VETERANS LAW JOURNAL

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

Competitors and Volunteers Make 2016 Veterans Law Moot Court a Huge Success

by Jon Gaffney

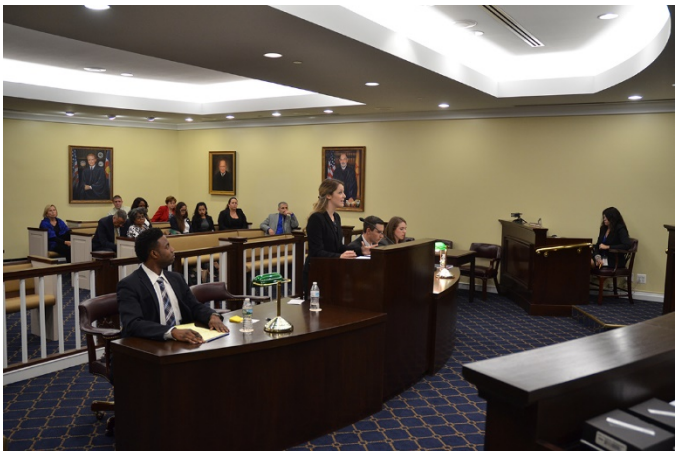
On November 5 and 6, the work of 48 law students, dozens of coaches and faculty advisors, and nearly 100 volunteers culminated in the eighth annual National Veterans Law Moot Court Competition (NVLMCC). The competition, which is a joint venture of the CAVC Bar Association, the CAVC, and the George Washington University Law School, pit two-person teams against each other in the fictional Supreme Court case of *McDonald v. Mitchell*, which involved a veteran's use of medical marijuana and a disability resulting from VA's refusal to administer a marijuana derivative.

The 2016 competition was the second-largest in its history, with 24 competing teams from 17 law schools. Two schools—the Antonin Scalia Law School at George Mason University and the University of Denver Sturm College of Law—competed for the first time, while three returning schools—the George Washington University Law School, the John Marshall Law School, and the Stetson University College of Law—shared the distinction of having competed in every year of the NVLMCC since it began in 2009.

Over the two days of competition at GW Law and the Court, the two-person teams addressed the following questions:

1. Does the U.S. Court of Appeals for Veterans Claims have the authority to review the validity of laws and regulations outside of Title 38 of the U.S. Code and Code of Federal Regulations, specifically the laws and negligence, lack of proper skill, error in judgment, or similar instance of fault" for the purposes of 38 U.S.C. § 1151?

The Baylor Law School team of Savanna Barlow and Marcus Fifer took home the Best Team award in this year's competition, arguing against their Baylor classmates Lauren Livingston and Kyle Steingreaber in the final round. The finalists argued before CAVC Chief Judge Robert Davis and Judges Mary Schoelen and William Moorman.



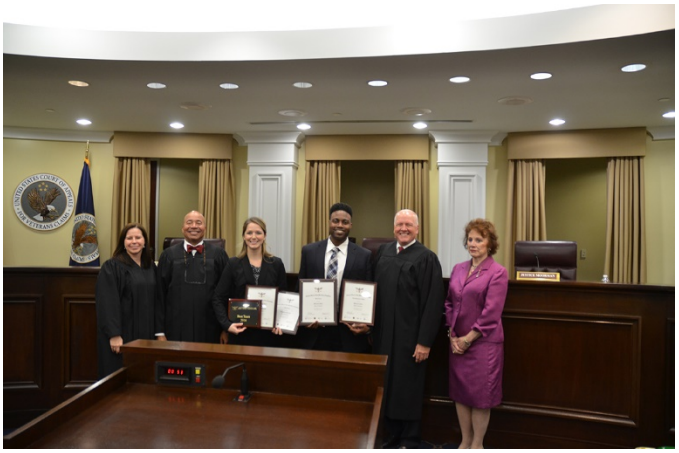
Savanna Barlow argues in the final round of the 2016 NVLMCC

In the semifinal rounds, the Baylor teams faced off against Hoyt Prindle and Taylor Ryan, of the Stetson University College of Law, and Robert Gail and Vilerka Bilbao, of the Florida Coastal School of Law. The semifinal rounds were judged by Gregory Block, Clerk of the CAVC; Mary Ann Flynn, Chief Counsel for VA's Veterans Court Litigation Group; and Zachary Stolz, former president of the CAVC Bar Association and a partner at Chisholm Chisholm & Kilpatrick.

***Moot Court,* continued on p. 2.**

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

***Moot Court,* continued from cover.**



2016 Winners
Best Team Savanna Barlow and Marcus Fifer of Baylor Law School with Judge Mary Schoelen, Chief Judge Robert Davis and Judge William Moorman of the CAVC and Mary Ann Gilleece, Chairman of the Board, Veterans Consortium Pro Bono Program.

2016 was my fourth year as director of the competition, and each year I am reminded of how much the NVLMCC's success hinges on the dedication and hard work of its volunteers. Without the support of the Bar Association members who donated their time to create the competition problem, grade briefs, and judge the oral argument rounds, the competition simply could not happen.

Several volunteers and sponsors deserve special recognition for the roles they played in the 2016 NVLMCC. First, we welcomed the Veterans Consortium Pro Bono Program as our Trophy Sponsor this year. The Consortium generously donated engraved chart weights as awards for our winning competitors, as well as perpetual plaques bearing the names of the NVLMCC's past winners that will hang outside the CAVC courtroom. Second, Madeline DiLascia, our GW Law student liaison, worked tirelessly to ensure that the Saturday rounds went off without a hitch. Finally, I want to thank my assistant director, Lindsay Littleton, whose immense contributions to every aspect of this year's competition made my job easy.

Thank you to each of them and to all of you who volunteered for helping to make this year's competition a success!

Full Competition Results and Participating Schools

Best Team
Savanna Barlow and Marcus Fifer
Baylor Law School

Best Oral Advocate
Paul Hubbell
Houston College of Law

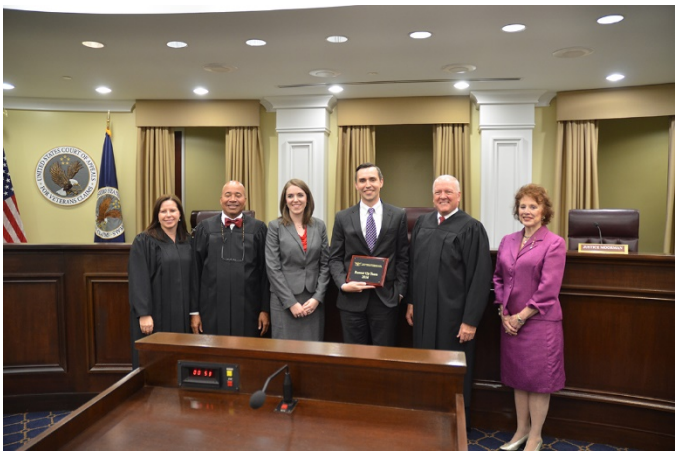
Best Petitioner's Brief
Savanna Barlow and Marcus Fifer
Baylor Law School

Best Respondent's Brief
Hoyt Prindle III and Taylor Ryan
Stetson University College of Law

Participating Schools
Sandra Day O'Connor College of Law, Arizona State University
Baylor Law School
Emory University School of Law
Florida Coastal School of Law
The George Mason University Antonin Scalia School of Law
The George Washington University Law School
Georgetown University Law Center
Golden Gate University School of Law
Houston College of Law
The John Marshall Law School (Chicago)
New York Law School
Penn State Law
Stetson University College of Law
University of Denver Sturm College of Law
University of Detroit Mercy School of Law
University of Missouri School of Law
William & Mary Law School

***Moot Court,* continued on pg. 3**

***Moot Court,* continued from pg. 2.**



2016 Runners Up
Lauren Livingston and Kyle Steingreaber of Baylor Law School with Judge Mary Schoelen, Chief Judge Robert Davis and Judge William Moorman of the CAVC and Mary Ann Gilleece, Chairman of the Board, Veterans Consortium Pro Bono Program.

