

VETERANS LAW JOURNAL

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

Fall 2013

Bar Association Program Explores DSM-5 Changes

On September 10, 2013, the Court of Appeals for Veterans Claims Bar Association sponsored an insightful program at the offices of the Federal Circuit Bar Association (FCBA), entitled “Perspectives on the DSM-V for Veterans Law Practitioners.” Doctors Brian Marx and F. Barton Evans presented on changes in the newest version of the American Psychological Association’s Diagnostic and Statistical Manual of Mental Disorders, and what they mean for the diagnosis and evaluation of post-traumatic stress disorder (PTSD) and other trauma-related mental conditions.

Brian Marx, Ph.D., is a Professor of Psychiatry at Boston University School of Medicine and staff psychologist at the National Center for PTSD, VA Boston Healthcare System. Dr. Marx discussed the changes to the classification and diagnostic criteria for PTSD in DSM-V. Previously classified under “anxiety disorders,” PTSD now belongs to the new category of “trauma and stressor related disorders.” A catch-all diagnosis, “other specified trauma and stressor related disorder” replaces “anxiety disorder not otherwise specified.” This diagnosis requires exposure to trauma similar to PTSD criterion A. A new sub-category of PTSD, dissociative, was defined, and it describes a subset of PTSD usually associated with sexual trauma and very intense symptoms. In DSM-V there are also new and redefined symptoms and subcategories of PTSD. For example, a sense of “foreshortened future” now is defined as negative expectations of the future.

Dr. Marx explained the use of different tools to measure functional impairment, such as the WHODAS 2 (World Health Organization Disability



Doctors Brian Marx (L) and F. Barton Evans (R)

Assessment Schedule 2.o). His slides illustrated recent research on the validity of these questionnaires. Both Drs. Marx and Evans expressed positive reactions to the IPF (Inventory of Psychosocial Functioning), an 80-item self-report on the past month’s functioning, which does not ask the person to attribute a cause to their symptoms. The doctors saw this as a benefit over the Global Assessment of Functioning (GAF) scale, which confounded symptoms and functioning. The GAF scale was removed from DSM-V, but no particular tool was selected to replace it, with the authors advocating for research among the long list of alternatives.

DSM-5 Panel, continued on page 13.



COURT OF APPEALS
FOR VETERANS CLAIMS
BAR ASSOCIATION

IN THIS ISSUE

Message from the President.....	2
Remarks from the Chief Judge.....	4
AZ v. Shinseki	6
A Peek Inside Goodman, Allen & Filetti	7
Book Review of <i>Assault from the Sky</i> and <i>Shadow Warriors</i>	9
<i>Parks v. Shinseki</i>	12
The Librarian’s Corner	14

Message from the President

Membership year 2013-2014 is upon us! I am thrilled to be serving as president of the Bar Association over the next year, and continuing the legacy that my hard-working predecessors have left. My goal for the next year is to maintain the momentum of the last few years. We aim to have regular educational, social, and service programs; deepen our outreach to law schools regarding the field of veterans law; and continue production of the *Veterans Law Journal*. Moreover, the Bar Association will continue to sponsor, participate in, or advertise programs for veterans law practitioners, to include our partnership with the Federal Circuit Bar Association to make more programs accessible through the internet.

In the coming year, the Bar Association will be involved with a number of events. Given that there will not be a Judicial Conference in 2014, we are planning to hold an all-day CLE event focused on the practice of veterans law in late spring or early summer 2014. We welcome input on which aspects of veterans law practice would be most beneficial at this seminar, so if you have suggestions, please let us know.

We also have numerous upcoming programs before then. November 16-17 brings the National Veterans Law Moot Court Competition, which is a collaborative effort of the CAVC Bar Association, the Court of Appeals for Veterans Claims, and the George Washington University Law School. Hosted every fall in Washington, DC, the competition brings together teams of students from around the country to argue cutting-edge veterans law issues before panels of distinguished practitioners and judges. Please consider volunteering for this fantastic event. Later in the fall or early winter, the Bar Association will also be hosting a screening of the documentary *The Invisible War*, followed by commentary from VA treating clinicians.

In addition to the above programs, the Bar Association is continuing its sponsorship of happy hours in Washington; the next one will held on December 5, 2013, at the City Club of Washington. Our recent happy hours have featured a wide spectrum of practitioners from the Court, the private bar, the veterans service organizations, the BVA, and VA's Office of General Counsel. We expect continued great turnout, and we will provide a



wonderful spread of hors d'oeuvres for all who attend. The Bar Association will also be working with the National Parks Service again to volunteer to wash both the Vietnam Memorial Wall and the Korean War Memorial in the summer of 2014.

I must also mention our outreach activities. We continue to publish the quarterly *Veterans Law Journal*, which is available on our website. Importantly, we also continue to expand our student outreach program by presenting our Introduction to Veterans Law presentation, not only to local law schools, but also around the country, including events at Yale, the University of Missouri, Iowa, Penn State and, soon, the University of San Diego.

Ultimately, the work we do for our members is all accomplished by volunteers, without the assistance of any full-time staff, such as those found at most larger associations. While our Board of Governors is fantastic, the best way to provide more service is to have more contributors. Therefore, we are always looking for more assistance from non-Board members. If you have something to contribute, new ideas for programs, or a willingness to take on a discrete task, we want to hear from you!

So if you have not yet joined or renewed for this year—or if you know someone who needs to—now is the time. For the membership form and rates, visit <http://cavcbar.net/html/membership.html>.

Bradley W. Hennings
President, CAVC Bar Association
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SAVE THE DATE!!



**Holiday Happy Hour at the
City Club of Washington**



December 5, 2013, 5:30 to 7:30 P.M.



