VETERANS LAW JOURNAL

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

SPRING 2016

In Memoriam: Judge Jonathan R. Steinberg

by Judge Margaret Bartley and
Diane J. O'Brien-Holcomb

Jonathan R. Steinberg, retired judge of the U.S. Court of Appeals for Veterans Claims, passed away in December 2015. From August 1990 until August 2005, Judge Steinberg was fully engaged in the mission of the Court, to fairly and fully consider each case assigned to him. His enthusiasm for the law remains an inspiration to those who worked closely with him and lives on in associates and former clerks who continue to work in veterans law and in public service. Aside from his impact on those he worked with, his most significant legacy is the scrupulously researched and meticulously drafted opinions that have shaped, and continue to shape, veterans law.

Prior to his appointment to the Court, Judge Steinberg performed considerable legislative work in the veterans law arena. He served as Chief Counsel and Staff Director to the U.S. Senate Committee on Veterans' Affairs from 1977 to 1981 and 1987 to 1990, and as Minority Chief Counsel and Staff Director to the Committee from 1981 to 1987. In these positions he was able to assist in the establishment of the Readjustment Counseling Program for veterans, more commonly known as the Vet Center Program, the Montgomery GI Bill, and the Radiation-Exposed Veterans Compensation Act of 1988. He also worked on the 1988 Veterans' Judicial Review Act, which established the Court.

Because of his background working with the Senate Committee on Veterans' Affairs, he was able to educate clerks in all aspects of the law that impacted

In Memoriam: Judge Steinberg, *Continued on Page 2*

IN THIS ISSUE

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

In Memoriam: Judge Steinberg, *Continued from cover Page.*

cases, and he provided clerks with his thoughts and comments on new or amended regulations, sometimes regardless of whether they were currently at issue in a Court case. He wrote and rewrote opinions and memorandum decisions and chose language with utmost care. For discussing cases and altering analysis as appropriate as a decision was being drafted, he left his door always open. He will be remembered especially for his thoroughness in reviewing each case, making sure that each appellant before the Court received a fair hearing.

Judge Steinberg believed strongly in introducing law students to veterans law through judicial internships. It was common for his law clerks to assist in training such interns and in editing their work. And law clerks could fully expect to share office space with one (or more) judicial intern, especially in the summer months.

Outside the Court, Judge Steinberg was a gracious host who enjoyed athletics and cultural pursuits. For many years current and former clerks, interns, and chambers administrative staff, and their families, enjoyed an annual summer picnic at the Judge's home. Activities included tennis, frisbee, and a fantastic buffet of Mediterranean food. He was always supportive of fitness and exercise, encouraging others to walk or jog, as he did. Judge Steinberg enjoyed attending live theater, especially at the Round House Theatre in Bethesda, Maryland. His friends at the Court occasionally would find that their mailboxes contained the latest playbill from a play he had just seen.

Panel opinions authored by Judge Steinberg continue to be frequently cited and used to decide cases. One of his early opinions, *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991), affected the right of a veteran to have his or her case heard in this Court. *Rosler* presented the Court "with its first opportunity to rule on the interrelationship between the filing during [the 120-day judicial-appeal period] of a motion for Board reconsideration and the subsequent filing of a [Notice of Appeal] with this Court following the [Board's] denial of that motion after the 120th day has passed." The Court held that if a motion for Board reconsideration is filed within 120 days of a final Board decision "the finality of the initial [Board] decision is abated by that motion for reconsideration," and "[a] new 120-day [judicial] period begins to run on the date on which the [Board] mails to the claimant notice of its denial of the motion for reconsider. . . ." Such action was necessary, the Court reasoned, to harmonize the Court's statutory appeal period with a Supreme Court holding that established that a "timely petition for administrative reconsideration stay[s] the running of the [relevant] limitation period [for filing a petition for review with a court of appeals]." *Rosler*, 1 Vet.App. at 244-45. *Rosler* has been cited in thousands of Court cases.

Other significant cases, authored by Judge Steinberg, that continue to be cited with some frequency include:

- *Schafrath v. Derwinski*, 1 Vet.App. 589 (1991), which held that the Board is required to consider all evidence of record and to consider and discuss in its decision all "potentially applicable" provisions of law and regulation;
- *Procelle v. Derwinski,* 2 Vet.App. 629 (1992), which clarified the nature of a claim for an increased evaluation;
- *AB v. Brown*, 6 Vet.App. 35 (1993), which held that, as to a claim for an original or an increased rating, the claimant will generally be presumed to be seeking the maximum benefit allowed by law and regulation, and it follows that such a claim remains in controversy where less than the maximum available benefit is awarded;
- the *Hatlestad v. Derwinski* cases – 1 Vet.App. 164 (1991); 3 Vet.App. 213 (1992); 5 Vet.App. 524 (1993), discussing the "confusing tapestry" of regulations regarding TDIU;

In Memoriam: Judge Steinberg, *Continued on Page 3.*

In Memoriam: Judge Steinberg, *Continued from Page 2.*

- *Bernard v. Brown*, 4 Vet.App. 384, 391 (1993), which held, among other things, that, before the Board addresses an issue not addressed by a VA regional office, "it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby";
- *Beaty v. Brown,* 6 Vet.App. 523 (1994), which held that the Board may not deny TDIU entitlement without producing evidence, as distinguished from mere conjecture, that the veteran can perform substantially gainful work;
- *Cohen v. Brown,* 10 Vet.App. 128 (1997), which held that the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) does not impose additional requirements for service connection; that a PTSD diagnosis by a mental health professional must be presumed to have been made in accordance with applicable DSM criteria as to adequacy of symptoms and sufficiency of the stressor; that when the record contains such a PTSD diagnosis, the Board may use the DSM criteria only as a basis to return the examination report for clarification or another examination; that such return, as opposed to mere discounting of the evidence, is mandated when the Board believes that the report does not accord with applicable DSM criteria; and that the question of the sufficiency of a claimed stressor is a medical question to be addressed by a mental health professional;
- *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam,* 78 F.3d 604 (Fed. Cir. 1996) (table), which concluded, inter alia, that the reasons-or-bases requirement required the Board to analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting any favorable material evidence; and, finally,
- *Elkins v. West*, 12 Vet.App. 209, 217-18 (1999) (en banc), which played a prominent role in interpreting a prior version of 38 C.F.R. § 3.156(a), under which the Court undertook an "analysis in order to coalesce the binding precedents of the Federal Circuit" and produce "an integrated and cohesive approach to the consideration of the threshold issues of reopening and well-groundedness," and determined that the Court would review the Board's decisions regarding new and material evidence under the "clearly erroneous" standard.

