

VETERANS LAW JOURNAL

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SPRING 2015

The Churn of Cases Within VA's Appeals Process

by Nicholas B. Holtz

In January 2015, the House Committee on Veterans Affairs, Subcommittee on Disability Assistance and Memorial Affairs (DAMA) requested information from the Board of Veterans' Appeals (Board) concerning the ten longest-pending cases in the VA appeals process. The response to that request strikingly documented a number of weaknesses in the current appeals process: the unending churn of an appeal as it moves forward and in reverse through the process; the necessity within the process of sometimes dozens of adjudications of a single issue, without ever reaching a final decision; and the interminable wait that some Veterans must experience during their attempt to receive benefits from the Department of Veterans Affairs (VA).

Case (year)	NOD to SOC	SOC to Form 9	Form 9 to Certification	Receipt at Board to Board Remand
1 (1987)	67	20	628	180
2 (1988)	18	43	533 ⁰	302
3 (1987)	104	35	611	231
4 (1991)	42	41	219	261
5 (1990)	20	26	526	133
6 (1991)	32	59	316	347
7 (1992)	46	13	40	669
8 (1990)	40	9	671	468
9 (1990)	38	150	333	198
10 (1992)	24	56	299	136

Table 1: Number of days-in-stage for each of the ten oldest active appeals before the Board (at the time of the Congressional inquiry); the age of each case is indicated by the year of the original NOD, in parentheses.

DAMA's inquiry sought information on the time each appeal spent in five stages of the process: (1) the receipt of the Notice of Disagreement (NOD) to the issuance of the Statement of the Case (SOC); (2) the issuance of the Statement of the Case to the receipt of the Substantive Appeal (*i.e.*, Form 9); (3) the receipt of the Substantive Appeal to the Certification of the appeal to the Board; (4) the receipt of the appeal by the Board to the issuance of a decision or remand; and (5) the amount of time the appeal remained in remand status with the Veterans Benefits Administration (VBA). In response, the Board investigated and documented the procedural histories of the ten oldest active appeals then-currently within its jurisdiction based on docket number.

To determine the "oldest" appeals, it must be understood that a VA appeal does not remain static during its lifetime. New appeals by a Veteran, and downstream issues, such as initial rating or effective date issues, join with active older appeals under the original docket number, and thus an appeal of a single issue can morph over time into one of dozens of issues. The newer appeals continue under the same docket number even if the original issues are resolved, as was the case in four of the ten oldest appeals; in the other six, at least one original issue remained active. For clarity, the Board tracked the oldest issue appealed to address DAMA's request.

While ascertaining the number of days in the first four stages was a relatively straightforward endeavor, those numbers failed to tell the whole story of the VA appeals process. It is the fifth stage – read liberally to include not just the time following a

The Churn Continued on Page 3.



COURT OF APPEALS
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Message from the President

“But the law – it changes every day.” Those were the words of a veteran who thought she had no chance at succeeding in her claim because the law was not on her side. To some people, these words might suggest frustration and uncertainty, but to this veteran they emanated hope and motivation to continue her pursuit. That is the fascinating part of working in veterans law - in a world where many people have given up hope because they feel their voices cannot be heard, veterans feel the opposite. Veterans feel that the judiciary is where their voices will be heard, and where “change” can happen. This is a ringing endorsement of confidence that veterans have in the U.S. Court of Appeals for Veterans Claims, and should make each of us who practices in and before it proud to be part of something that our veterans believe in.

All members of the bar association are continuously striving for the same ideal. Each of us, whether we work for the Court, Department of Veterans Affairs, Board of Veterans’ Appeals, non-profit organizations and those in private practice are always focused on the singular goal of ensuring America keeps its promise to her veterans. Because veterans law is always evolving due to changes in legislation, regulations, and their interpretations, our community of practice has benefited greatly from the collegial environment that the Bar Association has provided a forum for in developing law that keeps our promise to veterans, while also ensuring that America is capable of sustaining such a paradigm for future generations of warriors. I encourage each of you to make the most of these opportunities and relationships because I truly believe that they are unique to veterans law, and a comparable friendly and open exchange does not exist in any other area of litigation. I look forward to seeing you at future events and continuing our work towards our common goal!

Aniela Szymanski
 President, CAVC Bar Association



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Board remand, but all of the time after the initial Board action, including subsequent consideration by the Court of Appeals for Veterans Claims (Court) – that demonstrates the churn of appeals within the system, and captures the “two steps forward, one-step backward” reality that Veterans face.

Case (issues)	Number of Adjudications (VBA; Board; Court)	Days with VBA	Days with the Board	Days with the Court
1 (6)	16; 10; 1	6593	1586	894
2 (31)	38; 7; 1	6066	621	n/a
3 (16)	38; 10; 1	7462	2131	335
4 (6)	9; 8; 1	6373	1565	341
5 (26)	50; 9; 3	5734	698	993
6 (6)	16; 11; 4	3150	2665	2746
7 (8)	17; 5; 1	5594	1972	229
8 (7)	36; 10; 1	5921	2537	326
9 (3)	10; 12; 5	3156	2916	2824
10 (9)	28; 13; 4	1228	502	467

Table 2: Number of adjudications by VBA, the Board, and the Court during the pendency of the docketed appeal, and the number of days that the original issue on appeal spent under each jurisdiction; the number of issues ultimately addressed on appeal is indicated in parentheses.