**Just Steps from Metro Center
555 13th Street, N.W., Washington, DC 20004**

Remarks of the Chief Judge at the Bar Association's Annual Meeting September 18, 2013

by Hon. Bruce E. Kasold



217 years ago, as of yesterday – September 17, 1796 – George Washington penned his presidential farewell address. Two days later, the carefully crafted words appeared in Claypoole's American Daily Advertiser in Philadelphia, one of the first daily newspapers in the country. In what was essentially a personal letter to the American people, George Washington notified the public that he would voluntarily step down as the nation's first president. That decision was extraordinary. Rarely, if ever, in the history of western civilization had a national leader voluntarily relinquished his title, and as we know, that action set a model for successive U.S. administrations and future democracies all over the world. History buffs take note that Washington dated the address to coincide with the 9 year anniversary of the adoption of the first draft of the U.S. Constitution -- September 17, 1787.

In his farewell address, President Washington noted that he was in a unique position to offer opinions and advice on the best future course for the nation. He said that he offered his thoughts with the freedom that comes from being a disinterested parting friend, and one who could have no personal motives to bias his counsel.

That little anecdote seems fitting for today, as the Bar Association turns over its leadership (also peaceably, it appears!), updates its membership on the activities and events of the past 12 months, and plans for the upcoming year. On behalf of the Court, thank you, James, for your enthusiastic leadership this past year. The Bar Association was indeed well-served by your many initiatives, and I'm hopeful that although you are relinquishing the title of President, you will still stay involved with the Association's programs and publications. As the Immediate Past President, I hope that you will follow Washington's example and pass on what you have learned throughout your leadership of the Bar Association to assist the organization in reaching even greater heights in the future. And congratulations to you, Brad, as you assume the role of President. In part due to your hard work, the Association certainly has done many great things for its members this year, and I know you will continue that course.

I saw many of you six months ago at the Court's Judicial Conference and at that time I offered a comprehensive "State of the Court." Allow me today to give a brief update on the happenings and work of the Court!

As you know, the Court is now at full strength with nine active Judges, and our "junior panel" is fully up to speed. We also have Senior Judge Bill Greene continuing to serve in recall status throughout the year, and Senior Judge Ken Kramer just completed a stint of recall service last month. All in all, we are in good shape as far as judicial strength goes.

Our fiscal year concludes in just a couple weeks, at the end of September, so we will soon begin compiling formal statistics for FY 2013. I can, however, give you a sense of the 2013 numbers and how they compare to years past.

The number of cases coming into the Court continues to be down somewhat in FY 2013. For many years

Chief Judge Kasold's Remarks, continued on page 5.

Chief Judge Kasold's Remarks, continued from page 4.

and until about 10 years ago we were averaging about 2300 cases and petitions filed per year. Five years ago or so we started to see a significant increase in filings, with the yearly filings nearly doubling to an average of 4400 appeals and petitions from 2007 to 2011. In FY2011 we had just under 4100 filings, and in 2012 that number dropped to about 3800. FY 2013 is on track to drop even further, and it looks like we will end the fiscal year at just under 3400 filings – about 400 filings less than last year – and, about 1000 fewer than we were 5 years ago, but about 1000 more than where we were 10 years ago. We also anticipate that over 2000 EAJA applications will have been filed and acted on by the Court this fiscal year - down slightly from last year, where we received 2355.

As far as cases decided, over the past several years the Court has nearly doubled its output of decisions compared to 10 years ago. From 2000 to 2005 the Court decided approximately 2200 appeals each year. That figure jumped to over 4000 the past several years, hitting a high of almost 5000 decisions in FY 2010. Last year the Court issued about 4500 decisions and FY 2013 looks like we will finish having decided about 700 fewer, or somewhere in the neighborhood of 3700 or 3800 decisions.

Although that figure is down from last year, it is still a large number of cases – about 1500 more that the Court was deciding annually 10 years ago. In looking at the flow “in” versus the flow “out”, the Court this year was able to dispose of hundreds more matters than came in the door, so we continue to significantly reduce the overall inventory of cases pending at the Court. In the coming year, I anticipate that we will remain fully staffed with all active-judge positions filled and our newest judges will continue to gain experience, so I anticipate that we will maintain or increase the flow of decisions out of the Court.

CLS continues to bring the parties together in most represented cases to conduct Rule 33 pre-briefing staff conferences. As you know, this process is aimed to bring the parties to resolution, if possible, prior to involvement of a Judge. For matters that cannot be resolved at the briefing stage, the conferencing is valuable in honing the issues on appeal so that the parties are in a better position to present precise and succinct briefs.

For FY 2013, the Court's Central Legal Staff will likely have conducted over 230 conferences per month, or just over 2800 conferences throughout the year. As I believe you are aware, approximately 50% of the cases conferenced are ultimately resolved without briefing – either as the result of a joint motion for remand, through some other settlement agreement, or based on a motion to withdraw the appeal. One benefit of this process is that the judges are able to more quickly handle the remaining cases – those that do require judicial intervention. Accordingly, the Court has made improvements in paring down the average time an appellant waits to have his or her case decided. The majority of the Court's single-judge decisions are now being rendered within 90 days of assignment to chambers – a considerable improvement from the recent past. Although panel decisions take longer (on average, last year, just over 5 months from assignment to a panel to date of decision) the overall impact of the Rule 33 conferencing and the lower inventories in both CLS and chambers, is that veterans, in general, are waiting less time for decisions from the Court. Thank you, practitioners, for your part in this accomplishment. I assure you that we continue to examine our processes to best maximize our efficiency.

In conclusion, I thank each of you here today -- for your individual effort and involvement with the Bar Association, and for your interest in ensuring justice for our veterans. The Court looks forward to collaborating with the Bar Association this coming year. Keep up the good work!

Regards,
Chief Judge Kasold

CONTRIBUTORS WANTED

Do you have a book you are interested in reviewing? Would you like to report on a recent case that you think is important? Do you want to give folks a peek inside your organization?