In addition to reviewing Board decisions and deciding cases, Judge Steinberg gave his time and talent to many Court committees during his tenure, leaving an imprint on Court policy and operation. As a member of the Policy Committee he worked on revisions of the Court's Internal Operating Procedures, changes to the EEO Program, establishing a recall policy for senior judges, and proposed amendments to the Court's Rules of Practice and Procedure and Rules of Admission and Practice. As part of the Committee on Legislative Matters he worked on budget and appropriations issues, among other things. His efforts were also instrumental in establishing the Veterans Consortium Pro Bono Program, created in 1992 to provide legal assistance to unrepresented veterans and their survivors who file appeals at the Court.

On his last day at the Court, Judge Steinberg issued three opinions – *Rodriguez v. Nicholson*, 19 Vet.App. 275 (2005), *rev'd*, 511 F.3d 1147 (Fed. Cir. 2008); *Pelea v. Nicholson*, 19 Vet.App. 296 (2005), *appeal dismissed by* 159 F. App'x. 1003 (Fed. Cir. 2005); and *May v. Nicholson,* 19 Vet.App. 310 (2005), *aff'd*, 208 F. App'x. 924 (2006). He retired on August 6, 2005.

In Memoriam: Judge Steinberg, *Continued on Page 4.*

In Memoriam: Judge Steinberg, *Continued from Page 3.*

Judge Steinberg's legacy not only includes well-reasoned and -written decisions, but also a dedication to veterans law and an enthusiasm for veterans law that continues in those he inspired. He will be missed.

Judge Bartley is a Judge on the U.S. Court of Appeals for Veterans Claims. Diane Diane J. O'Brien-Holcomb is an attorney in the Court of Appeals for Veterans Claims' Central Legal Staff.

Secretary of Veterans Affairs Declares VA Appeal System "Broken," Leads Reform Efforts

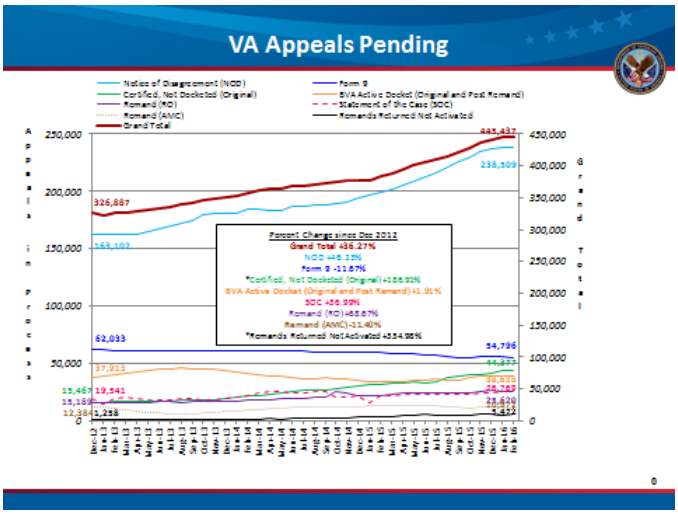
By James D. Ridgway

The release of the president's budget each February normally passes quietly for the Board of Veterans' Appeals. Although precise funding requests always fluctuate somewhat, the Board has continued its basic mission of holding hearings and issuing decisions.

This year was different. The president's FY2017 budget request for the Board kicked off a major initiative by VA to reconfigure the appeals process. This initiative has the potential to fundamentally alter the design of the system in a way not seen since the statement of the case and substantive appeal procedures were added in 1962.

In testimony to Congress surrounding the rollout of the budget, Secretary Bob McDonald declared that the appeals process is "broken" and that now is the time to fix it. He declared that VA would like to resolve 90% of all appeals within one year of the filing of a notice of disagreement by 2021. To reach this goal will require both legislative reform to modernize the process and a substantial infusion of additional resources to process claims.

Presently, there are nearly 450,000 appeals pending at different stages throughout the department. The Board alone has more than 80,000 cases before it compared to the approximately 20,000 that was typical just a few years ago. This volume of appeals has been driven by the massive increase in initial claims filed and decided over the last decade. In recent years, the Veterans Benefits Administration has been deciding approximately 1.4 million claims each year --- about double what it handled a decade ago. Although the rate of appeals has held steady at the historical average of 10-12%, the volume of appeals has risen in proportion to the number of claims decided.



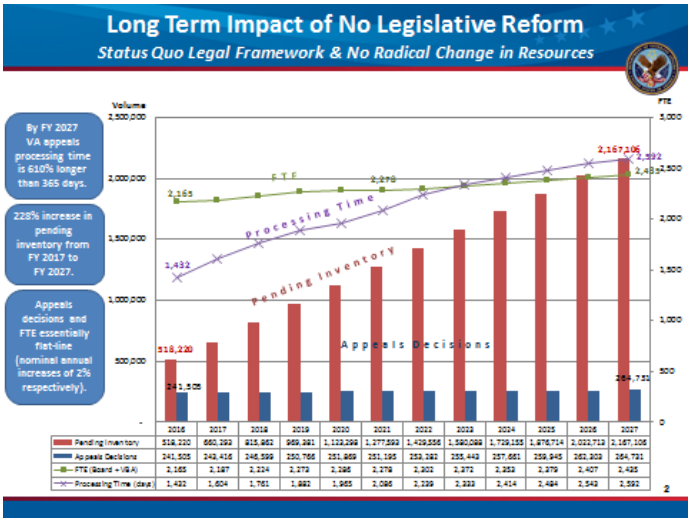
While the volume of appeals work rose in proportion to the work done on reducing the claims backlog, the Board's growth has been less dramatic. For decades, the Board's size hovered around 500 full time employees (FTE). Since 2013, it has grown to approximately 680 FTE. However, the president's FY2017 budget proposes adding 242 additional FTE, which would bring the Board to over 900 employees and, presumably, lead to a proportional increase in work for the CAVC.

Moreover, this growth has been described by VA as a down payment on much more dramatic growth that would be required in future years to handle the

Appeals Reform, *continued on page* 5.