The ten oldest appeals have remained pending (as of January 1, 2015) from between 8235 and 10,202 days since the original NODs. Those are numbers that VA cannot run from, but must address. There is no question that every Veteran’s case is different, and that some of the churn buried within the VA appeals process is truly Veteran-beneficial: additional examinations without which the claim could not be adjudicated; the development of the evidence that helps a Veteran meet his or her burden; and the fact that VA determinations are not final without providing the Veteran the opportunity to appeal to the Court for extra-agency adjudication, for example. Yet it is common knowledge that the combination of some of the procedural safeguards, such as the open record (continuously supplemented by the ongoing duty to assist) and the right to one review on appeal for every piece of

evidence, results in an unending process. When appeals stretch on for years, Veterans often begin to feel punished by the process that ostensibly intends to aid them, or that VA’s goal is simply to outlast them. Their desire for a final determination, as well as VA’s intention to fairly and finally adjudicate appeals in a timely fashion, become frustrated. It is undebatable that such a result was unintended.

The report the Board submitted to Congress concerning the ten oldest pending appeals can be viewed simply as an indictment of the failures of the system. Or it can be an instigator for change in the process, and an opportunity to determine a way forward that enables VA to more fairly and more efficiently adjudicate appeals, while providing greater satisfaction to Veterans.

Nicholas Holtz is an Associate Counsel at the Board of Veterans’ Appeals, currently serving a special assignment within the Appellate Group at the Board, in the position of Special Counsel to the Principal Deputy Vice Chairman. The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of the Board of Veterans’ Appeals, VA, or any other agency or department of the United States government.



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Law Students Participate in Veterans Law-Technology Course

By David E. Boelzner

The Law School at the University of Richmond is currently offering a course that combines an introduction to veterans law with learning to use application-development software to create analytical tools useful in assessing veterans' issues. It may be the first law school course to join veterans law with use of computerized legal expert systems. First offered in the Spring 2015, the course will again be offered in the Fall semester.

Enrolment is capped at a small number of students due to the need for one-on-one work on project development. The course is team taught, with David Boelzner teaching the substantive veterans law portion and Paul Birch of the Law School's Library staff leading the technology exploration. The primary resource for the substantive law portion of the course is James Ridgway's casebook (soon to be released). Through an arrangement with the vendor, students are learning to use Neota Logic software to create a computer application that will perform analysis of legal issues based on responses to interview questions. The aim of such an application is to enable veteran claimants to obtain certain legal advice without having to hire a lawyer, and to be able to assemble better-developed claims even if they do eventually retain counsel.

Georgetown University Law School has pioneered use of Neota Logic in a law school context, offering a four-hour course on using the software to develop applications based on the needs of various clients, and has developed at least one veteran-related application. Prof. Tanina Rostain of Georgetown, along with Kevin Mulcahy of Neota Logic, provided advice to the U of R professors as they developed a course combining the substance of veterans law, particularly the veterans benefits claim system, with learning how to create applications that would quickly take a user, whether a potential claimant or someone assisting claimants, through analyses yielding answers on such questions as eligibility,

readiness to pursue a claim based on current evidence, and recommended steps for further development.

David E. Boelzner, of Goodman, Allen & Filetti, represents veterans.

Syracuse University College of Law Opens Veterans Legal Clinic

by Yelena Duterte

As fate would have it, two Syracuse law students, Tom Caruso and Josh Keefe, met in Officer Candidate School (OCS) for the Marine Corps in the summer before law school. After Tom was unable to complete OCS due to a back injury, he was determined to find another way to serve his country. Unfortunately, Syracuse University's College of Law did not have a program to assist veterans. Tom connected with Josh to brainstorm ways that law students could serve the veteran community.



From left to right, 1Lt. Josh Keefe, Lt. Tom Caruso, Yelena Duterte, and Col. Joseph Lamendola (Ret.)

With the Syracuse VA Medical Center right across the street from the law school, Tom and Josh recognized the need in the local veteran community for legal assistance. To address this need, Tom and

Syracuse Veterans Clinic continued on page 6.

Syracuse Legal Clinic *continued from page 5.*

Josh formed a student organization, Veterans' Issues, Support Initiative and Outreach Network, also known as VISION. VISION began as a student organization focused on recruiting students to assist at the local bar association's monthly legal clinic, researching military legal issues, and creating a comprehensive guide to veterans' services in Central New York. VISION quickly became one of the largest student organizations at the College of Law.

As semesters progressed, VISION wanted to do more. The organization created Valor Day, a semiannual event to connect veterans with law students and practicing attorneys to discuss legal issues. Valor Day was a success, and has expanded over the years to assist veterans with additional professional services, such as tax return preparations, resume reviews, and credit counseling.

The success of Valor Day demonstrated to the College of Law and the local community the critical need for legal assistance in the local veteran population. After securing funding from public and private donors, the College of Law committed to establishing a permanent Veterans Legal Clinic (VLC).

