VETERANS LAW JOURNAL

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Summer 2013

Justice Scalia Headlines the Twelfth CAVC Judicial Conference

On April 18, 2013, Justice Antonin Scalia addressed the CAVC's Twelfth Judicial Conference. He spoke about the history of veterans benefits law at the Supreme Court and the "veteran's canon" as part of the canons of construction.

Justice Scalia explained that a nation can be judged by how well it treats its veterans. He noted that, in a number of prior conflicts, nearly every American had a personal connection to those who had served, including the Civil War and the World Wars. Today, with an all-volunteer force, however, relatively few Americans have borne the burden of our more recent wars, and their care is a sacred trust. Justice Scalia indicated that he also felt a personal responsibility as the father of a career infantry officer.

Justice Scalia then went into a brief history of veterans benefits, noting that litigation over veterans benefits dated to the very beginning of the country. He observed that Congress's first system for adjudicating veteran entitlements to public pensions provoked an early separation of powers crisis, reaching the Supreme Court in *Hayburn's Case*, 2 Dallas 409 (1792). After discussing the development of the law and the lack of judicial review regarding veterans benefits until 1988, Justice Scalia noted that veterans are favored by a unique canon of interpretation.

The "veteran's canon" is thus described as where "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Justice Scalia quoted Justice Souter as describing this canon as one of a few surviving canons of statutory interpretation that puts a "thumb on the scale" in favor of a specific class of parties, *Sanders v. Shinseki*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting).

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Justice Scalia addresses the Conference.

However, Justice Scalia stated that "in practice, it may be more like a fist than a thumb, as it should be." He then discussed the development of the canon, including what he described as the canon's high watermark in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011).

Justice Scalia then went on to identify the interesting question of how the veteran's canon interacts with the principles in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). He noted that the veteran's canon instructs that statutory ambiguities are to be resolved in favor of the veteran, but that *Chevron*, on the other hand, requires courts to defer to the administering agency's reasonable interpretation of a statutory ambiguity. Justice Scalia opined that the Federal Circuit likely correctly rejected the view that *Chevron* does not apply to VA.

Justice Scalia told the judicial conference attendees that he believes that *Chevron* and *Gardner* cannot coexist. Rather, he thinks it is likely--although a case before the Supreme Court has not yet presented such a question--that we must qualify the veteran's canon and use *Gardner* as an ordinary canon of construction. Thus, interpretive doubt, *where not resolved by the administering agency*, is to be

Justice Scalia, continued on page 12.

Message from the President

I hope everyone is enjoying their summer. The year is half over and my term as president is coming to a close. Looking back on the 2012-2013 membership year, I am pleased at how the Bar Association has performed. The job of the Board of Governors is to ensure that we continue to perform our core functions well, while also exploring opportunities to serve the membership in new ways. Judging by the tremendous program turnout and the growth in our membership, this has been a very successful year.

I am very proud of the work that has been done by the Board of Governors this year, and I am confident that next year will be even better. To that end, I highly encourage all of our members to reach out to the Bar Association's leadership with topics for educational programs and ideas for new events. Several of our most well received initiatives were new. For example, within the past year, we screened our first documentary and began a summer program to wash the memorials on the National Mall. Two years ago, we partnered with the FCBA to make many of our educational programs available online through WebX. All of these innovations have been very popular, and we are always looking for more. If you have an idea for an education, outreach, or service program, please contact me at my email address listed below.

Of course, ideas are just the beginning. Events and programs do not happen unless someone takes the reins and brings them to fruition. The Board of Governors provides a lot of this energy, but we always have opportunities for those who would like to help. All of our members are busy people, but a lot can be accomplished with a modest investment of time. Whether you want to write a piece for the *Veterans Law Journal* or help coordinate a panel for an educational program, a couple of hours can translate into a concrete contribution to our community. A quick look at our recent programs shows what wonderful results can be accomplished.

For example, our most visible recent event was the half-day panel and speaker the Bar Association organized in conjunction with the CAVC's Judicial Conference. With several hours of emails and phone calls, we were able to put together a useful and fascinating program on medical causation. Similarly, this summer and last, the Bar Association has worked with the National Park Service to wash the war

memorials on the National Mall. Working with the National Park Service to coordinate these events is very straight forward, and a good start for volunteers.

Another example of a meaningful program that a volunteer could coordinate with only a minor time commitment was our May screening of John Huston's *Let There Be Light,* which was followed by commentary from Dr. Ronald Smith. Again, finding a copy of the documentary and reaching out to an appropriate expert were both very manageable tasks. The net result was not just a fascinating look at how mental health issues were handled after World War II, but also a lively discussion about how the medical and treatment practices have changed with each subsequent conflict. You can put your talents to work for us in helping to make more of these great programs happen.

Currently, the Bar Association is preparing a program on the DSM-5 and a screening of *The Invisible War*, a documentary on military sexual trauma. In September, the Bar Association will have its annual meeting. All of these programs and others like them are put together by volunteers who deserve all our thanks and appreciation.

I hope to see you at these events, and I look forward to your ideas and feedback on how we can serve you even better.

James Ridgway
President, CAVC Bar Association
james.ridgway@va.gov

Upcoming Bar Association Events

Save the Date: Perspectives on the DSM 5 for Veterans Law Practitioners

Dr. Terence Keane, Director, Behavioral Science Division, National Center for PTSD
Dr. Brian Marx, Associate Professor of Psychiatry, Boston University School of Medicine
Dr. F. Barton Evans, Clinical Psychologist, VA Compensation and Pension Service

Tuesday, **September 10**, 2013
2:00pm – 3:00pm ET

Please join us for a webinar to discuss how changes in the Diagnostic and Statistical Manual of Mental Disorders may affect the VA claims process. Clinicians and Researchers will describe the changes in the DSM 5 and how they affect diagnosis, psychiatric testing, insurance coverage, and more. The use of DSM-IV and ICD-11 will also be discussed.

Attend in person at the offices of the Federal Circuit Bar Association, 1620 I Street, NW Suite 801 Washington, DC 20006, or online through WebX.

IN THIS ISSUE

Volunteers Needed for the 2013 National Veterans Law Moot Court Competition

The National Veterans Law Moot Court Competition is celebrating its fifth anniversary. This year, the NVLMCC will be held on the weekend of **November 16-17**, 2013. The event is cosponsored by the CAVC, the Bar Association, and the George Washington University Law School. Preliminary rounds will be at GWU Law School on Saturday and the semi-final and final rounds will be held in the CAVC courtroom on Sunday.

We need volunteers for a variety of tasks, including evaluating briefs beforehand, and judging oral arguments on November 16. If you are interested in helping, please contact Victoria Moshiashwili at <VMoshiashwili@uscourts.cavc.gov>.

2012's Best Oral Advocate, Jeffrey DeSousa of Georgetown Law Center argues in the final round

P.S. Registration for teams is open through **Sept. 18**. If you have contacts with a law school that might be interested in participating, more information is available at <www.nvlmcc.org>. The problem will be released on Sept. 20. Briefs are due October 22.

Transforming VA Into a 21st Century Paperless Environment

by Terrence T. Griffin

At the CAVC 12th Judicial Conference, Under Secretary for Benefits at the Department of Veterans Affairs Allison A. Hickey reaffirmed VA's commitment to eliminate the claims backlog by the year 2015 and to adjudicate claims within 125 days with a 98% accuracy rate. To reach this goal, she highlighted various programs that would allow VA to operate in a paperless environment to become more efficient at delivering benefits.

Under Secretary Hickey highlighted the increased usage of the eBenefits system and the transparency gained by allowing instant access to the status and location of a claim. Significantly, to protect the date of claim, a claimant need only enter and save his or her name and Social Security number in the eBenefits system. Consistent with operating in a paperless environment, the eBenefits system also affords the convenience of being able to upload evidence and arguments in support of a claim directly to the system, eliminating the any lag time associated with mailing and processing such evidence.

Authorized representatives would have access to the Stakeholder Enterprise Portal, permitting the representative to view the electronic claims folder, upload additional evidence and argument, and view the progress of the adjudication process. Also, in the event the authorized representative is changed by the claimant, the Stakeholder Enterprise Portal notifies the former representative via email of the change to allow the representative to devote resources to other claims.

With respect to the development and adjudication of VA benefits claims, Under Secretary Hickey highlighted implementation of the Transformation Organization Model (TOM) at the Regional Offices (ROs). The TOM will triage VA benefits claims into three categories: (A) an express lane, (B) a special operations lane, and (C) a core lane. The express lane will focus on claims that can be quickly developed and adjudicated because they encompass

Under Secretary for Benefits Allison Hickey addresses the Bar Association's Membership

one to two medical issues or if submitted as a fully developed claim. The special operations lane will direct claims to particularly experienced raters to address claims that are considered complex or of a sensitive nature (e.g., diabetes mellitus, Parkinson's disease, military sexual trauma, prisoners of war, etc.). The bulk of the claims, approximately 60%, that do not fit within the other categories will be adjudicated in the core lane. Citing the success of similar work processes by the Internal Revenue Service and Social Security Administration, Under Secretary Hickey stated that TOM would allow for training tailored individual raters and make the claims adjudication process more efficient.

