indiana Ave., N.W., Washington, DC.

The panel will consist of two members of the Court's Rules Advisory Committee, who will discuss the Rule changes from the perspective of both VA's Group VII and the private bar. The purpose of this program is to not only to raise awareness regarding the nuances of the revised Rules, but also to promote discussion and encourage the submission of comments to the Court. Time will be set aside for questions and perspectives from the audience. Light refreshments will be served following the program in the Judges' Conference Room.

To attend either in person or by teleconference, rsvp to Glenn Bergmann at BERGMANNLAW@MSN.COM.

Rule 33 Conferences Revisted: Improving an Already Effective Process

by Andrew P. Reynolds, Esq.

The Central Staff Legal (CLS) of the Court first began conducting briefing conferences in the mid-1990s. At that time, members of CLS conducted conferences at their own discretion on a case-by-case basis. In addition, there was no procedural requirement that the appellant submit a Summary of the Issues (SOI) 14 days prior to the conference. Because no SOI was required, the Secretary was not required to participate with settlement authority.

The Court now conducts Rule 33 briefing conferences in every case in which the appellant is represented. This has resulted in a significant increase in the number of conferences conducted, as well as an increase in the time spent on the process, both substantively and procedurally, by all parties. Thus, the purpose of this article is to make suggestions that assist in streamlining the process, while also achieving the optimum results from the conferencing process. Keeping in mind that although many attorneys already achieve the foregoing, which has lead to excellent results for the Court's conferencing program, the following discussion is intended as a helpful reminder.

CLS attorneys schedule multiple conferences each day. Our schedule is fluid because conferences may get canceled, rescheduled, and/or reassigned to a new CLS attorney. In other words, everyone's conference schedules begin to look like a matrix of cases, particularly CLS's. To save time in keeping the conferences organized, it is helpful that the SOIs contain certain basic information in the heading, consisting of the following: case name and docket number, attorneys participating, date and time of conference, and the date the appellant's brief is due. (At the end of the conference, the parties tend to discuss the due date.) Much of this information simply assists all parties in staying organized and can help save much time in the long run.

As to the length of the SOI, it differs among the attorneys, varying anywhere from one page to a "brief." The attorneys are encouraged to keep it as a "summary" at this stage, but of course, it is up to the appellant's counsel as to how to manage her/his own case and time. What is clear, is that Rule 33 requires the appellant to submit "a summary of the issues that he or she intends to raise in the appeal, including citations to the relevant authorities and pertinent documents." This does not mean that the appellant's counsel can submit an SOI that literally only restates the issues listed on the Board decision without an explanation of their argument. To the contrary, the more pointed the argument, the better prepared the Secretary and CLS will be for the conference, which invariably leads to a more fruitful result.

An important feature of the SOI is the appellant's citation to the Record Before the Agency (RBA) to support the argument. The Secretary's response often times can only be as good as the SOI allows. Without proper citation to the RBA to support the argument, there is less opportunity for agreement. For example, if the appellant were arguing entitlement to an increased rating and asserting that he or she meets certain symptoms warranting an increased rating, citation to the RBA to support that argument would be imperative and often the crux of the appellant's case.

Although not required by the Rule, sometimes it is helpful if counsel appends to the SOI the most relevant documents from the RBA. Although appended records are not needed in all cases, they tends to be helpful, for example, in cases in which the parties dispute the adequacy of an examination or an examiner's intended meaning in a report. Keep in mind that although both parties are privy to the RBA, CLS attorneys are not, unless those relevant documents are provided to us with the SOI.

Once the appellant has submitted the SOI, the Secretary may have questions about the argument, or the appellant may come across a new issue that he or she intends to raise at the conference. In addition, it may be that the Secretary plans to concede error on a few or all of the claims. In each of these instances, a discussion prior to the conference can lead to better preparation.

Sometimes a party needs to file a motion to reschedule a conference. Logistically, it makes sense that the moving party contact CLS and opposing counsel to arrange an agreed-upon date. Once all parties agree to a time and date, this can then be incorporated into the motion. This allows the CLS

Rule 33 Conferences, continued on page 12.

CAVC Sanctions Secretary for Mishandling a Remanded Claim

by Kim Sheffield, Esq.

Reporting on *Harvey v. Shinseki*, __ Vet.App. __, No. 10-1284 (Jan. 25, 2011).