VLC opened its doors this past January under the leadership of Director Yelena Duterte and External Director Joseph Lamendola. VLC focuses on initial claims and appeals for service connection, non-service connected pension, dependent benefits and overpayment cases before the Department of Veterans Affairs. VLC also assists veterans with discharge upgrades. The clinic is staffed by eight students this semester, with ten staffing the clinic in the fall. The students are engaged in an in depth seminar component with the clinic to understand the intricacies of veterans law. Within the first few months, the clinic has received over 200 requests for legal assistance.

The other legal clinics at the College of Law have also dedicated priority slots to veterans in their practice areas, which include family law, elder law, consumer rights, disability rights, bankruptcy,

community development, tax and criminal defense. As the need is vast, VLC is in the process of creating a pro bono network of attorneys in the central New York area called Homefront Heroes. Homefront Heroes will be dedicated to taking cases in areas that are outside of the clinic's scope, such as immigration and housing issues.

Since graduating this past May, Tom is a commissioned Lieutenant in the United States Navy and Josh is a commissioned First Lieutenant in the United States Marine Corps, both as officers in the JAG Corps.

Yelena Duterte is the Director of the Veterans Legal Clinic at Syracuse University College of Law. Duterte supervises students working on cases before the Department of Veterans Affairs and other federal agencies. Duterte is the former Assistant Director at the Veterans Legal Support Center & Clinic at the John Marshall Law School in Chicago. Duterte regularly speaks on veterans law topics and provides training to other law schools on creating successful veterans clinics.

Court Clarifies Roles of Board and Director as to Extraschedular TDIU

by Matthew Tenner

Reporting on *Wages v. McDonald*, No. 13-2694, ___ Vet. App. ___ (January 23, 2015).

The way in which VA rates disabilities that are related to a Veteran's military service is typically based on the application of the Schedule for Rating Disabilities as found in Title 38, Part 4 of the Code of Federal Regulations ("Schedule"). The Schedule is essentially a "guide" whereby percentage ratings are assigned based on the "average impairment in earning capacity" and is intended to adequately compensate for "loss of working time." As a matter of policy, the Schedule recognizes that a Veteran

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Wages continued from page 6.

may be unable to secure or follow a substantially gainful employment as a result of service-connected disabilities. In these situations, if certain disability level thresholds are present, VA is authorized to award a total disability rating based upon individual unemployability (“TDIU”). For example:

Veteran alleges that he can no longer work as a result of service-connected disabilities. He has a 40 percent disability rating for a low back disability, a 40 percent rating for a lung condition, and a 10 percent rating for a hearing loss disability.

Based on these facts, he may be entitled to a total rating if the evidence shows that he is incapable of performing the physical and mental acts required by employment due to the service-connected disability or disabilities. But even if regulatory disability level thresholds are *not* met, if a Veteran is unemployable by reason of service-connected disabilities, VA has a procedure under 38 C.F.R. § 4.16(b) whereby it can submit a case for review to its Director of Compensation Service (“Director”) for consideration of an “extraschedular” TDIU determination.

In *Wages v. McDonald*, the United States Court of Appeals for Veterans Claims (“Court”) considered a case in which the Board of Veterans Appeals (“Board”) relied on the opinion of the Director in finding that the Veteran did not meet the criteria for an award of an extraschedular TDIU. Specifically, the Board concluded that the Veteran was capable of sedentary employment, relying on the various medical opinions and, significantly, the “opinion from the Director” as the most probative evidence on the claim.

Before the Court, Mr. Wages argued that the Board erred in its finding that the Veteran was capable of sedentary employment. In addition, he alleged that the Board erred by relying on the Director’s opinion as “evidence” against the claim. The Secretary, while conceding that the findings by its Director were not evidence, nevertheless argued that the Director’s

ultimate decision to award or deny extraschedular TDIU was non-reviewable by the Board.

The Court agreed that the Director’s opinion was not evidence but held that the Board erred in relying on it. In addition, the Court addressed the scope of 4.16(b), and ruled that the Board was required to obtain the Director’s decision before awarding or denying extraschedular TDIU. The Court reasoned that the Director was acting in the place of the Regional Office personnel and that the Director could provide “a degree of uniformity over such decisions that would be difficult to maintain if each RO were permitted to award extraschedular TDIU.” Moreover, the Court rejected the Secretary’s contention that the Director’s decision was non-reviewable by the Board. Rather, citing to the general authority under 38 U.S.C. §511(a), the Court found that the Board was the “final arbiter” on the question. As final arbiter the Board was directed to review the evidence of record *de novo* and thus was precluded as a matter of law from assigning weight to the Director’s determination.

Chief Judge Kasold, while concurring with the decision, stated his belief that the Board should have the authority to award extraschedular TDIU in the first instance.

The *Wages* case provides much-needed clarification to VA regarding the Director’s duty to initially assess entitlement to extraschedular TDIU, as well as the Board’s role as VA’s ultimate decision-maker on the issue. Private practitioners should ensure that the record is fully developed, so VA has all the facts before it when it makes a decision on a claim, and, of course, should advocate for the Board to make a *de novo* determination on the claim rather than place evidentiary weight on the initial decision by the Director.

Matthew Tenner is a Veterans Law Judge at the Board of Veterans’ Appeals.