For more information about this year's competition and the NVLMCC in general, please visit the competition's web site at www.nvlmcc.org.

An inside view of the NVLMCC

by

Savanna Barlow
Marcus Fifer
Lauren Livingston
Kyle Steingreaber

It wasn't supposed to be. Our coach specifically selected us for another competition, but when she learned of that competition's cancellation, she registered us for the National Veterans Law Moot Court Competition. Fortunately for us, we took what might have been lemons and enjoyed what will surely be one of the highlights of our time in law school.

We learned so much in preparing for this competition. In writing our briefs, we were able to put into practice what we had learned in our Legislation, Administrative Power and Procedure (LAPP) class about administrative law and the canons of construction. We totally immersed ourselves in learning and understanding the issues related to the medicinal use of cannabidiol and its classification as a Schedule 1 drug. We worked hard to craft persuasive arguments, knowing that with a closed record, we could have no excuses for missing anything.

Along the way, we gained an appreciation for the importance of veterans' claims and ensuring that those who have served our country are treated fairly. We were impressed by the vitality of the veterans' claims bar and their dedication to not only their own practices, but also their dedication to serving as judges for the competition, some travelling from afar to participate. We very much appreciated and enjoyed arguing before judges who were well-prepared to ask challenging questions.

We especially enjoyed competing in the final round. Beyond competing against our fellow students and friends, it was very special to argue before a panel that included current and former members of the Court of Appeals for Veterans Claims. It wasn't supposed to be, but this competition turned out to be an exceptional experience for us.

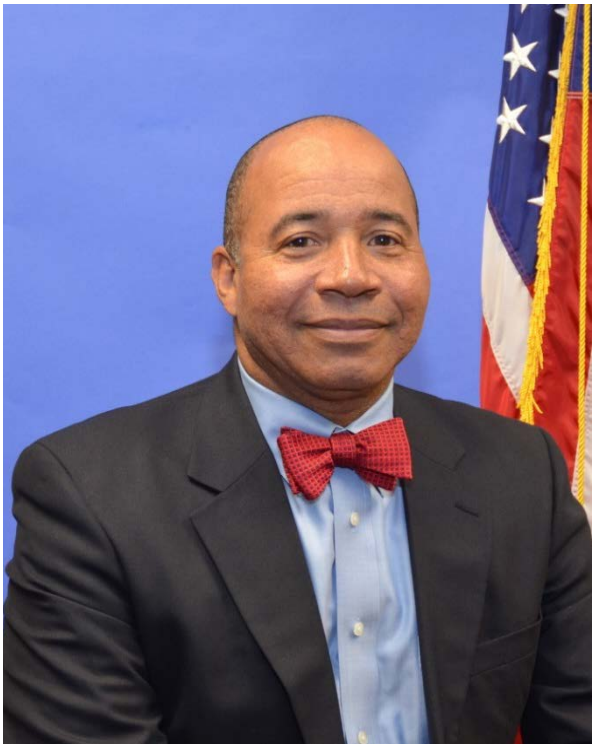
Savanna Barlow, Marcus Fifer, Lauren Livingston, and Kyle Steingreaber are all second year students at Baylor Law School.

IN THIS ISSUE

This special edition of the Veterans Law Journal focuses on law schools and includes student written articles.

A Message from the Chief Judge

by Robert N. Davis



Dear Fellow Bar Association Members,

It's hard for me to believe that it has been 5 months since I took over as Chief Judge of the Court. I knew that this role would bring new responsibility and new challenges – and it has not disappointed. This has been an incredibly busy time, and in many ways it feels as if I have been at this for much longer. But it also feels like time is moving quickly, and there is much I want to accomplish during my three-year tenure as Chief Judge. Let me share with you here one of those goals.

Whether by accident or by design, we all have the privilege of being a part of one of the most unique and unusual federal appellate courts in the country. From its infancy in 1988, the Court has evolved and expanded, and in the 12 short years that I have been on the Court, I have likewise seen the area of veterans law develop and grow. In 2004 there were only 15 West volumes of veterans law, just a handful of courses, clinics, and law review articles on the subject, and no casebooks. Today we have a significant body of caselaw, law school clinics working with veterans exist at a sizable number of schools, and veterans law courses are becoming the norm at many law schools. Moreover, literature on veterans law has matured, and recently there have been published casebooks and other books on veterans law, as well as a raft of articles on a wide variety of issues affecting veterans, the VA, and the Court.

A significant sign that the work of the Court and the veterans law field in general is maturing is found in the articles that are critical of the Court -- articles that call for the Court to examine where it is and where it is going, its practices and rules and its manner of deciding cases. I view these developments not as negatives, but as great signs that we are a healthy vibrant community existing at a critical time in the continuing development of this unique legal field at the intersection of law and medicine. In the brief period during which I am a steward for the care and progress of the Court, one of my focuses is to listen to the input of our stakeholders and improve the way the Court accomplishes its function of providing prompt, full, and fair judicial review of appeals from America's veterans.

To that end, the Court has recently created a Judicial Advisory Committee, with 11 members representing a cross section of the Court's constituency. Boiled down to simplest terms, the mission of the Committee is to meet regularly and exchange ideas on issues, problems, procedures, or improvements to the Court's operations and the larger practice of veterans law. It is my hope that the Court will then take hold of these proposals and recommendations and ultimately institute positive change. The Judicial Advisory Committee recently held its first meeting and the enthusiasm and eagerness of the group exceeded my expectations. Bar Association President Megan Kral serves on the Committee, and as we shape the agenda for the coming year, I will look to her as a conduit for the Association's input. I am truly excited about this enterprise.

***Message from Chief Judge,* continued on pg. 5.**

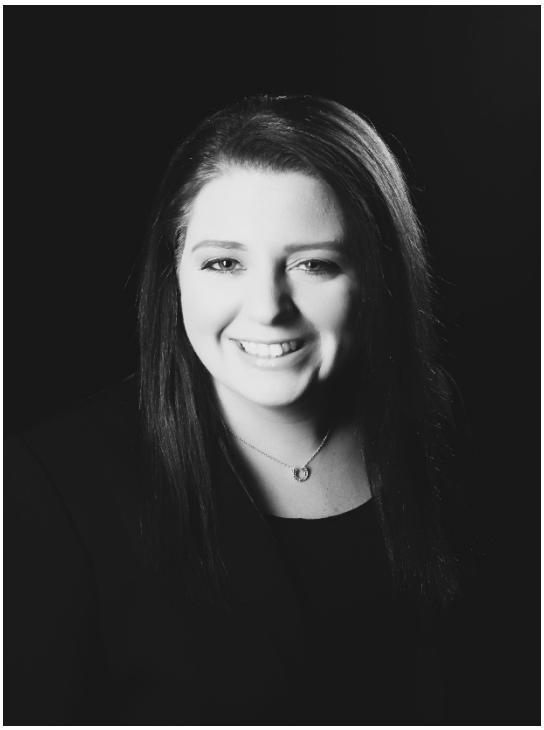
***Message from Chief Judge,* continued from pg. 4**

Our mission is a noble one, to resolve difficult claims from our nation's veterans, and our cause is just, to provide justice in a timely, efficient and fair manner. All Bar Association members are stakeholders in this mission. I look forward to engaging with all of you in this endeavor.