In June 2008, the Court of Appeals for Veterans Claims ruled that retired veteran Cleveland Harvey's election of compensation in lieu of military retirement pay should have been effective on September 17, 1998, rather than April 1, 2000, as previously found by the Board of Veterans' Appeals. On September 16, 2008, the Court issued a remand order for the limited purpose of calculating the amount of compensation benefits due Mr. Harvey. Nearly 19 months later, on March 9, 2010, Mr. Harvey, having received no answer from the VA concerning this calculation, filed a petition for extraordinary relief with the Court. He promptly supplemented this petition with an allegation of intentional delay in the processing of his claim, and requested that the Court order VA to finalize his claim and sanction VA employees for the delay. The Court formed a panel to consider the matter, requested the input of an amicus curiae, and required the Secretary to provide a detailed chronology of the events following the September 2008 remand.

On July 14, 2010, the Los Angeles Regional Office issued Mr. Harvey a letter in which it informed him that it had completed its calculation of the monies owed as a result of the Court's remand order. The Regional Office determined that he had been fully compensated by a retroactive payment made on August 16, 2000.

In the case on appeal, the Secretary argued that the issuance of the July 14, 2010, letter rendered the petitioner's request for a writ moot because it complied with the requirement of the Court's remand order. During oral argument, and following clarification by the Secretary, both the petitioner and the amicus curiae acknowledged that Mr. Harvey had received the relief mandated the Court's June 2008 order. Both also, however, argued that sanctions should be imposed for the "considerable delay" involved in processing the claim and implementing the remand order. The Court, consistent with governing legal precedent, dismissed Mr. Harvey's petition as moot. The Court then turned to the issue of whether sanctions were warranted for the lengthy delay involved in compliance with its prior mandate.

The Court emphasized the role played by the contempt sanction not only in protecting the due and orderly administration of justice, but also "in maintaining the authority and dignity of the court." The Court pointed out that a party is in contempt of that authority, and sanctions may be imposed, as a result of "disobedience or resistance to its lawful writ, process, order, rule, decree or command." 38 U.S.C. § 7265. The Court established that it may hold a party in civil contempt when three conditions are met: (1) there is a clear and unambiguous rule or order, (2) there is clear and convincing proof of noncompliance with that rule or order, and (3) there is a showing that the contemnor has not been reasonably diligent and energetic in attempting to accomplish his duty under the rule or order. The Court further explained that there is no requirement of bad faith or willfulness for a finding of contempt.

In applying the standard to the case at issue, the Court found that all three criteria for a finding of contempt had been met. The remand instructions were unambiguous and the Secretary's requirement under the law to "provide for expeditious treatment" of remanded claims was clear. Secondly, the Board found that there had been noncompliance with the order despite the Secretary's argument that the July 14, 2010, letter accomplished the required task, and therefore this element could not be met. The Court pointed out that the Secretary's obligation includes the duty to accomplish Court-ordered tasks "in an expeditious manner." 38 U.S.C. § § 5109B, 7112. In considering whether this duty had been discharged in such a manner in this case, the Court noted the "simple, clear and direct" nature of the order, which did not involve any additional development or evidence collection. The Court also considered the lengthy delay involved in compliance, as well as errors, oversights, and irregularities in the processing of the case. The Court held that "under unique circumstances similar to those of this case," the failure to comply expeditiously is the same as noncompliance. Finally, the Court found that there had been a lack of reasonable diligence in the instant case. As sanction for the "lack of proper diligence and respect for the Court's June 2008 remand order," and in consideration of the time and resources which were expended as a result, the Court imposed a

Harvey, continued on page 13.

When May Entitlement to an Award of TDIU be Treated as a Claim Separate and Apart from an Underlying Claim for an Increased Schedular Rating?

by Virginia A. Girard-Brady

Reporting on *Locklear v. Shinseki*, __ Vet.App. __, No. 09-2675 (Feb. 11, 2011).

In May 1983, the Board awarded veteran Edison B. Locklear a ten percent disability rating for his service-connected schizophrenia. The Board acknowledged the fact that entitlement to an award of total disability based upon individual unemployability (TDIU) had also been asserted, but declined jurisdiction over the matter, and referred the question back to the Agency of Original Jurisdiction (AOJ) for a separate adjudication, with specific instruction to prepare a Statement of the Case (SOC) on the issue. No such SOC was ever issued by the AOJ, nor did the Board address the question of TDIU in the context of a later appeal from the denial of an increased rating.

