VETERANS LAW JOURNAL

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

CAVC Bar Association Spring Event Panel on Character of Discharge and Discharge Upgrades

On Wednesday, May 10, 2017, the CAVC Bar Association held a panel discussion on the topic of character of discharge regulations featuring speakers from the Veterans Benefits Administration (VBA) and legal scholars from the Mississippi College School of Law and the Legal Services Center of Harvard Law School. Jane Nichols, a member of the CAVC Bar Association Board of Governors, moderated the panel. This event took place at the Federal Circuit Bar Association in Washington, D.C.

Much of the discussion focused on the implications of VA's regulations concerning character of discharge. VBA's Roselyn Tyson and Andrew Bodyk provided a foundation for VA benefits eligibility and the current VA character of discharge process, including statutory and regulatory bars, along with highlighting new potential development in VA rulemaking.

Coming from an advocacy and academic perspective, Evan Seamone and Dana Montalto contributed their thoughts on the impact of current VA regulation concerning character of discharge regulations for the veteran population and provided ideas on reform.

Panelist Dana Montalto was a contributing author of *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*. This piece was published by Swords to Plowshares, in conjunction with National Veterans Legal Services Program and the Veterans Legal Clinic at the Legal Services Center of Harvard Law School.

In summary, *Underserved* relays the following message:

"Not all who have served are "veterans" in the eyes of the Department of Veterans Affairs. If the veteran has less than a General discharge, the VA creates obstacles to getting health care, benefits, homeless resources and other services. Most of these veterans are simply turned away. Congress never meant for eligibility to be so exclusive, it intended that only veterans who served dishonorably be denied access. The VA's own discretionary policies unnecessarily deny hundreds of thousands veterans benefits, who are often those most in need of the VA's support. These former service members are more likely to have mental health disabilities and twice as likely to commit suicide. They are more likely to be homeless and to be involved with the criminal justice system."

Key findings from the report included:

- Marines are nearly ten times more likely to be excluded from VA services than their counterparts in the Air Force
- Current era service members are excluded at higher rates than other eras– more than twice the rate for Vietnam Era veterans and nearly four times the rate for World War II Era veterans
- Mental health and combat have little effect on eligibility
- 3 out of 4 veterans with bad-paper discharges who served in combat and who have Post-Traumatic Stress Disorder are denied eligibility by the Board of Veterans' Appeals

***CAVC Bar Association Spring Panel* Event, continued on page 5.**

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

A Message from the Chief Judge

by Robert N. Davis

Dear Fellow Bar Association Members,

It's hard to believe that fall is upon us. I hope each of you found time this summer for some rest and rejuvenation -- I strongly believe that people are most efficient and productive when they have a healthy work-life balance. I enjoyed an amazing week in July canoeing and camping with Special Forces friends on the Smith River in Montana. It was both relaxing and invigorating, and that's a good thing because it is now back to work and life at the Court is busy.

We were excited to recently welcome Judge Michael Allen, Judge Amanda Meredith, and Judge Joseph Toth to the Court. Operating at 55% of our statutory judicial strength for the past several months has been challenging. These new judges bring a wealth of varied experience to the Court, and they are eager and excited to get to work. I know they are looking forward to the opportunity to interact with the Court's Bar Association and exchange ideas with you. We still have one judicial vacancy and are optimistic that a nominee will be named before the end of the year.

Last time I wrote I advised that the Court had created the Judicial Advisory Committee, representing a cross section of the Court's constituency. The JAC's mission is to exchange ideas on matters related to the Court's operations and the larger practice of veterans law, and to share proposals and recommendations with the Court in an effort to institute positive practice or change. In early July the Judicial Advisory Committee put together an outstanding informational program on class action/aggregate litigation. A panel of expert presenters from across the country shared their experiences with invitees to include the Court's judges and legal staff, members of the JAC, and members of the Court's Rules Advisory Committee. It was an exceptional learning opportunity on a complex topic. I was pleased that Bar Association President Megan Kral attended in her capacity as a member of the Judicial Advisory Committee, and I encourage you to see her as a conduit to that Committee.

In other news, the Court has renewed its efforts to secure a suitable permanent Veterans Courthouse. For over ten years, veterans, Veterans Service Officers, and others in the veterans community have sought a courthouse that would be a symbol of the gratitude and respect of the Nation for the sacrifices of those who have served. We recently identified a preferred location and have taken steps to make appropriate requests to Congress and the General Services Administration. I am excited about this possibility and ask for the continued support of the Bar Association in this endeavor. At the appropriate time, I anticipate that I may ask that your voices be heard in support of this goal. What a thrill it would be for us all to see a veterans courthouse come to fruition!

Enjoy the last vestiges of summer and I look forward to seeing you soon.

Regards,
Chief Judge Davis

Message from the President

Happy Summer Everyone!

On behalf of the CAVC Bar Association, I would like to welcome Judge Michael P. Allen, Judge Amanda L. Meredith, and Judge Joseph P. Toth to the United States Court of Appeals for Veterans Claims. The Bar Association is excited and encouraged by your appointments to the bench.

Additionally, on behalf of the Bar Association, I would like to welcome James M. Byrne as the new General Counsel at the Department of Veterans Affairs and look forward to working with him.

It feels like just yesterday I was introducing myself to the members of this Bar Association, and now I am planning for my succession. In early August, the Bar Association solicited nominees for the next Board of Governors. I encourage everyone to consider seeking election to the Board of Governors.

We are seeking nominees for the following positions:

President-Elect
Treasurer
Secretary
Members-at-Large (5 openings)

If you have any questions about the responsibilities of these positions, please do not hesitate to email me at cavcbarassoc@cavcbar.net.

In my opinion, the benefits of serving on the Board are vast. Serving on the Board provides a unique meeting of the minds, with Board members representing VA, the Court, private practice, academia, and veterans service organizations, to engage in candid conversation about areas of success, or concern, in the practice and to brainstorm on how best to address those areas of concern.

Additionally, and speaking from my own experience, my entire career in veterans law has been limited to appeals. However, serving on the Board of Governors showed me that the practice of veterans law is much more far-reaching than just the niche I was working in. It allowed me to see the bigger picture more clearly, and, in particular, how the moving parts of the system all worked together.

***Message from President,* continued on page 4.**

IN THIS ISSUE

Message from President, **continued from page 3.**

This has made me understand all that much better how my small role in the process affects so many of our nation's veterans. This knowledge has been invaluable.