Regards,

Chief Judge Davis

Message from the President



Thank you for affording me the honor and privilege to serve as President of the CAVC Bar Association for the upcoming year.

For those of you unfamiliar with me, I currently serve as a Senior Appellate Attorney with the Department of Veterans Affairs, Office of General Counsel, Court of Appeals Litigation Group. I have been with VA for over six years; the first four years as a staff attorney with the Board of Veterans' Appeals before transferring to the General Counsel's office. Prior to relocating to D.C. to join VA, I was a litigator in northern New Jersey.

I have always believed that the strength of this Association is the diversity of views held by its members. As is well-documented, this Association comprises representatives from VA, the private bar, the veterans service organizations, and law school clinics. There are very few opportunities for such diverging opinions to be heard and discussed, but this Association proves to be the exception and, in fact, encourages such conversations. Even amongst the diversity of viewpoints, the common goal of all stakeholders is attaining just resolutions for our nation's veterans. This diversity while obtaining a common goal is this Association's strength, one that we will continue to rely on in the year ahead.

A common theme in speaking with constituents of this Association and to other stakeholders of the practice is that we face a unique time, with unique challenges. A lot of change to the practice has occurred in the past year, with more changes on the horizon. These changes do not just affect one level of our practice, but the entire system – from the filing of a claim to the finality of a litigated decision. The Court is managing unprecedented vacancies. The Board is preparing to be inundated with an unprecedented number of appeals. At the Agency level, hiring freezes and personnel changes raise uncertainties --not to mention the discussions about appeals reform, regulation change, and the unknowns of a new administration.

My goal, which some may call lofty, and others may call naïve, is to provide this Association with the necessary education and resources to navigate through these unique times. Educational programs focused on changes in the practice will be explored

***Message from the President,* continued on pg. 6.**

***Message from President,* continued from pg. 5.**

and scheduled as needed. A new website will be unveiled in the near future to provide information to our membership. The *Veterans Law Journal* will continue to provide updates on new case law as both our Court and the Federal Circuit issue decisions relevant to our practice.

Additionally, I anticipate using the resources of this Association to provide input and assistance where requested, or where we, as an Association, see it is needed. I am very cognizant of this Association's neutral position. However, as stated before, very few forums allow a diversity of opinions to be heard and debated. If this free flow of information and thought allows us to answer questions that will help shape the success of the system, I will ensure that the Association's voice is heard.

I hope to continue to facilitate these conversations, and take pride as the voice of the Association at a time where we have the ability to continue to ensure the success of the veterans benefit system for all of the nation's veterans.

Megan C. Kral
President, CAVC Bar Association

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 Jamie Atwood at: jatwood@abslawyer.com for more information.

Court Addresses Applicability of 38 C.F.R. § 4.59 to Musculoskeletal Disability Not Predicated on Range of Motion Claim

By Adam Lubliner

Reporting on *Southall-Norman v. McDonald*, No. 15-1357 (December 15, 2016).

In *Southall-Norman v. McDonald*, the Court of Appeals for Veterans Claims (CAVC) addresses, whether 38 C.F.R. § 4.59 applies only when evaluating a joint disability under a diagnostic code that is predicated on a motion measurement range. It also considered whether the Board's failure to consider evidence in the record when making a credibility determination constitutes harmless error.

Ms. Southall-Norman is a United States Marine Corps veteran who began seeking service-connection for bilateral foot disability and hemorrhoids in June 2007. At that time, she underwent a VA general medical examination and reported physical ailments with her feet which caused her constant and localized pain, exacerbated by physical activity and by wearing high heels. In December 2007, at a private medical appointment, she reported hemorrhoid pain. In March 2008, the RO granted service connection for bilateral hallux valgus and external hemorrhoids, and assigned her non-compensable evaluations for the two conditions.

Ms. Southall-Norman disagreed with the VA's evaluations and submitted a statement regarding additional instances of side-effects from her hemorrhoid condition. She was again examined in August 2011and complained of exacerbated hemorrhoid-related ailments, but the examiner found no indication of the complained-of exacerbation. In September 2011, Ms. Southall-Norman underwent a VA foot examination, during which she reported bilateral foot pain and cramping when her feet were in motion and at rest.

During a Board hearing in October 2013, she testified that she experienced constant bilateral foot pain

while standing, walking, and at rest. She further stated that five or six years earlier, her external hemorrhoid condition had worsened. She also reported that she had to wear pads on a daily basis. The Board granted a 10%, but no higher, initial evaluation for hemorrhoids and remanded the foot claim. In June 2014 another VA physical examination confirmed bilateral foot pain upon weight-bearing. The RO in September 2014 added bilateral pes planus to Ms. Southall-Norman's service-connected bilateral foot disability, assigning her 50% disability.

In January 2015, the Board considered Ms. Southall-Norman's case, and found that there was insufficient evidence in the record to establish her entitlement to compensation for a bilateral foot disability prior to June 2014. The Board determined that her pes planus demonstrated mere mild symptoms and could be relieved by built-up shoes or by arch supports. The Board also found that hallux valgus was mild or moderate and did not require surgery.

The Board also ruled that Ms. Southall-Norman was not entitled to a separate evaluation for her hemorrhoid condition, as the Board asserted that her reports of hemorrhoid-related symptomology were inconsistent throughout her claim period and were contradicted by the medical evidence.

Appellant argued that the Board should have considered 38 C.F.R. § 4.59, which states, "[i]t is the intention [of the Board] to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint." 38 C.F.R. § 4.59 (2016). The Board in Ms. Southall-Norman's case did not address § 4.59 in any way in its decision. The Secretary argued on appeal that § 4.59 applies only when evaluating a joint disability under a diagnostic code predicated on a motion measurement range.

***Southall-Norman*, continued on pg. 8.**

***Southall-Norman*, continued from pg. 7.**

The Court determined, first, that 38 C.F.R. § 4.59's plain language did not, on its face, limit the section's applicability to disabilities predicated on range of motion measurements, as the Secretary contended.

The Court held that the plain language of § 4.59 includes all conditions which involve painful motion of the musculoskeletal system. *See Correia v. McDonald*, 28 Vet.App. 158, 165 (2016). The Court concluded that § 4.59 applies to painful joint or periarticular pathology regardless of whether the disability is evaluated under a diagnostic code that is predicated on a range of motion measurements. Because the record contained evidence of Ms. Southall-Norman's foot pain upon weight bearing, walking, standing, and manipulation, the Court held that the RO should have considered § 4.59 when evaluating her initial compensable evaluation for the bilateral foot disability.