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for Veterans Claims

May 28th and 29th, 2015
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Participants are presented the opportunity for dialogue and discussion between the Court and members of its bar. Primary purpose of the Bar and Bench Conference is for the parties to discuss ideas to improve practice and efficiency before the CAVC. The Conference format is designed as informative presentations leading to small group activity as well as traditional panel presentation with interactive audience discussion. The conference discussions will be facilitated by Dean Michael P. Allen, Stetson University College of Law with the goal of finding consensus of the parties on specific topics to make practical suggestions to the Board of Judges for improving court practice.

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Effective Date of Hearing Loss Rating Clarified

by Amanda Gibson

Reporting on *Swain v. McDonald*, No. 14-0947, ___ Vet. App. ___ (January 8, 2015)

Mr. Swain served in the U.S. Army from March 1953 to March 1955. In May 1956, he was service-connected for bilateral hearing loss and assigned a noncompensable (0 percent) rating effective from the day after he was discharged from active duty. He did not seek an increase for this disability until October 2007, which was denied by the regional office in March 2008.

When appealing the denial of this claim, Mr. Swain submitted the results of two private audiometric examinations, dated November 10, 2009, and December 9, 2010. Each examination diagnosed hearing loss, but neither identified the list of words used during the speech discrimination portion of the test. The Board remanded Mr. Swain's claim for a VA examination, and asked that the graphical results of the private audiograms be interpreted. Based on the results of the June 2013 VA examination, the regional office (RO) assigned a 10 percent rating that was effective from the date of the examination. Mr. Swain appealed for an earlier effective date for that rating.

The Board again remanded Mr. Swain's claim, to attempt to ascertain which word list was used in the private examinations, and to ask a VA examiner to provide comment relating the results of the earlier examinations to the findings from the June 2013 examination. Such development revealed that the Maryland CNC test was not used during the November 2009 private examination. No response was received regarding the December 2010 private examination, but the June 2013 VA examiner opined that the audiometric results from these earlier examinations were consistent with the June 2013 results. Despite this positive opinion, the Board denied an earlier effective date for his 10 percent rating because the earlier private examinations did

not include the Maryland CNC test, which the Board found was required by the provisions of 38 C.F.R. § 4.85 (2014).

On appeal to the Court, Mr. Swain argued that section 4.85, entitled "Evaluation of hearing impairment," does require use of the Maryland CNC for determining the appropriate rating for hearing loss, but *does not* require it to assign an effective date of a rating. Rather, he argued the VA examiner's opinion on the consistency of the private tests with the VA examination results was sufficient to establish an effective date from November 2009.

The Secretary argued that the Maryland CNC test was required for determining the effective date. He further argued that the holding in *Chotta v. Peake*, 22 Vet. App. 80 (2008) did not apply because hearing loss disability is based on the results of specific tests that cannot be conducted retroactively. Rather, the Secretary asserted that *Chotta* is restricted to claims for disabilities that have readily observable symptoms that can be diagnosed retroactively.

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Veterans Benefits Claims: A comprehensive look at the steps from filing at the Regional Office through Federal Circuit review

Presented by The Veterans Appeals committee of the Federal Circuit Bar Association and the Court of Appeals for Veterans Claims Bar Association

This program explored the basics of practice before VA regional offices, the Board of Veterans' Appeals, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Federal Circuit. The panelists provided insight into how the VA and court appeals processes work, challenges facing adjudicators and practitioners, and the role pro bono advocacy plays in the appeals process.

Swain continued on page 10.

Swain continued from page 9.

In ruling for Mr. Swain, the Court found that the plain language of 38 C.F.R. § 4.85 does not address the effective date of a rating. Similarly, the case of *Lendenmann v. Principi*, 3 Vet. App. 345, 349 (1992), which provides that ratings are established via a “mechanical application” of the rating schedule, does not contain any language supporting the notion that the effective date of an increased rating is controlled by section 4.85. Rather, the law pertaining to effective dates is contained in 38 U.S.C. 5110 (West 2014) and 38 C.F.R. § 3.400 (2014). The Court pointed out that these provisions generally tie an effective date to the earliest date a disability or an increase in disability is ascertainable or to the date the claim was received. The Court also cited to cases cautioning against the mechanical assignment of an effective date based on a date of diagnosis, instead imploring the consideration of all facts to ascertain the time period of initial manifestation. See *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011); *Hazan v. Gober*, 10 Vet. App. 511 (1997).

It therefore held that the effective date for an increased rating, including initial or staged ratings, is predicated on when the increase in the level of hearing loss can be ascertained. The Board’s denial of an earlier effective date for the award of an increased rating was reversed, and the claim was remanded to the Board to assign an effective date of November 10, 2009, for his 10 percent rating.

Amanda Gibson is an Associate Counsel at the Board of Veterans’ Appeals

Do you have a viewpoint to share?

Please contact Megan Kral at Megan.Kral@VA.gov for more information.

What is the Scope of the CAVC’s Equitable Powers?

By Nicholas L. Phinney, Esq.

Reporting on *Gazaille v. McDonald*, 27 Vet.App. 205 (2014).