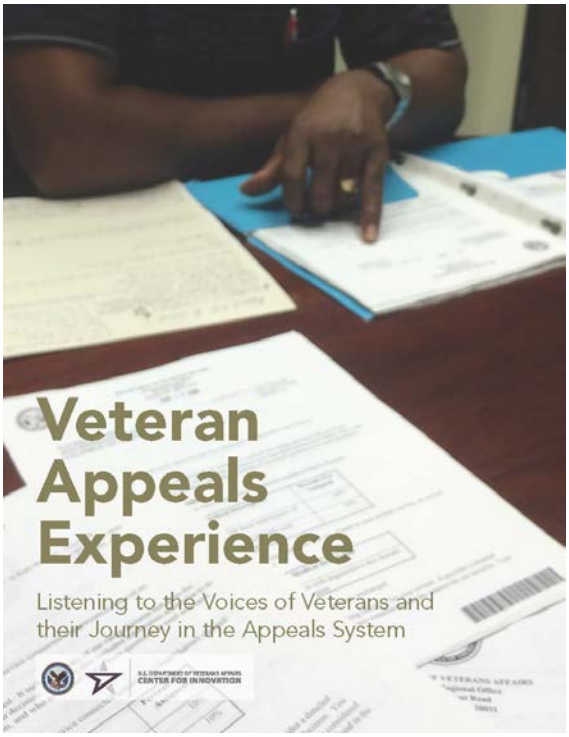
Appeals Reform, *continued from page 4*.

volume of pending appeals as well as the ongoing demand for review generated by an initial claim process that is not projected to decline in output in the near future. If the FY2017 funding request and subsequent increases are not granted, then VA predicts that the number of pending appeals will rise to over 2 million in the next decade.



If the present appeals system were to be continued, VA projects that funding for appeals would need to nearly quadruple in the short term and then remain at approximately triple current levels in outer years. However, Secretary McDonald does not believe that these costs are justified to sustain a process that is not delivering a quality experience for Veterans. In 2015, the VA Center for Innovation (VACI) undertook an examination of the appeals process from the perspective of Veterans using human-centered design methods used by top private-sector industries. VACI interviewed 92 Veterans at different stages in the appeals process. The result was a report released in January. http://www.blogs.va.gov/VAntage/25331/listening-to-the-voices-of-veterans-and-their-journey-in-the-appeals-system/

The report identified five key themes surrounding Veterans' needs, perceptions and expectations during the appeals process: (1) The length and labor of the process takes a toll on Veterans' lives; (2) Like in the military, Veterans care deeply about the outcomes of other Veterans; (3) Veterans feel alone in a process they don't understand; (4) The appeals process feels like a fight; and (5) Veterans want to be heard. The clear message was that the status quo isn't acceptable for Veterans or for taxpayers.



As a result of this report and the analysis done for the FY2017 budget, Secretary McDonald has declared reforming the appeals process to be one of the top 12 priorities of the agency. Presently, the appeals process is confusing and can churn appeals through the process for decades without resolution. As the Board reported to Congress in 2015 (and as was summarized in the Spring 2015 issue of the *Veterans Law Journal*), the oldest appeals in the system have been in process for twenty years or more. These Veterans have typically received dozens of decisions and yet they continue to wait for additional adjudications without any clear end in sight. VA has concluded that it does not make sense to either Veterans or to taxpayers to have a process where 65% of appellate actions merely transfer a matter from VBA to the Board or back again.

Appeals Reform, *continued on page* 6.

Appeals Reform, *continued from page 5.*

Veterans deserve a process that delivers a positive Veteran experience that is timely, fair, and understandable. To this end, the agency has engaged in intense negotiations with the major veterans service organizations, other key stakeholders such as the National Organization for Veterans Advocates, and congressional staff. This effort has received vocal support from key members of both the Senate and House Veterans Affairs Committees. Accordingly, VA is optimistic that legislative reform may be enacted this year that is supported by all parties and fundamentally reconfigures the appeals process in a way that makes to all involved so that Veterans can receive the justice that they deserve.

James D. Ridgway is the Chief Counsel for Policy and Procedure and a Veterans Law Judges at the Board of Veterans' Appeals and a Professorial Lecturer in Law at the George Washington University Law School.

SAVE THE DATE:

On Saturday, June 25, 2016, the CAVC Bar Association will wash the Korean War Veterans Memorial

Opinion: VA's Subpoena Power: A Solution for Inadequate Medical Opinions?

By David E. Boelzner

Wigmore termed cross examination "the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367 (3d. ed. 1940). It is generally accepted that VA claims proceedings do not afford an opportunity for anything resembling the cross examination that occurs in adversarial litigation. The Court has expressly acknowledged that medical opinions are not subject to cross examination on their factual underpinnings and their conclusions, as they would be in adversarial proceedings. *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994). The Court explained that the requirement that the Board give reasons or bases explaining its scrutiny of the evidence must serve a function similar to cross examination. *Id.*

I confess that I have myself accepted this reality, pointing out that if a VA medical examiner finds lack of nexus because no service treatment records document relevant symptoms, a veteran does not have the opportunity to challenge the assertion by asking the doctor if he considered other evidence, such as that the veteran feared retaliation if she complained or sought medical attention. D. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decisions for Reasons and Bases vs. Clear Error,* 17 Rich. J. L. & Pub. Int. 681, 691 (2014).

But is this correct? Have we gone too gentle into that good night? A particular frustration for a veteran's advocate, where an adverse expert opinion seems insufficiently rigorous or perhaps based upon factual error, is to be helpless to probe its basis via cross examination. The opinion looms balefully over the claim—*expert* testimony is compelling—pressing the decision-maker to rule against the claim, while the only recourse for the veteran's advocate is to object to perceived defects and submit competing

Subpoena Power, *Continued on page 7.*

Subpoena Power, *Continued from page 6.*

evidence (if any can be procured). He is left to argue that VA should disregard the view of its own professional employee and hearken to what is urged as "better" evidence proffered by the veteran, an uphill fight.

The veteran is not the only victim of the lack of cross examination in the non-adversarial system. Regional Offices are sometimes flummoxed by an examiner's failure to include or address in an opinion all that is necessary. And the Board must at times regret, or at least it should, that expert opinion evidence is so sketchy or unclear. The Board can, of course, remand for the purpose of seeking more detail or explanation, but the Board understandably wields this power hesitantly, in the knowledge that each remand means many months of delay in the veteran's case.

The problem can also prevent full consideration of issues by the Court. There will be no rescue afforded by the Court if the basis for an effective challenge to a medical opinion has not been established in the record before the agency. In a case of mine, a VA examiner opined against nexus, citing two specific medical articles as supportive. Neither the veteran nor the Board had consulted the actual articles, but when I did so after the case was appealed to the CAVC, I discovered that neither actually supported the opinion. Because the text of the articles and thus their substance was not in evidence before the Board, it was tricky to address this problem at the Court. Fortunately, the title of one of the articles gave away its thrust sufficiently to allow me to raise the issue successfully at the Court. (It is not entirely clear whether the examiner's mere citation of the articles would have permitted discussion of their text before the Court.)