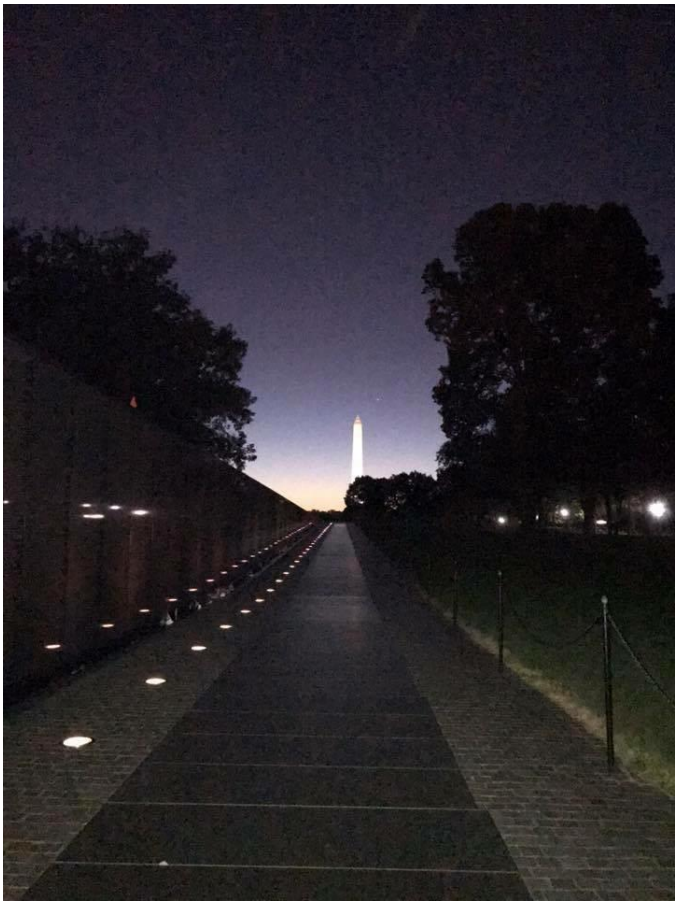
In the final months of my tenure as President, I invite everyone to participate in our upcoming events. On September 9, members from the Bar Association will participate with the Honor Flight Program and welcome veterans to Washington, D.C. On September 17, volunteers will work with the National Park Service to clean the Vietnam War Memorial.

In addition, on October 20, the Bar Association will sponsor an all-day CLE conference and host our Annual Meeting and Reception at the Navy Yard. The current members of the Board of Governors are working to provide a series of seminars that are timely to address the current concerns of our practice. Once our schedule for the CLE conference is solidified, information on how to register will be sent via email to all members. Until then, if you have any questions, or would like to participate in any of the above events, please feel free to email me.

I look forward to our upcoming events and hope you all will join the Board of Governors and me in attendance.

CAVC Bar Association Upcoming Events

September 9	Honor Flight
September 17	Vietnam Memorial Wall Washing
October 12-14	CAVC Bar Association Table at NOVA Conference, St. Petersburg, FL
October 20	CLE/Annual Meeting
December 16	National Wreaths Across America Day



***CAVC Bar Association Spring Event Panel*, continued from page 1.**

"We ask the VA to revise its regulations to more accurately reflect congressional intent that only those who served "dishonorably" be excluded. It should require consideration of positive and mitigating factors and not disqualify veterans for minor misconduct. We also believe the VA can and should grant access to basic healthcare while it makes eligibility determinations so that veterans can receive prompt treatment for service-related injuries. Access to this healthcare can mean the difference between maintaining stability and entering a spiral of homelessness, addiction, and suicide."

A full copy of *Underserved* can be obtained here: https://www.swords-to-plowshares.org/wp-content/uploads/Underserved.pdf

The panelists' bios are below.

Roselyn Tyson, Veterans Benefits Administration

Ms. Roselyn Tyson is a policy analyst in the Veterans Benefits Administration, Compensation Service (also an attorney). As a policy analyst, Ms. Tyson drafts regulations and provides technical guidance on matters related to VA's adjudication process, and serves as the subject matter expert on VA's character of discharge process. Ms. Tyson joined VA in 2013 as an associate counsel for the Board of Veterans' Appeals.

Mr. Andrew P. Bodyk, Veterans Benefits Administration

Andrew P. Bodyk currently serves as an External Liaison at the Compensation Service's Interagency Data Sharing Office in the Veterans Benefits Administration Central Office in Washington DC. His area of expertise is in improving the processes in which the Department of Defense (DoD) and the Department of Veterans Affairs exchange DoD Official Military Personnel Files (OMPFs) and Service Treatment Records (STRs) as well as other records VA needs from DoD to adjudicate Veterans claims. He was promoted to this area of Central Office in June 2006, from the VA Regional Office in Nashville, TN.

Mr. Bodyk began his VA career as a Veterans Serve Representative at the Regional Office in New York City in August 2001. Mr. Bodyk continued his career as a Veterans Service Representative when he moved to the Nashville Regional Office in Tennessee in May 2003. In addition to his time with the Department of Veterans Affairs, he has also worked for the Department of State (civilian), Department of the Army (civilian), Department of the Air Force (civilian).

Mr. Bodyk is married to LTC Nancy E. Bodyk (ret). She retired from the United States Army in July 2012 with 22 years of active duty service.

Evan R. Seamone, Law Professor

Evan R. Seamone is a Professor at Mississippi College School of Law who directs the Legal Writing Program. He also serves as a Major in the Army Reserve Component with duties as a Senior Defense Counsel. Recently, he ended a twelve-year career as an active duty judge advocate. His most recent assignment was service as a Prosecutor in the Office of Chief Prosecutor of Military Commissions where he was responsible for cases involving terrorism and the acts of unprivileged enemy belligerents tried at Guantanamo Bay, Cuba, under the *Military Commissions Act of 2009*. In other military assignments, Professor Seamone supervised prosecuting attorneys and several civilian and military paralegals in some of the busiest criminal jurisdictions in the Army. During his tours in Iraq, Germany, and at domestic military installations, he has participated in sexual assault, complex death penalty, and other felony criminal cases involving PTSD as a prosecutor and defense attorney.

Professor Seamone has published over twenty scholarly articles with law schools including Yale, Columbia, Georgetown, and New York University on

***CAVC Bar Association Spring Event Panel*, continued on page 6.**

***CAVC Bar Association Spring Event Panel*, continued from page 5.**

topics including psychology, medical malpractice, national security and international law, and court administration. His *Military Law Review* articles on enhanced legal counseling techniques for clients with suspected or diagnosed PTSD have been featured by state bar associations, the Arizona Public Defenders Association, and in training for military disability evaluation attorneys. Along with a number of preeminent attorneys and mental health professionals, Professor Seamone contributed a book chapter to the volume *The Attorneys' Guide to Defending Veterans in Criminal Court*, titled "The Counterinsurgency in Legal Counseling: Preparing Attorneys to Defend Combat Veterans Against Themselves in Criminal Cases." He has written extensively about treatment-based sentencing alternatives in military courts-martial and the use of civilian Veterans Treatment and Mental Health Problem-Solving Courts by military organizations and commanders.

Professor Seamone presented at the Court of Appeals for Veterans Claims Judicial Conference regarding an article he co-authored on understanding the Department of Veterans Affairs' Character of Discharge review process for veterans separated with stigmatizing discharges. He has also trained attorneys at the Board of Veterans Appeals and Veterans Service Officers on this topic. After publishing the first ever article to assist custody evaluators and family court judges in improving their assessment of parents with PTSD, Professor Seamone accepted an offer to edit a special edition of *The Family Court Review* devoted to military families and the courts. Professor Seamone worked hand-in-hand with various interdisciplinary authors (including psychiatrists, pediatricians, judges, and attorneys) to address a wide range of family law issues currently facing veterans and their families.

On May 30, 2013, Professor Seamone received the Meyer Elkin Essay Award from the Association of Family and Conciliation Courts for his *Family Court Review* article from a panel of distinguished interdisciplinary professionals. As the Vice Chair of the Military Committee of the National Council of Juvenile and Family Court Judges, he is involved in the development of a standardized curriculum to assist family court judges in better understanding the unique needs of military families.