The Court of Appeals for Veterans Claims has stated time and again that it does not have equitable relief powers. *Brown v. Principi*, 15 Vet.App. 421, 428 (2002); *Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997). The Court has exercised equitable powers, however, in enlarging the time to appeal a Board of Veterans’ Appeals decision where it felt it was appropriate. See *Ausmer v. Shinseki*, 26 Vet.App. 392, 402 (2013); see also *McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005), overruled in part by *Checo v. Shinseki*, 748 F.3d 1373, 1379-80 (Fed. Cir. 2014). Recently, in *Gazaille v. McDonald*, 27 Vet.App. 205 (2014), the Court wrestled with the question of whether its equitable power allowed it to lengthen the period a deceased veteran and surviving spouse are considered to have been married for purposes of obtaining Dependency and Indemnity Compensation.

For marriages which occurred following a deceased veteran’s discharge from active service, an award of DIC benefits requires that the surviving spouse be married to the decedent for at least one year prior to the decedent’s death. 38 U.S.C. § 1304(2); 38 C.F.R. § 3.54(c)(2) (2014). In *Gazaille*, the widow of a deceased veteran who passed away 58 days before their first wedding anniversary sought DIC benefits. 27 Vet.App. at 207. The veteran’s death certificate indicated he died from respiratory distress due to lung cancer. *Id.* Although nearly two months short of the one-year minimum, she argued that if VA medical staff had properly diagnosed her husband’s cancer in time, he would have been alive for their first wedding anniversary. *Id.* The Board held that the lack of a legal marriage for an entire year prior to death precluded an award of DIC benefits and that an equitable finding to the contrary was precluded by law. *Id.*

Gazaille continued on page 11.

Gazaille continued from page 10.

On appeal to the CAVC, the surviving widow reiterated her argument that the failure of VA medical staff to promptly diagnose her husband's lung cancer delayed treatment for the disease and, thus, hastened his death. *Id.* at 208. She also argued that 38 U.S.C. § 1304 should be read in conjunction with 38 U.S.C. § 1151, which calls for DIC benefits where VA's negligence caused the veteran's death, and that this meant that there was an exception to the one-year rule in cases where the veteran died as a result of VA's negligence. *Gazaille*, 27 Vet.App. at 208.

Judge Hagel authored the Court's opinion. *Id.* at 206. He determined that the plain language of both statutes contained no exceptions to the one-year requirement. *Id.* at 209-10 (citing 38 U.S.C. §§ 1151, 1304). He further noted that the Supreme Court had never applied the doctrine of equitable estoppel against the government but conceded that it had "perhaps, left the door to that possibility slightly ajar." *Gazaille*, 27 Vet.App. at 211. But he found the doctrine inapplicable regardless because there was nothing to suggest that either Mr. or Mrs. Gazaille relied on any misrepresentation of law by the government to their detriment. *Id.* He affirmed the Board's decision. *Id.* at 212.

In a concurring opinion, Judge Greenberg noted his agreement with Judge Hagel that the plain language of 38 U.S.C. § 1304 did not permit an exception to the one-year requirement. *Gazaille*, 27 Vet.App. at 213 (Greenberg, J., concurring). But he expressed the view that the CAVC had the same inherent constitutional power as an Article III Court to administer equitable remedies. *Id.* at 213-14. Yet he found that Mrs. Gazaille did not show that she was entitled to an equitable remedy, as she failed to provide evidence that her husband's death was due to VA's negligence or that the veteran would have lived to the date of the one-year anniversary if not for VA's negligence. *Id.* at 215.

Chief Judge Kasold issued a dissenting opinion in the case. *Id.* at 215 (Kasold, C.J., dissenting). He agreed with Judge Greenberg that the Court had the

power to order equitable relief. *Id.* He expressed the view that the death of a veteran as a result of VA's medical malpractice required a finding that VA was equitably estopped from asserting that a DIC award is not appropriate since the veteran's marriage lasted less than a year. *Id.* at 217. He stated that if it were up to him, he would remand the case back to the Board for it to provide development on the issue of whether the veteran died because of VA's negligence. *Id.* at 218.

Contrary to the Court's past decisions, when read together, the three opinions rendered in *Gazaille* tend to indicate that the Court does have equitable powers which extend beyond the matter of whether tolling of the appeal deadline is appropriate. Judge Hagel's opinion indicates some reluctance to apply the doctrine of equitable estoppel to the government. *Id.* at 211. Like the Supreme Court, however, he did not completely shut the door on this possibility, but instead found that the lack of detrimental reliance precluded its application to Mrs. Gazaille's claim. *Id.* Conversely, both Chief Judge Kasold and Judge Greenberg believe that the Court does have the power to grant equitable relief on the ultimate question of whether benefits are warranted. But, unlike Chief Judge Kasold, Judge Greenberg was not persuaded that the duty to assist required the Board to develop evidence to aid in determining whether equitable estoppel was necessary. *Id.* at 215 (Greenberg, J., concurring). However, Judge Greenberg's opinion does not appear to foreclose the potential for this type of development. *Id.* It is not clear how Judge Hagel would feel about this type of evidentiary development if the government could be equitably estopped under different circumstances.

CONTRIBUTORS WANTED

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 Megan Kral at: Megan.Kral@va.gov for more information.

Gazaille continued on page 12.

Gazaille continued from page 11.