The Court declined to defer to the Secretary's offered interpretation of § 4.59 because § 4.59's plain language indicates potential applicability to Ms. Southall-Norman's bilateral foot condition. The Court reiterated the principle that, if the plain meaning of a regulation is clear from its language, then that meaning controls and "that is 'the end of the matter.'" *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). Where the regulatory language is ambiguous, the Court must defer to the agency's interpretation of its regulation unless that interpretation does not represent the agency's considered view on the matter. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). The Court here said that, even if the language of § 4.59 was not clear, it would still not defer to the Secretary's interpretation, as there was evidence that the Secretary had not maintained a consistent position on § 4.59's meaning. The Court noted at least two concessions by the Secretary in non-precedential Court decisions that expressed interpretations inconsistent with his present position. Additionally, the Court found that, during oral argument in another case, the Secretary had cited the diagnostic code for hallux valgus (one of Ms. Southall-Norman's issues) as an example of a diagnostic code to which § 4.59 applied, and thus had inconsistently applied § 4.59. Because of the Secretary's inconsistency in application of § 4.59, the Court refused to apply *Auer* deference to the Secretary's interpretation. Thus, the Court deemed inadequate the Board's reasons or bases for denying Ms. Southall-Norman's compensation, and remanded the case for further inquiry of whether the record reflected an actually painful, unstable, or malaligned joint or periarticular region that would elicit application of § 4.59.

With respect to the hemorrhoid claim, the Court considered whether the Board's credibility determination constituted harmless error. The Board had found her statements not credible because her descriptions of the the onset, degree, and type of hemorrhoid-related ailments were inconsistent throughout the period of complained symptoms, including whether or not she had had to resort to the use of a pad. For example, the Board stated that Ms. Southall Norman's denial of use of a pad in July 2007 was inconsistent with her October 2013 report that she had begun using a pad around 5 to 6 years earlier. The Court found that Ms. Southall-Norman's earlier statements were entirely consistent with her later testimony that this condition worsened post-service, thereby compelling her to wear pads after her separation, noting that 5-6 years before October 2013 was later than July 2007. Thus the Court held that the Board's reasons or bases for impugning Ms. Southall-Norman's credibility on the basis of her hemorrhoid symptoms were inadequate. The Court held that those errors were not harmless, and that the issue required reconsideration. The Court consequently remanded the hemorrhoid claim as well.

Adam Lubliner is a student at the University of San Diego School of Law and is a member of the university's Veterans Legal Clinic.

Court Addresses "Veteran" Status, Presumption of Aggravation, and Entrance Examination Requirements Related to Disabilities Incurred or Aggravated During a Period of ACDUTRA

by Kirsten Lilly

Reporting on *Hill v. McDonald*, No. 14-1811 (October 7, 2016).

In *Hill v. McDonald*, the Court of Appeals for Veterans Claims (CAVC) held the following: (1) where VA determines that a claimant has established veteran status for a period of ACDUTRA (active duty for training) by establishing service connection for one disability, the claimant may take advantage of the presumption of aggravation for other preexisting disabilities claimed to have been aggravated during the same period of training and (2) an entrance examination given prior to the period of ACDUTRA is not necessary for the application of the presumption of aggravation where the baseline severity of the preexisting condition can be determined through other contemporaneous evidence.

Mr. Hill served several periods of Reserve duty in the U.S. Army National Guards of Michigan and Wisconsin from 1980 to 2002. During an ACDUTRA period, a bolt of lightning struck a tree near where Mr. Hill's unit was performing field exercises. An eyewitness reported that Mr. Hill was standing near the tree when it was struck by lightning, at which point Mr. Hill "fell to the ground." Immediately thereafter, Mr. Hill sought medical attention for knee and back pain. The Wisconsin Army National Guard classified Mr. Hill's knee injury as incurred "in the line of duty" and his chronic low back pain as "in line of duty-[existed prior to service]-aggravation."

In June 2002, Mr. Hill filed a VA benefits claim seeking service connection for a lower back condition, knee condition, and memory loss. He alleged that these injuries were incurred or aggravated as a result of being struck by lightning during a period of ACDUTRA. In March 2003, the RO granted service connection for the knee condition but denied his low back and memory loss claims. Mr. Hill did not appeal that decision and it became final.

In September 2008, Mr. Hill submitted additional evidence to reopen his claims for lower back pain and short-term memory loss with PTSD. The RO denied Mr. Hill's claim for PTSD (now bifurcated from his claim for memory loss) and found that Mr. Hill had failed to submit new and material evidence sufficient to reopen his low back pain claim. On appeal the Board in April 2014 denied his PTSD and lower back pain claims.

Mr. Hill challenged at the CAVC the Board's determinations that (1) he failed to submit new and material evidence sufficient to reopen his low back pain claim, and (2) the weight of the evidence did not show that his PTSD increased in severity during service. In October 2015, the CAVC issued a memorandum decision vacating the Board's April 2014 decision and remanding Mr. Hill's claims for re-adjudication.

The Memorandum Decision declared that a presumption of aggravation was not applicable for a condition claimed to have worsened during a period of ACDUTRA. Mr. Hill filed a motion for panel review of that ruling. The CAVC granted Mr. Hill's motion for panel review and proceeded to analyze three separate issues relevant to this issue raised by its earlier decision: (1) veteran status, (2) presumption of aggravation, and (3) the entrance examination requirement.

(1) Veteran Status.
The Board had concluded that, because Mr. Hill established that he was a veteran for the relevant period of ACDUTRA, his status as a veteran applied to other claims based on the same period of ACDUTRA. The CAVC, reviewing *de novo*, agreed.

***Hill*, continued on pg. 9.**

***Hill,* continued on pg. 10.**

The CAVC determined that the plain language of 38 U.S.C. § 101 makes clear that once an individual establishes that *any* disability was incurred during a period of ACDUTRA, he has established that said period of ACDUTRA constitutes "active, military, naval, or air service" and demonstrated that he is a "veteran." Thus, "once a claimant has achieved veteran status for a single disability incurred or aggravated during a period of ACDUTRA, that status applies to all disabilities claimed to have been incurred or aggravated during that period of ACDUTRA."

(2) Presumption of Aggravation.
The Board had determined that, because Mr. Hill had established veteran status, he was entitled to the presumption of aggravation so long as he could demonstrate that his psychiatric disorder worsened during the period of ACDUTRA. Based on its ruling that a veteran who has established veteran status for one condition during a period of ACDUTRA "is now a veteran for the purposes of all other claims based on that same period of ACDUTRA," the Court affirmed this determination as well.

(3) Entrance Examination Requirement.
The issue whether the application of the presumption of aggravation requires an entrance examination to establish the baseline severity of a preexisting disability claimed to have worsened during a period of ACDUTRA presented an issue of first impression for the CAVC. The Court concluded that 38 U.S.C. § 1153 is ambiguous with regard to whether an entrance examination is a prerequisite for the application of the presumption of aggravation, and there is no agency interpretation to resolve the ambiguity. But it determined that the interpretation of section 1153 offered by both Mr. Hill and the VA in the appeal, that is, that no entrance examination is necessary where there is contemporaneous evidence of the baseline severity of the preexisting condition, was a reasonable interpretation of the statute. The CAVC held that where a claimant submits evidence of a pre-existing disability along with evidence that helps establish that "there [was] an increase in disability during" the ACDUTRA period, the claimant "may take advantage of the presumption of aggravation."

(4) Claims on Appeal.
Having resolved the issues concerning presumption of aggravation, , the CAVC concluded that the Board had erred in its treatment of various items of evidence. Accordingly, the CAVC reversed the Board's determination that Mr. Hill had failed to submit new and material evidence to reopen his back pain claim and vacated the Board's April 2014 ruling that denied Mr. Hill service connection for PTSD.

Kirsten Lilly is a student at West Virginia University College of Law and is a member of the Veteran's Advocacy Clinic.

Court Determines That DC 7101 Considers Effects of Medication in Assigning Compensable Ratings

By Ryan McCarthy Davis

Reporting on *McCarroll v. McDonald*, No. 14-2345 (November 7, 2016)

In *McCarroll v. McDonald*, the Court of Appeals for Veterans Claims addressed whether diagnostic code 7101 under 38 C.F.R. §4.104, for Hypertensive Vascular Disease, considers the ameliorative effect of medication in determining a rating for the condition.