Dana Montalto, Legal Services Center of Harvard Law School

Dana joined the Legal Services Center as an Attorney and Arthur Liman Public Interest Fellow in the Veterans Law Clinic in 2014. She represents low-income veterans who received less-than-honorable discharge in discharge upgrades and federal and state veteran benefits.

Dana received her bachelor's degree, *magna cum laude* and Phi Beta Kappa, from Wellesley College and her law degree from Yale Law School, where she participated in the Veterans Legal Services Clinic and the International Refugee Assistance Project. After graduating, Dana clerked for the Honorable F. Dennis Saylor IV of the U.S. District Court for the District of Massachusetts.

Appeals Reform Legislation Passed

by Jenny J. Tang

On August 1, 2017, the Senate unanimously voted to pass the "Veterans Appeals Improvement and Modernization Act of 2017" (S. 1024) to reform the current VA appeals process. The House version of the bill (H.R. 2288) was unanimously passed in May.

The Veterans Appeals Improvement and Modernization Act of 2017 proposes a new appeals framework in which a Veteran or claimant may choose one of three processing lanes within one year after receipt of an initial decision by the agency of original jurisdiction (AOJ).

***Appeals Reform Legislation Passed*, continued on page 7.**

***Appeals Reform Legislation Passed*, continued from page 6.**

One, the claimant can file a request for higher-level *de novo* review at the AOJ level. This higher-level adjudication is limited to the evidence already of record, and there is no opportunity for a hearing. The higher-level adjudicator may return the claim to the lower-level to correct pre-decision duty to assist errors.

Two, the claimant can file a "supplemental claim." In this lane, the claimant can submit new evidence and have a hearing, and VA would have a duty to assist.

Three, the claimant can file a notice of disagreement, which would appeal to the Board of Veterans' Appeals (BVA). This lane is split into two separate dockets: one for a non-hearing option with no submission of new evidence, and one for a hearing option that also provides a limited window to submit new evidence. BVA may remand to correct pre-decision duty-to-assist errors. After the BVA decision, the claimant may submit a supplemental claim within one year, or the claimant may appeal to the Court of Appeals for Veterans Claims within 120 days.

Once the higher-level review, supplemental claim, or notice of disagreement is adjudicated, a claimant may then choose to pursue another lane in succession with respect to the same claim or issue.

The effective date of a grant of benefits would be at earliest the date of receipt of an application for benefits. This date would be considered the date of the initial application for benefits throughout the appeal process if the claim was continuously pursued, even if successively through more than one of these lanes.

If more than one year has passed since the AOJ decision, the claimant may file a supplemental claim, and the claim will be "readjudicated" if new and "relevant" evidence is submitted. For such supplemental claims received more than one year after the AOJ decision, the effective date would be at earliest the date of the receipt of the supplemental claim.

President Trump signed the bill on August 23, 2017. The Veterans Appeals Improvement and Modernization Act of 2017 can be found here.

Jenny J. Tang is Associate Counsel at the Department of Veterans Affairs, Board of Veterans' Appeals. She also serves as Secretary for the CAVC Bar Association.

President Trump Nominates Candidates for CAVC Judgeships

By Jeremy R. Bedford

On June 7, 2017, President Trump nominated Michael P. Allen, Amanda L. Meredith, and Joseph L. Toth to fill three of four judicial vacancies at the Court.

Michael P. Allen is a familiar face in the field of veterans' law. Professor Allen's first experience in veterans' law was when he was asked to speak at the Court's Judicial Conference in 2006. According to his July 19, 2017, Senate testimony, he was asked to speak before the Conference precisely because he knew nothing of veterans' law. Since speaking at that conference, he has spoken to groups across the country about veterans' law, presented at judicial conferences for the Court, and Federal Circuit, become the Director of the Veterans Law Institute at Stetson University, written law review articles about veterans law, and testified before the Senate and House Veterans Affairs Committees. He is considered an expert in the field of veterans' law.

***President Trump Nominates Candidates for CAVC Judgeships*, continued on page 8.**

***President Trump Nominates Candidates for CAVC Judgeships*, continued from page 7.**

Amanda L. Meredith is also a familiar face in the field of veterans' law. Confirmation as a Judge is a homecoming of sorts for Ms. Meredith. She began her legal career by serving as a law clerk for the Court for seven years.

Subsequently, she has served for more than 12 years in the United States Senate Committee on Veterans' Affairs where she conducted oversight and analyzed legislation regarding veterans' benefits, the claims and appeals process at VA, and the Court. She is currently serving as the General Counsel and Deputy Staff Director for the Senate Veterans Affairs Committee.

Joseph L. Toth is a veteran of the Naval Judge Advocate General Corps. He served in the war in Afghanistan as a field officer in the Rule of Law Field, where he was stationed with the 10th Mountain Division in the Zhari District. SInce leaving the active duty military, Mr. Toth has spent his career as a lawyer in federal trial and appellate courts. He currently serves as a federal public defender in Wisconsin.

These three candidates appeared in a hearing before the Senate Veterans Affairs Committee on July 19, 2017. On the following day, the Committee voted in favor of sending their nominations to the full Senate for consideration. The three candidates were confirmed by the full Senate as judges on August 3, 2017.

While these nominations are certainly a step in the right direction, the Court still has one vacancy for which a nomination has not been made.

Jeremy R. Bedford is a Staff Attorney with the Court

The Board May Not Consider Risk of Self-Harm or Hospitalization in Gauging the Severity of Suicidal Ideation

by Stuart J. Anderson

Reporting on *Bankhead v. Shulkin*, no. 15-2404 (Mar. 27, 2017).

In Bankhead v. Shulkin, the Court considered the term "suicidal ideation" from 38 C.F.R. § 4.130's criteria for a 70 percent disability evaluation for service-connected mental disorders. The Court held that the Board may not require more than thoughts of death to establish the symptom of suicidal ideation and may not consider the absence of hospitalization as a reason to find the symptom insufficiently severe to warrant a 70 percent evaluation.

Mr. Bankhead claimed service connection for posttraumatic stress disorder. A VA regional office granted service connection for major depressive disorder, with a 30 percent evaluation under 38 C.F.R. § 4.130, diagnostic code (DC) 9411, effective the date of the claim. The Board, in the decision on appeal, assigned Mr. Bankhead a 50 percent evaluation. Mr. Bankhead appealed.

The Board denied a 70 percent evaluation despite Mr. Bankhead's documented and undisputed experience of suicidal ideation. As regards the suicidal ideation, the Board found that the symptom lacked the severity that would justify a higher evaluation because Mr. Bankhead was at a sufficiently low risk of self-harm, he had been consistently treated on an outpatient basis, and there were no instances of hospitalization, inpatient treatment, or domiciliary care for his suicidal ideations.

***Bankhead*, continued on page 9.**

***Bankhead,* continued from page 8.**

The Court issued a single-judge decision on the case on March 17, 2017. After the Secretary filed a motion for panel reconsideration or, in the alternative, en banc review, the Court granted the motion for panel reconsideration and issued the present opinion on May 19, 2017. The Secretary has filed a second motion for en banc review.