Confronted with a damaging but vulnerable medical opinion, the advocate yearns to place the medical expert in the witness box and question her about her credentials, her familiarity with the relevant data, and whether her methodology is generally accepted. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302-04 (2008) (noting that the probative value of

medical opinions turns on whether appropriate data were reviewed and whether valid medical analysis was applied). Is this sort of questioning, which is routine in adversarial litigation involving medical issues, possible in veterans cases as well?

By statute and implementing regulations, the Board of Veterans' Appeals has the power to subpoena witnesses within a 100-mile radius to testify in a personal hearing. 38 U.S.C. § 5711(a)(1); 38 C.F.R. §§ 2.2, 20.711. VA's regulation specifies that subpoenas will not be issued to compel the attendance of VA adjudicatory personnel. 38 C.F.R. § 20.711 (a). But VA C&P examiners are not adjudicatory personnel. There appears to be nothing in the regulations that would prohibit VA from subpoenaing its examiners to testify at a veteran's personal hearing before the Board, and thereby be subject to cross examination by the veteran's counsel. The appellant would arguably have to arrange for a Board hearing site near enough to the location of the VA expert to fall within the 100-mile limit. *See Nohr v. McDonald*, 27 Vet. App. 124, 128 n.4 (2014)

Board subpoenas must be requested via motion by an appellant, and the movant must show that the evidence is necessary and cannot be obtained in any other reasonable way. 38 C.F.R. § 20.711(a). When the issue is the basis and competency of a medical expert opinion, however, it is hard to see how the evidence could come from any source other than the author of the opinion. It lies within VA's discretion whether to grant a subpoena request. 38 C.F.R. § 20.711(b) – (e).

There are some decisions from the Court indicating that VA could not deny such a request arbitrarily. In two memorandum decisions, judges of the Court have remanded, on reason-or-bases grounds, cases in which the Board had not properly considered the reasonableness of (non-medical) witness subpoenas requested by Filipino claimants. *Aban v. Shinseki*, No. 07-3093, 2010 U.S. App. LEXIS 2025 (Nov. 8, 2010); *Enriquez v. Shinseki*, No. 11-1511, 2014 U.S. App.

Subpoena Power, *Continued on page 8.*

Subpoena Power, *Continued from page 7.*

LEXIS 641 (April 21, 2014). In another memorandum decision, involving an unclear private medical opinion, Judge Davis has noted that VA has subpoena power with respect to witnesses, and he affirmatively suggested that on remand the "Board should consider whether it might help to invoke that power in an attempt to shed further light on this case." *McDonald v. Nicholson*, No. 08-4023, 2010 U.S. App. LEXIS 1393 (July 30, 2010).

In a recent panel decision, the Court confronted a due process challenge to VA's refusal either to subpoena or propound "interrogatories" to a VA physician expert consulted by the Board, by which an appellant sought to clarify the expert's opinion. *Nohr v. McDonald*, 27 Vet. App. 124 (2014). The Court warned that, in view of the increasing involvement of lawyers in the VA claims system, "the veterans bar and VA must proceed with caution so as not to unravel Congress's desire to preserve and maintain the unique character and structure of the paternalistic, nonadversarial veterans' benefits system." *Id.* at 131. Nevertheless, the Court held that the appellant's attempt to obtain the information he sought via the proposed interrogatories was legitimate and warranted a response from the Board. The Court noted the rebuttable presumption of competency which attaches to the provider of a VA medical opinion and reasoned that, since an appellant challenging an expert's qualifications has to specify reasons therefor, the request for information about the doctor's qualifications was appropriate. The doctor had also noted an unspecified "personal limitation," and the Court likewise found that this raised an issue justifying further inquiry of the doctor. 27 Vet. App. at 132-33.

The Court thus disapproved, under both reasons-or-bases and duty-to-assist analyses, the Board's refusal to consider propounding the proffered interrogatories, and the Court deemed it unnecessary to address the appellant's alternative request for a hearing subpoena. But it noted that, if the Board ultimately determined that no clarification need be sought from the doctor, then the Board would have to reconsider the subpoena request. 27 Vet. App. at 135. Notwithstanding the Court's concern about distorting the paternalistic, nonadversarial system, then, it upheld the claimant's ability to develop evidence properly and to employ tools to challenge adverse expert opinion evidence.

It is an irony that the benign motivation of Congress to provide a "friendly" claims system actually results, through the lack of adversarial cross examination, in a situation that is often unfriendly to a claimant: the inability to challenge effectively a powerful item of evidence against her claim. I submit that, while it would undoubtedly complicate matters and would just as undoubtedly be deeply resented by VA doctors, subpoenaing a VA examiner is a means available to claimants under current law, which could help remedy the problem of ill-formed or inadequately supported VA medical opinions. Not only would cross examination in a particular case afford the veteran the chance of successfully debunking an unsound opinion, but the threat of subpoena would likely both inspire more careful selection of clearly qualified examiners and impel closer attention by examiners to the rigor of their opinions, resulting in better evidence before VA.

David E. Boelzner, formerly with Goodman Allen Donnelly PLLC in Richmond, VA, is an assistant professor in William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic.

Announcing the formation of the CAVC Historical Society.

Visit www.cavchistory.org for more information

When can the CAVC invoke the doctrine of issue exhaustion?

By Jenna Zellmer

Reporting on *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015), *Bozeman v. McDonald*, --F.3d --, 206 WL 791113, (March 1, 2016), and *Dickens v. McDonald*, --F.3d --, 2016 WL 791131, (March 1, 2013).

The Federal Circuit held in a 2000 case that 38 U.S.C. § 7252(a) requires issue exhaustion at the Board in appropriate circumstances on a case-by-case basis. *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000). Last year, in *Scott v. McDonald*, the Federal Circuit clarified when such appropriate circumstances exist.

In *Scott*, the Veteran, seeking service connection for hepatitis C, requested a Board hearing in 2008 but was unable to attend due to incarceration. 789 F.3d at 1376-77. The Board subsequently denied service connection. *Id.* at 1377. On appeal to the Veterans Court, the Veteran did not raise any issue regarding the hearing. *Id.* The Court remanded the issue of entitlement to service connection, and the Board subsequently denied the claim again. *Id.* The Board noted that the Veteran did not renew his request for a hearing. *Id.*

On appeal again to the Veterans Court in 2013, the Veteran raised an issue concerning the hearing for the first time since 2008. *Id.* The Veterans Court refused to consider the issue, reasoning that it amounted to "piecemeal litigation." *Id.*

In affirming the Veterans Court decision, the Federal Circuit distinguished between two potential situations. It noted: "[t]here is a significant difference between considering closely-related theories and evidence that could support a veteran's claim for disability benefits and considering procedural issues that are collateral to the merits." *Id.* at 1381. In the first situation, the veteran's interest is served by a thorough examination of the record. *Id.* In the latter, a "veteran's interest may be better served by prompt resolution of his claims rather than by further remands to cure procedural errors" that may not be relevant to final resolution of the claim. *Id.*

The Federal Circuit held that the Veteran's entitlement to a hearing was more akin to the second case: a procedural issue collateral to the merits of his appeal. *Id.* If a veteran has initially failed to raise a procedural issue, "the veteran should not be able to resurrect it months or even years later." *Id.* Although the Board and the Veterans Court must liberally read a veteran's pleadings, they need only address "those procedural arguments specifically raised by the veteran." *Id.*

Most recently, the Federal Circuit has provided further instruction on when the Veterans Court may decline to consider issues raised before it.