Mr. McCarroll, a U.S. Army Veteran, filed a claim for entitlement to service connection of hypertension in March 2009. His Service Treatment Record (STR) indicated a history of borderline hypertension, with readings of 132/95 and 128/95 on September 14, 2008. In April 2009, a private cardiologist prescribed Mr. McCarroll Lisinopril, a medication used to treat high blood pressure. In October 2009, the Salt Lake City

***McCarroll*, continued from pg. 10.**

***McCarroll*, continued from pg. 11.**

VA Regional Office granted Mr. McCarroll service connection for hypertension with a non-compensable rating. Mr. McCarroll filed a timely appeal of the assigned rating in October 2010, and after a hearing in November 2012, the Board affirmed the RO and denied an initial compensable rating for hypertension in June 2014.

Before the court, Mr. McCarroll argued that the Board violated the court's holding in *Jones v. Shineski*, 26 Vet. App. 56 (2012) when denying him a compensable rating for hypertension. In *Jones*, the Court held that the Board cannot deny entitlement to a higher rating based on the effects of medication if a diagnostic code is silent on the effects of medication. The diagnostic code in *Jones* did not specifically mention treatment by medication, but the Board had denied a higher rating in that case in light of the ameliorative effects of medication. The court ruled that it was clear error to consider the ameliorative effects of medication where they were not contemplated by the diagnostic code.

Mr. McCarroll contended that in his case the Board ignored *Jones* and improperly considered the ameliorative effects of medication when it denied him an initial compensable rating. The Court reasoned that, in order for the *Jones* holding to apply, the diagnostic code must be silent on consideration of the effects of medication. To determine if the Board improperly failed to apply *Jones*, the court analyzed the plain text of the diagnostic code, which assigns an initial compensable rating of 10% for a veteran who has a "history of diastolic pressure predominantly 100 or more who requires continuous medication for control." 38 C.F.R. §4.104 DC 7101. The Court reasoned that the mention of medication in the plain text of the diagnostic code shows that the Secretary intended to consider the effects of medication when assigning a compensable rating for hypertension. Thus, the *Jones* case did not apply and the Board's decision stood.

Furthermore, the court determined that, even if the Board had not considered the ameliorative effect of medication, the facts of Mr. McCarroll's case did not qualify him for an initial compensable rating. The court cited six blood pressure readings from March 2, 2009, to indicate that, even before he began using medication, his blood pressure did not rise to a compensable level.

The Court also denied Mr. McCarroll's claim to entitlement to an extraschedular rating, because he had not argued for such a rating during the Board hearing and because it found no evidence in the record suggesting that a schedular rating may be inadequate.

The decision includes both a concurrence and a dissent. Two dissenting judges criticized the majority for, in their opinion, improperly reading the ameliorative effect of medication into DC7101. DC7101 contains three possible scenarios to qualify for a 10% rating for hypertension. The first two criteria for a compensable rating at 10% under 38 C.F.R. §4.104 are "diastolic pressure predominantly 100 or more" and "systolic pressure predominantly 160 or more." The dissenting judges disagreed with the majority's interpretation that, because the third criterion for an initial compensable rating includes the consideration of medication ("history of diastolic pressure predominantly 100 or more who requires continuous medication for control"), the other two criteria impliedly do as well. The dissenters found no justification for what they called an expansive reading of the criteria. They would have vacated the Board's decision denying Mr. McCarroll benefits, and remanded the matter for the Board to consider whether a medical opinion was required to determine the severity of Mr. McCarroll's condition absent any ameliorative effects of medication.

The concurrence urged the Court to explicitly overturn the *Jones* decision entirely, and for the Board to consider the ameliorative effect of medication in all instances of issuing a disability rating. According to the concurring judges, the purpose of disability evaluations is to evaluate "the ability of the body . . . to function under the ordinary conditions of life." 38 C.F.R. §4.10. These

***McCarroll*, continued on pg. 12.**

***McCarroll*, continued from pg. 11.**

judges declared medication that is commonly used to treat high blood pressure to be an ordinary condition of life. Therefore, the effects medication has on an individual's blood pressure are relevant when assigning a rating. The concurring judges believe that the Secretary intended to consider the ameliorative effects of medication as a criterion to judge the severity of a condition. Moreover, the concurrence contended that the *Jones* holding creates an impracticable scenario: requiring speculative medical opinions regarding the severity of medical conditions without medication. It also creates an incentive for veterans to stop their use of medication to receive a higher disability rating, a result the concurrence found repugnant to public policy.

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VA Regulations Establish Presumption of Service Connection for Camp Lejeune

by Matthew L. Ledford

More than three decades ago contaminants were found in the water supply at U.S. Marine Base Camp Lejeune in Jacksonville, N.C. Unaware of the toxins, thousands of service members and their families drank and bathed in the water, resulting in severe health effects. The Government was slow to acknowledge the pollution, and veterans were left diseased and without means of recourse. In "The Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012," Congress provided for medical care to those affected. *See* Pub. L. No. 154, 1165 Stat. 126. Building upon the Act, the Department of Veterans Affairs (VA) has taken a major step toward further addressing this issue for veterans, creating the framework for establishing a crucial link between their military service at Camp Lejeune and resulting health conditions.

In January of this year, the VA published regulations to establish a presumption of service connection for eight diseases associated with the pollution at Camp Lejeune. *See* Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune, 82 Fed. Reg. 4173 (Jan. 13, 2017) (amending 38 C.F.R. § 3.307 and 3.309); Press Release, U.S. Dep't of Veterans Affairs, VA's Rule Establishes a Presumption of Service Connection for Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune (January 13, 2017) (on file with Office of Pub. Affairs and Media Relations) [hereinafter "*Press Release*"]. A presumption of service connection requires the VA to grant service connection for specific disabilities diagnosed in certain veterans that were caused by the circumstances of their military service at Camp Lejeune, therefore entitling them to disability compensation, unless the presumption is rebutted. *See* U.S. Dep't of Veterans Affairs, *Disability Compensation: "Presumptive" Disability Benefits*, Compensation and Pension Service (February 2015), http://benefits.va.gov/BENEFITS /factsheets /serviceconnected/presumption.pdf.

The VA determined that proof of qualifying service at Camp Lejeune coupled with the subsequent diagnosis was sufficient to presume that the disease occurred "in the line of duty . . . [and] establishe[d] entitlement to service connection." *See* Federal Register: The Daily Journal of the United States Government, Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune (January 13, 2017), https://www.federalregister.gov/documents/2017/01/13/2017-00499/diseases-associated-with-exposure-to-contaminants-in-the-water-supply-at-camp-lejeune. The presumption applies to "active duty, reserve, and National Guard members who served at

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***Camp Lejeune*, continued from pg. 12.**

Camp Lejeune for a minimum of 30 days (cumulative) between August 1, 1953 and December 31, 1987" and are diagnosed with one of the following conditions:

- adult leukemia
- aplastic anemia and other myelodysplastic syndromes
- bladder cancer
- kidney cancer
- liver cancer
- multiple myeloma
- non-Hodgkin's lymphoma
- Parkinson's disease

82 FR 4175, 4185; https://www.federalregister.gov/d/2017-00499/page-418.

Tests of the water supply at Camp Lejeune conducted in 1980-81 indicated contamination by "halogenated hydrocarbons, chlorinated hydrocarbons, and organics." *Jones v. United States*, 691 F.Supp.2d 639, 643 (E. D. N. C. 2010). Water systems were shut down in February of 1985 when years of discovery revealed the presence of trichloroethylene (TCE), a metal degreaser, perchloroethylene (PCE), a dry cleaning agent, and benzene and vinyl chloride. *Press Release*. A variety of experts including the Department of Health and Human Service's Agency for Toxic Substances and Disease Registry (ATSDR) and the National Academies of Sciences, have concluded that scientific and medical evidence support the presumption. Fact Sheet, U.S. Dep't of Veterans Affairs, VA's Final Rule to Consider Certain Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune as Presumptive for Service Connection (January 13, 2017) (on file with Office of Pub. Affairs and Media Relations) [hereinafter "*Fact Sheet*"].