In an opinion authored by Judge Bartley, the Court first considered whether the Board had erred in denying a 70 percent evaluation for the veteran's service-connected major depressive disorder or, in the alternative, provided an inadequate statement of reasons or bases by conflating the symptom of suicidal ideation with the risk of self-harm. The Court noted that the Board had found that Mr. Bankhead's suicidal ideation did not rise to the level contemplated by a 70 percent evaluation because of the low risk of self-harm associated.

The Court also noted the contention by the Secretary that the degree of social and occupational impairment resulting from suicidal ideation should be measured by the degree of risk of self-harm. But the Court found that the Board's measure of severity of "suicidal ideation" in terms of the risk of self-harm conflated that symptom with the 100 percent symptom "persistent danger of hurting self."

Specifically, the Court dissected the meaning of the term "suicidal ideation" in 38 C.F.R. 4.130, finding that it encompassed a spectrum of behavior related to thinking about death, including both passive and active, and with and without intent. The Court concluded that the plain language of the regulation indicated that Mr. Bankhead's thoughts about his death without more can cause occupational and social impairment in most areas (the level of impairment warranting a 70 percent evaluation). The Court also observed that, while there was no analogous symptom listed for lower evaluations in 38 C.F.R. 4.130, that regulation identified "persistent danger of hurting self or others" among the symptoms that may warrant a 100 percent evaluation.

The Court ultimately rejected the Secretary's argument that the risk of self-harm was a proper gauge for the severity of suicidal ideation. It determined that this argument improperly narrowed the scope of the symptom "suicidal ideation" from the plain meaning of that term, a meaning that did not depend at all on the risk of self-harm. It also noted that, because risk of self-harm was already explicitly a criterion for 100 percent evaluation, by considering suicidal ideation in light of the risk of self-harm the Board improperly conflated the assessment of the distinct symptoms of different severity in a way that frustrated judicial review.

The Court next considered whether the Board erred in using hospitalization as a gauge for the severity of Mr. Bankhead's suicidal ideation. The Court observed that the Board was required to measure the impact that Mr. Bankhead's symptoms had on his social and occupational situation. That measure, however, had to consist of a consideration of the actual impact experienced by Mr. Bankhead, not a reference to what the Court called an "external gauge." Hospitalization may be relevant as an indicator of the severity of symptoms in a case where the veteran is hospitalized, the Court continued, but its absence may not be used to discount the severity of symptoms.

Finally, the Court considered whether the Board had improperly combined the levels of impairment required for a 70 percent evaluation and a 100 percent evaluation. The Board had found that the suicidal ideation did not warrant an evaluation higher than 50 percent because Mr. Bankhead still retained some social and occupational functioning. Because a 70 percent evaluation requires only occupational and social impairment with deficiencies in most areas and not total occupational social impairment—the level warranting a 100 percent evaluation—the Court found that the Board had erred in applying an incorrect standard.

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

The Court Addresses Employment in a 'Protected Environment'

by Samantha Mountford

Reporting on *Cantrell v. Shulkin*, No. 15-3439 (April 18, 2017)

In *Cantrell v. Shulkin*, the Court of Appeals for Veterans Claims reviewed the Board of Veterans' Appeals decision to deny entitlement to a total disability evaluation based on individual employability (TDIU) and referral for consideration of an extraschedular evaluation. The Court addressed the issue of how to apply the concept of employment in a "protected environment" in the context of determining entitlement to a TDIU, as well as the applicability of *Johnson v. McDonald*, when deciding if an extraschedular referral is warranted.

Mr. Cantrell served in the U.S. Army from January 1988 to September 1988 and in the U.S. Air Force from May 2003 to August 2003. The current appeal stems from a September 2006 claim for service connection for ulcerative colitis. The regional office (RO) granted service connection in December 2011 and assigned staged ratings for the disability the next month. The Veteran timely appealed this decision, seeking an increased initial evaluation for the disability. Subsequently, the Veteran was granted secondary service connection for urge incontinence, degenerative joint disease of the left and right hips, hemorrhoids, erectile dysfunction, and pouchitis. Additionally, the Veteran requested, and was denied, entitlement to a TDIU. The Veteran perfected his appeals of the RO's denials, of an increased initial rating for ulcerative colitis and entitlement to a TDIU, to the Board.

Throughout the record on appeal, the Veteran repeatedly identified the symptoms of his service connected disabilities, specifically pouchitis, and the effects these symptoms had on his employability. Specifically, the Veteran described that he would experience 6 to 10 bowel movements per day and 16 to 20 bowel movements per day during monthly episodes of pouchitis. The Veteran also reported that during pouchitis episodes he had urinary and fecal leakage, causing him to change his underwear two to three times per day.

At the time of the appeal, the Veteran worked as a park ranger and reported that he was only able to perform this job due to the numerous accommodations made by his employer.

A TDIU is warranted when a veteran is unable to secure or follow a substantially gainful occupation as a result of service connected disabilities. 38 C.F.R. § 4.16 (2016); *see Hatlestad v. Brown*, 5 Vet. App. 524, 529 (1993). Relevant to the case at hand, § 4.16 additionally states that "[m]arginal employment shall not be considered gainful employment" and that [m]arginal employment . . . includes but is not limited to employment in a protected environment such as a family business or sheltered workshop." Therefore, if a veteran is only capable of marginal employment, such as that in a protected environment, entitlement to a TDIU is warranted.

A vocational expert opined that the Veteran's current employment was "tantamount to a 'protected employment' situation" because "no typical employer can or would allow a worker to take three and on third (3 1/3) hours per workday/work shift for bathroom break purposes." The expert continued to state that the Veteran's necessary accommodations render him totally unemployable. The assessment concluded that the Veteran's employment was "completely contingent upon the unprecedented beneficence" of his employer.

The Veteran argued that his employment was in a protected environment and that entitlement to a TDIU is warranted.

The Board denied the Veteran's claim for entitlement to a TDIU and refused referral for extraschedular consideration. Regarding

***Cantrell*, continued on page 11.**

***Cantrell,* continued from page 10.**

entitlement to a TDIU, the Board held that the Veteran's employment was not "protected" and it discounted the vocational expert's opinion. The Board found that the Veteran's current employment was substantially gainful, notwithstanding his employer's various accommodations. The Board denied referral for extraschedular consideration on the grounds that the record did not contain evidence that the combination of the Veteran's service connected disabilities caused a disability picture not contemplated by the schedular rating.

The Veteran argued that the Board provided inadequate reasons or bases for determining that his employment did not qualify as a 'protected environment' for TDIU purposes. Additionally, the Veteran argued that the record did in fact contain evidence sufficient for referral for extraschedular consideration.

The Court agreed with the Veteran on both matters. The main issue in this case is the undefined term 'protected employment/environment' and its application in the analysis of entitlement to a TDIU. The Secretary of Veterans Affairs argued that the VA has purposely chosen not to define the phrase so as not to disturb the factfinder's discretion exercised on a case-by-case basis. But the Veteran argued that such discretionary authority would lead to "arbitrary and capricious decision making" and that without a defined standard, the Court cannot determine whether it was applied appropriately.