In *Bozeman v. McDonald*, the Federal Circuit reversed the Veterans Court decision to invoke issue exhaustion. In *Bozeman*, the Veteran appealed the Board's denial of an increased rating in 2013, which the Veterans Court vacated and remanded pursuant to a joint motion for remand. 2016 WL 791113 at*2. The basis for the remand was the Board's failure to provide adequate reasons or bases. *Id.* The JMR specified that VA was obligated to conduct a critical examination of the justification for its decision. *Id.*

The Veteran appealed the Board's post-remand denial, this time arguing that the Board had failed to address relevant, material evidence contained in a 2005 examination report. *Id.* Although it acknowledged that the JMR did not limit the scope of the Board's review on remand, the Veterans Court invoked issue exhaustion, reasoning that the Veteran had failed to raise the argument regarding this evidence in his first appeal to the Court or before the Board on remand. *Id.*

The Federal Circuit, however, held that the Veterans Court misinterpreted the doctrine of issue exhaustion. It reasoned that an "argument that the Board failed to consider evidence contained in the record, which supports a veteran's established legal claim, should not be considered a new legal argument raised for the first time on appeal." *Id.* at*3. Thus, Mr. Bozeman's claim fell into the first

Scott category: considering closely-related theories and evidence that could support a veteran's claim for benefits.

However, the Circuit Court limited its holding, noting that "[a] new legal argument raised for the first time on appeal, even if based on already established evidence, can be subject to the issue exhaustion requirement." *Id.* But in the narrow situation where a legal argument "has been properly preserved for appeal," issue exhaustion cannot bar citation to evidence in the record. *Id.*

In contrast, the Federal Circuit affirmed the Veterans Court's use of issue exhaustion in *Dickens v. McDonald*. In *Dickens*, the Veteran passed away while his appeal for service connection for PTSD was still pending. 2016 WL 791131 at *1. His widow filed a claim for accrued benefits. *Id.* The Board originally denied Mrs. Dickens' claim, finding no evidence that the Veteran engaged in combat during service. *Id.* On appeal to the Veterans Court, the parties agreed that the Board had failed to adequately discuss the Veteran's combat status, and entered into a joint motion for partial remand. *Id.* The Board denied the claim again in March 2013. *Id.*

On her second appeal to the Veterans Court, Mrs. Dickens argued that VA violated its duty to assist because, during a 2011 Board hearing, the hearing officer had failed to suggest she obtain a copy of her husband's service records. *Id.* The Veterans Court declined to consider this argument because it was not raised in the earlier JMPR or in Mrs. Dickens's appeal to the CAVC. *Id*.

The Federal Circuit agreed. *Id.* at *2. It briefly reasoned that Mrs. Dickens had the opportunity to raise her duty-to-assist argument during her first appeal to the Veterans Court, and to the Board following remand. *Id.*

Like Mr. Scott's issue concerning denial of a hearing, Mrs. Dickens' duty to assist argument regarding the hearing officer's duties was a collateral procedural issue, subject to issue exhaustion. It was also akin to "a new legal argument raised for the first time on appeal," as the Federal Circuit had explained in *Bozeman.*

While these three cases provide some guidance for assessing issue exhaustion scenarios, we may gain further direction from the Supreme Court. Petition for Certiorari in *Scott* was filed on February 19, 2016.

Jenna Zellmer is an attorney at Chisholm, Chisholm, and Kilpatrick, LTD.

McKinney: Defects must be disabilities to preclude the presumption of soundness.

by Joseph M. Cappola

In *McKinney v. McDonald*, No. 13-2273, 2016 WL 932820 (Vet.App. Mar. 11, 2016), the Court of Appeals for Veterans Claims (Court) addressed whether evidence of hearing loss found on a service entrance examination constituted a preexisting condition under 38 U.S.C. § 1111. Interpreting the phrase "except as to defects, injuries, or infirmities noted" at the time of enrollment, the Court concluded that no "defect" could exist where the condition would not constitute a "disability" for VA purposes. Applying this interpretation, the Court found that Mr. McKinney had no defect noted at entry despite having some degree of bilateral hearing loss. The Court also found errors in the Board's decision regarding its statement of reasons or bases and its duty to assist analysis. Judge Schoelen, joined by Judge Davis, wrote for the Court. Judge Bartley wrote separately joining in part, concurring in part, and dissenting in part.

McKinney, continued on page 11.

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.

McKinney, continued from page 10.

Mr. Clyde McKinney, Jr., (McKinney) served in the U.S. Navy from April 1969 to April 1971. *McKinney*, 2016 WL 932820, at *2. His entrance examination revealed puretone thresholds of 35 decibels (dB) in each ear at 4000 Hertz (Hz). *Id.* However, the examiner did not include any further notation about defective hearing in the "Summary of Defects and Diagnoses" and in fact gave McKinney a score of 1 (the highest) for his "hearing and ear" fitness. *Id.* at *2-3.

In 2009 McKinney filed a claim for benefits based on bilateral hearing loss. *Id.* at *3. The Board denied his claim, relying on a May 2011 VA opinion to find that he had had some degree of pre-existing hearing loss upon entry into service and was therefore not entitled to the presumption of soundness. *Id.* at *4.

On appeal, McKinney argued that the Board erred in finding he had had preexisting hearing loss because the evidence of hearing loss at entry did not constitute a disability under 38 C.F.R. § 3.385. The Secretary argued that the Board's finding was proper because the entrance examination showed a preexisting condition and that § 3.385 was not relevant to the presumption of soundness analysis.