Upon the release of the new regulations, Secretary McDonald expressed optimism regarding the changes, stating: "We have a responsibility to take care of those who . . . have been exposed to harm as a result of [their] service. Establishing a presumption of service . . . will make it easier for those Veterans to receive the care and benefits they earned." *Press Release*. The regulations will take effect either 60 days after publication in the Federal Register, or following conclusion of the 60-day Congressional Review, whichever is later. *Fact Sheet*. Veterans who believe they qualify should file a VA Form 21-526E and provide information regarding their service and diagnosis. *Id.* Veterans can also file a claim electronically through eBenefits by stating on their application that their claim is for presumptive service connection related to exposure at Camp Lejeune. *Id.*

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Court Addresses Whether Board May Incorporate Reasons and Bases From A Prior Remand Decision Sub Silentio

By Nikki Clark

Reporting on *Mathews v. McDonald*, No. 15-1787 (October 14, 2016).

In *Mathews v. McDonald*, the Court of Appeals for Veterans Claims (CAVC) addressed whether the Board of Veterans Appeals (Board) may sub silentio incorporate its reasons or bases for a finding made in a prior remand order into a subsequent Board decision. The CAVC concluded that the Board may not.

Mr. Mathews served on active duty in the U.S. Navy from July 1966 to February 1970, in Vietnam. He

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***Mathews*, continued from pg. 13.**

suffers from a lesion on his neck, which he contends is related to exposure to herbicides.

Mr. Mathews's lesion was evaluated by no fewer than seven physicians prior to the filing of his claim. These doctors offered varying opinions as to the precise diagnosis for the lesion, including its primary site and origin. Mr. Mathews's treating physician noted exposure to Agent Orange and opined that "it appears that this could be related to the etiology of the malignant lesion from a skin primary."

Mr. Mathews filed a claim with VA in June of 2003 for neck cancer, among other conditions. The Regional Office (RO) denied the claim because the evidence did not show a cancer listed on the presumptive list of Agent Orange diseases.

After filing a Notice of Disagreement, Mr. Mathews submitted a statement from his oncologist providing a differential diagnosis of "synovial or epitheliod sarcoma." In December of 2003, the RO denied the claim.

In February 2004, another doctor determined that the primary site of the lesion corresponded to respiratory cancers and said that the tumor was "an undifferentiated carcinoma". Yet another doctor submitted a letter stating that pathology reports for the lesion had not established a definitive diagnosis.

On appeal to the Board, Mr. Mathews argued that he should be granted service connection under the benefit of the doubt standard, given the uncertainty as to the type of cancer as expressed by the doctors.

In May 2007, following a hearing, the Board remanded the claim due to "inconclusive opinions regarding the diagnosis, primary [s]ite, and origins of the malignant tumor." The remand order required two actions: 1) three oncologists to review the claims file and tissue sample and 2) this panel of three to provide "consensus answers" to the medical questions.

The AMC attempted to assemble a panel of three oncologists located near Mr. Mathews but failed. And, although the AMC obtained the exam report it

did not obtain an actual tissue sample. Internal e-mails indicate that the AMC eventually determined that only a single oncologist was required.

The AMC then retained a private physician who determined that the histopathology of the lesion was undifferentiated carcinoma and the available evidence did not point to a likely site of origin for the lesion. This doctor concluded that she could not determine whether the lesion was caused by or aggravated by military service.

VA denied the claim and Mr. Mathews then provided a list of oncologists from a VA website.

In December 2011, the Board remanded the claim a second time, because VA had failed in its duty to assist, because it did not secure a release to obtain the tissue sample, and because the doctor engaged by VA had failed to provide adequate supporting rationale for her opinion. The Board stated, however, that the fact that only one oncologist – not three – was contacted was not prejudicial to the veteran.

Following this second remand, VA secured an opinion from a nurse that the condition was "less likely than not" incurred in or caused by service. Mr. Mathews challenged the adequacy of this opinion and his challenge gave rise to a third remand in June of 2013, which again found a failure in the duty to assist, because the tissue sample was not obtained, and the medical opinion was inadequate.

After this third remand, the AMC was unable to secure the tissue sample but did secure stain slides. The slides were sent to a staff physician in the hematology/oncology section of the Albuquerque VAMC. This physician noted that the neck lesion was not a cancer on the AO list and determined it "less likely than not" related to service. However,

***Mathews*, continued on pg. 15.**

***Mathews*, continued from pg. 14.**

because it was not clear whether this physician reviewed the slides, the Board remanded a fourth time. Following this fourth remand, the physician in Albuquerque provided additional information about his review, and reasserted his conclusion that Mr. Mathews's melanoma was not caused by herbicide exposure.

In January of 2015, the Board found that VA had substantially complied with prior remand orders and that Mr. Mathews's claim should be denied. Mr. Mathews appealed to the CAVC.

In its decision, the CAVC reaffirmed the principle that a claimant has a legal right to compliance with a remand order, citing *Stegall v. West*, 11 Vet. App. 268,271 (1998). In addition, the CAVC reaffirmed the principle that substantial compliance -not strict compliance – is required with remand orders. *Donnellan v. Shinseki*, 24 Vet. App. 167, 176 (2010) But the CAVC held that the Board must support a substantial compliance determination with an adequate statement of reason or bases so that the claimant understands the precise reasons for the finding and so that Court review is facilitated.

With respect to Mr. Mathews's appeal, the CAVC found that the Board failed to provide adequate reasons or bases explaining why the three-oncologist panel (originally ordered in May 2007) was not necessary. In response to the Secretary's argument that the December 2011 remand order had explained that a single oncologist opinion was not prejudicial to the veteran, the CAVC squarely held that the Board may not sub silentio incorporate reasons or bases from a prior remand order into a later decision. The CAVC reasoned that, because remand orders are non-final and non-reviewable, 'it would be antithetical to the pro–claimant veteran system" to allow unfavorable findings in Board remand orders to bind a veteran.

The CAVC determined, moreover, that this error was prejudicial. Noting that VA is presumed to have selected a competent source for a medical opinion, the Court held that the Board had failed to explain why its earlier selection, a consensus among three oncologists, was no longer necessary.

Although the CAVC found that the Board decision lacked adequate reasons and bases for its determination that one oncologist instead of three sufficed, the CAVC acknowledged that the Board was not prohibited from finding substantial compliance where only one oncologist was consulted. Thus the case required remand.

Nikki Clark is a student at the University of Missouri School of law and is a member of the school's Veterans Clinic.

Court Holds No Regulatory Right to Remote Read-Only VBMS File Access for Client or Attorney

by Rachel Roush

Reporting on *Green v. McDonald*, No. 16-0407 (October 24, 2016).