The Court first attempted to determine the interpretation of the term employment "in a protected environment" as stated in § 4.16(a). The Court found that the meaning of "protected employment" is not clear from the plain language. Additionally, the Court found that the context of the phrase does not aid in its interpretation. Therefore, the Court would have next considered whether VA's definition of the term at issue is entitled to deference, but it declared that the Secretary has refused to provide any concrete definition of employment "in a protected environment."

The Court pointed out that the VA is essentially asking the Court to delegate ultimate deference to the factfinders to apply a "we know it when we see it" definition of employment in a protected environment.

The Court found that this level of deference is unsound. Without a defined standard, the potential for inconsistent application would lead to the Court's inability to provide meaningful review. Although the Court recognized that administrative decision-making does not entail perfect consistency, "overly ambiguous standards almost inevitably lead to inconsistent application." *Citing King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006).

So as to not overstep its bounds, the Court declined to define employment "in a protected environment" itself and referred this task to the VA. Ultimately, the Court remanded the issue of entitlement to a TDIU on the grounds that, without a definition of employment "in a protected environment," proper reasons and bases for denial of a TDIU involving that standard cannot be found. It is unclear whether the Court will intervene in the future if a definition is not provided.

Additionally, the Court found that the Board failed to identify a justified basis for dismissing the credibility of the Veteran's proffered vocational assessment.

The final issue addressed in this case is referral for consideration of an extraschedular evaluation. Here, the Court reiterated that when expressly raised by the Veteran or reasonably raised by the record, the Board must consider the combined effect of multiple service connected disabilities. *See Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014). The Court concluded that the Board failed to properly address the collective impact of the Veteran's service connected disabilities and that a remand was necessary for an extraschedular referral.

Samantha Mountford is an Associate Counsel at the Board of Veterans Appeals.

Referral Theory and Causation Scrutinized Under 38 U.S.C § 1151

by Mark Villapando

Reporting on *Ollis v. Shulkin*, 857 F.3d. 1338 (Fed. Cir. 2017)

In *Ollis v. Shulkin*, the U.S. Court of Appeals for the Federal Circuit affirmed, in part, and vacated and remanded, in part, a U.S. Court of Appeals for Veterans Claims decision that affirmed the Board of Veteran's Appeals' (Board) denial of Mr. Ollis's claim for benefits under 38 U.S.C. § 1151. The issue on appeal was how section 1151, which requires VA to pay benefits for certain injuries incurred as a result of VA medical care, applies to referral situations when treatment is provided by a non-VA facility.

In 1997, Mr. Ollis was diagnosed with atrial fibrillation and received a pacemaker in 1999 to treat that condition. In 2007, Mr. Ollis visited a VA cardiologist and inquired about a new surgical procedure called a "mini MAZE." The cardiologist informed him that VA did not have the specialized equipment and operator for that procedure but that it could be performed at other local institutions, and recommendations were provided. Mr. Ollis then saw his private cardiologist, who discussed the procedure and referred Mr. Ollis to another private cardiologist, who ultimately performed the procedure. Mr. Ollis paid for the procedure though his private medical insurance. Mr. Ollis later filed a claim under 38 U.S.C. § 1151 asserting that the procedure caused phrenic nerve damage resulting in paralysis of his diaphragm and causing shortness of breath and decreased lung function. The Board denied Mr. Ollis's claim and the CAVC affirmed that denial, holding that the injury was not caused by VA medical care but rather by a non-VA employee, who had no contractual relationship with VA. The CAVC also held that there was no due process right to notice that referral to a private doctor could affect benefits under section 1151.

The Federal Circuit noted that the first issue on appeal was how to interpret 38 U.S.C. § 1151 when a disability-causing event occurred during a medical procedure not performed by VA personnel or a VA facility, and it sought to determine how section 1151 applied to referral situations.

The Federal Circuit found that the proximate cause requirement of 38 U.S.C. § 1151(a)(1)(A), applicable to VA-fault claims, incorporates traditional tort law notions of proximate cause. It found no error in the CAVC's analysis that, even if Mr. Ollis could have met the causation requirement under section 1151(a)(1), his argument regarding VA fault of negligent referral to a particular doctor under section 1151(a)(1)(A) was "speculative at best," *i.e.*, there was no proximate cause between the VA referral and the injury. But the court found that the question of whether Mr. Ollis's VA medical doctors were negligent under § 1151(a)(1)(A) by recommending *the procedure* to him still remained, and it remanded for the CAVC to determine whether Mr. Ollis's VA medical doctors were negligent under section 1151(a)(1)(A) by recommending a medical procedure that was ultimately performed by a non-VA doctor.

The Federal Circuit also determined that the CAVC had not considered whether the requirements under 38 U.S.C. § 1151(a)(1), *i.e.*, the proximate cause of the disability and whether the event was not reasonably foreseeable, were met. The court interpreted the causation requirement under section 1151(a)(1) as having in the referral context a "remoteness" component, or, in other words, "a lesser proximate cause requirement." 857 F.3d at 1345. The court explained that causation requires that VA medical treatment proximately cause the treatment that then caused the disability, or in this case, the performance of the procedure and not the resulting shortness of breath and decreased lung function. The Federal Circuit found that the question of whether VA medical care proximately caused the procedure still remained, which the CAVC did not address.

The Federal Circuit also noted that when recovery is predicated on a referral theory involving an unforeseeable event under 38 U.S.C. § 1151(a)(1)(B),

***Ollis,* continued on page 13.**

***Ollis,* continued from page 12.**

section 1151(a)(1) likewise requires that VA medical care proximately cause the medical treatment or care during which the unforeseeable event occurred. Thus, the chain of causation has two components (neither of which requires fault), *i.e.*, proximate cause between VA medical care and the treatment, and proximate cause between the unforeseeable event and the disability.

The Federal Circuit observed that the CAVC appeared to have confused the cause and the proximate cause requirements of 38 U.S.C. § 1151(a)(1) and 38 U.S.C. § 1151(a)(1)(A)-(B). First, the court stated that the CAVC incorrectly framed the question as whether Mr. Ollis's *disability* was a remote consequence of VA medical treatment, and that the correct inquiry under section 1151(a)(1)(B) was whether *the medical procedure* was a remote consequence of the VA medical treatment, or in other words, whether VA medical treatment proximately caused Mr. Ollis to undergo the procedure. Because the CAVC did not analyze this case under this framework, the Federal Circuit remanded the case for that analysis. The court also asked that the CAVC address the not-reasonably-foreseeable and proximate-cause-of-the-disability requirements under section 1151(a)(1).

Mr. Ollis also argued that VA's failure to provide him notice that referral to a private facility for the procedure could extinguish his eligibility for benefits under 38 U.S.C. § 1151(a) was a violation of his rights to due process. The Federal Circuit affirmed the CAVC's holding that there was no due process violation. The court explained that there was "no due process right to notice regarding conditions that might in the future affect an individual veteran's right to monetary benefits . . . before the veteran incurs an injury or applies for such benefits." 857 F.3d at 1347.

The Federal Circuit has since approved VA's request for rehearing en banc.

Mark Villapando is an Appellate Attorney in the Office of General Counsel at the Department of Veterans Affairs.

Court Addresses Whether the Duty to Assist Requires Attempting to Obtain Records Other Than the Claimant's

by Krista Logan

Reporting on *Molitor v. Shulkin*, No. 15-2585 (June 1, 2017).