In analyzing the appeal, the Court first reviewed the statutory framework, including the provision in 38 U.S.C. § 1111 that "every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment . . . ." *Id.* at *7. A majority of the Court then found that a preexisting hearing loss was "noted" at entrance based on the auditory examination results showing thresholds above 20 dB at 4000 Hz. *Id.* at 8. The Court relied on *Hensley v. Brown*, 5 Vet.App. 155, 157 (1993), for the medical standard that puretone hearing thresholds above 20 dB indicated some degree of hearing loss. *Id*. The Court also found support in the 2011 opinion that discussed McKinney's abnormal hearing at entry. *Id.*

The Court next tackled whether McKinney's abnormal hearing at entry was a defect, injury or infirmity for purposes of 38 U.S.C. § 1111. It turned to *Winn v. Brown*, 8 Vet.App. 510, 515 (1996), which had interpreted "defect" narrowly and found that it "'necessarily means a defect that amounts to or arises from a disease or injury' resulting in a disability authorized by section 1110." *McKinney*, 2016 WL 932820, at *13 (quoting *Winn*, 8 Vet.App. at 516). The Court also relied on *Terry v. Principi*, 340 F.3d 1378 (Fed. Cir. 2003), which, the Court held, along with *Winn* stood for the proposition that "when VA, by regulation, provides that disability compensation is not permitted under section 1110 for a particular condition, the excluded condition can never amount to a 'defect' within the meaning of section 1111." *McKinney*, 2016 WL 932820, at *13-14.

Applying this rule to McKinney's appeal, the Court held that the hearing loss noted at entry was not a defect, infirmity, or disorder because hearing loss that does not meet the requirements of 38 C.F.R. § 3.385 is not a disability for VA purposes. *Id.* at *14-15.

In addition to providing this new guidance on the presumption of soundness, the Court also applied existing law to find that the 2011 opinion was inadequate for rating purposes. *Id.* at *16-18. The examiner had stated that she could not offer a definitive nexus opinion without resorting to speculation because no audiometric test was performed at McKinney's separation from service. *Id.* at *16. The Court held that the examiner did not provide a rationale because it was not clear whether her statement "reflects the limits of knowledge in the medical community at large or the limits of the VA examiner's knowledge." *Id.* at *17. In addition, the Court found the opinion deficient because the examiner did not consider McKinney's testimony that he first noticed a change in hearing in the 1970's. *Id.*

McKinney, continued on page 12.

McKinney, continued from page 11.

Finally, the Court also concluded that the Board failed to provide an adequate statement of reasons or bases and erred in finding the duty to assist satisfied with respect to a respiratory disorder claim that was also on appeal. The Court found that the Board erred by "summarily rejecting" two 1996 reports that stated McKinney had asbestosis despite "significantly predate[ing]" his claim. *Id.* at *22. The Court found the documents relevant because they detailed McKinney's claimed exposure to asbestos and contained diagnoses of asbestosis. Accordingly, the Board was obligated to address them. *Id.*

The Court also found the Board's reasons or bases deficient where the Board relied on a 2008 VA examination report that failed to mention the 1996 diagnoses of asbestosis. The Court held that the Board failed to address the competing evidence as to whether McKinney currently had asbestosis. *Id.* at *23. Furthermore, the Board failed to explain its reliance on the 2008 report where the examiner "focused solely on whether a respiratory disability was related to in-service asbestos exposure and did not address linkage to service on any other basis." *Id.* at *23.

Regarding the duty to assist, the Court first found that a March 2012 Joint Motion for Remand did not preclude McKinney from arguing that the Board violated the duty to assist when it failed to make reasonable efforts to obtain certain medical records, because the JMR stated that "'the Board is obligated to conduct a critical examination of the justification for its previous decision.'" *Id.* at 25. Based on this language, the Court held that the JMR "did not limit the scope of the Board's review of newly raised arguments." *Id.* The Court then concluded that the Board erred in finding the duty to assist satisfied where the VA Regional Office made no attempt to contact the physician despite having the physician's telephone number and despite having been informed that the medical facility from which it had requested records did not have them.

Judge Bartley wrote separately to dissent from the majority's opinion to the extent that it concluded that McKinney's preexisting hearing loss was "noted" on his entrance examination. *Id.* at *26. Judge Bartley disagreed with the majority's willingness to rely on *Hensley* and the May 2011 VA opinion to find some degree of hearing loss on McKinney's entrance examination: "Relying on post-entry examination interpretation to find that Mr. McKinney had hearing loss at entry is contrary to the statute." *Id.* at *27. Judge Bartley would interpret 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b) as requiring the examiner who conducted the entrance examination to expressly note any defect as opposed to permitting the Board to rely on a retrospective interpretation of the entrance examination.

On April 1, 2016, the Secretary filed a Motion for Reconsideration of the Court's decision.

Joseph M. Cappola is an attorney for the Department of Veterans Affairs, Office of General Counsel, Court of Appeals for Veterans Claims Litigation Group.

The Court addresses rating foot disabilities by analogy and the application of the Federal Circuit's holding in *Johnson v. McDonald*

by Brent Bowker

Reporting on *Yancy v. McDonald*, No. 14-3390 (February 28, 2016).

In *Yancy v. McDonald*, the Court addressed two separate issues. First, the Court addressed the diagnostic criteria for rating foot disabilities, particularly Diagnostic Code (DC) 5284, which is for rating "Foot injuries, other." 38 C.F.R. § 4.71a, DC 5284. Second, the Court addressed how the Board is to apply the Federal Circuit's decision in *Johnson v. McDonald*, 462 F.3d 1362 (Fed. Cir. 2014).

The foot disability issue arose in the context of a veteran who the Board found was not entitled to a

Yancy, continued on page 13.

Yancy, continued from page 12.

compensable rating for hallux valgus for either foot. The Board found that the evidence did not establish that his feet had undergone an operation with resection of the metatarsal head, and it also found that his hallux valgus was not so severe as to be the equivalent of having his great toe amputated, noting that he had functional movement in both great toes. 38 C.F.R. § 4.71a, DC 5280. The Board also denied a rating in excess of thirty percent for bilateral pes planus, and in the context of that discussion found that the veteran had not been diagnosed with hallux rigidus, and it further found that separate ratings under DCs 5281 (hallux rigidus) and 5284 (foot injuries, other) were not warranted. 38 C.F.R. § 4.71a, DCs 5281, 5284.

On appeal, the veteran argued that the Board did not adequately explain why he was not entitled to separate ratings under DCs 5281 or 5284. He also argued that the record demonstrated that he had been diagnosed with hallux rigidus. The Secretary contended that, because the diagnostic code for hallux rigidus states that the disability should be rated the same as hallux valgus, any error is harmless. The Secretary also argued that DC 5284 only applies to "foot injuries," and consequently the veteran could not receive a rating under that DC because he did not have a foot injury.