Clearly, the cornerstone of Under Secretary Hickey's vision for eliminating the claims backlog is the Veterans Benefits Management System (VMBS) at the ROs. She reported that by December 2013 the VBMS would be deployed in all 56 ROs, with approximately 36 ROs presently using the system. Under Secretary Hickey stated that, once the system was in place, all new VA claims will be developed and adjudicated in the VBMS system, with any legacy paper claims folder being digitized in approximately 5 days. At the time of her remarks, 14% of all pending claims (approximately 117,000 claims) were completely electronic in the VBMS system.

However, speaking of the approximately 700,000 paper claims, Under Secretary Hickey reported that the claims would be adjudicated as paper claims and subsequently digitized upon receipt of any new claim for benefits.

Ultimately, Under Secretary Hickey envisions all parties involved in the VA benefits process operating in a paperless environment because paper claims create an inefficiency that delays the delivery of benefits.

Bar Association Presents Panel on Medical Causation Evidence

After the court's judicial conference closed on Friday, the CAVC Bar Association presented a panel discussion entitled, "Understanding Medical Causation Evidence: A Conversation with the Experts." Many veterans' claims turn on the evidence that has been obtained (or is lacking) from the claims file. The evidence on the required element of nexus, or causation, is often the reason that claims are granted or denied. The goal of this program was to make medical evidence and issues of causation more understandable to lawyers, so that they can obtain useful answers from the first request for information.

The Bar Association gathered a prestigious panel of experts to address these issues:

- Epidemiologists: Dr. Michael R. Peterson, a consultant on Post-Deployment Health at VHA's Office of Public Health; and Dr. Thomas H. Sinks, Deputy Director of the National Center for Environmental Health and Agency for Toxic Substances and Disease Registry of the Centers for Disease Control and Prevention.

- Scientists: Dr. Glen I. Reeves, Principal Scientist of Human Effects and Medical Response, from Applied Research Associates, Inc.; and Dr. William E. Schlenger of Abt Associates, Inc.

- Physicians: Lt. Col. Wade Gordon, M.D., USAF MC, Interim Chief of the Orthopedic Trauma Service at Walter Reed's Department of Orthopedic Surgery; Dr. Judy Schafer, Coordinator and Reviewer for C&P Audiology Exams at VAMC, Washington; and Dr. Samuel Belkin, Chief of Optometry at the Washington, DC, VA Medical Center.

The panel was moderated by James D. Ridgway, President of the CAVC Bar Association and Chief Counsel for Policy and Procedure at VA's Board of Veterans' Appeals.

The session opened by discussing whether the panelists had received any training about causation during their medical or scientific education. Lt. Col. Gordon noted that medical schools do not teach legal causality at all, and explained that medical training is really "the art of figuring out disease processes and symptoms, which is very different from a legal conclusion that has ramifications." Dr. Belkin and Dr. Schafer pointed out that, compared to legal causation, physicians are trained to think in the reverse: the symptoms are what are important and, if they can be treated effectively, the cause may be completely irrelevant. The primary goal is simply to take care of the patient, and causation may only become relevant if the symptoms recur or are progressive. Among mental health conditions, PTSD is the only one that has a specific causal element as part of its definition, but even knowing what the stressor is may not affect the treatment for PTSD.

TAKEAWAY FOR LAWYERS: Treating physicians worry about taking care of their patient, which usually means treating symptoms. Understanding the cause of those symptoms is often irrelevant.

Drs. Peterson and Sinks explained that the field of epidemiology focuses on association and risk. For example, one might study whether there is a difference in health outcomes between soldiers who are deployed and those who are not. Dr. Peterson noted that this may sound like causation, but it is not actually so because epidemiologists are studying populations, not individuals. Dr. Schlenger noted that the "gold standard" for determining causation is the randomized trial, a specific type of scientific

The Bar Association's Post-Conference Program

(L-R) Bar Association president, James Ridgway introduces the panel of experts: Dr. Peterson, Dr. Schafer, Dr. Reeves, Dr. Gordon, Dr. Belkin, Dr. Sinks, and Dr. Schlenger.

experiment in which the participants in the study are randomly assigned to one group or another. The groups are then treated differently, and the results compared. However, one of the fundamental problems with figuring out the cause of medical conditions is that we cannot set up randomized trials for the medical conditions that many veterans suffer. For example, no one would design a study in which one group of participants is deliberately exposed to chemicals or inflicted with a TBI, just to study the effects as compared to another group of participants who were not exposed to chemicals or given a TBI.

TAKEAWAY FOR LAWYERS: It is very hard to design studies that lead to good data about the effects of what happens in the military because many issues cannot be ethically reproduced in a controlled study.

The veterans benefits system uses the standard of "at least as likely as not," and the panelists were asked how similar or different this is from how they think about causation in your work. Dr. Sinks noted that the idea of "50/50" just does not make sense for an epidemiologist, who deals with probabilities, populations, and statistics, as opposed to specific causes in individuals. Dr. Peterson added that they work in an environment in which science helps inform large decisions, such as the presumptions of service connection. He explained that it is important to remember that one study is not, by itself, definitive, and that it can take years and years to figure out what the science is really telling us. Even when studies are designed well, it can be a challenge to tease out what the results of the studies actually mean.

TAKEAWAY FOR LAWYERS: Scientific studies can provide us with information about how frequently a medical condition occurs in a given population, but generally do not provide useful information about whether any individual veteran's medical condition has a specific cause.

The panelists were asked what they look at when trying to determine causation in a given veteran's case. Dr. Schafer explained that, when she provides a medical nexus opinion on a hearing loss claim, she will review the veteran's claims file, especially for shifts in hearing, any hearing loss at discharge, or a noise-notched audiogram, and she also reviews post-deployment questionnaires. She noted that it is more problematic when the claims file indicates that there was no loss of hearing during service, but the veteran developed hearing problems that are related to other service-connected medical conditions or other claimed problems. In those cases, it is much more difficult for her, as an audiologist, to determine causation because she does not have any way to evaluate those other medical conditions. At that point, she needs to obtain and rely on opinions

from other care providers about the other medical condition, so she can evaluate its effect on the veteran's hearing.

TAKEAWAY FOR LAWYERS: Application of medical knowledge to the facts of a complex case is at least as much an art as an application of the law.

The panelists were asked how they go about researching the current state of knowledge on any given medical issue. Lt. Col. Gordon had an answer that will be familiar to attorneys: You know your research is solid and nearing completion when the sources you find are all referring to each other. Unlike legal research, he indicated that relevant medical research would only need to stretch back about a decade. When asked how long such research might take, the panel had a variety of answers. For a physician who is very expert in his or her field, or for a very narrow issue, a search might only take five minutes. On the other hand, a junior resident might take a few hours to research the same problem – "or less, if there's nothing to find," as noted by one panelist. Dr. Belkin said that he also asks his colleagues if they have heard of anything that he might have missed. Lt. Col. Gordon added, "Remember that you're getting an opinion, not science."

TAKEAWAY FOR LAWYERS: In the end, when you request an opinion, that is what you get: one person's opinion.

(L-R) Todd Wesche, David Hobson, and Matt Hill enjoy the Bar Association's Reception after the first day of the Court's Judicial Conference.

Join Us to Clean the Korean War Veterans Memorial

On **Sunday, August 18**, at 6:30 a.m. we are volunteering to assist the National Park Service clean the monument on the National Mall.

Spouses, children, and friends are all welcome for this moving opportunity!

All equipment will be provided by the NPS. For more details, visit www.cavcbar.net.

A Peek Inside . . .
CAVC's Central Legal Staff

by Jennifer A. Dowd

The CAVC Central Legal Staff (CLS) is one of the six subdivisions of the Court that comprise the Office of the Clerk. (The other sections are the Public Office, Counsel to the Court, Information Technology, Budget and Finance, and the Administrative Office.) In addition to the CAVC, virtually every state appellate court, as well as the thirteen federal courts of appeal, the Court of Appeals for the Armed Forces, and the Supreme Court all have central legal staffs that provide advice to judges regarding pending cases. In light of the CAVC's single-judge authority, CLS's function from a central perspective is particularly important for keeping our judges informed about pertinent issues pending in other chambers.

CLS is led by Chief Staff Attorney Cynthia Brandon-Arnold, who directs up to ten attorneys, three paralegals, and two legal assistants. Ms. Brandon-Arnold joined the court as a staff attorney in 1990 and was promoted to Chief in 2006. While on active duty in the Army Judge Advocate Generals' Corps, she was assigned to the U.S. Army Legal Services Agency, where she worked as an attorney in the government appellate division and as a commissioner for the Army Court of Military Review.

Current staff attorneys include Nicole DeGraffenreed, Jennifer Dowd, Marty Fred, Liz Hessman, Alice Hoover, John Huebl, Sonia Shah Mezei, and Andy Reynolds. Bernard "Woody" Woodruff is the supervisory paralegal, and the paralegals are John Wilson, and Wendy Nicholson. Jean Norris and Fatima Sock are the legal processing secretaries. The collective veterans/legal experience of the CLS staff includes veterans of the U.S. Air Force, Army, and Navy; former CAVC employment in the Public Office and chambers of Chief Judge Frank Nebeker and Judge Jonathan Steinberg; former VA employment with the Board of Veterans' Appeals, Professional Staff Group VII, and the Regulation Rewrite project; former employment with the National Veterans Legal Services Program; and private practice. Several CLS staff attorneys have actively participated on the Board of Governors of the Court's Bar Association. All CLS staff attorneys have been trained and certified in Advanced Mediation Training by the Center for Alternative Dispute Resolution.