In *Molitor v. Shulkin*, the Court addressed the circumstances under which the duty to assist requires VA, in a claim for service connection for a psychiatric disorder, to attempt to obtain records of servicemembers other than the claimant to aid in corroborating a claimed personal assault.

Ms. Molitor appealed a May 12, 2015 Board decision denying service connection for a psychiatric disability encompassing PTSD. Ms. Molitor had filed a claim for service connection for PTSD due to military sexual trauma (MST) in December 2003.

In June 2004, Ms. Molitor underwent a VA PTSD examination. A VA regional office denied service connection for Ms. Molitor's PTSD in June 2004 and again in May 2005. Ms. Molitor timely disagreed with those decisions. In a November 2004 intake form Ms. Molitor indicated that she was sexually assaulted in service during a Military Police (MP) initiation/hazing ceremony and that she did not report the incident due to fear of retaliation.

In an October 2005 letter, the veteran's psychologist opined that Ms. Molitor's delayed reporting of the assault was "normal" and did not diminish the authenticity of that report. The psychologist provided a sexual trauma markers worksheet, which included the approximate date of the claimed assault, the location, her unit, and the names of several witnesses. In November 2005, Ms. Molitor submitted a statement to VA in which she provided further details of the assault. Later that month, the Regional Office issued a Statement of the Case

***Molitor,* continued on page 14.**

***Molitor*, continued from page 13.**

continuing to deny the claim, and Ms. Molitor timely appealed to the Board. The Appeals Management Center issued a formal finding in April 2012 that the claimed in-service assaults could not be verified based on information provided by Ms. Molitor due to issues regarding her credibility.

In October 2012, during one of Ms. Molitor's examinations she mentioned another soldier who she believed had also been assaulted and asked VA to check that soldier's file, as well as the files of three other women she served with in Germany, for corroborating evidence and potential claims related to MST. Ms. Molitor also identified her alleged assailant.

In May 2015, the Board denied service connection for an acquired psychiatric disorder encompassing PTSD. In reaching its decision, the Board found that VA had fulfilled its duties to notify and assist, even though VA did not discuss the veteran's request for efforts to obtain records from fellow servicemembers. Ms. Molitor's current appeal followed.

Ms. Molitor argued that the Board failed to provide adequate reasons or bases in finding that VA had satisfied its duty to assist, when VA did not attempt to obtain records from other servicemembers whom she specifically identified. She further asserted that remand was warranted because G.C. Precedent Opinion 05-14 required VA to attempt to obtain those records, or at a minimum, required the Board to explain why VA did not undertake such efforts. In addressing Ms. Molitor's arguments, the Court noted that claims for service connection for PTSD based on an in-service personal assault are governed by § 3.304(f)(5). This regulation lowers the evidentiary burden for corroborating the occurrence of an in-service personal assault stressor. The Court further outlined the duty to assist standard as "making reasonable efforts" to obtain from the VA or other Federal departments or agencies relevant records that have been adequately identified by the claimant. 38 U.S.C. § 5103A(c)(1); 38 C.F.R. § 3.159(c)(2)-(3) (2016).

The Court held that the Board had failed to satisfy its duty to assist when it failed to consider G.C. Precedent Opinion 05-14, or in the alternative, failed to provide an adequate reasons and bases for why G.C. Precedent Opinion 05-14 was not considered. Although the Court is not bcontound by VA General Counsel Precedent Opinions, the Board is. 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.").

G.C. Precedent Opinion 05-14 states that the duty to assist requires VA, in a claim for service connection for PTSD based on in-service personal assault, to make *reasonable efforts* to obtain records from fellow servicemembers. This duty applies when those records are adequately identified by the claimant, are relevant to the claim, would aid in substantiating the claim, and would be subject to disclosure under the Privacy Act and 38 U.S.C. §§ 5701 and 7332. The Court noted that "*reasonable efforts*" to assist is a factual question to be answered on a case-by-case basis, weighing the competing interests of the claimant and third party and considering the sensitive nature of the particular claim.

The Court found that Ms. Molitor adequately identified relevant records from fellow servicemembers that may aid in corroborating her claimed in-service assaults. Therefore, G.C. Precedent Opinion 05-14 would apply to her claim and the Board was required to address it in assessing whether VA satisfied the duty to assist. *See* 38 U.S.C. § 7104(a).

In view of the sexual trauma markers worksheet that included a description of the MP initiation rape, her unit data, the location and approximate date of the incident, and the names and ranks of four witnesses; her provision of the name and rank of one of her alleged assailants, who may have sustained injuries during the assault that could be reflected in his records; and her identification of four women stationed in Germany with her at the time of the

***Molitor*, continued on page 15.**

***Molitor*, continued from page 14.**

incident, including another female MP who Ms. Molitor believed had also been raped in service, the Court held that the records were adequately identified, relevant, and likely to aid in substantiating her claim.

The Court rejected the Secretary's argument that the Board's finding that Ms. Molitor was not a credible historian excused the Board's failure to specifically discuss the G. C. Opinion. Noting that the Board failed to invoke § 3.159(d) ("Circumstances where VA will refrain from . . . providing assistance."), the Court explained that the claimant's credibility does not nullify VA's duty to assist a claimant in developing his or her claim.

Accordingly, the Court held that, where a claimant pursuing service connection for PTSD based on an in-service personal assault adequately identifies relevant records of fellow servicemembers that may aid in corroborating the claimed assault, then G.C. Precedent Opinion 05-14 is applicable to the claim and VA must either attempt to obtain such records or notify the claimant why it will not undertake such efforts.

Krista Logan is a third year law student at the University of Kansas.

The Veterans Court May Certify Class Actions

by Laura R. Braden

Reporting on *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017).

In *Monk v. Shulkin*, the Federal Circuit considered whether the Veterans Court has the authority to certify and adjudicate class action cases. It held that the Veterans Court does have such authority and may also maintain similar aggregate resolution procedures; it reversed the judgment below and remanded the matter for the Veterans Court to determine whether a class action or other method of aggregation would be appropriate in the case at hand.

Conley F. Monk, Jr., applied for service connection and compensation for PTSD and diabetes in February 2012. VA denied his claim due to Mr. Monk's discharge from the Marine Corps being "other than honorable." After submitting a notice of disagreement with VA's decision and separately applying to the Board of Correction of Naval Records (BCNR) to upgrade his discharge status, Mr. Monk filed a petition for a writ of mandamus with the Veterans Court in April 2015, requesting the Court to compel the Secretary to decide his claim for service connection promptly. His petition also requested that the Veterans Court adopt an aggregate resolution procedure for all similarly situated veterans who had not received a decision within twelve months of timely filing a notice of disagreement with a regional office denial of benefits and who could demonstrate medical or financial hardship.

The Veterans Court denied Mr. Monk's individual petition for mandamus relief, finding that the delay in adjudication of his claims was due at least in part to the need for certain records from the BCNR, and the Court also rejected his request for certification of a class action or other aggregate relief on the grounds that it lacked the authority to entertain class actions. Mr. Monk appealed both determinations to the Federal Circuit. After Monk appealed, the Secretary determined that Mr. Monk was eligible for full disability benefits for service-connected PTSD and diabetes.