In *Green v. McDonald*, the Court of Appeals for Veterans Claims (CAVC) addressed whether a claimant, or his attorney, has a right to remote read-only access to the claimant's Veterans Benefits Management System (VBMS) file.

Mr. Green appealed a January 15, 2016 Board of Veterans' Appeals (Board) decision denying his claims for service connection for bilateral eye disorder and an increased rating for lower extremity radiculopathy. The Secretary served Mr. Green with a physical copy of the record before the agency (RBA) pursuant to Rule 10(a)(5) of the Court's Rules of Practice and Procedure. Mr. Green was required to submit any motion disputing the RBA's content within fourteen (14) days pursuant to Rule 10(b). Mr. Green contended, however, that he was unable to submit a Rule 10(b) motion identifying any RBA discrepancies without access to his VBMS file.

***Green*, continued on pg. 16.**

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Accordingly, Mr. Green filed motions to stay the proceedings until his attorney was granted remote read-only VBMS and to compel the Secretary to grant such access. Mr. Green advanced several arguments in support of his motions, the most compelling of which relied on 38 C.F.R. §§ 1.600(b)(1) and 1.601(a)(2) and U.S. Vet. App. Rule 10(d).

In response, the Secretary asserted that the CAVC lacked jurisdiction to review the manner in which the VA chooses to provide access to its administrative system. The Secretary further contended that Mr. Green and his attorney were permitted to view and access Mr. Green's VBMS records from either the VA General Counsel's office or any RO location, consistent with the VA's long-standing practice applicable to review of paper claims files. The Secretary also argued that Mr. Green's attorney would be entitled to remote access to VBMS files so long as she became a VA accredited representative.

(1) Jurisdiction

The CAVC began its analysis by first rejecting the Secretary's argument that it lacked jurisdiction to decide the VBMS access issue raised by Mr. Green. The Court explained that it had jurisdiction over the pending controversy because it has jurisdiction to enforce its own rules, and the issue before the Court implicated the Secretary's compliance with Rule 10(d).

(2) Compliance with Rule 10(d)

The Court began by looking at the plain language of 38 C.F.R. §§ 1.600(b)(1) and 1.601(a)(2). Section 1.600(b)(1) states that "VBA will provide access to its automated claimants' claims records from locations outside the [RO] . . . only to individuals and organizations granted access to automated claimants' records under §§ 1.600 through 1.603." Section 1.601(a) further provides that an applicant requesting remote VBA access must be accredited by the VA or be "an attorney of record for a claimant in proceedings before the [Court] or subsequent proceedings who requests access" as part of the claimant's representation.

The Court explained that, when read together, the regulations supported Mr. Green's argument that VBA access should be granted to a claimant's attorney of record before the CAVC, regardless of whether that attorney was VA accredited. The inquiry, however, did not there end, because it was unclear whether the provisions that provide remote access to "automated VBA claims records" are broad enough to include access to VBMS files. Indeed, the Secretary expressly argued that the VBA access regulations, which were enacted prior to the development of the VBMS, were inapplicable.

In order to resolve the issue, the CAVC pointed to Section 1.600(c)(1), which limits access to certain categories of data and makes no reference to VBMS files. Ultimately, the Court concluded that Section 1.600(c)(1)'s remote access provisions were not broad enough to include VBMS files. As a result, Mr. Green's attorney was not entitled to remote access to his VBMS file under Sections 1.600-.603.

The Court then went on to determine whether the Secretary's VBMS access policies were reasonable under Rule 10(d) insofar as they require an attoney either to travel to the VA General Counsel's office or a VA RO to inspect and copy the files, or become VA accredited. Rule 10(d) states that the "Secretary shall permit a party or representative of a party to inspect and to copy, subject to reasonable regulation by the Secretary, any original material in the [RBA]." U.S. Vet. App. R. 10(d). The CAVC made clear that the Secretary, as the records custodian, had the burden of showing that the agency's VBMS access policies were reasonable.

In his attempt to shoulder that burden, the Secretary argued that no statutory or regulatory provisions require the VA to provide remote access to VA claims files. The Secretary also contended that the VA's established procedures for disclosure of claims file information were governed by and

***Green*, continued on pg. 17.**

***Green*, continued from pg. 16.**

consistent with the Privacy Act, 5 U.S.C. § 552a, and created for the protection and confidentiality of claimants' files.

The Court accepted the Secretary's "contention that VA's policy of permitting an attorney representing an appellant at the Court to inspect and copy original material in the RBA at the General Counsel's office or the VA RO is longstanding and rooted in safeguarding individual privacy from the misuse of information." The CAVC also acknowledged that the Secretary is required to consider the security risks associated with digital storage of information and to keep confidential claimant's claim files. Ultimately, the Court held that, "[a]bsent any statutory obligation to provide remote access to veterans' claims records, … [t]he Secretary's policies and procedures that allow an appellant or his representative to inspect and copy any original material in the RBA … at the VA General Counsel's office or at a VA RO are reasonable and comply with Rule 10(d)."

The CAVC nonetheless went on to express concern with the VA requirement that an attorney become accredited in order to obtain remote access to VBMS files. The Court described as "disconcerting" the VA accreditation requirement as applied to attorneys who only practice before the Court. In this connection, the CAVC pointed out that accreditation imposes requirements on attorneys that are not required by the Court and, given the length of time it takes VA to process accreditation applications, "the Secretary's endeavor to make remote read-only access available might be an empty gesture" for most attorneys representing claimants before the CAVC.

Judge Vance concurred in the CAVC's *per curium* opinion, writing separately to make the point that VA's policy that requires a claimant or his attorney to travel to the General Counsel's office or a VA RO in order to inspect and copy the claimant's file may not be reasonable in every case, depending upon the distance the claimant or his attorney is required to travel.

In conclusion, the Court held that 38 C.F.R. §§ 1.600-.603 do not provide a claimant or his counsel the right to remote read-only access to VBMS files.

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Veterans Law Review Call for Submissions

The *Veterans Law Review*, an online journal publishing in the area of Veterans' law and jurisprudence, is now accepting submissions for consideration of publication in Volume 9. The submissions cycle for Volume 9 will close on January 31, 2017; until that date, writings may be submitted through Scholastica or ExpressO, or may be sent directly to the Editorial Board via the email below. The *Veterans Law Review* actively encourages Veterans' service organizations, Veterans, and those working on Veterans' issues to submit original legal writings for consideration for publication. Manuscripts should be typed and double-spaced in Microsoft Word, Times New Roman 12-point font, and should conform to the current edition of the *Blue Book: A Uniform System of Citation*. The editors review each manuscript for scholarly merit, clarity, and accuracy and will notify authors of any substantive changes. Authors are invited to discuss potential submissions with the current *Veterans Law Review* Editorial Board via email at BVAVeteransLawReviewEditor@va.gov.

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Vacancies Plague the CAVC and the Veterans Benefit System as a Whole

New administrations are a time of change, and the incoming Trump Administration is no exception. Both the CAVC and the veterans benefits system as a whole are waiting for critical leadership vacancies to be filled.

First, the CAVC has three current vacancies, created by retirements and the December 2016 passage of legislation, expanding the Court back to nine judges. An additional judge is leaving the Court at the end of April 2017, with the Court contracting to five active judges. As recently as August 2015, the Court had nine active judges. Thus, four vacancies may need to be filled by President Trump. This is a significant concern, given the numerous other priorities of any new administration.