Mr. Locklear was eventually awarded a total schedular disability rating, with an effective date of May 20, 1990. Mr. Locklear appealed for an earlier effective date, as early as May 1981, based upon the assertion that entitlement to TDIU had remained pending and unadjudicated since that time. In an April 2009 decision, the Board found that, despite the fact that TDIU had been raised at least four times prior to May 1990, the prior denials of Mr. Locklear's claims for increase had implicitly denied TDIU, and had become final.

The Court thus addressed the question of when entitlement to TDIU may be treated as a separate claim, and when it may be considered to be an implicit consideration within the context of an already pending claim for a schedular increase, even where the decision denying a schedular increase fails to reference TDIU or the applicable regulations.

Mr. Locklear argued that, because the Board's 1983 decision specifically and explicitly separated his entitlement to TDIU from his claim for an increased schedular rating, and such question was never addressed by the either the RO or the Board during the intervening years, the question of his entitlement to TDIU had remained pending and unadjudicated since that time. The Secretary argued that, because TDIU is an inherent consideration in every claim for an increased rating, the Board's finding that it had been implicitly adjudicated and denied in the prior decisions, should be affirmed.

The Court initially addressed the apparent conflict created by *Rice v. Shinseki*, 22 Vet.App. 447, 453 (2009) and *Tyrues v. Shinseki*, 23 Vet.App. 166, 176 (2009) with respect to when a theory of entitlement becomes a claim separate and apart from the underlying claim for benefits. In *Rice*, the Court held that entitlement to an award of TDIU was not a separate claim for benefits, but rather should be treated as part of the underlying claim for an increased disability rating. However, under the particular facts in *Rice*, the adjudication of the veteran's entitlement to TDIU was never separated from the underlying claim for increase. In *Tyrues*, the Court held that the Secretary had discretion to bifurcate a claim based upon different theories of entitlement. Moreover, the Court noted that its decision in *Rice* did not foreclose on the possibility of TDIU being treated as separate claim in certain instances.

The Court then addressed the question of when the "implicit denial" rule was for application. The Court found that the answer turned upon whether or not a reasonable person would understand, from the decision denying the requested benefit, that a particular theory of entitlement had necessarily been implicitly adjudicated and denied. Thus, in those instances in which a veteran is not awarded a 100 percent disability rating, a reasonable person would understand that entitlement to TDIU was implicitly denied, unless entitlement to TDIU had been separately, and explicitly, adjudicated. In such a case, "a reasonable person would expect to see a specific decision on the part that was separated." *Locklear*, slip opinion at 6 (emphasis in original).

At oral argument, the Secretary argued that a February 1986 Board decision that discussed Mr. Locklear's occupational impairment should have been construed as a subsequent adjudication of TDIU. The Court acknowledged that there might be instances in which a bifurcated claim could be found to have been "implicitly denied" by a particular decision. However, the Court found that, in Mr. Locklear's case, the Board created an express expectation on Mr. Locklear's part that an SOC would be issued by the

Locklear, continued on page 13.

CAVC Discusses VA's Waiver of Ability to Dismiss Issues

by Bradley Hennings

Reporting on *Evans v. Shinseki*, __ Vet.App. __, No. No. 08-2133 (Jan. 28, 2011).

In *Evans v. Shinseki*, decided on January 28, 2011, the Court held that when a claimant checks box 9.A. on a VA Form 9 indicating that he wishes to appeal all issues on a SOC, all issues are on appeal to the Board, and the Board has waived its ability to dismiss any of those issues under 38 U.S.C. § 7105(d)(5). An opinion concurring in part and dissenting in part was filed by Judge Schoelen.