Among its many duties, CLS is primarily responsible for (1) conducting telephone conferences/mediation aimed at (a) resolving Rule 10 disputes, (b) streamlining or resolving issues to be briefed pursuant to Rule 33, and (c) settling Equal Access to Justice Act (EAJA) disputes; (2) drafting procedural orders; (3) coordinating pending motions for panel decision and/or en banc review; (4) providing a summary of briefed issues in joined cases along with a recommendation to the assigned judge regarding disposition; and (5) supporting senior judges when they are recalled to active judicial service.

Telephone conferences and mediation are possibly the most significant responsibility held by CLS. Rule 10 conferences are held to resolve record disputes in both represented and unrepresented appeals. Conferences are also held to discuss EAJA disputes where the only issue is the reasonableness of the fee requested. Pre-briefing conferences pursuant to Rule 33 are routinely conducted prior to briefing in all cases in which both parties are represented. This process was significantly revised following the Bench and Bar Conference in April 2007 and the subsequent change to Rule 33. The purpose of these conferences is to explore the issues and resolve those matters about which the parties can come to agreement. The remaining issues tend to be sharpened in the process. The Court's Rule 33 conferencing program is extraordinarily successful. Since 2008 (when statistics began to be monitored), the program has resulted in over 50% of represented cases being disposed of without resorting to judicial resources. The great majority of these cases are resolved via a joint motion for remand garnered after the parties were directed to mediate the matters on appeal prior to briefs being filed. On occasion, CLS will schedule a telephone conference after briefs have been filed when it is clear that the parties would benefit from such discussion, in preparation for oral argument, or at the request of a judge or panel.

Procedural orders that cannot be automatically drafted from a standard template are sent to CLS from the Public Office. These include, but are not limited to, addressing motions to supplement or amend the Record Before the Agency or Record of Proceedings, motions to strike, motions to dismiss for procedural and jurisdictional reasons, joint motions for remand, and motions for substitution. Most of these orders are drafted by one of the paralegals and then reviewed

A Peek Inside, continued on page 9.

A Peek Inside, continued from page 8.

by an attorney before being forwarded to the assigned chambers or the Clerk.

CLS attorneys review motions for reconsideration and/or decision by a panel or the full court under Rule 35 and prepare a "vote package" for chambers' review. A memorandum analyzing the merits of the motion is prepared, along with a draft order. Once the vote package is assembled, it is circulated to the selected chambers. Votes on pending motions are returned by the judges to CLS, where they are tallied. Once voting is complete, CLS prepares the final order to be routed through the lead judge on that case (or the Chief Judge on en banc votes).

CLS also prepares screening memoranda for cases once they are joined. Each memorandum includes a brief synopsis of the facts, a discussion of the issues raised by the parties as well as any other issues CLS might identify, a legal analysis, and a recommended disposition. CLS will identify pending cases or recent opinions and memorandum decisions that may have bearing on the decision. Generally, CLS supplies a screening memorandum in those cases in which the issues are not well briefed, and where such a memorandum would benefit chambers, i.e., in pro se cases or where the issues are particularly complex. Additionally, in any case that CLS does not select for screening, the assigned judge can request that CLS provides input.

Finally, when the Chief Judge recalls senior judges to provide service to the court, CLS provides support for the recalled judges. Supportive efforts include drafting orders and memorandum decisions and keeping the judges informed of pending issues at the court.

As previously noted, CLS functions as the central staging point for most of the cases that are appealed to the CAVC. CLS is made up of an experienced group of attorneys, paralegals, and support staff, who efficiently manage thousands of motions and cases every year. Whether a case is awaiting a ruling on a pending motion or assignment to a judge for ultimate disposition, it is likely that the Court's Central Legal Staff will perform the initial assessment and triage.

Jennifer A. Dowd is an attorney with the CAVC's Central Legal Staff and a past president of the Bar Association.

CAVC Holds that Practitioners are Under a Duty to Timely Inform the Court of Developments in a Case that Could Deprive the Court of Jurisdiction or Otherwise Affect its Decision

by Patrick A. Berkshire

Reporting on Solze v. Shinseki, __ Vet. App. __, No. 09-4406 (May 3, 2013).

On May 3, 2013, the CAVC issued a per curiam order by a three-judge panel in the case of *Solze v. Shinseki*, ___ Vet. App.___, slip. op. No. 12-1512, 2013 U.S. App. Vet. Claims LEXIS 69 (May 3, 2013). In *Solze*, the CAVC held that practitioners before it had an ongoing obligation to the Court to keep it informed of case developments that could deprive it of jurisdiction or otherwise affect its decision. Much interest has been generated by this decision because the Court found that experienced counsel for both the petitioners and the Secretary had violated this duty. Furthermore, the Court indicated that future violations of this duty by practitioners could result in sanctions.

The facts in *Solze* involved an underlying dispute between the petitioners (Robert L. Solze and Lois M. Dimitre, who served as Mr. Solze's agent pursuant to a durable power of attorney (POA) issued in the state of Maine) and VA over the necessity of having a federal fiduciary appointed to distribute Mr. Solze's VA disability benefits. Previously, Mr. Solze had been deemed incompetent to manage his funds. VA eventually appointed a fiduciary, and the petitioners filed two Notices of Disagreement contesting the appointment, and eventually threatened to sue the fiduciary in state court for the release of Mr. Solze's funds. This resulted in the first fiduciary resigning. However, VA again pursued the appointment of a fiduciary, and did not distribute Mr. Solze's benefits due to the lack of a fiduciary.

Eventually, the petitioners filed a petition for extraordinary relief with the CAVC seeking a writ of mandamus that, among other things, would order VA to recognize Ms. Dimitre as Mr. Solze's attorney in fact under the POA, and distribute all funds owed to Mr. Solze through Ms. Dimitre, or in the alternative,

Solze*, continued on page 10.*

Solze, *continued from page 9.*

require VA to provide written justification for not recognizing Ms. Dimitre as Mr. Solze's attorney in fact pursuant to 38 C.F.R. §§ 13.58 and 13.59. On January 4, 2013, the Court denied the motion because it found that the petitioners had not demonstrated that they lacked adequate alternative means to resolve their case, as it was still pending on appeal, but the Court did express concern over VA's failure to afford temporary payments under 38 C.F.R. § 13.63.

In response to the Court's denial, the petitioners filed a motion for reconsideration with the CAVC, alleging that VA continued to refuse to make a decision on the applicability of temporary payments under § 13.63. This motion was denied, and the petitioners then filed a motion seeking full court review, which was granted. While the case was still pending, and on the same day that petitioners had filed their motion for reconsideration, the Board of Veterans' Appeals issued a decision appointing Ms. Dimitre as a temporary fiduciary. However, neither the petitioners nor the Secretary informed the CAVC of this decision. Instead, the CAVC discovered sua sponte that the Board had issued a decision.

As a consequence, the CAVC withdrew its denial of reconsideration and ordered counsel for the petitioners and the Secretary to appear before the Court and explain why the Court should not impose sanctions or commence disciplinary proceedings against them. Before the CAVC, both parties argued that there was no effort to intentionally mislead the Court and that there was no violation of the Court's Rules of Practice and Procedure or Admission and Practice, or of the Model Rules of Professional Conduct. The parties asserted that the Court's earlier January 4, 2013, decision denying the petition at issue in the case had ended any duty to notify the Court.

In its decision, the CAVC rejected the arguments of counsel and found that counsel for both the petitioners and the Secretary had breached their duty to the Court. Specifically, the CAVC held that practitioners before the Court have a duty to timely inform the Court of developments that "could deprive the Court of jurisdiction or otherwise affect its decision." It explained that this duty had its root in Article III standing, and is meant to avoid courts issuing decisions on cases that no longer contain a live case or controversy.

The Court further specified that this duty was "particularly significant" in cases involving petitions for extraordinary relief seeking a writ of mandamus, when Court action can interfere with the ongoing process at the agency. The Court stated that, when "the petitioners ask the Court to dip its oar into the waters of the agency's ongoing claims process; it is incumbent on the parties to chart for the Court the hazards lurking beneath the water's surface and changes in the current's flow." Furthermore, the Court specified that, by filing a motion for reconsideration, the petitioners resurrected the parties' obligations to fully inform the Court of relevant documents. It explained, in the context of the *Solze* case, how the failure of the parties to keep the Court informed could have created significant legal conflict, stating, "Failure to notify the Court of the Board's decision could have resulted in a reconsidered panel decision or en banc decision in conflict with that determination, placing the fiduciary hub in the impossible position of trying to decide how to effectuate both binding orders."

As a result, the CAVC found that the judgment of counsel for the parties had lapsed, and that they had breached their duty to timely notify the Court of the Board's decision in the case. The CAVC, however, stated that, "[t]o the extent that this duty has not previously been made clear by the Court, neither sanctions nor referral for disciplinary action are warranted in this case." The CAVC did warn, however, that "all parties to every case before the Court—are now on notice of their continuing responsibility to apprise the Court of significant developments."