The publications committee is looking for contributions to upcoming editions of the *Veterans Law Journal*. Participants do not need to be located in the Washington, DC area. Please contact Victoria Moshiahwili at VMoshiahwili@uscourts.cavc.gov or David E. Boelzner at Dboelzner@goodmanallen.com for more information.

In-Service Sexual Assaults: Absence of Official Record is Not Negative Evidence

by Aniela Szymanski

Reporting on *AZ v. Shinseki* and *AY v. Shinseki*, ___ F.3d ___, Nos. 12-7046, 12-7048 (Sept. 30, 2013).

AZ and AY each were denied service connection for post-traumatic stress disorder (PTSD) that they both attributed to sexual assaults while in the military. Neither veteran's sexual assaults were recorded in their service personnel or medical records, which the Board considered to be pertinent evidence against their claims that they were sexually assaulted (i.e. negative evidence against their claims).

In both AZ's and AY's cases, even though the service records were silent for complaints of sexual assault, each had reported the sexual assaults to other individuals who submitted lay statements to VA in support of the veterans' claims. The Board disregarded the lay statements of these other individuals, however, because the individuals had not personally witnessed the assaults taking place. The Veterans Court deferred to the Board's authority to weigh the evidence, including the absence of corroborating records and evidence that purportedly contradicted that the sexual assaults had occurred, such as the absence of treatment records for a suicide attempt by AY and evidence that AZ planned to get married after she found out she was pregnant. The Veterans Court also did not find error in the Board's use of "omissions" in the service records as contradictory evidence against the lay statements in AZ's case, but did not clearly decide this matter in AY's case.

The Federal Circuit saw two relevant issues in these consolidated cases: first, whether the Board may treat the absence of contemporaneous service records reporting the sexual assault as pertinent evidence that the sexual assault did not occur, and, second, whether the fact that no report of the alleged sexual assault was made to military authorities should be considered evidence that the alleged sexual assault did not occur.

After defining "pertinent evidence," the Federal Circuit pointed out that 38 C.F.R. § 3.304(f)(5) was enacted specifically because many incidents of in-service personal assault are not officially reported.

In 2012, according to Department of Defense statistics, only eleven percent of sexual assaults had been reported to military authorities, and in 2006, the number was only seven percent. The Federal Circuit also pointed out that service members face unique disincentives to report these assaults.

The Federal Circuit cited to common law principles that if a report would naturally have been made of an incident, then certainly the absence of such a report may indicate that the incident did not occur and may constitute negative evidence. However, "courts have refused to admit evidence of the absence of a record to show that an event did not occur, where it was not reasonable to expect the event to have been recorded." The Federal Circuit cited to three Veterans Court decisions, including one that was non-precedential, in support of this principle as it applies to veterans law.

In answer to the first issue posed by the Federal Circuit, it stated "no reasonable person could expect records documenting the assaults to exist, or infer that the absence of such records tends to prove the assaults did not occur." Thus, the absence of such records have no probative value, one way or another.

As to the second issue, the Federal Circuit stated that "VA may not treat a claimant's failure to report an alleged sexual assault to military authorities as pertinent evidence that the sexual assault did not occur." The Federal Circuit set forth five reasons for this conclusion. First, the failure to report such a crime was considered, at common law, relevant only where the victim failed to make any complaint to anyone, not necessarily where the victim failed to report the crime "to a supervisor, an employer or the police." Second, "it is now known that sexual assault is generally underreported," and, therefore, "modern courts are skeptical that the lack of a prompt report has probative value." Third, "where an individual would not be expected to make a statement, courts generally do not admit testimony that no statement was made." "Fourth, there is a unique deterrent to reporting in-service sexual assaults to military authorities that is not usually present in criminal cases: that is the fear of reprisals." Fifth, the Federal Circuit stated that, because the veteran's benefit system is based on solicitude for the claimant, and VA expects that many sexual assaults will not be reported for reasons unrelated to the merits of the claim, penalizing assault victims for not reporting

AZ, continued on page 7.

AZ, continued from page 6.

their assaults “would hardly comport with a system in which ‘the importance of systemic fairness and the appearance of fairness carry great weight.’”

The Federal Circuit remanded both cases to the Veterans Court because both the Veterans Court and the Board “appeared to treat the veteran’s failure to report the assault to military authorities as evidence that the assault did not occur.”

Judge Moore dissented, explaining that VA is required to consider all pertinent medical and lay evidence, per 38 C.F.R. § 3.303(a), and that evidence is relevant to an issue if it has any tendency to make a fact more or less probable, per Federal Rule of Evidence 401(a). Judge Moore stated that “non-reporting still meets the low relevance threshold: namely, non-reporting has some tendency to make the fact that the rape occurred less probable.” She asserts that the majority’s opinion really went to the weight assigned to the evidence, not its admissibility, and that it had no jurisdiction over that issue.

The full decision can be found at www.ca9.uscourts.gov/opinions-orders/o/all/12-7046.

Aniela Szymanski is an Appellate Attorney with Bergmann & Moore, LLC, based in Bethesda, Maryland.

A PEEK INSIDE ... The Private Representation of Veteran Clients Goodman, Allen & Filetti

by David E. Boelzner

Disclaimer: Previously in this space we have peeked inside government agencies, which are open to public scrutiny. A private law firm, of course, is a proprietary business, which limits to some degree the nature and extent of the inside look that can reasonably be provided. I will be as forthcoming as possible. -- DEB

Who are we? The Veterans Benefits Practice Group (VBG) of Goodman, Allen & Filetti (GAF) has existed since 1998, and was originally affiliated with another firm. It was founded and is still headed by Daniel G. Krasnegor, and it joined GAF in January 2008. GAF

is a full-service firm, handling litigation, such as medical malpractice defense, business, intellectual property, and many other matters.