Evans involved the appeal of veteran James I. Evans. In February 2004, the RO issued a rating decision that disposed of sixteen separate issues. The appellant timely filed a Notice of Disagreement (NOD) to the RO's decision with respect to his claims for asbestos exposure, a back disability, a collapsed lung, hepatitis B and C, and his distal left fibular shaft fracture. In September 2004, the RO issued a Statement of the Case (SOC) with respect to the six claims referenced in the appellant's NOD. Using a VA Form 9, the appellant filed a Substantive Appeal with the Board concerning the "issues" outlined in the September 2004 SOC. On his Form 9, the appellant checked the first box in section 9.A., stating that, "I WANT TO APPEAL ALL OF THE ISSUES LISTED ON THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENTS OF THE CASE THAT MY LOCAL VA OFFICE SENT TO ME." In the space provided for issues below part B of section 9 on that same Form 9, the appellant specifically listed the RO's denial of his claims for a fractured distal fibular shaft, back injury, and collapsed lung.

In January 2008, the Board provided a hearing for the appellant. During that hearing, the hearing officer identified that the only issues on appeal were entitlement to service connection for a back disability, service connection for residuals of a collapsed lung, and entitlement to a compensable (increased) evaluation for residuals of a fracture of the left distal fibular tip/shaft. The veteran agreed on the record that those were the issues on appeal. The Court found that the Board in its decision fully addressed the three "issues" specifically outlined in part B of section 9 on the appellant's Form 9.

However, the Court found the Board dismissed the appellant's claims for asbestos exposure, hepatitis B, and hepatitis C under 38 C.F.R. § 20.202 because it reasoned that the appellant's Form 9 showed that the appellant was only appealing the "issues" related to a back disorder, the residuals of a collapsed lung, and entitlement to a higher rating for the residuals of a fractured distal left fibular shaft.

The Court reversed and remanded the Board's decision, and held that if a claimant uses a VA Form 9 and checks box 9.A., stating that he wants to appeal all of the issues listed on the SOC, then all issues listed on the SOC would be on appeal and the Board has waived its ability to dismiss any of those issues under 38 U.S.C. § 7105(d)(5). The Court's rationale was that when VA selects only certain issues to decide on appeal, without directly informing the claimant that he is abandoning the remaining issues, it creates an ambiguity that must be resolved in the claimant's favor.

In discussing its rationale, the Court noted that the Board has an obligation to read pro se filings liberally for proceedings appealing the decision of the RO to the Board, and that this obligation also applies to filings made by represented appellants in their direct appeals to the Board, citing to *Robinson v. Shinseki*, 557 F.3d 1355, 1359 (Fed.Cir.2009). The Court further observed that the Secretary essentially offered to waive the statutory adequacy requirements for a Substantive Appeal when he included a box on Form 9 allowing a claimant to check off that he or she wishes to appeal all issues listed in the SOC. Therefore, even if the appellant had not stated a single argument, the Board would have still been obligated to consider all the issues on appeal and to review all the issues and theories reasonably raised by the evidence of record. However, the Court also stated that the issues on appeal could have been limited if this appellant's intent were clear on the record.

Judge Schoelen, concurring in part and dissenting in part, pointed out some issues with the Court's analysis, and indicated a remand was warranted in this case because the Board failed to give an adequate statement of reasons or bases for its conclusion that Mr. Evans had not filed a Substantive Appeal on three of the six issues that were identified in his NOD and the RO's SOC.

Evans, continued on page 12.

A Peek Inside . . .
The National Courts Section of the Commercial Litigation Branch, Department of Justice

by Scott Austin

The National Courts Section is the largest of five sections within the Commerical Litigation Branch of the Civil Division of the Department of Justice. The National Courts Section currently employs approximately 150 attorneys, 20 of whom are current or former members of the military. Its attorneys practice primarily before the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims, and the United States Court of International Trade. The National Courts Section has existed in various forms for more than 150 years, pre-dating the establishment of the Department of Justice itself.

The National Courts Section represents the Department of Defense in multiple litigation matters, including suits brought in the Court of Federal Claims pursuant to the Contract Disputes Act for: contractual disputes related to goods and services ranging from facility maintenance contracts to the construction of aircraft; procurement protests involving lawsuits challenging federal government action in connection with awarding government contracts; monetary claims made by members of the Armed Forces for allegedly denied wages or benefits; and appeals from military administrative boards of contract appeals, such as the Armed Services Board of Contract Appeals.