A motion for full court review was denied on May 22, 2013. *See Solze v. Shinseki*, No. 12-1512, 2013 U.S. App. Vet. Claims LEXIS 807 (May 22, 2013). Time to file a Notice of Appeal with the U.S. Court of Appeals for the Federal Circuit has expired.

Patrick Berkshire is a Staff Attorney with the National Veterans Legal Services Program, in Washington, DC.

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, DC area. Please contact our Publications Chairman, David E. Boelzner, at <Dboelzner@goodmanallen.com> for more information.

The Federal Circuit Clarifies the Process of Rating Mental Disorders under 38 C.F.R. § 4.130

by Bryan Andersen

Reporting on *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013).

On April 8, 2013, the United States Court of Appeals for the Federal Circuit held, in *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013), that a veteran may only qualify for a given disability rating under 38 C.F.R. § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration.

In this appeal, Vietnam veteran Genaro Vazquez-Claudio challenged the 50 percent rating assigned for his service-connected post-traumatic stress disorder (PTSD). The General Rating Formula for Mental Disorders, codified at 38 C.F.R. § 4.130, provides for incremental compensation correlated to the veteran's level of occupational and social impairment. Mr. Vazquez-Claudio desired a 70 percent rating, which requires "[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking or mood, due to such symptoms" as suicidal ideation, near-continuous panic, or depression affecting the ability to function independently, appropriately and effectively, or inability to establish and maintain effective relationships, among others.

He appealed the decision of the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims, and argued that the Board had wrongly denied his claim because he lacked the particular symptoms associated with a 70-percent disabling rating, rather than evaluating whether the symptoms he actually did demonstrate caused deficiencies in "most areas." The CAVC disagreed, and held that the frequency, severity, and duration of his psychiatric symptoms were the relevant issues before the Board.

In his appeal to the Federal Circuit, Mr. Vazquez-Claudio reiterated his argument that a veteran should be entitled to a 70-percent rating if any of his PTSD symptoms caused the requisite level of impairment, regardless of whether they are listed in the associated rating criteria. The Court examined the broader regulatory structure of the General Rating Formula, and noted that, as the ratings increase, the associated symptoms become noticeably more severe. The Court also noted that the intermediate disability levels are distinguished from one another by the frequency, severity, and duration of their associated symptoms. Therefore, the regulation's plain language highlights its symptom-driven nature, and Mr. Vazquez-Claudio's interpretation would nullify this structure by reading relevant symptomatology almost entirely out of the regulation. The court reasoned that requiring a veteran to demonstrate the particular symptoms (or others of similar severity, frequency, and duration associated with the disability rating) was supported by the requirements of § 4.126 and a regulatory history that replaced subjective determinations with determinations based upon specific signs and symptoms.

Of course, a veteran's level of occupational and social impairment still remain important in evaluating the severity of his disability. The court separately addressed whether the fact-finder must make findings regarding this impairment in "most areas" in its evaluation. Although symptomatology should be the fact finder's primary focus, the court held that, in the context of a 70-percent rating, § 4.130 also requires that those symptoms have caused occupational and social impairment in most of the referenced areas. Accordingly, the CAVC erred to the extent it implied the listed "areas" were irrelevant to the 70-percent disability determination.

Unfortunately for Mr. Vazquez-Claudio, the Federal Circuit held that this was a harmless error because the Board neither ignored the issue of whether his symptoms qualified under the appropriate rating requirements, nor failed to consider the level of impairment those symptoms caused in the relevant areas. The Federal Circuit's holding sets a framework for rating mental disorders, and it remains to be seen how it will affect CAVC case law on the subject.

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Justice Scalia, continued from the front page.

resolved in favor of the veteran. Therefore, *Chevron* would apply with full force. He noted that it would seem quite anomalous if VA alone among federal agencies was denied *Chevron* deference. Justice Scalia closed his remarks by recognizing that the fact that the country has a specialized veteran's court is a credit to our national commitment to do justice by "him who shall have borne the battle."

Justice Scalia with the Judges of the CAVC

- ***Highlights From Professor Michael Allen's Discussion of Major Developments in Veterans Law Since 2010***

The CAVC has invited Professor Michael Allen of Stetson University College of Law to speak as a panelist for several judicial conferences now, and each year his discussion proves to be extremely informative (not to mention highly entertaining) for all attorneys practicing in the field, be it the appellant's bar, the General Counsel's Office, or Board counsel. This year was no different, as Professor Allen surveyed the most important cases to come out of both the CAVC and the U.S. Court of Appeals for the Federal Circuit between 2010 and 2013.

Professor Allen began his discussion by quoting Judge Lance's observation in his concurrence in *Delisio v. Shinseki*, 25 Vet. App. 45, 63 (2011), that "[t]here is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year." Professor Allen agreed with this observation, and noted that the increasing complexity of the law in this area also presents difficulties for new attorneys practicing in the field. He pointed specifically to the CAVC's discussion of the implicit denial doctrine in *Cogburn v. Shinseki*, 24 Vet. App. 205 (2010), as a demonstration of just how complex the law is becoming.

Professor Allen explained that one potential pitfall of adopting a rule as complex as the implicit denial doctrine is that, when combined with the duty to sympathetically read a claimant's submissions, application of the rule may result in a situation in which a claimant files a claim for X, but has no intent to file a claim for Y, and years down the line when he or she does decide to file a claim for Y, the implicit denial doctrine and the duty to liberally construe the claimant's submissions mandate a conclusion that the claim for X included a claim for Y, which was finally denied. In that case, the claimant would be required to submit new and material evidence with respect to the claim for Y, even though he or she never intended to file a prior claim for Y and was not aware that the claim had previously been finally denied.

Continuing with his discussion of *Cogburn*, Professor Allen turned to the court's holding that a factor to be considered in determining whether a claim was previously, implicitly denied is whether the claimant was represented by an attorney before the agency. Professor Allen opined that this part of the Court's holding reflected a hostility toward attorneys who represent claimants before the agency and fail to raise significant issues. He agreed with Judge Schoelen's observation in her concurring opinion that, pursuant to the Federal Circuit's holding in *Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009), "VA's duty to liberally construe and sympathetically read a veteran's pleadings generally applies equally to represented and unrepresented claimants." He questioned what is left of the duty to sympathetically construe a represented veteran's submissions in the wake of the court's holdings in *Cogburn* and *Massie v. Shinseki*, 25 Vet. App. 123 (2011).

Professor Allen also discussed the relatively recent resurrection of equitable tolling in veterans law. However, before discussing the case law that reinstituted the doctrine, Professor Allen noted that, in *Henderson v. Peake*, 22 Vet. App. 217 (2008), the CAVC held that the doctrine of equitable tolling could no longer be invoked to excuse the late filing of a Notice of Appeal; however, the Federal Circuit had not yet reached any similar conclusion. Professor Allen questioned the propriety of the CAVC's holding, because the CAVC is subordinate to the Federal Circuit, and referenced the ongoing discussion (led by Chief Judge Kasold) as to whether the two-court review system currently in place is really necessary.

Prof. Michael Allen

Moving on, Professor Allen noted that the Supreme Court reversed the Federal Circuit's decision affirming the CAVC's holding in *Henderson*, and held that the 120-day period for filing a Notice of Appeal is not jurisdictional in nature in light of the pro-claimant nature of the VA adjudication system. The CAVC later held in *Bove v. Shinseki*, 25 Vet. App. 136 (2011), that because the 120-day period is not jurisdictional in nature, equitable tolling applies and the failure to file the Notice of Appeal within that period may be excused under certain circumstances. Professor Allen voiced concern with the court's holding in *Bove* that the General Counsel may not waive the timeliness requirement. He pointed specifically to the court's statement that "[t]o hold that the Secretary could affirmatively or by forfeiture waive the 120 day filing period of 38 U.S.C. § 7266(a) would cede some control of the court's docket to the Secretary . . . ." *Id*. at 141. Professor Allen commented that this statement reflected a degree of "judicial insecurity," and opined that the CAVC's concern regarding control over its docket was "overblown," especially in light of the fact that the proceedings before the court are adversarial in nature.

The CAVC's jurisdiction to reverse a BVA decision was also discussed. Professor Allen focused on the Federal Circuit's decision in *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012), wherein the Federal Circuit held that the CAVC may not make findings in the first instance, even if all the evidence is favorable to a claimant. Professor Allen pointed out that, in that case, Ms. Byron's claim had been pending for 40 years, and opined that the unusually long delay should have been considered. Professor Allen noted that there is no question that the CAVC has authority to reverse a clearly erroneous Board decision under 38 U.S.C. § 7261, but pointed out that that provision also prohibits the CAVC from conducting a trial de novo of the Board's findings. He suggested that the two sections of § 7261 granting the CAVC authority to reverse the Board's findings and prohibiting the court from conducting a trial de novo of the Board's findings could be reconciled if the court adopted what he termed the "hypothetical clearly erroneous" standard of review. Under this standard of review, the CAVC would determine whether, if BVA had made an adverse finding, that finding would have been clearly erroneous. If so, the CAVC could reverse the Board's decision. Professor Allen suggested that if the CAVC adopted this standard, Congress would not need to amend § 7261.