Like all lawyers who practice before the agency, the VBG’s lawyers are accredited by VA, and they came to veterans work with varied prior experience: clerks for the Court of Appeals for Veterans Claims, the Board of Veterans’ Appeals, VA’s General Counsel, the National Veterans Legal Services Program, in-house corporate counsel, and in trial and appellate litigation for a large private law firm. The lawyers are supported by case managers (paralegals), assistants, and nurse-paralegals. The VBG is distributed among several GAF offices in Virginia, with a presence in suburban Washington as well.

What representations do we handle? The VBG represents veterans from all over the United States and Puerto Rico, as well as those living in other countries, such as the Philippines, England, and Belgium. The VBG has always represented claimants at the Court and then at the agency on remand. When the law changed in 2007 to permit lawyers to become involved after the AOJ decision at VA, the firm undertook representation at the agency as a initial matter in addition to continuing its work at the Court. Because the practice before the Court tends to involve a focus and even a skill set somewhat different from representation before the agency, work at the VA and at the Court is usually handled by different lawyers. About 80% of the VBG’s work is before the agency.

Most veterans seeking benefits cannot afford to pay even the most modest hourly fee for legal representation. The firm therefore seeks to provide representation without out-of-pocket costs to them.

Veterans with apparently meritorious appeals to the Court can get no-cost representation because, if the appeal at the Court succeeds, the lawyer will be paid by the government under the Equal Access to Justice Act (EAJA) for the time spent prosecuting the case. Reliance on EAJA funding is a risk for the lawyer. If the appeal were lost, or if the appeal were won but the Court were to determine that the government’s position was substantially justified even though ultimately unsuccessful, there would be no money for the lawyer’s work (or for the light bill).

Peek Inside, continued on page 8.

Peek Inside, continued from page 7.

At the agency there is no EAJA counterpart, so the only way to represent veterans at no cost to them and still cover the costs of the work is via a contingent fee arrangement, where the lawyer is compensated by a portion of the cash sum that is awarded as benefits to the claimant. This procedure is authorized and carefully regulated by law. It also involves risk for the lawyer, because if no benefits were ever awarded, or if the cost of pursuing the claim at the agency were to exceed the ultimate fee, the VBG again would become a charity. Economic survival for a veterans legal practice obviously depends upon having a mix of cases such that enough of them result in compensation to the firm to cover the costs of operation.

One sometimes hears that EAJA fees induce repetitive re-appeals to the Court. However, EAJA fees only allow a lawyer to forestall the expiration of a veteran's claim, funding a meritorious appeal that would otherwise have to be handled *pro se* or *pro bono*, or not appealed at all, if the veteran is, like most, impecunious. If there is arguable error in a final Board decision, having the Court say so is the only way to preserve the claim, so the ethical obligation to zealously represent the client compels an appeal. However, there are only two goals at the Court: (1) win the appeal so as to preserve the veteran's effective date for any benefits ultimately awarded, and (2) obtain court guidance on a legal point to avoid repetition of error. If this were accomplished, the appellant would have no interest in further appeal. Clients want benefits, not remands. As noted above, eighty percent of the VBG's work is preparing claims that are winnable at the agency. Only when the Board denies a claim that VBG believes was meritorious, is appeal necessary.

What do we do in a Court case? After VA's counsel files the BVA decision, it is checked to verify that it is correct: appeals are noticed by date, and the Board sometimes issues two decisions on the same date. Next, VA provides, usually on CD-ROM, a copy of the Record Before the Agency, which can run from several hundred to many thousands of pages. This is reviewed carefully, not only to make sure it is complete and legible, but also because the next task is to write a summary of the issues on appeal, so we look to see if the claim and medical history disclose appeal issues that were not apparent on the face of the Board decision itself.

The Rule 33 summary of issues, though abbreviated, must be complete enough to convey the appellant's view of the issues to VA's and the Court's staff counsel. The conferences are generally very helpful; even if they do not immediately accomplish a remand, they often show where VA (or the staff attorney) thinks the claim is weak and thereby allow for a stronger brief, which then sometimes convinces VA's counsel to agree to remand because the issue has been more fully addressed.

If no agreed remand occurs at the conference, the initial brief is written. This begins with the points and facts set out in the summary of issues, but is much more thorough. It must be complete and anticipate how the issues will develop; the Court is not obliged to consider issues not raised in the initial brief. VA's counterarguments are responded to in a reply brief, which can be a challenging drafting exercise because it must reinforce the position of the appellant at the same time it responds to what the opponent has said.

If the CAVC appeal succeeds in getting a remand, then the focus shifts to bolstering the claim so the agency will award benefits. If the appeal fails, then several options must be considered, each of which poses difficulties. Reconsideration can be sought if something was missed by the Court, but this must be undertaken cautiously, since the Court just decided the case and will not be overjoyed to revisit it. If the way the case was resolved raises a novel question of law, panel or even *en banc* consideration can be sought, or the case can be appealed to the Federal Circuit. The latter's jurisdiction is very constrained in veteran cases, and the court will often entertain briefing and oral argument, but then summarily affirm, which means a loss without any explanation of the legal basis and thus no very satisfactory explanation to the client for the loss. For these reasons, these options are undertaken only after careful assessment.

For all its challenges, representing veterans can be very gratifying. One of the best features of the Court practice is the high level of professionalism and collegiality among the members of the bar: the legal arguments can be vigorous, but they do not spill over into unpleasantness among counsel.

David E. Boelzner is an attorney in private practice with Goodman, Allen & Filetti.