The Federal Circuit, in an opinion authored by Judge Reyna, first considered the Secretary's argument that the court lacked jurisdiction over the appeal because no justiciable controversy remained in light of VA's awarding Mr. Monk a 100 percent disability rating for his claim. Although it agreed that Mr. Monk's appeal concerning his individual disability claim had become moot, the Federal Circuit

***Monk*, continued on page 16.**

***Monk*, continued from page 15.**

nonetheless held that it had jurisdiction to decide whether the Veterans Court could certify and adjudicate a class action case, finding that a justiciable controversy over that question remained.

The Federal Circuit relied in part on the Supreme Court's decision in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202 (1980), to support its jurisdiction determination. In that case, the Supreme Court held that where a class certification has been denied, a class action does not become moot when the substantive claim of the named plaintiff expires. Although the Supreme Court's reasoning in *Geraghty* relied on the right to class certification conferred by Rule 23 of the Federal Rules of Civil Procedure, which do not apply to proceedings in the Veterans Court, the Federal Circuit found that distinction was not dispositive, rejecting the Secretary's argument that the Supreme Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), limited *Geraghty* to situations in which Rule 23 applies. Instead, the Federal Circuit found that the primary reason the Supreme Court did not extend *Geraghty* in *Genesis* was that the named plaintiff's substantive claim in the latter case became moot before a decision on class certification was rendered, which was not the case with Mr. Monk's claim.

In addition, the Federal Circuit looked to data presented to it concerning the average length of time that passes between a veteran's filing a notice of disagreement with a VA regional office decision and receiving a final Board decision, and it determined that, even if *Geraghty* did not apply, Mr. Monk's case was apparently not moot for the separate reason that it was "capable of repetition, yet evades review." The Federal Circuit noted in this regard that Mr. Monk himself had filed a notice of disagreement challenging the effective date of the disability benefits that had been granted to him and, therefore, in pursuing his new appeal, he could be subject to the same average adjudication delay that his present case had been brought to challenge.

Having found that it had jurisdiction to address the issue of the Veterans Court's authority to certify a class action or maintain a similar aggregate resolution procedure, the Federal Circuit ruled that the Veterans Court's decision that it lacked such authority was an abuse of discretion. The Federal Circuit held that the All Writs Act, 28 U.S.C. § 1651(a), authorizes the Veterans Court to aggregate claims in aid of its jurisdiction under 38 U.S.C. § 7261(a)(2) to "compel action of the Secretary unlawfully withheld or unreasonably delayed." It relied on a Second Circuit case, *United States ex rel. Sero v. Preiser*, 506 F.2d 1155 (2d Cir. 1974), which allowed a district court to aggregate claims in habeas proceedings in which Rule 23 of the Federal Rules of Civil Procedure did not apply. In that case, the Second Circuit reasoned that the All Writs Act empowered courts to create appropriate procedures by analogizing to existing rules or other modes of judicial usage.

The Federal Circuit determined that there was no indication that Congress intended the Veterans Court's authority under the Veterans Judicial Review Act to exclude class actions. It noted that the Court's jurisdictional statute, 38 U.S.C. § 7264, expressly authorizes it to create procedures needed to exercise its jurisdiction, and that tribunals such as the Equal Employment Opportunity Commission have relied on similar authority to create class action procedures.

Acknowledging that the Veterans Court had concluded that it lacked authority to entertain class actions in an *en banc* decision in *Harrison v. Derwinski*, 1 Vet.App. 438 (1991), the Federal Circuit explained its disagreement with that decision. The Veterans Court based its determination in *Harrison* on statutory provisions limiting its jurisdiction to review of Board decisions, (38 U.S.C. § 7252), prohibiting trial de novo of findings of fact made by the Secretary or the Board, (38 U.S.C. § 7261(c)), and requiring notices of appeal to the Court to be filed by each person adversely affected by a Board decision, (38 U.S.C. § 7266). The Federal Circuit disagreed with the Veterans Court's conclusion,

***Monk*, continued on page 17.**

***Monk*, continued from page 16.**

authorized by 38 U.S.C. § 7261(a) to "compel action of the Secretary unlawfully withheld or unreasonably delayed" and by 38 U.S.C. § 7264 to prescribe rules of practice and procedure for its proceedings.

While declining to address whether certification of a class would be appropriate in the case on appeal or what type of procedures the Veterans Court could establish for aggregate actions, the Federal Circuit noted several policy goals that could be aided should the Veterans Court exercise its authority to adjudicate class actions. It stated that class actions could promote efficiency, consistency, and fairness by compelling correction of systematic errors and ensuring like treatment of similarly situated veterans, while also improving access to legal and expert assistance for parties with limited resources. The Federal Circuit also noted that a claim aggregation procedure could help the Veterans Court achieve a heretofore elusive goal of reviewing VA delays in the adjudication of appeals by preventing VA from mooting individual petitions alleging unreasonable delay when ordered by the Court to respond to such petitions.

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

The Federal Circuit addresses whether it has Jurisdiction to Review the Provisions of the VA Adjudication Procedures Manual M21-1

By Catherine Vel

Reporting on *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 2017 U.S. App. LEXIS 10528, 16-1493 (Fed. Cir. June 14, 2017).

In this case the U.S. Court of Appeals for the Federal Circuit (Court) refused to review, and dismissed for lack of jurisdiction, a petition challenging a provision of the M21-1 Manual, holding that the Manual is not subject to judicial review.

The Court first explained 38 U.S.C. § 1117, which provides presumptive service connection for veterans who served in the Persian Gulf War with a qualifying chronic disability. Qualifying chronic disabilities include: (a) an undiagnosed illness; (b) a medically unexplained chronic multisymptom illness ("MUCMI"); and (c) any diagnosed illness as determined by the Secretary. The VA's regulations define a MUCMI as: a diagnosed illness *without conclusive pathophysiology or etiology*, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. 38 C.F.R. § 3.317(a)(2)(ii). Chronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, are not considered medically unexplained. Also, both statute and regulation identify sleep disturbances and signs or symptoms involving the respiratory system as possible manifestations of a MUCMI. 38 U.S.C. § 1117(g)(8)–(9); 38 C.F.R. § 3.317(b)(8)–(9).

The Court then noted that the VA consolidates its policy and procedures into the Adjudication Manual M21-1, which provides guidance to VBA employees and stakeholders to enable them to process claims benefits quicker and more accurately. Any VBA employee can request changes to the M21-Manual, through submission of an online form.

The Court noted that in September 2015, a VBA employee requested a change to the M21-1 Manual to specify that the language "without conclusive pathophysiology or etiology" in §3.317 requires that "there is 'both' an inconclusive pathophysiology 'and' an inconclusive etiology" for an illness to qualify as a MUCMI. He also requested that the M21-1 Manual specify that sleep apnea is not a qualifying chronic disability under §1117 and §3.317.

***DAV*, continued on page 18.**

***DAV*, continued from page 17.**

The VA adopted the requested revisions on November 30, 2015. It changed the definition of MUCMI from illnesses exhibiting "no conclusive physiology or etiology" to require "both an inconclusive pathology, and an inconclusive etiology." Under the subsection "Signs and Symptoms of Undiagnosed Illnesses or MUCMIs," the VA added, "Sleep apnea cannot be presumptively service-connected (SC) under the provisions of 38 C.F.R. § 3.317 since it is a diagnosable condition." DAV petitioned for review of these revisions pursuant to 38 U.S.C. § 502.