Another highlight of Professor Allen's presentation was his discussion of the tension between the Supreme Court's holding in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that a court must defer to an agency's reasonable interpretation of a statute, and *Brown v. Gardner*, 513 U.S. 115 (1994), that interpretative doubt must be resolved in a veteran's favor. Professor Allen opined

that the *Chevron* rule and the *Gardner* rule could not co-exist, and that one would be hard pressed to find a published decision that relies on *Gardner*. He suggested that the issue be brought before the Supreme Court for clarification. On the other hand, he commended Judge Moorman's concurring opinion in *Johnson v. Shinseki*, 26 Vet.App. 237 (2013), in which Judge Moorman ultimately concurred with the majority's deference to the Secretary's interpretation of his own regulation pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997), but commented that the case had "caused [him] to ponder whether special rules of construction should be applied to VA regulations in circumstances such as these." *Johnson*, 26 Vet. App. at 251-52. Professor Allen noted that Judge Moorman's concurrence demonstrated the perfect application of *Auer* deference, i.e., when a court defers to an agency's interpretation because it is reasonable, even though the court believes the interpretation is wrong. In addition, Professor Allen agreed with Judge Moorman's suggestion that special rules of construction should be applied to VA regulations, commenting that "if you want to be a special system, you need special rules."

- ***Introduction to New Judges***

The CAVC's Twelfth Judicial Conference introduced members of the bar to the newly appointed judges of the Court. Judges Coral Wong Pietsch, Margaret Bartley, and William S. Greenberg were in attendance to detail how their diverse and storied careers led them each from dedicated public service to the Court.

Judge Pietsch dedicated her career to public service, both as a civilian and in the military. Notably, she was the first woman to be promoted to the rank of Brigadier General in the U.S. Army Judge Advocate General Corps, held the position of Senior Attorney and Special Assistant at U.S. Army Pacific Headquarters, served as Deputy Rule of Law Coordinator for the Baghdad Provincial Reconstruction Team, and chaired the Hawaii Civil Rights Commission. Even after a dedicated career, Judge Pietsch told conference attendees how surprised she was to receive the nomination, and detailed how her appointment to the court changed her life. Specifically, in a light-hearted moment, she explained that appointment to the court meant she needed to purchase her first winter coat to transition from the climate of Hawaii. Judge Pietsch expressed that, for her, there was "no greater cap to a lifetime of public service" than being appointed to the court.

(L-R) Judges Pietsch, Bartley, and Greenberg

For Judge Bartley, transitioning from her career as a veterans advocate as a senior staff attorney for the National Veterans Legal Services Program to Judge was less life-altering. For her, the nomination to the bench was "gratifying" after seventeen years of dedication to the country's veterans; because she liked the work she did and knew she wanted to continue her work. She explained to the audience that "if I liked what I was doing before [the appointment], I like what I do now better." During her discussion (and throughout the conference), her enthusiasm for her work and mission was palpable. Although her transition from advocate to judge did not require the purchase of a winter coat, part of her transition, she detailed, was learning how to draft panel decisions, particularly in learning how and when to compromise with the other judges on the bench.

Prior to his nomination, Judge Greenberg served for 27 years in the Reserve Components of the Army, retiring as a Brigadier General, and for 45 years as a litigator. Judge Greenberg served as Chairman of the Reserve Forces Policy Board, and was awarded the Secretary of Defense Medal for Outstanding Public Service, the second highest civilian award in the Defense Department. Originally from New Jersey, the New Jersey State Bar Foundation recognized him with their highest honor for his work in establishing the military legal assistance program and representing solders at Walter Reed Army Medical Center during disability board hearings. Judge Greenberg announced his first decision would be forthcoming with a citation to *Hayburn's Case*,

and joked that he wrote the decision in anticipation of Justice Scalia, who earlier in the day referenced the famous Supreme Court decision. Judge Greenberg takes pride in the history of the CAVC and the legacy it is establishing. He is proud to be a part of that legacy.

- ***Raising the Bar: Law School Veterans Clinics and the Veterans Law Community***

The Raising the Bar program shined a spotlight on veterans law clinics around the country that are moving the practice of veterans law forward and addressing the changing landscape of legal education by providing law students with clinical experience in serving the needs of veterans. Judge Alan G. Lance, Sr., of the CAVC, introduced the program and encouraged conference attendees to reach out to law schools that might be interested in hosting a CAVC oral argument.

Professor Justin Holbrook of Widener University School of Law

Professor Justin Holbrook of Widener University School of Law moderated the panel, which highlighted the unique capability of veterans law clinics to train law students to develop practice ready skills through live client experience. Law students in the clinics gain practical experience by representing veterans at VA regional offices, the Board of Veterans' Appeals, and the CAVC. The students help veterans find and retain forensic medical experts to obtain critical medical opinions, advocate for legislative changes at the state and national level, engage in impact litigation, perform empirical research on issues affecting veterans and their families, and assist veterans with issues such as child custody and landlord-tenant disputes, and reemployment or employment issues before the Merit Systems Protection Board.

The panel also discussed how their legal clinics strive to establish strong relationships with veterans service organizations, private practitioners, local churches and businesses, and other community partners to meet the increasing demand for support from both the millions of veterans returning from Iraq and Afghanistan, and the aging populations of Vietnam and World War II veterans. The panel encouraged conference attendees to reach out to their local law schools and support them in starting their own veterans law clinics. The panel featured law professors from veterans law clinics throughout the country, including Widener University School of Law, Yale Law School, William & Mary Law School, the John Marshall Law School, the University of Detroit Mercy School of Law, and the soon-to-be founded clinic at the University of Utah S.J. Quinney College of Law.

- ***Ethics and Veterans Law Practice: A Spectrum from Discipline to Civility***

One of the most interesting parts of the 2013 Judicial Conference was the presentation by Clerk of the Court, Colonel Gregory O. Block, entitled "Ethics and Veterans Law Practice: A Spectrum from Discipline to Civility." Colonel Block provided a compendium of the grievances addressed by the court's Committee on Admission and Practice from 2006 to 2011. He then led the audience through a series of ethical scenarios addressing some of the more common ethical issues that arise: withdrawal of representation, declining representation, solicitation of clients, EAJA and fees, conflicts of interest, and diligence and competence in representing clients.

For the second part of presentation, Colonel Block walked the attendees through the results of an ethics survey that had been distributed to participants prior

to the conference, addressing professional conduct, both good and bad, in the veterans law community. As expected, the results showed a wide spectrum of views, sometimes contradictory, on the degree of professional conduct displayed by the parties as perceived by the respondent. As part of this discussion, Colonel Block also raised the question of what was the proper basis for determining what constitutes professional conduct: the Model Rules, State Bar Codes, or aspirational ethics models like Civility Codes, which are used in a number of states. Overall, his presentation was well paced, interactive, and thought provoking.

- ***Anatomy for Attorneys--Traumatic Brain Injury and the Nervous System***

Professor Samuel D. Hodge, Esq., of Temple University, led a captivating session on brain anatomy. While not for the squeamish, as his presentation contained photos of actual human brains (before lunch, no less), this session was a fascinating look at the anatomy of our brain, spinal cord, and peripheral nervous systems. Professor Hodge focused on how the brain is constructed, beginning with its cellular structure, i.e., glial cells and neurons. He described the various parts of the brain and the layers of meninges, which serve as protective cover, and he finished with a brief explanation of how the nervous system transmits information down the spine and throughout the body.

Of note, a particularly amusing moment occurred when Professor Hodge presented a slide used to test whether one is more attuned to his or her right or left brain. This was a fascinating, well-led session. We tip our hats to Professor Hodge for presenting an informative and useful science lesson to an audience of judges and attorneys. Professor Hodge was so accomplished that this writer did not realize until after the presentation that he is not a medical doctor.

I would also recommend reading through the accompanying materials. Much of this material was not covered in as much detail in the actual presentation, which, due to time limitations, focused primarily on brain anatomy. Given the number of brain injuries experienced by troops stationed in Iraq and Afghanistan, knowledge of the brain and how it functions is key to understanding traumatic brain injuries.

- ***Records: What NPRC and JSRRC Have and Do***

Panelists explained the documentary resources held or consulted by the National Personnel Records Center (NPRC) and the Joint Services Records Research Center (JSRRC), and how VA calls upon those resources.

Jay Trainer of the National Archives and Records Administration (NARA), which oversees NPRC, discussed how federal records are assessed for retention and housed by NARA. Regarding NPRC in particular, he recited some history: in the 1950s to 1960s the Department of Defense worked with GSA to build a facility in St. Louis; DOD and GSA facilities merged in 1966; the ill-fated decision to omit fire suppression sprinklers and the damage in the 1973 fire; and efforts since 2000 to move toward electronic storage. He discussed the NPRC search process and efforts to reduce response time. He mentioned that part of the process is a "highly automated" identification of what needed to be searched, but he did not discuss how the NPRC carries out this crucial function in view of the enormous number of records.

Dominic Baldini of JSRRC explained that his agency is not a document repository but rather a research team of 13 experts engaged in verifying PTSD stressors and Agent Orange exposures. VA is its primary "customer," and individuals may not engage JSRRC's services. He stressed the difficulty of locating exact information about service members by name in the various records.