Book Reviews:

***Assault from the Sky:
U.S. Marine Corps Helicopter
Operations in Vietnam,*
Dick Camp**

(Casemate, Havertown, PA,
and Oxford, UK, 2013), 320 pp.

and

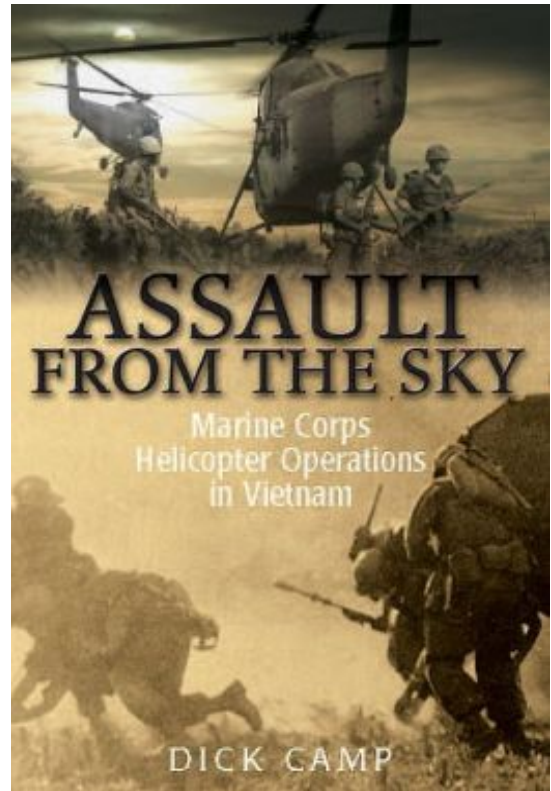
***Shadow Warriors:
The Untold Stories of American
Special Operations During WWII,*
Dick Camp**

(Zenith Press, Minneapolis, MN, 2013), 246 pp.

by Alice A. Booher

Many readers, particularly those emanating from the active military and/or veteran constituencies and their intelligence counterparts, undoubtedly will be familiar with one or more of Col. Dick Camp's previous literary efforts, whether historical or fiction.¹ Camp's personal and professional credentials have long prepared him for "walking the walk and talking the talk."² It has been a bit of a hiatus since he provided us with such a wealth of new work, but it was worth the wait. Camp always guarantees his reader loyalty to be both true to the subject and game for an adept facilitation of the structure, and that bifurcated commitment has been again well fulfilled with both of these new books. Camp's extensive shelf of prior works confirms that the Vietnam era, which tends to be his most personally familiar area of expertise, is also his most prolific area. One of these books, *Assault*, has such a focus. That said, through the years, Camp has concurrently expanded his spectrum of military and historical topics, and the other book, *Shadow Warriors*,³ completes a minor vacancy in that spectrum. Both books have similarities in structure and style, and together, they address such a wide span of times and diversity of militaria that they seem to incorporate all or certainly much of it.

On the one hand, *Assault from the Sky* is an extraordinary tribute to numerous dedicated and gifted chopper pilots in the Southeast Asia arena and to the commanders who structured and evolutionarily



perfected them as a unique and pivotal force of the war at all levels, from battle to medical rescue. Camp quotes newsman Harry Reasoner as saying that "helicopters are different from planes," and proceeds to document that so are their pilots. The book is divided into three parts: "Build-Up" (1962-1966), "Heavy Combat" (1967-1969), and "The Bitter End" (1975). Decidedly first hand, *Assault* bears Camp's witness of the escalation of battle and concomitant helo use in Northern I Corps, while it also documents the skill, capacity, and commitment of those Marine pilots and crews, both officer and enlisted. This book is a significant reportage of and gracious tribute to that group of men, many of them specifically identified and described. The volume excels at some of Camp's most impressive techniques--including interviews with participants, naming names and listing contributors, and placing these in historic context--the sum aggregate of which makes real what can often become very depersonalized. *Assault* is enhanced immeasurably by the interspersing of an album of black and white vintage photos. It is a book of military history and personal stories, techniques and tactics in the context of personal truths.

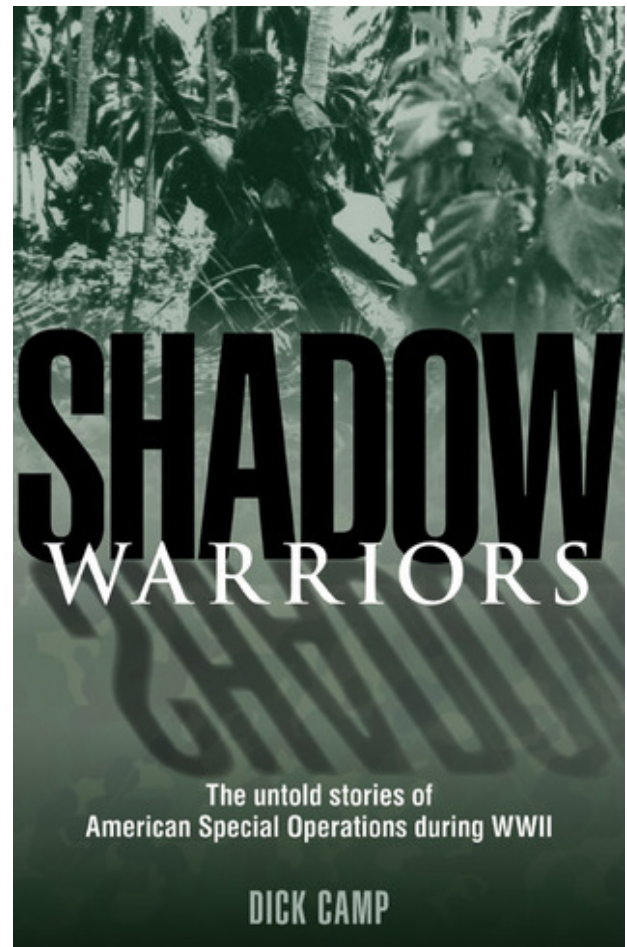
Shadow Warriors, however, goes to another place and time. Camp notes in the preface that it was during

Book Reviews, continued on page 10.

his earlier pre-Vietnam peacetime experience when he first serendipitously crossed paths with legendary shadow warrior Col. Ed Dupras, who had been a platoon commander in the First Raider Battalion in WWII under the even-more famous Col. "Red Mike" Edson, whose Raiders and Marine brethren and Office of Strategic Services (OSS) operatives were the ultimate trailblazers for later reconnaissance men and women. It is this earlier unique facet of history and cooperation of seemingly often disparate patriots on which Camp concentrates in his exceptional *Shadow Warriors*. Some of their stories have been tangentially noted in history, and otherwise fictionally parlayed into explosive movies or dashing novels, but truth had to wait for recent declassification; that done, there is no one better able to tell it than Camp.