The National Courts Section also handles appeals from the Merit Systems Protection Board to the Federal Circuit. The board adjudicates appeals from personnel decisions made by Federal Government agencies. Based upon the expertise developed by the National Courts Section in this area, when the Veterans' Judicial Review Act was passed in 1988, creating the Veterans Court and granting limited jurisdiction to the Federal Circuit to review legal conclusions of the Veterans Court, the National Courts Section was selected as the appropriate Department of Justice section to handle these appeals. The National Courts Section has handled all appeals from the Veterans Court to the Federal Circuit on behalf of the Department of Veterans Affairs (originally the Veterans Administration) since 1988.

The National Courts Section works closely with Professional Staff Group II (PSG II) within the Department of Veterans Affairs (VA) Office of the General Counsel to prepare and defend appeals of decisions of the Veterans Court to the Federal Circuit. Working in conjunction with PSG II, the National Courts Section prepares and files briefs before the Federal Circuit. In most of the cases where veterans are represented by counsel, National Courts attorneys also present oral argument to the Court. Many National Courts attorneys, including one deputy director and two assistant directors, have an expertise in veterans law and devote a significant amount of their time to VA appeals. Approximately ten of our attorneys have handled numerous oral arguments in VA appeals before the Federal Circuit, and many others have varying levels of experience in veterans law.

As part of National Courts' role in handling appeals of veterans benefits cases, our attorneys assess the propriety of the Veterans Court's decision and determine, in conjunction with PSG II, whether a settlement of the appeal would be appropriate. Settlements, however, are relatively infrequent and, because the payment of money is rarely involved in an appeal of a Veterans Court decision and claimants instead usually seek procedural relief, the settlements that do occur typically involve a stipulated remand to the Veterans Court rather than a final resolution of the case. The National Courts Section brings experience and perspective from handling cases from

Peek Inside, continued on page 12.

The Federal Circuit courthouse at Lafayette Square

The Librarian's Corner: Focus on Local Federal Libraries

by Allison Fentress

I thought I would highlight a few of the federal libraries that I visit. These are fairly close to the CAVC's location; I also like these because security is not terribly onerous. (Ever been to the DOJ? Their security is like something out of Star Trek.)

BVA Library and Research Center

You may already know about this one, tucked away on the eighth floor of the BVA building. It is small but packed with VA materials. The Research Center is open to anyone, but you have to go through security. The collection consists mainly of archival VA materials, including regulation histories of Title 38 CFR, and statutory histories of 38 USC. Some are too large to attach to email but can be faxed. It is probably best to send an email request and wait until materials are determined to be available. The library will be moving in June.

Current location:
810 Vermont Ave, N.W., Room 812
Washington, DC 20420

Phone: (202) 461-8182
Hours: 8:00-5:00
Email: bvarcquestions@va.gov
Appointment not necessary but strongly recommended.
Copier available to government employees.
No arrangement for payment for copies.

New location:
425 I Street, NW
Chester Arthur Building, 5th Floor
Washington, DC 20001

They expect to be there mid-June. I am not sure if the phone number will be the same.

Circuit Library for the U.S. Courts for the D.C. Circuit

This library has a fairly large collection and plenty of space to work. The collection includes basic legal, administrative law, and congressional materials. The atrium in the new portion of the building is definitely worth a peek if you have never seen it.

E. Barrett Prettyman U.S. Courthouse,
Room 3205
333 Constitution Ave. N.W.
Washington, DC 20001

Phone: (202) 216-7396
Hours: 8:30-4:00
No appointment needed.
Copiers available, but only for court materials.

Law Library of Congress

This is the mother lode of legal libraries. It is a bit of a hassle to use because you have to get a reader identification card, but once you have that, you are good to go. One advantage is that it is open on Saturday. Be sure you go to the James Madison building. When you have finished your legal research, there is a tunnel that goes over to the Jefferson building; you will not have to go through security again. Go visit the historic reading room if you have never done that. View Thomas Jefferson's book collection. See the Declaration of Independence. Buy a coffee mug or a book bag in the gift shop. For lots of information about visiting the Law Library of Congress and their policies, check out the website, http://www.loc.gov/law/

James Madison Building
Room LM201
101 Independence Avenue
Washington, DC 20540

Phone: (202) 707-5079
No appointment needed
Hours: 8:30-5:00 Mon-Sat
Copiers available

I hope you find this helpful. I will do an update about the BVA Research Center once they get settled into their new quarters this summer, so stay tuned. ■