James Sampsell of the VA Compensation Service spoke about how VA undertakes establishing Agent Orange exposure, most particularly with regard to Blue-Water Navy veterans, and how ship lists are developed to establish presumptive exposure. He also commented on how requirements for establishing service connection for PTSD were liberalized.

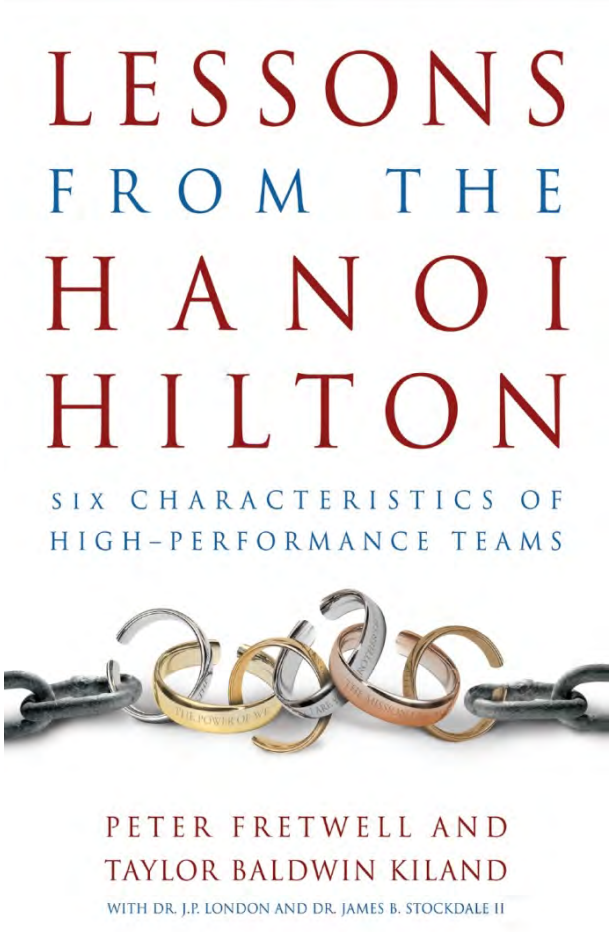
BOOK REVIEW:
Lessons from the Hanoi Hilton: Six Characteristics of High-Performance Teams,
Peter Fretwell and
Taylor Baldwin Kiland
(Naval Institute Press, Annapolis, MD, 2013), 152 pp.

by Alice A. Booher

The 1973 repatriation of American prisoners of war (POWs) from North Vietnam was a time for rejoicing at their release. Increasingly, as their stories were told and debriefs were undertaken, the discussion turned to the extraordinary societal structure they had developed during their captivity. In the decades since then, many of the "NamPOWs" themselves have written books, some of them more than one, and psychologists and other trained specialists have analyzed the special facets of that particular, collective POW experience. Dozens of books and articles have also been written on the "lessons learned" and, most importantly, the positive, progressive, and stable lessons--learnable and trainable.

Author Peter Fretwell is an expert in strategic leadership, and Taylor Baldwin Kiland brings her experience as a naval officer and management consultant in technology and strategy. Together, they bring a long-term commitment to assessing the NamPOWs and what their experiences can teach. Fretwell and Kiland have done their homework, interviewed, read, studied and evaluated, and, as noted in Dr. James Bond Stockdale II's introduction, they have accomplished a remarkably useful and insightful distillation. Dr. Stockdale should know, because his Stanford philosophy trained father, Vice Admiral James Bond Stockdale, was the primary shaper of the leadership pathway that would guide the NamPOW community structure.

Harking back to Epictetus' truth that "subjective consciousness as the ability to distinguish what is in my power from that which is not," Stockdale's guidelines for the self-sustaining POW "organization" within the camp narrowed down to the essentially now-familiar tenets: (1) the mission leads (maintain laser focus on "Return with Honor"); (2) you are your brother's keeper (finding purpose in protecting the guy next door, we've got your back); (3) think big and basically don't get rattled; (4) don't piss off the turnkey (focus on what you can control and minimize what you cannot); (5) keep the faith (hard-nosed optimism); and (6) the power of "we" (a united effort, we're in this together).



The premise of this and other works is that these characteristics translate well into a mantra of leadership in any sustainable, high-performance culture. It is one of personal responsibility, tempered with practicality and an underpinning of steadfast resolve. Working toward the goal of a tolerable, temporary (albeit lengthy), imprisoned existence combined with an ultimately sound survival, the POWs obligated themselves to a committed and sustained focus. Using pragmatic adaptability and other positive reinforcements, NamPOW leadership's underlying foundation included communication and commitment to a single purpose, both leaving a latitude for personal frailties and strengths.

Hanoi Hilton, *continue on page 18.*

Hanoi Hilton, *continue from page 17.*

From 1964 to 1973, when American POWs were held in the former French colonial Hoa Lo prison (the name meaning "Fiery Furnace" (a.k.a. Hell Hole) in Vietnamese, the NamPOWs cynically renamed it the Hanoi Hilton), verbal discourse was initially forbidden, so the POWs relied on the "tap code," using numbers for letters of the alphabet. As critical as that was, however, also fundamental to the success of their rapport and resilience was a guideline to implement and permit flexibility, e.g., if a POW had been pushed beyond a breaking point and revealed something he might regret, he was first required to let the others know, was immediately forgiven, and often the "guilty" admission was deliberately rendered useless by the subsequently skewered "reveals" of others, occasionally with classic bawdy American humor. The concept of the POWs making lemonade from the lemons they had been dealt had unexpected ramifications after the unsuccessful American rescue raid on Son Tay in 1970, an event which spooked the North Vietnamese. Afraid of the lack of defense if more raids were carried out on the then widely located smaller prison camps, they brought all the POWs in North Vietnam to Hoa Lo. Putting them in one place at the same time permitted the POWs to be in contact with one another, communicate, socialize, and put their "rules of conduct" into effect. In the end, they called it "Camp Unity."

Studies were later undertaken to analyze not only the NamPOWs but to compare them with other eras of prisoner and nonprisoner combatants, partly to assess what made this select group's success in captivity and return to freedom seemingly so much more productive and resilient. The trauma of these disciplined military men being shot from the sky, being taken POW, and suffering what followed during captivity, was horrific and never minimized, but the tools they established for themselves to deal with these facts clearly made the difference. The end result was what experts like Dr. Richard Tedeschi described as post-traumatic growth (PTG) versus post-traumatic stress disorder (PTSD). The pivotal mitigators for this included immediate disclosure and acknowledgement of the trauma/stress, and forgiveness (by self and others) of the guilt, permitting a resilient moving forward. Some cogent statistics are included in the book with generous references to various supportive objective studies, including the Robert E. Mitchell Center for POW Studies in Pensacola, where it was determined that an incredible 96% of the NamPOWs were free of PTSD, compared to a 1997 American Psychiatric Association report that found a lifetime PTSD incidence of 50% in POWs from other conflicts.

Furthermore, as has been demonstrated by myriad corporations, these "rules of conduct" transfer magnificently from the POWs in the Hanoi Hilton to civilians, to include professional and commercial organizations. *Lessons from the Hanoi Hilton* does a particularly fine job of analyzing the elements of the tools and following up with post-captivity examples of the POWs' ongoing remarkable resilience and strength, including many who managed their post-captivity life with élan and dignity. Examples include those who reached high post-war personal or corporate achievements (such as the 24 who rose to the military level of flag or general officer; 18 to federal or state high level positions, such as senators and representatives; Ambassador Pete Peterson, who returned to Vietnam in that capacity; and 8 who received the Medal of Honor), as well as the myriad others who continue decades later to lead their communities in corporations, charitable activities, scouting, etc. Their post-captivity leadership qualities, operating on a daily basis, are shown in things like the e-mail sent by POW Orson Swindle, then a FTC Commissioner, to all FTC employees after 9/11; or POW Paul Galanti's relentless pursuit of a valid and facile system of dealing with veterans' benefits claims in the age of computers.

The pivotal point, however, is that the success of the POW "Hanoi Hilton system of leadership" extrapolates not only to those who participated therein, but also to those who did not--in all strata of business and life. The latter facet is discussed within this volume, but its major strength lies in the succinct and well drawn assessments and delineations of the system itself to make it available and easily referenced for those who might seek to benefit from using it.

The volume itself is physically handy in that it is pocket-sized and wonderfully portable, and has its layout in a tidy form, with chart-like inserts for reference; it is both a handbook and a business text covered by a philosophical dust jacket, if you will. To remind the reader of the context of the lessons, some important lists on a printed page may have a

Hanoi Hilton, *continue on page 19.*

Hanoi Hilton, *continue from page 18.*

subtle but mindful substitution from a traditional series of bullet dots on the side of a list of items to miniature POW bracelets circling the salient elements of the structure. These bracelets can often be symbols worn not only to reflect the mindfulness of those who waited for the release of the captives, but of everything positive about the POW experience--being not a fully formed circle, but one with an opening permitting flexibility and thus resilience itself without breaking the strength of the circle. *Lessons from the Hanoi Hilton* is a sage and valuable tool for those searching for guidance to excellent personal and professional performance.

Alice A. Booher, a former Foreign Service Officer, was Counsel, Board of Veterans' Appeals (1969-2011). She has long written veteran-related reviews and features for national print media.