As the American Legion provided in testimony to the Senate Committee on Veterans' Affairs in October 2015, supporting legislation to expand the CAVC back to nine:

> The Court is authorized seven permanent, active Judges, and two additional Judges as part of a past temporary expansion provision. Over the next two years a sequence of retirements risks resulting in the Court falling to just five judges right when a new administration and Congress have a thousand other nominations to worry about. Past history tells us that it will take at least two years before anyone notices the Court is drowning. With the Board [of Veterans' Appeals (BVA)] growing and its output going up to levels not seen since the Court was created, the CAVC will be in big trouble if allowed to fall to five judges for multiple years. Therefore, this needs to be addressed this year. The American Legion has a long history of supporting the Court and it would be a great disservice to veterans and the Court to not address this now.

What the American Legion feared has indeed come to pass. The BVA, whose decisions are appealed to the CAVC, has recently grown significantly. In the last six months, it has onboarded over *two-hundred and fifty* new staff attorneys (*a forty-percent increase*), and appointed *twenty-six* new Board Members, also known as Veterans Law Judges (*a forty-percent increase*). With this staff expansion, the BVA is expected to issue a record number of decisions, potentially overwhelming the CAVC. If the CAVC vacancies are not addressed relatively soon, it will be down to five judges, right as the appeals wave hitting the BVA begins to crest at the CAVC. All this is likely to occur in the next six to twelve months.

Next, the BVA itself is suffering from significant leadership vacancies. The BVA has been without a top executive, an appointed Chairman, since February 2011, *over six years ago*. In addition, the number two job at BVA, the Vice-Chairman, is also currently vacant. Its most recent occupant, Carol DiBattiste, left in January, after only six months on the job. Moreover, BVA has had five out of five Senior Executive Service positions turn over in the last twelve months.

Finally, the Department of Veterans Affairs as a whole has significant leadership vacancies that would confront any new administration. Some of the Senate-confirmed positions, such as the Undersecretary for Benefits, however, have been vacant a significantly longer amount of time. Although Secretary Dr. David Shulkin was recently confirmed by the Senate, a review of VA's executive biographies website reveals at least thirteen "acting" positions, including the Deputy Secretary, the number two position at the Agency. It was also recently announced that Chief of Staff Robert Snyder, a holdover from the Obama Administration, was retiring from federal service at the beginning of March.

These critical vacancies at the CAVC as well as throughout the Agency will obviously do nothing to help further the mission of properly handling the claims of our Nation's veterans.

Book Review: *The Bonus Army: An American Epic*, Paul Dickson and Thomas Allen (Walker Books, 2006), 384 p.p.

by Aaron Moshiashwili

The First World War often gets short shrift in American history. It's easy to see why people tend to focus on the sequel. The enemy being the Nazis removes any possible hint of moral ambiguity. World War Two was more of a dramatic adventure story, whereas its predecessor was a hellish slog through muddy trenches. And in the aftermath of the war, veterans had FDR's GI bill, which led the millions returning from the war to become the greatest engine of national prosperity which has ever existed, creating a half-century of unparalleled economic expansion.

In the aftermath of the First World War, on the other hand, veterans had Hoover, who called the cavalry on them and had them killed in the streets.

The short story behind that is this – America experienced a wartime boom, one in which the soldiers fighting overseas could not participate for obvious reasons. Upon returning, these veterans found that the economy had begun to contract as that boom ended, and there were no jobs available for people who had spent the last two years learning how to fire a rifle and dig a trench instead of how to turn a lathe or solder a joint. (And in pre-GI bill America, college education is not an option for any but the elite.) Political pressure by and on behalf of these veterans – frequently jobless, often homeless – eventually led to the grant of an unusual "bonus" to those who had served overseas… a bonus payable in 1945. As the economy gave way to depression, and joblessness and homelessness led to starvation, veterans increasingly felt that without the money they were promised, they would not survive to see 1945. From every part of the country, veterans formed themselves into the "Bonus Expeditionary Force" (the BEF, mirroring the AEF, or American Expeditionary Force, they had lately served in) and marched on Washington to demand immediate payment of the bonus. Despite the fact that the protestors were reasonably peaceful and disciplined, eventually President Hoover ordered the Army Chief of Staff, Douglas MacArthur, to evict them – which he (along with then-Major Patton) did, using tanks and cavalry, burning down the shantytowns which housed the veterans and their families, leading to injuries and deaths. (Macarthur's aide – Major Eisenhower – is the only one of the three who comes across well in the book's version of the story, seeming to actually recognize and be troubled by the gravity of what they are doing.)

It's easy to see why we'd want to forget this unpleasant bit of American history. But we need to honor the suffering of the veterans of the first World War as much as we honor the accomplishments of the veterans of the second. *The Bonus Army: An American Epic*, by Paul Dickson and Thomas Allen, is an incredible way to become familiar with this important, and horrifying, moment in history. The authors go incredibly deep into the historical record to paint a vivid picture of this period in time that starts with the years, then months, weeks, days, and finally the hours and minutes as the army descends on the BEF's camps. The book is not only historically impressive but a wonderful narrative, with characters (both heroes and villains) that today are nearly lost to time. They stick to the path of the story—but because this time period is also the time period leading up to the Second World War, the authors predict where the audience will want to spend a few pages digressing and following the historical figures they already know about. It's rare that a book this deeply researched is also such an easy read.

If this book has a flaw, it's that the authors – having done the extensive research through primary sources to create a work like this—bombard the reader with names. The book is not just a narrative, it's a pastiche, with virtually every fact, every

***The Bonus Army*, continued on pg. 19.**

***The Bonus Army*, continued from pg. 19.**

paragraph cited to a specific person whose recollection is being recounted. But at the same time, when I read that "Anderson" wrote X on page 176, I have no idea who "Anderson" is, even though he was first mentioned only ten pages previously, because I've been bombarded with a hundred other names since then. Luckily, there is an equally-meticulous index, which is fifteen solid pages of names mentioned in the book. And in the end, if the worst that can be said of the book is that it forces me to read the names of hundreds of soldiers who would otherwise be forgotten to history, then it might be a virtue, not a flaw.

But the flip side of that kind of meticulousness is that by the end of the book the reader can't help but feel that every point of view has been represented. The authors aren't out to simply tell the story of a bloody, shameful moment in American history—they chronicle every step leading up to it, from the point of view of virtually every faction imaginable. The list includes pro- and anti-bonus factions of Congress, veterans' organizations, newpapers and popular radio personalities, citizens of DC, both wealthy and poor, and people across America. It includes the viewpoints of three presidents, of the military (both observing the BEF as it encamps in Washington and as it moves to evict them), and of law enforcement, including DC's police chief Glassford, who comes off as an absolute hero. And most of all, it includes the viewpoints of the veterans, based on personal interviews they gave to reporters, from testimony before congress, and from their own newspaper (the *B.E.F. News*) and their own writings.

These sources expose the fears and prejudices of those who opposed and attacked the BEF—fear of Communism, fear of the fact that the BEF, unlike the US army, was racially integrated—and they do a great job of showing just how much middlemen with specific political viewpoints can prejudice the information being presented to decision makers. (American communist elements did converge on the BEF, seeing it as an ideal place to win converts, but the BEF expelled them. Nevertheless, the FBI and military intelligence presented a view of the BEF to the upper echelons heavily focused on Communist elements that were imagined or simply fabricated.)

It is so easy for moments in our history like this to simply vanish—not intentionally forgotten, simply shuffled to a place where they never quite seem important enough to bother with. *The Bonus Army: An American Epic* brings this hard-to-hear but critically important story to the forefront, and does so without passing judgment. It simply presents the history, which more than speaks for itself.

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