Shadow Warriors is divided into two parts consisting of the Pacific and European theaters. Somewhat longer in length, the Pacific focus is on the brutal attacks of Tulagi, Gavutu-Tanambogo, the Makin (Atoll) Raid, Edson's Ridge, and the Choiseul efforts, including those by the Second Parachute Battalion and via the leadership of then-Lt. Col. Victor Krulak. Anyone who has even a passing knowledge of these venues knows how complicated they were, and Camp does a remarkable job of sorting it out from a military standpoint without sacrificing the monumental stories of the men involved. He does a particularly good job of characterizing the work of Medal of Honor awardee Col. Edson, right down to the bullet holes in collar and shirt. *Shadow Warriors* is the documentation of the predecessors of special ops, whether they are from his beloved Marine's Special Operations Command (MARSOC), Navy SEALs, or Army Special Forces; all of it is heady stuff.

For each segment of combat emphasis, there is at least one (and often more) personal eyewitness viewpoints expressed for each arena, and clear-cut readable maps with markings to explain movements. Citations for medals and other special derivative or collateral information is included in boxes with slightly darker background paper, which distinguishes the text without resorting to footnotes, which can be interruptive and annoying. *Shadow Warriors*, like *Assault*, effectively shares vintage photos. Camp utilizes a special technique that has been facilitated by the declassification of documents, and insightfully quotes participants on both sides.⁴



For the military lawyer, Camp's best focus may be WWII on the European front, where Marine action and espionage via the OSS often go hand in hand, including Syrian-born and ultimate Devil Dog, Col. William Eddy, whose espionage exploits via General Donovan's operatives/operations have long been the dreams of mere mortals. Camp spends well used time and space unraveling the extraordinary spying and other associated efforts via Tangier and other North Africa sites, Operation Torch, and its successors. He closely follows other OSS-ers from General Donovan's Wall Street law firm, including Walter Mansfield and his work with the Chetniks, and does a remarkable job of sorting out the layers, factions and factors of that WWII effort from the ultimate antagonists Tito and Mihailovich. Camp explores the efforts of OSS-trained Marine Jack Risler; internationally decorated Peter Ortiz, formerly of the French Foreign Legion, and his legendary adventures; an OSS Corsica operations officer; and Marine Walter Taylor, and their comrades, including new details of their aggregate POW experiences. Camp includes a generous bibliography, pivotal maps and inserts, and an informative index. In comparing the combat and

Book Reviews, continued from page 10.

intrigue of the Pacific and European theaters, Camp excels in capturing the pivotal elements and flavor through the examination of a select group of people and efforts.

For both *Assault* and *Shadow Warriors*, few authors could sum up such a wide spectrum of experiences and raw data in such a facile manner, and the result is a duet of reading guaranteed to enlighten and entertain, educate and confound – and, all in all, well worth the effort.

¹ Dick Camp's other books include *Operation Phantom Fury: The Assault and Capture of Fallujah, Iraq*; *Last Man Standing: The 1st Marine Regiment on Peleliu, September 15-21, 1944*; *The Devil Dogs at Belleau Wood: U.S. Marines in World War I*; *Battle for the City of the Dead: In The Shadow of the Golden Dome, Najaf: August 2004*; *Boots on the Ground: The Fight to Liberate Afghanistan from Al-Qaeda and the Taliban, 2001-2002*; *Leatherneck Legends: Conversations with the Marine Corps' Old Breed*; *Iwo Jima Recon: The U.S. Navy at War, February 16, 1945*; *Battleship Arizona's Marines at War: Making the Ultimate Sacrifice, December 7, 1941*; and *Lima-6*; as well as two novels, *Echo Among Warriors* and *The Killing Ground*.

² A U.S. Marine Corps officer for 27 years before his retirement in 1988, Camp was rifle and reconnaissance platoon company commander (Lima Co., 3rd Battalion, 26th Marines), 1967-1968, in Vietnam with the 3rd Marine Division along the demilitarized zone (DMZ) and Khe Sanh, during which service he was awarded the Purple Heart. Staff assignments included *aide de camp* to General Ray Davis (Medal of Honor recipient), a Basic School instructor, and recruiting. For 16 years he was a school district business manager in Cincinnati, and then he moved to the Fredericksburg, VA, area to become the Deputy Director of the Marine Corps' History Division and then the Marine Corps Heritage Foundation's Vice President for Museum Operations at the National Museum of the Marine Corps (Quantico). He is also the author of more than 100 magazine articles.

³ *Shadow Warriors* (as herein reviewed) must be distinguished from some other things by the same name. For instance, there is another recent book, *Shadow Warrior: William Egan Colby and the CIA*, by Randall Woods (Basic Books, 576 pp.), which

places lengthy emphasis on Colby during the Vietnam War, but also contains details dovetailing *Shadow Warriors* vis-a-vis WWII intelligence, including Colby's own extraordinary OSS activities in sabotage operations against German railways in Norway.

A 2003 book by Tom Clancy (with General Carl Stiner), was *Shadow Warriors: Inside the Special Forces* (Berkley Trade Publishers). Clancy, who recently passed away, was memorialized by Erin Simpson and Phillip Carter in the *Washington Post* on October 6, 2013 (p. B2), noting that he had created a literary bridge across the civil-military divide, inspiring many to join the national security units and agencies, that he "made the military cool again" after Vietnam. Clancy's works, including *Shadow Warriors*, included many of the history, tools, and persons of the other books of similar names.