If the Court were to apply the plurality rule, the holding of *Gazaille* would be that the CAVC does have the power to grant equitable relief but that it was not appropriate here. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single opinion explaining the Court's rationale gains the support of a majority of the Court, the holding of the case is that of the judges who concurred in the judgments on the narrowest grounds). However, since neither Judge Hagel nor Judge Greenberg were required to reach the question of whether equitable estoppel could ever be applied to the government, one could also argue that their opinions on this matter are simply dicta. As Chief Judge Kasold stated: "it is likely that the issue of equitable relief will return to the Court." *Gazaille*, 27 Vet.App. at 215 (Kasold, C.J., dissenting).

Nicholas Phinney is an attorney at Chisholm, Chisholm, and Kilpatrick, LTD.

A Message from the VETERANS LAW REVIEW

Volume 7 will be published in early Spring 2015. Submissions for Volume 8 will be accepted beginning January 1st through May 1st. The VLR seeks submissions from attorneys, veterans' service organizations, veterans, and other experts with content focusing on veteran specific issues. Authors will be notified of selection in mid-May. Submissions should conform to the current edition of the *Blue Book: A Uniform System of Citation*. Authors are invited to discuss potential submissions with the current VLR Managing Editor by email at BVAVeteransLawReviewEditor@va.gov.

Upcoming Program:

Practices and Procedures of the Board of Veterans' Appeal – A Panel Discussion

April 15, 2015 @ 3:00 p.m.

Offices of the Federal Circuit Bar Association located at 1620 I Street, NW, Suite 801, Washington, DC 20006.

This program will examine the practices and procedures at the Board of Veterans' Appeals by fostering a discussion among panelists with different perspectives of the Board and its practices and procedures. The objective is to improve the judicial process at the Court of Appeals for Veterans Claims by providing practitioners a better understanding of the Board and how it functions, and by discussing ways in which the Board can produce decisions that enable more effective judicial review.

Panelists

- * John Crowley, Veterans Law Judge, Board of Veterans' Appeals
- * Daniel Krasnegor, Shareholder, Goodman, Allen & Filetti
- * Diane Rauber, Associate General Counsel for Appeals, Paralyzed Veterans of America
- * Selket Nicole Cottle, Deputy Assistant General Counsel, Department of Veterans Affairs, Office of the General Counsel

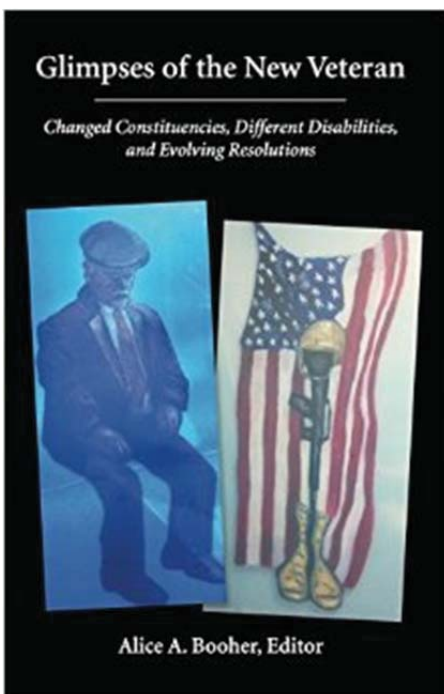
Moderator

- * Mark Vichich, Attorney, Department of Veterans Affairs, Office of the General Counsel

Book Review:
Glimpses of the New Veteran,
Alice A. Booher, Ed.
(Carolina Academic Press, 2015),
257 pp.

by David E. Boelzner

Alice A. Booher, long-time Counsel to the Board of Veterans' Appeals (42 years), advocate, and writer on veterans' issues, has compiled a formidable array of essays in this compendium, covering issues ranging from political/cultural shifts, such as accommodation of same-sex unions, to the advent of new disabilities such as Gulf War Syndrome and prosthetics, to various programs aimed at the myriad challenges faced by veterans. One has the impression that the authors were mostly enlisted from the editor's circle of friends and acquaintances but, given Booher's long history in the field, that circle is impressive.



As the editor explains in her Introduction, the themes that unify the widely varying subjects are that (1) the veteran constituency has changed over time, (2) the disabilities faced by veterans have also

changed in ways that significantly affect efforts to deal with them, and (3) these changes present both difficulties and opportunities to the system.

Articles range from a few pages to more than 25, from a brief report on a specific program such as the *pro bono* efforts of a particular law firm, to a thoughtful analysis of the current VA claims system and how needed change should be approached. The editor helpfully updates the story or provides cross references at the end of some of the articles. The predominant message is that much effort is being expended across a wide variety of programs, and there is distinctly more stress laid on the noble aims and successes of various efforts than on failings in the system, but that is perhaps to be expected from authors who are writing about programs they are involved with. And who wants to read a lot of grousing, anyway? A review can merely sample from among the seventeen articles contributed by 40 authors:

It can confidently be asserted that this compendium provides considerable insight into the scope of challenges facing the veteran community. For example, Judie Armington (formerly of FEMA, EPA) provides a helpful report on how the VA has sought to navigate the changing and varying approaches to same-sex unions and other LGBT issues as reflected in the enactment and subsequent abolition of Don't-Ask- Don't-Tell, and the federal Defense of Marriage Act. Anthony Mainelli of the Board of Veterans' Appeals writes about the challenge of homelessness, noting success and continued difficulties in this area. Lee Becker (VA) and Lawrence Miller (USMC) describe the challenges and efforts in addressing wounded warrior care for reservists. (This otherwise informative piece suffers from overuse of the Managementese term "leverage.")