The essay below was one of the winning entries in the Bar Association's 2013 Judicial Conference Scholarship Conference.

Someone Else's War Story

by Brandy Disbennett

How do you tell a war story? How do you tell someone else's war story? I grew up listening to veterans--my father, grandfathers, "the guys"--tell their war stories. They were fantastic stories, heroic, funny, exciting --never dangerous, or at least that is what they told me.

Two years ago, I was accepted into the Veterans Research Internship Project at the University of Maryland. The project centered around the Memorial Book, which holds the names of over 200 veterans who attended the university and served in World Wars I and II, Korea, and Vietnam--just their names, their hometowns, and branch of service. From this, we were to tell not only their war story, but their life story.

I was assigned nine lives and nine war stories from the Army Air Corps. I immersed myself in the National Archives and our university's archives seeking life stories. In the depths of the Archives were their war stories, perpetually heartbreaking, and every story had the same ending. Young boys, newly married, lost in training accidents, or caught in the cross-fire of a dog-fight, their last words lost on carbon-copy: "I have had it, I'm bailing out." How do you look at a boy's birth date, then at the document detailing this *man's* death, and write his middle?

I was emotionally drained. My fourth veteran, though, saved me—saved me in a way I could never save him. When I began researching Irving, a World War II veteran, I immediately discovered there was no military record of his death. My mind reeled: Could he be alive? Does he have family? A wife? Unfortunately, I discovered that Irving passed away hardly over a year before I began my research. However, I did find Irving's daughter. I emailed her that night, and the next morning she responded.

I was humbled and honored when she graciously took me in and told me Irving's heroic story. One night, I listened to a voice I had never heard recount the first time she heard her father's story; It was the first time anyone heard his story. After a family barbeque, Irving's son presented him with a photograph of a B-24; disappearing into the house, Irving returned with a D-ring. It was the D-ring from the parachute he deployed escaping from his B-24, and had kept hidden in his boot. No one knew. Irving was a POW, and more importantly, an ex-POW. Stunned, the family gathered to hear their POW's--their father's--story.

The D-Ring from Irving's parachute

Irving was a nose turret gunner in a B-24 bomber. On a mission in German airspace, the crew found themselves in a dog fight. From within the flak-riddled plane, Irving watched as the navigator, the

Someone Else's War Story, continued on page 20.

Someone Else's War Story, continued from page 19.

person who was to help him out of the turret, dove from the bomber, but Irving managed to pull himself out of the turret before the nose glass blew out. Sitting in the wind by the nose wheel hatch, he questioned his ability to jump: "I got down, like I was sitting on the edge of a swimming pool, and I was testing the water, I put my foot in, and the wind, I was lucky that it didn't rip my flight boots off." With the bomber entering a shallow dive, Irving thought of his wife: "Ren would want me to try." Irving struggled to remember the last seconds, but concluded, "It was Ren's hand or God's hand that pushed me out, [but] she wasn't there." Irving did write about his experience as a POW. A portion of his story has been featured in the book *A Gathering of Eagles*. There are also many materials (interviews and writings) that the family provided me, which are the source of the quotations included in this paragraph. Irving was then imprisoned in Stalag Luft I for thirteen months.

I sat at my kitchen table, clinging to the phone and her voice, tears in my eyes. That night, these two daughters of veterans forged a bond. We had recognized something akin in each other. Sometimes the best thing for people is just to tell their story. She not only told me his story, she told me her own.

Irving's honored legacy seemed so complete that I began to worry there was nothing left for me to do for the family. However, I was able to introduce them to a community that felt strongly and adamantly about preserving their father's memory. Soon, these biographies will be available online, along with their inscription in the Memorial Book. I also supplemented their records with documents from the university and the National Archives.

I remember sitting at my computer thinking that, finally, I could tell a true war story, a life story. But Irving's "middle" was not where he was born, nor when he enlisted or where he was stationed. His middle was how he survived. It was how he loved and protected his family. How he wanted to share with them his story, and how much he shaped their lives. His story is how he affected all who have listened.

Brandy Disbennett of Roger Williams University School of Law was one of the winners of the Bar Association's 2013 Judicial Conference Scholarship Essay Contest.

BOOK REVIEW:
The War Comes Home,
Aaron Glantz
(Univ. of Calif. Press), 288 pp.

by Aaron Moshiashwili

For the last issue of this newsletter, I wrote a review of *Vets Under Siege* by Martin Schram, a book that I felt did a disservice to the important cause it trumpeted. Since then, I have been looking for a counterpoint--a book that makes the case for how veterans are disserved by the government, but which argues the facts instead of playing to emotions. I found that book in Aaron Glantz's *The War Comes Home*. These two books could be the centerpieces for a class on written advocacy; Glantz covers almost exactly the same ground as Schram, but does it in a readable, persuasive, and moving manner.

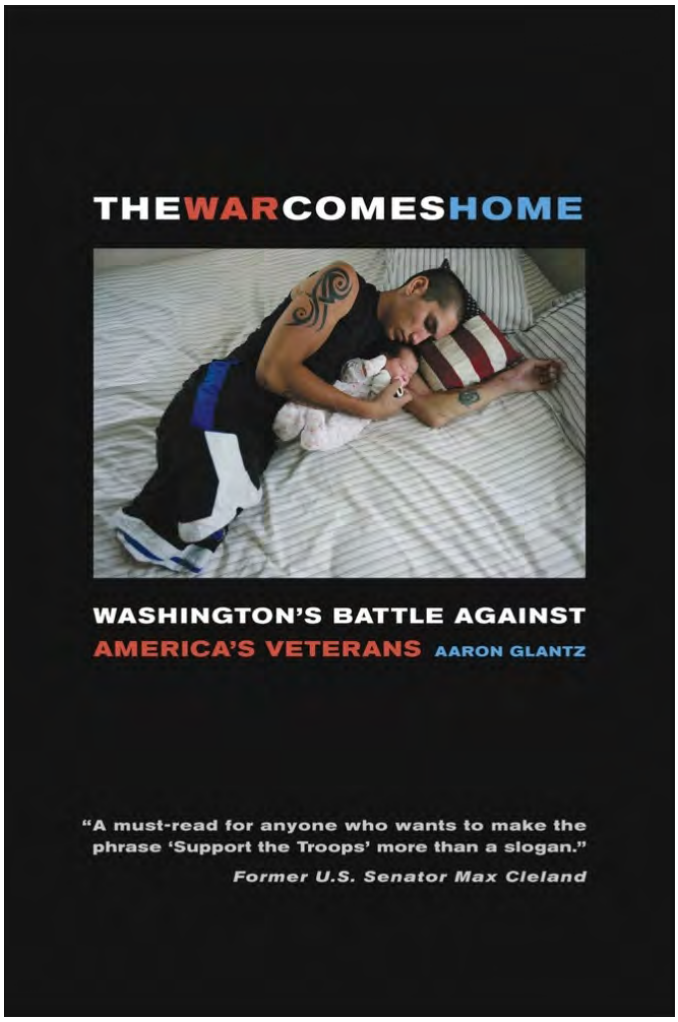
The book is bracketed by Glantz's own experiences as a war reporter--more specifically, dealing with the trauma of his own time in Iraq. He treads carefully, and respectfully, around the distance between his personal experience with PTSD and the experiences of the service people he interviews and describes, but there is no question that when he is talking about the problems PTSD can cause, he is speaking from a place of personal experience.

That grounding in the personal sets the tone for the book. Like *Vets Under Siege*, the book is full of horror stories about the treatment of service people at the hands of the military, VA, the legislature, and the executive. However, because Glantz establishes that level of authority in the reader's eyes from the beginning, there is never a need to shock the reader by describing a given veteran's maggot-ridden wound. In the end, stories of terrible wounds are what many of us EXPECT when hearing about the horrors visited on those who served on our battlefields. In many ways, the story of Sergeant Gerald Cassidy, who suffered a traumatic brain injury in Iraq, is far more horrifying. Sergeant Cassidy died in his bunk in Fort Knox, mere hours before—and only at his family's insistence--someone from the "wounded warrior transition unit" checked on him, after he had not been heard from for days. Horror stories stemming from battle are understandable, but a soldier surviving those

The War Comes Home, *continued on page 21.*

The War Comes Home, *continued from page 20.*

horrors, and then dying of pure neglect, is something many of us may have a harder time comprehending. These are the stories on which Glantz focuses.



In fact, Glantz goes so far as to give VA a chance to respond. He makes it clear from interviews he summarizes that the average VA employee is not the evil-minded bureaucrat that Martin Schram described in *Vets Under Siege*. Rather, he or she is someone who feels "anger and regret" at the stories of veterans suffering at the VA´s hands. And Glantz gives VA its due, agreeing that--when everything is working properly--VA provides care as good as or better than any HMO. He does not argue against the idea that some veterans have unrealistic expectations for what VA can accomplish, or that some veterans simply take their frustration out on a convenient target. Once again, this makes for excellent advocacy, because it makes Glantz's point even more devastating: that, for as true as those points may be, VA is not Aetna—it is not caring for people who bought health coverage through their employer, as most of us do. VA cares for people injured while serving their country, and it is the responsibility of all of us to make sure that the agency is held to a higher standard than merely "competitive with Aetna."