⁴ Camp shares a technique for WWII histories used to great benefit by several other recent authors and film documentarians, in part due to recent declassifications of CONUS and German and Japanese archives, discovery of wreckage after the fact, identification of specific individuals on both sides, and the healing with the passage of time permitting all to speak up. In cases of diverse viewpoints and motives, etc., it is valid and productive to quote and visualize both sides, using the actual participants themselves when possible. See, e.g., *Guadalcanal* (1990, Random House), and subsequent books by military expert and former Veterans Law Judge Richard B. Frank; or *Tears in the Darkness: The Story of the Bastian Death March and Its Aftermath* by Michael and Elizabeth Norman (2009, Farrar, Straus & Giroux); or both book and documentary *The Lost Ships of Guadalcanal* (with Judge Frank) by Vietnam veteran Dr. Robert D. Ballard about the ships at the bottom of Guadalcanal, where both Allied and Japanese participants joined him onboard [and other films of his locating the German battleship *Bismarck*, sunk in WWII; the passenger liner *Lusitania*, sunk by a German torpedo during WWI; and the wreckage of John F. Kennedy's PT-109]. All used quotes, interviews, and photographs to juxtapose both sides of the WWII story, resulting in extraordinary clarity and elucidation. Camp has honed this technique to perfection.

Alice A. Booher, a former Foreign Service Officer, was Counsel, Board of Veterans' Appeals (1969-2011). She was admitted to practice before the bar of the U.S. Supreme Court in September 1969.

Federal Circuit Concludes that a Veteran’s Challenge to the Qualifications of a VA Examiner Was Waived, and Discusses the Presumption of Regularity

by James Drysdale

Reporting on *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013).

On May 3, 2013, the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued an opinion in *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), affirming a decision of the United States Court of Appeals for Veterans Claims. The Federal Circuit held that the veteran appellant had waived his right to rebut the presumption that a medical professional selected by the Department of Veterans Affairs was qualified to perform an examination and provide a medical opinion, when he failed to raise any objection to the examiner’s qualifications to either the VA Regional Office or the Board of Veterans’ Appeals.

In this case, veteran Arnold J. Parks sought service connection for diabetes type II with peripheral neuropathy and a heart disability, asserting the conditions were secondary to chemical exposure during his service in Vietnam, and, specifically, during his participation in a then-classified project called “Project 112,” Shipboard Hazard Defense (SHAD).

In 2008, VA designated an advanced registered nurse practitioner (ARNP) to perform an examination to determine whether there was a potential relationship between Mr. Parks’ participation in SHAD and his medical conditions. The ARNP provided an examination report that concluded Mr. Parks’ claimed conditions were less likely than not secondary to his confirmed chemical exposures during service.

Relying in part on the ARNP’s report, the RO denied Mr. Parks service connection for his medical conditions. On appeal to BVA, Mr. Parks argued only that the ARNP’s report should have been excluded because it was not signed by a physician. BVA found the ARNP’s opinion constituted competent medical evidence and denied service connection.

On appeal to the CAVC, Mr. Parks, through counsel, argued for the first time that VA erred by basing its decision on the ARNP’s report because the report did not constitute “competent medical evidence.” The CAVC rejected Mr. Parks’ argument as a matter of law, reasoning that under *Cox v. Nicholson*, 20 Vet. App. 563 (2007), “a nurse practitioner is able to provide a medical examination that meets the regulatory requirements of ‘competent medical evidence’” in terms of Section 3.159(a)(1). See 38 C.F.R. § 3.159(a)(1) (stating that “competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions”).

The Federal Circuit characterized the issue before it as whether Mr. Parks had waived his right to overcome the presumption that the selection of a particular medical professional by VA means that the person is qualified for the task. The court explained that, under the circumstances in this case, “[t]wo principles combine to control”: first, VA is required to rely only on “competent medical evidence” as defined in Section 3.159(a)(1), and, second, VA operates under a rebuttable presumption of regularity.

The court’s opinion explained that the presumption of regularity provides that, “in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their duties” and that “what appears regular is regular.” See *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009). Further, the court explained that, in the context of competent medical evidence, “VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case.” The court stated that “the presumption is not about the person or job title; it is about the process.”

The court explained that, although the presumption that VA properly did its job by selecting a qualified person to provide competent medical evidence is rebuttable, even a veteran acting *pro se* must at least object to the qualifications of the VA-selected physician as a first step to overcoming the presumption. The court held that Mr. Parks never raised any concern over the ARNP’s qualifications or sought to overcome the presumption until his appeal to the CAVC, and therefore waived the issue.

Parks, *continued on page 13.*

Parks, continued from page 12.

In so holding, the court emphasized that, although a *pro se* veteran's objection to the selection of a particular medical professional must be read sympathetically, there must nonetheless be an objection. The court stated that "it is one thing to read a record sympathetically, as required by *Comer v. Peake*, 552 F.3d 1362 (Fed. Cir. 2009)]; is it quite another to read into the record an argument that had never been made."

Finding Mr. Parks had waived any objection to the qualifications of the ARPN and finding no discernible error, the Federal Circuit affirmed the judgment of the CAVC.

James Drysdale is an attorney in Professional Staff Group VII of the VA Office of the General Counsel.