The book is also a fine resource for those who seek to assist veterans in various ways and contexts, as it discloses efforts and programs that those providing assistance may be unaware of. Thus Roy Spicer of Disabled American Veterans reviews his organization's activities and those of certain other

Glimpses continued on page 14.

Glimpses continued from page 13.

VSOs as illustrative of the range of services provided by these groups. Carolyn Haug explains the function of the U.S. Armed Forces Retirement Home in Washington where she is Activities and Volunteer Coordinator. Rick Williams, who also drew the art gracing the cover of the book, writes about veterans treatment courts, primarily the first one in Buffalo, NY. Booher, with David Coker and James Weiskopf of the Fisher House Foundation, write about the Fisher family and the many aspects of its charitable efforts on behalf of veterans, a narrative that provides both a fascinating human philanthropy story as well as some celebrity names – the Fisher programs are supported by people as diverse as President and Mrs. Obama, Garry Trudeau, and Bill O'Reilly.

For this reviewer, the most engaging and insightful article is James Ridgway's (of the BVA) review of the current disability claims system, which comprises not only an analysis of deficiencies but a well-conceived proposed framework for undertaking reform. For the constituency of the Bar Association, this piece alone is worth the price of the book, recognizing as it does the formidable obstacles to reform but also making a serious and realistic argument for that reform, explaining how and why the system is flawed and how and why it can and should be changed.

Alice Booher's long labor of love, as she terms the book, supplies something of interest to anyone involved with veterans.

David E. Boelzner, of Goodman, Allen & Filetti, represents veterans.

CONTRIBUTION IDEAS?

Please contact Megan Kral at Megan.Kral@VA.gov for more information.

**Book Review:
Redeployment,
Phil Klay**

The Penguin Press (2014), 291 p.p.

by Amy F. Odom

Redeployment is a collection of short stories that has been hailed by the *Washington Post* as "one of the most compelling depictions to date of the Iraq war." Written by a former U.S. Marine captain, the stories include subjects ranging from a chaplain grappling with questions of morality and religion in the context of war ("Prayer in the Furnace") to a civilian Department of State employee's struggle to carry out his mission to provide worthwhile services to the Iraqi people against a backdrop of Iraqi corruption and American bureaucracy ("Money as a Weapons System"). In 2014, *Redeployment* won the National Book Award, and Klay himself has been honored as a National Book Foundation 5 Under 35.

As can be expected given its subject, *Redeployment* is a grim read, punctuated from time to time with bits of humor. As a civilian reader, I was most affected by three aspects of Klay's writing: (1) his vivid depictions of the terror experienced by some of his characters; (2) his commentary on the civilian world's treatment of Iraq veterans; and (3) his observations on the effect of technology on this generation's veterans.

Perhaps the most impressive feat of this book is Klay's ability to portray the psychological toll that the war takes on his characters in such a way that the average civilian reader comes as close as possible to understanding that toll. Klay opens the collection with "Redeployment," a jarring introduction to the recurring themes of post-deployment adjustment and reintegration to the civilian world. In

Redeployment continued on page 15.

Redeployment *continued from page 14.*

“Redeployment,” a Marine returns to Camp Lejeune after an especially difficult deployment during which he and his platoon shot and killed corpse-eating dogs. During a routine shopping trip with his wife,

the Marine suffers a panic attack, Klay’s description of which brings the civilian reader as close as possible to actually understanding the psychology of panic:

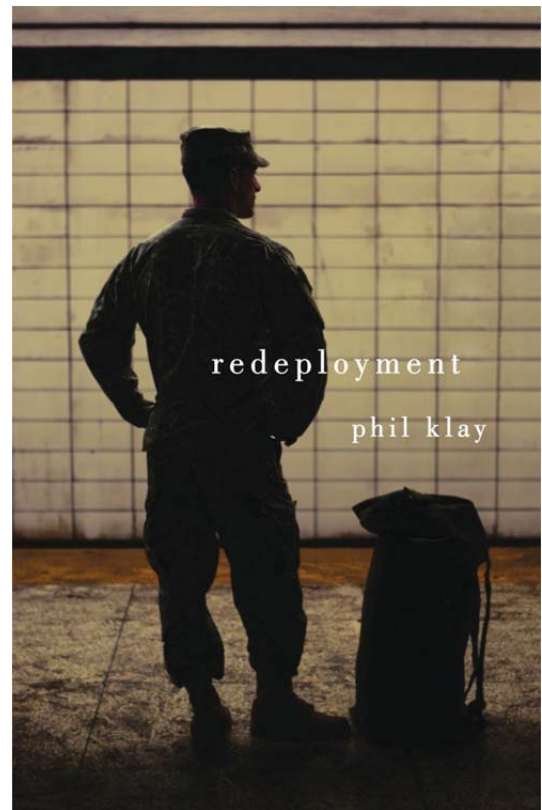
So here’s an experience. Your wife takes you shopping in Wilmington. Last time you walked down a city street, your Marine on point went down the side of the road, checking ahead and scanning the roofs across from him. The Marine behind him checks the windows on the top levels of the buildings, the Marine behind him gets the windows a little lower, and so on down until your guys have the street level covered, and the Marine in back has the rear. In a city there’s a million places they can kill you from. It freaks you out at first. But you go through like you were trained, and it works.