First, the Court found that the record contained a medical opinion diagnosing the veteran with "hallux valgus et rigidus," and that the Board's failure to discuss this record frustrated judicial review. Although the Board discussed the functioning of Appellant's great toes and found that his great toes had free movement, indicating that their function was not equivalent to amputation, and despite the fact that hallux rigidus is also a disability affecting the great toes, the Court found that the error was not harmless. The Court found it lacked the necessary factual predicate to determine whether any hallux rigidus in the veteran's great toes was so severe as to equate to an amputation de facto, and it remanded for the Board to address the diagnosis of "hallux valgus et rigidus" and make the appropriate factual findings.

The Court also found that the Board did not adequately explain why a separate rating under DC 5284 for "foot injuries, other" was not warranted.

The Court agreed with the Secretary that the regulation's plain meaning meant that the DC only applied to "injuries," as opposed to disabilities caused by other factors such as degeneration. However, the Court found that unlisted foot conditions that are not the result of injuries can be rated under DC 5284 by analogy. The Court also noted that the veteran had been diagnosed with foot conditions not explicitly listed in the rating schedule, including calcaneus foot deformity and heel spurs, and those conditions may be rated by analogy. The Court found that the Board did not discuss whether those conditions could be rated by analogy, and that remand was warranted for the Board to address the matter.

Next, the Court addressed the Board's discussion of whether extraschedular referral was warranted in the context of the Federal Circuit's decision in *Johnson*, which held that 38 C.F.R. § 3.321(b)(1) provides for extraschedular consideration based on the collective impact of multiple service-connected disabilities. 762 F.3d at 1365. The Veterans Court held that the Board is required to discuss whether referral is warranted on a collective basis only when that issue is specifically raised by the claimant or when it is reasonably raised in the record by evidence of the collective impact of the service-connected disabilities. The Court also held that *Johnson* does not change the Board's obligation to conduct the three-part test set out in *Thun v. Peake*, 22 Vet.App. 111 (2008). Finally, the Court held that *Johnson* does not alter the Board's jurisdiction. Consequently, although the Board must consider the collective impact of the disabilities on the disabilities that are on appeal, and it lacked jurisdiction to refer any disability or combination of disabilities not in appellate status.

The parties had agreed that the Board did not address whether referral for extraschedular

Yancy, continued on page 14.

Yancy, continued from page 13.

consideration on a collective basis was warranted, and the veteran's attorney conceded at oral argument that he did not raise the issue below. However, the Court found that the issue was raised by the evidence, noting that the veteran alleged that his service-connected feet and knee disabilities precluded standing for longer than 15 to 20 minutes, and his service-connected hemorrhoids made him uncomfortable while sitting for prolonged periods. The Court found that the record reflects that he "cannot stand *or* sit for long periods of time as a result of his service-connected disabilities," and that therefore remand was warranted for the Board to address whether such referral is warranted.

Brent Bowker is an attorney for the Department of Veterans Affairs, Office of General Counsel, Court of Appeals for Veterans Claims Litigation Group.

The Board Reviews Extraschedular Rating Decisions by the Director of Compensation Service *De Novo*

by Laura R. Braden

Reporting on *Kuppamala v. McDonald*, 27 Vet.App. 447 (2015).

In Kuppamala v. McDonald, the Court considered the Board's obligations in reviewing decisions by the Director of Compensation Service concerning extraschedular disability ratings under 38 C.F.R. § 3.321(b)(1). The Court held that Board must review such decisions de novo and that the Board is authorized to assign an extraschedular rating when appropriate.

Mr. Kuppamala appealed from a Board decision denying him a rating of more than the 50 percent rating he was assigned for ulcerative colitis, status post colectomy. VA had assigned Mr. Kuppamala a 40 percent schedular rating, the maximum available under Diagnostic Code (DC) 7329, for residuals of resection of the large intestine. In a December 2011 decision, the Board remanded his claim for an increased rating for consideration of extraschedular entitlement, to include referral to the Director of Compensation Service. The Director determined that an extraschedular evaluation was warranted due to the frequency of Mr. Kuppamala's severe symptoms, which affected his ability to perform his occupational duties, and he awarded Mr. Kuppamala a 10 percent extraschedular rating, which was then implemented by the RO. Mr. Kuppamala appealed the extraschedular rating to the Board, which noted the Director's decision and found that the total 50 percent rating was warranted.

The Court, in an opinion authored by Judge Schoelen, first considered whether the Board has jurisdiction to review the Director's assignment of an extraschedular rating, relying on 38 U.S.C. §§ 511(a) and 7104(a) to determine that the Board generally may review the entire Agency decision below. It noted the Secretary's argument, based on *Warden v. West*, 13 Vet.App. 463 (2000), that decisions committed to the discretion of the Secretary for which no manageable standards of evaluation exist form an exception to this general rule. However, the Court found that the Director's determinations regarding extraschedular entitlement are governed by judicially manageable standards, so this exception does not apply.

Specifically, the Court noted that 38 C.F.R. § 3.321(b), the regulation authorizing the assignment of extraschedular ratings, authorizes approval of an extraschedular evaluation "commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities." 38 C.F.R. § 3.321(b)(1) (emphasis added by the Court). The Court found that average impairment in earning capacity functions as a limiting principle on the Secretary's discretion in 38 C.F.R. § 3.321(b)(1), and it is the standard that forms the basis for the entire rating schedule pursuant to 38 U.S.C. § 1155. The Court therefore found average earning

Kuppamala, continued on page 15.

Kuppamala, continued from page 14.

capacity to be a judicially manageable standard that limited the Secretary's discretion, and it held that the Board must review the Director's decision to "ensure that it was made within the statutory or regulatory standards." *Werden*, 13 Vet.App. at 467.

The Court next addressed the Secretary's argument that the plain language of § 3.321(b)(1) indicated that its purpose was to provide an additional rating in exceptional cases not contemplated by the rating schedule as a matter of equity. The Court rejected this argument, noting that there was no argument that § 3.321(b) was promulgated under the authority of 38 U.S.C. § 503, which provides authorization for equitable relief. It also stated that reading § 3.321(b)(1) as limiting the Board's scope of review would contradict the clear congressional intent embodied in 38 U.S.C. § 7104(a) that the Board should be the final authority on all benefits decisions, since there was no legitimate dispute that the regulation affects the provision of benefits.

The Court went on to find that the Director must provide a statement of reasons or bases supporting his decision regarding an extraschedular rating. Building on its statement in *Wages v. McDonald*, 27 Vet.App. 233 (2015), that the Director's decisions concerning extraschedular total disability based on individual unemployability under 38 C.F.R. § 4.16(b) have the same effect on the Board's statutory jurisdiction and standard of review as RO decisions, the Court reasoned that the Director takes the place of an RO adjudicator when he acts in the context of extraschedular ratings and must comply with the same requirements as the RO pursuant to 38 U.S.C. § 5104(b).