Allison Fentress is the Librarian for U.S. Court of Appeals for Veterans Claims

CONTRIBUTORS WANTED

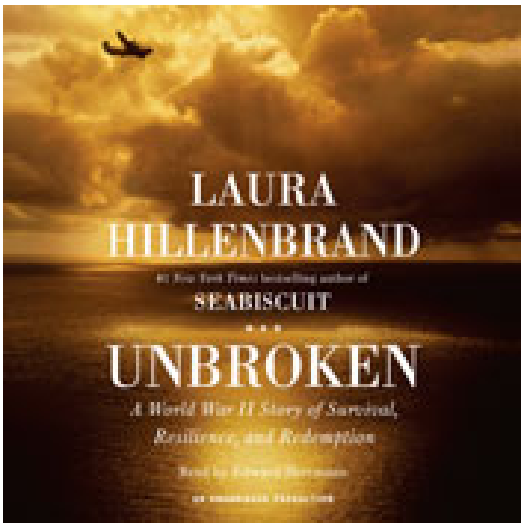
The publications committee is looking for new members to contribute to upcoming installments of the *Veterans Law Journal*. Participants do not need to be located in the Washington, D.C. area. Contact James Ridgway at *jridgway@uscourts.cavc.gov* or Glenn Bergmann at BergmannLaw@msn.com.

Unbroken: A World War II Story of Survival, Resilience, and Redemption
By Laura Hillenbrand
(Random House, 2010), 406 pages

by Louis George

Let me say this simply: This is a terrific book. *Unbroken: A World War II Story of Survival, Resilience, and Redemption*, tells, in riveting detail and in a quick, narrative fashion, the story of one man's life. In a life that so far has spanned 94 years, Louis Zamperini (or just Louie, as he is referred to throughout the book) was an Olympic runner, an Army Air Forces B-24 bombardier, a castaway in the South Pacific, and ultimately a POW of the Japanese government from 1943-1945. The author, Laura Hillenbrand, who wrote the bestselling book, *Seabiscuit: An American Legend*, crafts an involving story of Louie and the defining moments of his life and those around him.

Ms. Hillenbrand traces Louie's life as an enthusiastic (but incorrigible) youth in Torrance, California, who turned to running as a teen on the urging of his older brother, Pete, an athlete in his own right. Running soon became an obsession to Louie, who became known as the "Torrance Tornado," and who in 1934 broke the national high school record by more than two seconds, running a mile in 4:21.3 (the record stood for nearly 20 years). The year 1936 brought Louie to the Olympic trials in the 106-degree summer heat of New York City. One athlete was so desperate for relief from the heat that he moved into an air-conditioned movie theater (one of the few places that were air conditioned in those days), buying consecutive tickets and sleeping through every showing.



It is this level of detail — this unexpected, but never unnecessary — detail, which guides us through Ms. Hillenbrand's book. We learn how it was to be an Olympic athlete in Berlin during the 1936 Olympics. We learn how when the war came, Louie served as a B-24 bombardier. We learn about the eccentricities of the B-24, as well as how it was to negotiate on a bombing run, when the Norden bombsight took over the job of flying the plane. We learn how it was to "ditch" a B-24 in the Pacific Ocean.

Much of *Unbroken* deals with Louie's service in World War II in the Pacific, and ultimately his survival of a horrific crash and drifting for weeks on a raft in the Pacific, pursued by sharks and fighting thirst and starvation. If that were not bad enough, this once-in-a-lifetime experience was followed by capture and more than two years of incarceration in various Japanese POW camps. I will not devote much time to that here, but it is a harrowing period and makes this book a must-read for all of us who, in our work and in our lives, serve veterans. The physical and psychiatric traumas that Louie underwent during his ordeal – many inflicted by a sadistic prison guard nicknamed the "Bird"- are shocking and a testament to what a human being can tolerate.

The book goes on to describe the difficult times after Louie returns to the United States, as he tries to put his life back together despite suffering grievously from what we now call post-traumatic stress disorder. He ultimately turns his life around and builds a life for himself and his family, but the process is neither simple nor accomplished overnight.