In one last--and crucial--difference between this book and *Vets Under Siege*, *The War Comes Home* is extensively footnoted. Although there were not any passages outrageous enough to make me want to go back to the original source for confirmation, there is an additional level of trust conferred by the knowledge that a skeptical reader could do so. In addition to footnotes, the book has fairly extensive sidebars containing information about various veterans' organizations--both for people reading the book who might want to help in some way, or for those reading the book who might need help.

There is, however, one major flaw in Glantz's writing--one which, in retrospect, will probably apply to a wide variety of writings about the Bush years. Neither Glantz nor anyone else writing at the time could possibly have foreseen the polarization that would engulf the country during the Obama years and, frankly, pointing fingers at the Bush administration seems passe. He is righteously angry at the massive missteps of the Bush war policy but, from the vantage point of 2013, it feels like half the country will disagree with anything disparaging the Bush administration on principle, and the other half already feels so negatively that there is no value to piling on more. Glantz does not spend too much time bashing the Bush administration but, every time he does, it feels like a throwback to an earlier time. Then it feels really depressing that it is possible to become so jaded in only four years.

Whatever you think of its politics, however, *The War Comes Home* is spectacular advocacy. It makes it clear that there is a problem. It makes it personal. And then, it tells you how you can help be part of the solution.

Aaron Moshiashwili is an IT policy analyst who does pro bono veterans advocacy.

CAVC Holds Subsequent Decisions Terminate Pending Claims and Failing to Search for Medical Records Does Not Constitute CUE

by Julianne Kelly-Horner

Reporting on *Beraud v. Shinseki*, __ Vet. App. __, No. 11-726 (May 17, 2013).

In May 2013, the CAVC issued a decision holding primarily (1) that a subsequent decision on the appellant's claim terminated any pending claims on the same issue, and (2) that a lack of medical records was not the product of clear and unmistakable error (CUE) warranting remand. *Beraud*, at *1-2. The Court also held that the Board provided an adequate statement of reasons or bases when the Board was not obligated to discuss whether Mr. Beraud's 1985 claim was pending. *Id*. at *6.

Leonard Beraud was struck in the head in 1975 during active service in the U.S. Navy. *Id*. at *1. In 1985, Mr. Beraud sought service connection for headaches he believed resulted from this head injury. *Id*. On November 12, 1985, the RO notified Mr. Beraud that it could not locate his medical records, and asked him to provide the addresses of any reserve units he was assigned to or to ask that his medical records be forwarded to the RO within the next 30 days. *Id*. Less than a month later, on November 29, the RO denied Mr. Beraud's claim, and Mr. Beraud did not subsequently file a Notice of Disagreement (NOD). *Id*. Shortly after the RO's decision, Mr. Beraud responded to VA's November 12 letter, notifying VA that the Naval Reserve Readiness Center in New Orleans possessed his medical records. *Id*.

In 1989, Mr. Beraud requested VA to reopen his headache claim, which the RO did, but then it denied the claim in 1990. *Id*. at *2. Mr. Beraud did not appeal this denial. *Id*. In 2004, Mr. Beraud had a VA compensation and pension examination after requesting an increased rating for a right eyebrow scar. *Id*. The examiner opined that "it was as likely as not that his headaches were related to his 1975 in-service injury." *Id*. Later that year, the RO awarded service connection for headaches, rated at 50 percent disabling. *Id*. In early 2005, Mr. Beraud filed an NOD, arguing the effective date for his claim should be the date he originally filed the claim, 1985. *Id*. He also argued that the RO's 1985 decision denying service connection for headaches was the product of CUE. *Id*.

On December 15, 2010, the Board determined that the RO's decisions in 1985 and 1990 were final. *Id*. As such, the Board denied Mr. Beraud's request for an effective date of service connection of 1985 and also found no CUE. *Id*.

Mr. Beraud appealed this decision to the CAVC. First, he argued that he was entitled to an effective date of 1985 for service connection for headaches, rather than 2004. *Id*. He argued that his 1985 letter notifying VA of the location of his medical records constituted new and material evidence, giving rise to a pending and unadjudicated claim under 38 C.F.R. § 3.156(b). *Id*. Second, he argued that the Board erred in determining there was no CUE in the RO's 1985 decision denying him service connection. *Id*. at *3. Mr. Beraud argued that the RO failed to obtain his medical and service records, so these facts were not before the adjudicator. *Id*. Lastly, Mr. Beraud argued that the Board gave an inadequate statement of reasons or bases. *Id*.

For the first issue about whether Mr. Beraud's letter constituted new evidence giving rise to a pending claim—the Court first looked to *Ingram v. Nicholson*, 21 Vet. App. 232, 240 (2007), which held that a claim remains pending if VA fails to act on the claim. *Id*. Next, the Court looked to *Williams v. Peake*, 521 F.3d 1348 (Fed. Cir. 2008), where the Federal Circuit held that "a subsequent final adjudication of a claim which is identical to a pending claim that had not been finally adjudicated terminates the pending status of the earlier claim." *Id.* at 1351. The Court noted that the cases Mr. Beraud cited, *Young* and *Muehl*, dealt with new evidence giving rise to a pending claim, rather than the pertinent issue, subsequent final decisions before the Court. *Id*. at *4. Accordingly, the Court held that, under *Williams*, the RO's 1990 decision terminated any pending claim Mr. Beraud may have had stemming from his 1985 letter to the RO. *Id*. As such, the Board did not err when it denied an earlier effective date. *Id*.

Next, the Court addressed Mr. Beraud's assertion of CUE in the RO's 1985 decision. *Id*. at *5. The Court explained that, to establish CUE in an RO decision, "a claimant must show that (1) either the facts known at the time were not before the adjudicator or that the

Beraud, *continued on page 23.*

Beraud, *continued from page 22.*

law then in effect was incorrectly applied; and (2) had the error not been made, the outcome would have been manifestly different." *Id*. (citing *Grover v. West*, 234 F.3d 682, 696-98 (Fed. Cir. 2000); *Hillyard v. Shinseki*, 24 Vet. App. 343, 349 (2011)). Mr. Beraud had argued that the RO's failure to obtain his service records constituted CUE, but the Board disagreed, finding no CUE. *Id*. The Court agreed with the Board, noting that a breach of the duty to assist does not constitute CUE, and that Mr. Beraud had not convinced the Court that the facts in the record were not before the adjudicator, as CUE requires. *Id*.

Finally, the Court found the Board provided an adequate statement of reasons or bases because the Board was not obligated to discuss whether Mr. Beraud's 1985 claim was pending, contrary to Mr. Beraud's contention. *Id*. at *6. The 1990 RO decision terminated the 1985 claim's pending status, and any terminated claim before 1990 was irrelevant to the Board's analysis. *Id*. at *6. Likewise, the Court held the Board did not err in not discussing VA's failure to obtain Mr. Beraud's medical records because these documents were not part of the record. *Id*. Accordingly, the Court affirmed the Board's December 15, 2010, decision.

Judge Bartley filed a dissent, noting that Mr. Beraud was possibly entitled to an earlier effective date for service connection for headaches. *Id*. Judge Bartley explained that the majority improperly limited 38 C.F.R. § 3.156(b), which allows the effective date to be the day of the original claim. *Id*. Mr. Beraud's November 1985 letter constituted new evidence, thereby obligating the Board to consider whether the new evidence would support an earlier effective date under § 3.156(b). *Id*.

Further, Judge Bartley disagreed with the majority's assertion that a subsequent final adjudication terminates the pending status of an earlier, identical claim. *Id*. at *7. Instead, § 3.156(b) requires "continued pendency of a claim, even where there is a subsequent final denial, if the evidence has not been *considered* by the adjudicating or appellate body." *Id*. at *7. Judge Bartley argued that, in *McGee v. Peake*, the Federal Circuit held that VA was required to search for records that had the possibility of establishing an earlier effective date. *Id*. at *8 (citing *McGee v. Peake*, 511 F.3d 1352, 1358 (Fed. Cir. 2008)). As such, the dissenting opinion indicated that the Board's statement of reasons or bases was inadequate for failing to address § 3.156(b). *Id*.

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Judge Greenberg Formally Sworn In

On May 15, 2013, the CAVC officially welcomed its newest member in a special ceremonial session at the E. Barrett Prettyman Courthouse

The ceremony was opened by Chief Judge Bruce Kasold, who welcomed the Court's newest member. Judge William S. Greenberg was presented his commission by Collin T. McMahon, Special Assistant to the President for Presidential Personnel.

Four of Judge Greenberg's closest associates regaled the audience with colorful stories from Judge Greenberg's illustrious career. Senator Robert Menendez, former law partners from McCarter & English, LLP, John L. McGoldrick and Susan A. Fenney, and the Honorable Joseph E. Irenas, Senior Judge, U.S. District Court for the District of New Jersey each shared their fond memories.

Chief Judge Bruce Kasold (R) administers the oath to Judge Greenberg (L) while his wife, Tina Greenberg, holds the Bible.

After the remarks, Judge Greenberg took the oath of office and was robed by his wife, Tina Greenberg. He then acknowledged all his gathered friends, family, and colleagues with a stream of entertaining remarks.

With Judge Greenberg's arrival, the CAVC is at its full complement of nine judges for the first time in its history.

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