Acknowledging its holding in *Floyd v. Brown*, 9 Vet.App. 88 (1996), that § 3.321(b)(1) precludes the Board from assigning an extraschedular evaluation in the first instance, the Court held that the Board may assign an extraschedular rating when appropriate once the Director has made an initial determination. The Court pointed out that in *Anderson v. Shinseki*, 22 Vet.App. 423 (2009), it had held that each element for evaluating entitlement to an extraschedular rating under 3.321(b)(1) set forth in Thun is reviewable by the Board. It disagreed with the Secretary's argument that the Board lacks the requisite experience necessary to assign an extraschedular rating, finding that the Board considers average impairment in earning capacity in every decision involving the rating schedule and noting two examples in which the Board's review is not limited to a mechanical application of the rating schedule: assigning ratings by analogy, and, in the context of psychiatric disabilities evaluated under 38 C.F.R. § 4.130, considering symptoms other than those listed in the rating schedule that are of the same type and degree as the listed symptoms and affect the level of occupational and social impairment.

The Court stated that its holding did not render referral to the Director meaningless, since (1) the Director's decision may serve to inform the Board's review; (2) consolidating initial consideration of extraschedular ratings with the Director promotes uniformity with respect to the decisions; and (3) referral to the Director might facilitate satisfaction of the Secretary's duty under 38 U.S.C. § 1155 to readjust the rating schedule from time to time. The Court concluded that the clear import of the statutes establishing the Board's jurisdiction and the Court's prior case law leads to the conclusion that the Board reviews the Director's decision under § 3.321(b)(1) de novo and is authorized to assign an extraschedular rating when appropriate.

Laura R. Braden is an attorney for the Department of Veterans Affairs, Office of General Counsel, Court of Appeals for Veterans Claims Litigation Group.

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

BEN FRANKNLIN STATION · P.O. BOX 7992
WASHINGTON, D.C. 20044-7992

Book Review:
Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats

Lowell E. Baier

(Rowman & Littlefield, 2015), 678 p.p.

by Aniela K. Szymanski

Lowell E. Baier is a vehement environmental conservationist. He has received many accolades including Conservationist of the Year at least three times over, is past President of the Boone and Crockett Club, is one of the founders of the Wild Sheep Foundation, and has several more distinctions. Mr. Baier is also a lawyer and very active in the legal and public policy arenas. He has been a presidential advisor, drafted legislation, and testified before Congress. He has taken major issue with the Equal Access to Justice Act (EAJA) and its implementation in the environmental litigation space, both in the past and in this book, and he makes no secret that he strongly dislikes the Act in what it has done, or failed to do, for the environment.

Many veterans law practitioners have followed Mr. Baier's advocacy related to EAJA because of the significant impact that EAJA has on the veterans practice. I myself have read many of Mr. Baier's previously published articles on the topic, and I'm certain that my colleagues in this field have as well. I went into reading this book, therefore, with full knowledge of his positions and agenda – to reform EAJA. The book, however, does much more than advance that agenda.

Mr. Baier provides an excellent narrative history of how EAJA developed, beginning with what government regulation of all types (workplace safety, civil rights, etc.) was like pre-EAJA. I was fascinated by this history of the Act and how it developed and expanded over the years, almost always coinciding with some form of social movement in American society. Anyone intrigued about legal history will find these portions alone worth the read.

Mr. Baier spends time discussing individual environmental groups that utilize EAJA and examines their history, missions, operations, strategies, and effectiveness. Even though these chapters were related to an area not in my purview of legal practice, I found these parts very readable and enlightening. I must say that I will never look at the Center for Biological Diversity, Defenders of Wildlife, or even the Humane Society of the United States the same way again after reading this book.

In the realm of non-environmental fields, Mr. Baier sets forth solid cases for the usefulness of EAJA in veterans law and social security law, amongst others. He provides commentary on recent bills introduced into Congress that would bring EAJA back to its intended purpose, including protecting those constituencies.

Mr. Baier's book sounds a clear call to Congress for change in favor of what he sees as a better way to achieve the mission of environmental protection. In doing so, the book contains extensive citations to historical data, trend analysis and other supporting evidence for the positions he sets forth, yet is still easy to understand for those of us who are not experts in environmental law.

This book would be an excellent read for anyone who is interested in the history of administrative law, unintended consequences of Congressional action, or environmentalism (even if just from the lay person's perspective).

Aniela K Szymanski is Deputy Director at the Military Officers Association of America and an Adjunct Professor at William & Mary Law School.

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Court of Appeals for Veterans Claims Bar Association
Ben Franklin Station
P.O. Box 7992
Washington, DC 20044-7992

MEMBERSHIP APPLICATION/RENEWAL FORM

_____
Last Name First Name Middle Initial

_____
Employer / Firm Name

_____
Mailing Address City State Zip

_____
Telephone Number (including area code) E-mail Address

Membership Category (Please Check One)

_____	**REGULAR MEMBERSHIP:** I am an attorney or non-attorney practitioner in private or government practice and certify that I am admitted to practice in the U.S. Court of Appeals for Veterans Claims (Court).	$95.00*
_____	**ASSOCIATE MEMBERSHIP:** I am an attorney in good standing in the highest court of my state, but not admitted to practice before this Court.	$95.00
_____	**GOVERNMENT/ORGANIZATIONAL MEMBERSHIP:** I am an attorney or non-attorney practitioner in government practice designated for government/organizational membership by my supervisor.	N/C**
_____	**COURT MEMBERSHIP:** I am an employee of the Court and have been designated as eligible to participate in Bar Association activities. (Non-voting Membership)	N/C***
_____	**STUDENT MEMBERSHIP:** I am enrolled in an accredited law school.	$25.00
_____	**TRIAL MEMBERSHIP:** I am a newly-admitted attorney seeking a trial membership for the remainder of the membership year, ending September 30th. (Non-voting Membership)	**FREE!**

Membership fees are payable by check to the **Court of Appeals for Veterans Claims Bar Association**.
Please mail your completed application to the address above.

_____ _____
(Date) (Signature)

* An organizational/group rate of $75 per membership is available for 5 or more members of an organization or group applying for (or renewing) their membership.

**Government organizational members do not need to individually remit fees with this form. The organization will make one dues payment at the rate of $75 per membership.

***Court employees do not need to individually remit fees with this form. The Court will make one annual dues payment to the Bar Association.