In the end, this is a book that is true to its title, as it is a story of "survival, resilience, and redemption." It is an inspiring tale, one that tells of the success of the human spirit despite circumstances that would challenge each of us to the core of our soul. As the 1946 film, *The Best Years of Our Lives*, chronicled the tale of three returning veterans from World War II, this story tells the before, during, and after of just one of those veterans. It is a story that challenges each of us to wonder what we would do given the same circumstances. Perhaps even so for Louie, who said to a reporter shortly after his liberation: "If I knew I had to go through those experiences again, I'd kill myself." ■

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A Few Reminders from the Public Office of the CAVC About Common Mistakes Found in Pleadings

by Anne P. Stygles

The Court continues to receive pleadings that are not in compliance with the Court Rules. For example:

1. **Rule 28(a)(2)**: The RBA citations in your brief are not listed in the Table of Contents.

2. **Rule 26(b)(2)(A-D)**: The current due date, the revised date sought, and/or how many DAYS of extension each party has had, are incorrect.

3. **Rule 32(e)**: The name of the appellant/petitioner and/or the case number is/are incorrect.

4. **Rule 6 and E-Rule 13(b)**: Personal identifiers are not being redacted.

5. If you need to ask for an extension to respond to the RBA (or the ROP if it is mailed to you), please remember that **Rule 26(c)(1)** allows for an additional five days to respond, and those five days should be included in your motion for extension. ■

Anne P. Stygles is Chief Deputy Clerk of the CAVC.

The *Veterans Law Review* is currently accepting submissions for consideration for publication in Volume IV. The due date for submissions is May 1, 2011 for consideration for publication in the next edition. The *Veterans Law Review* actively encourages veterans' service organizations, veterans and people who work on veterans' issues to submit original legal writings for consideration for publication. The editors review each manuscript for scholarly merit, clarity, and accuracy only. The editors will notify the author of any substantive changes. Submissions should conform to the current edition of The Blue Book: A Uniform System of Citation. Authors are invited to discuss potential submissions with the current *Veterans Law Review*'s Managing Editor by email at *BVAVeteransLawReviewEditor@va.gov*. Style guidelines and articles from past issues can be found at http://www.bva.va.gov/VLR.asp.

Henderson, continued from front page.

The cornerstone of the Henderson opinion is that it made no sense for Congress, when enacting a strongly pro-veteran statute, to include a jurisdictional rule that would become a complete bar against veterans having their day in court. David Henderson himself was a prime example — the very disability he incurred through service to his country was what prevented him from timely filing his appeal. The Supreme Court found no language in the statute suggesting Congressional intent to create such a rule. In fact, the opinion seems to agree with the appellant's arguments almost completely, finding other sections of the statute that are clearly intended to be generous towards veterans on filing deadlines, terms of review, and even the ability to reopen a case if new evidence is found.

The Supreme Court went out of its way to rule narrowly, stressing the "unique administrative scheme" of VA-CAVC, and the "unusually protective" relationship between VA and its claimants. In the end, the opinion dismissed the existing precedents as not being on point in this particular case — an appeal from an administrative decision to an "Article I tribunal." In a turn of phrase likely to rankle some, the opinion repeatedly used the phrase 'Article I tribunal' rather than 'Article I court' to refer to CAVC. While there may, in fact, be other agency-to-Article-I contexts where this decision will control, they are undoubtedly few.

The Supreme Court also made clear that it was neither ruling that this particular situation warranted equitable tolling, nor on whether the deadline for filing an appeal to the CAVC is even subject to equitable tolling, regardless of whether the rule is jurisdictional or not. Henderson and other appellants will eventually flesh out this point; the *Henderson* opinion merely opens the door.

The Supreme Court reversed the Court of Appeals for the Federal Circuit by an 8-0 vote. Justice Kagan took no part. ■

Rule 33 Conferences, continued from page 4.

attorney to act on the motion more quickly before other conferences fill the schedule.

Each of these items are simply suggestions for the parties to consider to assist everyone in participating in a more effective process. Over the years, the parties have made wonderful strides in working together to accomplish a more effective process, which benefits the veterans in the end. Because of the parties' work, the Court's briefing conference program has had tremendous success. Any improvements to the process are simply a bonus to an already effective process that has been made more effective because of the parties' active participation. ■

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Peek Inside, continued from page 8.

many different government agencies. This often proves helpful in coordinating settlement decisions with VA in appeals of Veterans Court decisions to the Federal Circuit.