In Wilmington, you don’t have a squad, you don’t have a battle buddy, you don’t even have a weapon. You startle ten times checking for it and it’s not there. You’re safe, so your alertness should be white, but it’s not.

In “After Action Report,” a story about a young Marine’s struggle to come to terms with having killed a young Iraqi kid who was holding an AK-47, Klay provides another vivid description of the psychological toll of war:

Somebody said combat is 99 percent sheer boredom and 1 percent pure terror. They weren’t an MP in Iraq. On the roads I was scared all the time. Maybe not pure terror. That’s for when the IED actually goes off. But a kind of low-grade terror that mixes with the boredom. So it’s 50 percent boredom and 49 percent normal terror, which is a general feeling that you might die at any second and that everybody in this country wants to kill you. Then, of course,

there’s the 1 percent pure terror, when your heart rate skyrockets and your vision closes in and your hands are white and your body is humming. You can’t think. You’re just an animal, doing what you’ve been trained to do. And then you go back to normal terror, and you go back to being a human, and you go back to thinking.



Another theme of Klay’s stories that I found unsettling at times is the civilian world’s reaction to the men and women (in Klay’s book, almost exclusively men) returning from war. In “War Stories,” three veterans (including the only female veteran to make an appearance in the book) and one civilian meet up in a bar in Brooklyn. The purpose of the meeting is for Jenks, who was so badly burned in an IED explosion that it is hard to tell when he’s smiling, to tell his story to Sarah, a civilian who is working on a play in collaboration with Iraq Veterans Against the War. During the exchange, Sarah announces, “We’ve got some PTSD vets,”

Redeployment *continued on page 16.*

Redeployment continued from page 15.

presumably referring to her writing group. The narrator comments that the statement “[m]ake[s] it sound like she’s keeping them in jars somewhere.” Sarah then presses Jenks for the gory details of the explosion and his injuries while he struggles to read from a pre-written account of his physical and emotional recovery. Ultimately, the struggle proves too much, and he passes the statement to one of the other veterans, who reads aloud:

Whether I’m a poor, disfigured vet who got exactly what he volunteered for . . . or the luckiest man on earth, surrounded by love and care at what is unquestionably the worst period of my life, is really a matter of perspective. There’s no upside to bitterness, so why be bitter? Perhaps I’ve sacrificed more for my country than most, but I’ve sacrificed far, far less than some. I have good friends. I have all my limbs. I have my brain and soul and hope for the future. What sort of fool would I have to be, to not accept these gifts with the joy they deserve?

To which Sarah responds, “Okay great. . . . So you get back, your family is there. You can’t talk. You’re happy to be alive. But you’ve got fifty-four surgeries ahead of you, right? Can you take me through those?”

Upon reading this story, I found myself asking, is this a true reflection of the American civilian population? When we talk about “the troops” and honoring our veterans, are we really more interested in the gory details of it all than in the individual experience? It’s an uncomfortable question to ask, and one that I hadn’t thought to ask prior to reading *Redeployment*. It’s also one that I will likely try to work out for a long time to come, thanks to Klay’s artful, cutting commentary.



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FOR VETERANS CLAIMS
BAR ASSOCIATION

B EN FRANKLIN STATION · P.O. Box 7992
WASHINGTON, D.C. 20044-7992

Another question that I hadn’t thought to ask but that Klay’s stories bring to the forefront is, what is the effect of today’s technology on today’s veterans? Modern advances in battlefield medicine have been widely discussed, but Klay touches on the new idea that today’s social media might present a unique conundrum for today’s veterans. In “Unless It’s a Sucking Chest Wound,” a veteran returns from a deployment in Afghanistan and visits a friend (and fellow former Marine) studying law at New York University. After a night of drinking, the two return to the law student’s apartment and watch a video of an actual firefight filmed from a camera mounted on a soldier’s helmet and made available on the internet. The narrator compares the video to the popular video game *Call of Duty*. Klay’s point is not subtle—for this generation’s veterans, an entirely new phenomenon that is unique to them is that the battlefield will always be available via social media, and in some ways, impossible to escape.

If I were to describe *Redeployment* in two words, they would be “dark” and “thought-provoking.” It was an easy read in the sense that Klay’s prose is entertaining and for the most part easy to digest, but it was a difficult read in that parts of it made me deeply uncomfortable. But then again, perhaps this was Klay’s goal as an Iraq veteran himself. While the civilian population remained relatively unaffected and enjoyed all of the comforts of home during the Iraq war years, Klay and his characters suffered the discomforts of war, and perhaps *Redeployment* is Klay’s method of sharing this discomfort with us.

Amy F. Odom is the Director of Litigation with National Veterans Legal Services Program