DSM-5 Panel, continued from front page.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

FIFTH EDITION

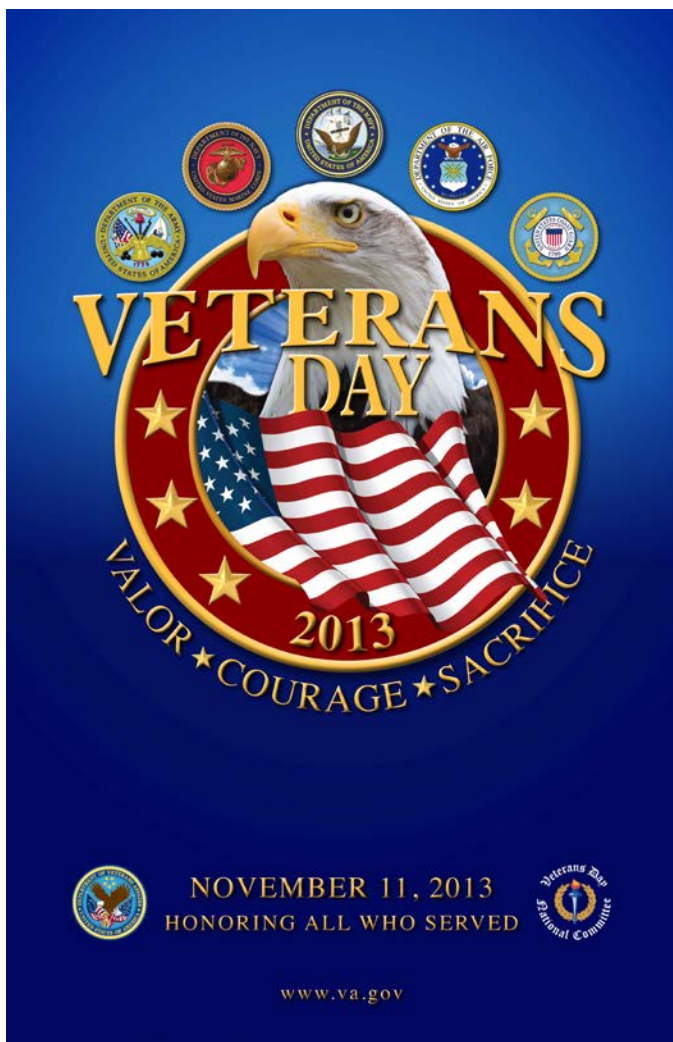
DSM-5

F. Barton Evans, Ph.D., is a C&P psychologist at the Charles George VAMC and Clinical Professor of Psychiatry at George Washington University School of Medicine. Dr. Evans discussed his experience in private practice as a clinical and forensic psychologist, and as a C&P evaluator to describe the approach of forensic psychologists, contrasted against treating clinicians. He highlighted that diagnoses are working hypotheses in the clinical world, and that sub-threshold PTSD (not meeting all criteria for diagnosis) is nonetheless associated with functional impairment. Dr. Evans also noted the need to watch for under-reporting and over-reporting of symptoms, particularly under-reporting as it denotes and is caused by avoidance and emotional numbness, two symptoms of PTSD.

In response to audience questions, both from in-person attendees and remote participants, the doctors discussed the process of forensic psychology in a compensation evaluation. Structured interviewing processes and evidence-based tools were highlighted as a way to elicit the required information, and discussion was made of the need for more time for evaluations.

The program was attended by a wide selection of CAVC Bar Association members and defense and health professionals. Participants attended both in-person and online via WebEx technology, allowing participation by CAVC bar association members located far from Washington, DC. CLE credit was offered for the attendees, and is offered whenever possible for these events sponsored by the CAVC Bar Association and Federal Circuit Bar Association.

For more on this engaging seminar, you can [listen to the presentation](#) and view the slides at the [CAVC Bar Association website](#).



The Librarian's Corner: Let's Go to the Movies

by Allison Fentress

I recently ran across a couple of websites listing the best movies about veterans, so I thought it might be kind of fun to use that for my column this time. (I am not including what I would call war movies, like *Midway* or *Glory*.) This topic seems especially fitting with the recent death of esteemed movie critic, Roger Ebert.

You may know some of these already. Here is a list I compiled from several websites:

Post-WWII:

Legends of the Fall (1994)

Post-WWII:

Pride of the Marines (1945)

The Best Years of Our Lives (1946)

The Men (1950)

White Christmas (1954)

It's Always Fair Weather (1955)

Slaughterhouse Five (1972)

Post-Korean War:

Manchurian Candidate (1962, 2004)

Post-Vietnam War:

Coming Home (1978)

Deer Hunter (1978)

First Blood (1982)

Born on the Fourth of July (1989)

In Country (1989)

Dead Presidents (1995)

Post-Iraq War:

The Messenger (2009)

I will just highlight a few of the ones I have seen:

The Best Years of Our Lives, often hailed as THE best movie about veterans, is the poignant story of three men trying to adjust to life after serving in World War II. What makes this such a realistic film is that the character of Homer Parish is played by real-life double-amputee Harold Russell. There is no sugar-coating this; there are no special effects. If you have never seen it, you should.



White Christmas is a fun musical with Bing Crosby and Danny Kaye as post-WWII servicemen who end up as successful Broadway producers. They discover that their former commanding general has an inn that is failing, and they set out to help him. The film deals with the loss of prestige that comes with civilian life, which is showcased in the song lyrics, "What do you do with a general/when he stops being a general?/Oh, what can you do with a general who retires?" One of my favorite holiday flicks.

Legends of the Fall tells the story of the Ludlow family dealing with the loss of the youngest son, Samuel, in WWII. His older brother, Tristan (Brad Pitt), cannot control his grief, and is suffering from PTSD. He falls in love with Samuel's fiancée, Susannah (Julia Ormond), as does his older brother, Albert (Aidan Quinn). Love, loss, and tragedy ensue. Beautiful film.

Deer Hunter is wonderfully cast with Robert DeNiro, John Savage, and Christopher Walken as three friends who serve in Vietnam and end up as POWs. Probably best known for the Russian roulette scenes. Meryl Streep also stars.

You can check your favorite movie source for availability. Happy viewing!

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



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