The National Courts Section plays a significant role in the process of determining whether the Government will appeal a decision of the Veterans Court to the Federal Circuit. As a practical matter, only a very small percentage of the appeals of decisions of the Veterans Court to the Federal Circuit are appeals filed by VA. The appeal process is initiated by PSG II sending a memorandum to the Department of Justice requesting that a notice of appeal be filed with the Federal Circuit. National Courts attorneys will write an internal memorandum either agreeing or disagreeing with VA's recommendation, which, if Civil Division officials outside of National Courts agree, becomes the recommendation of the Civil Division to the Solicitor General of the United States. The Office of the Solicitor General makes the ultimate decision as to whether the government will appeal a decision of the Veterans Court to the Federal Circuit. ■

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Evans, continued from page 7.

Judge Schoelen noted that a Substantive Appeal must satisfy the criteria that it "identify the benefits sought" and "set out specific allegations or error of fact or law," citing to 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.202 (2010). She indicated that the deficiency in the Board decision is that it does not provide an explanation as to how it resolved the seemingly conflicting statements on Mr. Evans's Substantive Appeal to arrive at its conclusion, and that it is impossible to determine from the Board's conclusory language whether it found the Substantive Appeal inadequate because the claimant did not comply with the specificity requirement as to the three disputed issues. Judge Schoelen also found the Board decision inadequate because the Board did not follow established procedure when it sua sponte raised the issue of the adequacy of the appellant's Substantive Appeal form, citing to 38 C.F.R. § 20.101(d).

However, Judge Schoelen disagreed with the majority's holding that if a claimant uses VA Form 9 and checks box 9.A., indicating that he wishes to appeal all of the issues listed on the SOC, then all issues listed on the SOC would be on appeal to the Board. Her rationale was that the VA Form 9 is not ambiguous, as it is clearly written and the instructions provide sufficient detail to enable a claimant to properly complete the form to satisfy both of the statutory criteria for a Substantive Appeal. Further, Judge Schoelen does not believe reliance on *Percy v. Shinseki*, 23 Vet. App. 37, 47-48 (2009) is appropriate in this case. Although that case held that the Board has the power to waive the timeliness and sufficiency requirements for a Substantive Appeal, the Court did so after considering VA's conduct in handling Mr. Percy's claim. Judge Schoelen indicated that the majority does not explain how the "rather extraordinary" facts of *Percy* are presented by this appeal, and argued that the majority essentially held that the Secretary waives the specificity requirement in every case in which a claimant uses a VA Form 9. She noted that the majority has pointed to no evidence of such an intent by the Secretary. ■

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Harvey, continued from page 5.

sanction of payment of reasonable attorney's fees and costs associated with the adjudication of Mr. Harvey's petition. In examining the statement of costs and attorney fees of the petitioner and amicus curiae, the Court did not take issue with the number of hours spent by counsel; however, it did find that both billing rates were unreasonable, as they exceeded the rate that was common for proceedings before the Court. Accordingly the hourly rates were reduced to the inflation-adjusted-rate of EAJA compensation.

Although this case demonstrates the Court's willingness to make findings of contempt and issue sanctions as appropriate, the Court also admonished that it "will not blindly issue writs or sanctions where the delay is the result of an overburdened system, rather than a disregard for the importance of compliance with a Court order." The opinion also cautioned against the filing of frivolous petitions, indicating that "the Court will carefully consider whether action must be taken" under such circumstances as well. ■

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Locklear, continued from page 6.

RO, such that a reasonable person in his position would understand that no further action could be taken absent the issuance of an SOC. The Court further disagreed with the Secretary's assertion that Mr. Locklear's later submissions to VA claiming entitlement to TDIU served to "reunite" his pending claim for TDIU with his subsequent claims for an increased schedular rating. Specifically, the Court found that even assuming that it were possible for a veteran to reunite what the Secretary has previously separated, such a conclusion would be incompatible with the veteran-friendly, nonadversarial nature of the VA claims system.

Consequently, the Court held that the Board erred in finding that Mr. Locklear's entitlement to TDIU had been "implicitly denied" by subsequent decisions denying entitlement to an increased schedular rating, and remanded back to the Board the question of whether Mr. Locklear was entitled to an award of TDIU prior to May 20, 1990. ■

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A check for my dues fee payable to the "Court of Appeals for Veterans Claims Bar Assn." is enclosed.

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