The Court explained that its jurisdiction, under 38 U.S.C. § 502, to review VA actions is limited; it can review actions of the Secretary subject to 5 U.S.C §§ 552(a)(1) and 553. §552(a)(1) refers to agency actions that must be published in the Federal Register, including "substantive rules of general applicability … and statements of general policy or interpretations of general applicability." 5 U.S.C. § 552(a)(1)(D). Section 553 refers to agency rulemaking that must comply with notice-and-comment procedures under the Administrative Procedure Act.

The Court cannot review agency actions under Section 552(a)(2), which need not be published in the Federal Register but only must be made publicly available in an electronic format. 5 U.S.C. § 552(a)(2).

Section 552(a)(2)(C) defines "administrative staff manuals and instructions to staff that affect a member of the public" as agency actions falling under this category. The Court explained that the M21-1 Manual is an administrative staff manual that affects a member of the public because it is intended to instruct VBA employees when processing claims and its provisions affect the public. Thus the Court concluded that Section 502's express exclusion of agency actions subject to § 552(a)(2), renders the M21-1 Manual beyond the Court's § 502 jurisdiction.

The Court distinguished case law DAV relied on, such as *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000), where the Court reviewed a Precedential General Counsel opinion under § 502. The Court noted that Precedential General Counsel opinions are published in the Federal Register and are expressly subject to § 552(a)(1). The Court also distinguished *LeFevre v. Secretary of Veterans Affairs*, 66 F.3d 1191 (Fed. Cir. 1995), noting that in *LeFevre*, the court held that it had jurisdiction to review the Secretary's determination because it was a "statement of general … applicability and future effect designed to implement … or prescribe … law or policy" as provided in § 552(a)(1). Congress had directed the Secretary to work with the National Academy of Science to review and summarize scientific evidence of exposure to herbicide in Vietnam. Congress then authorized the Secretary to determine whether to create a presumption of service connection for diseases that may have resulted from such exposure, and the Secretary published a detailed explanation of his decision in the Federal Register. *Id.* at 1196-97.

The Court also distinguished the M21-1 Manual revisions from VA letters, noting that the Fast Letters and Dear Manufacturer Letters are not agency actions defined under § 552. While Congress explicitly designated administrative staff manuals as agency actions falling under § 552(a) (2), it did not similarly specify whether VA letters are agency actions subject to § 552(a)(1) or § 552(a)(2).

DAV asserted that the M21-1 Manual revisions are substantive rules subject to § 553 because the revisions are inconsistent with 38 U.S.C. § 1117 and 38 C.F.R. § 3.317, and thus they announce a change in existing law, which should be voided for failure to provide the required notice and comment.

The Court cited three factors relevant to whether an agency action constitutes substantive rulemaking under the APA: (1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency. The first two criteria serve to illuminate

***DAV*, continued on page 19.**

***DAV*, continued from page 18.**

the third, for the ultimate focus of the inquiry is whether the agency action has the force of law. The Court explained that, to amount to substantive rulemaking with the force and effect of law, the rule's change in existing law must be binding within the agency and on tribunals outside the agency.

The M21-1 Manual revisions do not amount to a § 553 rulemaking, do not carry the force of law, and are not intended to establish substantive rules beyond those contained in statute and regulation. Thus the agency did not have to provide notice and comment before making revisions to the M21-1 Manual. The VA does not publish M21-1 Manual revisions in the Federal Register or Code of Federal Regulations, but instead issues revisions through an informal electronic process which can be initiated by VBA employees. Also, the M21-1 Manual is binding on neither the agency nor tribunals; the Board of Veterans' Appeals is bound only by "regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." 38 U.S.C. § 7104(c).

The Court concluded that, where, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board itself, and contained within an administrative staff manual, they fall within § 552(a)(2), not § 552(a)(1).

DAV, which had the burden of establishing jurisdiction, had not established that the Manual revisions fall within § 552(a)(1) or § 553. Thus, the Court concluded that it lacked jurisdiction to review revisions to the M21-1 Manual since the revisions did not amount to rule-making, did not carry the force of law, and were not binding.

The Court nonetheless noted that a veteran adversely affected by an M21-1 Manual provision can contest the validity of that provision as applied to the facts of his case under 38 U.S.C. § 7292.

Catherine Vel is an appellant litigation attorney at the Department of Veterans Affairs.

Book Review: *Those Who Have Borne the Battle*, James Wright (PublicAffairs, 2012), 368 p.p.

by Aaron Moshiashwili

Early on in *Those Who Have Borne the Battle*, James Wright gives his mission statement for the book itself - to "summarize[] critically how Americans historically have mobilized for war and how they treated those who fought." That told me the most important thing about this book, which the next 300 pages bore up - this is a book written by someone deep enough in the ivory tower to not think twice about using the word "critically" (meant in the academic sense) in that sentence. This book is not a narrative, nor is it meant as such. Wright is a history professor (and former president of Dartmouth) and also a Marine – but while his own experience in service and as a veteran clearly helps him understand the history he's writing about, this is the work of a scholar. The book has some wonderful stories in it (such as George Washington staving off an officer's revolt which would likely have ended the United States before it had a chance to form) but fundamentally it is written to appeal to people who might be interested in historical comparison of the compositions of draft boards in 1950 and 1975, not those looking for great historical anecdotes.

On that front, there is no question that it delivers, and in a fairly accessible way, a detailed historical examination of the experience of American combat troops. (Wright makes the point that his goal is to look solely at combat troops, not those in supporting roles.) For each war from the Revolution to the modern day, he looks at how the troops came to enlist; who they were and why they fought; what the conditions they served in were like; and how they were treated upon returning home.

The section of the book I found most fascinating was the chapter on Vietnam. I grew up in the time

***Book Review*, continued on page 20.**

***Book Review*, continued from page 19.**

period where Vietnam was no longer news, but was not yet in the history books; as a result, my understanding of it is very much shaped by popular culture. Reading a historian's account is fascinating. It was jaw-dropping to read that my most enduring idea of the war, that soldiers were spat on by anti-war protesters as they returned home, is not an accurate reflection of reality. While individual incidents may certainly have happened, polls showed popular support for the troops was as high during the 1960s as it is today. In fact, the idea that the anti-war protesters were against the servicepeople themselves was Nixonian propaganda aimed at discrediting the protesters. Wright has replaced my image with a new one: a demobilized veteran flying home alone, via a commercial flight, with no one to talk to on his way and no band or ceremony to greet him. That lonely image almost seems worse than the idea of being mobbed by hippies.

There are a bunch of low-hanging nitpicks that I couldn't help but be bothered by over and over. When talking about numbers he is unquestionably a historian, not a mathematician, and his prose frequently seems to get tripped up. He repeatedly confuses the reader with words that seem to misstate the significance of the historical figures he's describing (an eight percent increase in something's popularity over a period of months isn't usually considered a "jump" by statisticians, for instance.) His generally superlative reading of history, on the other hand, can occasionally seem to have blinders on. He is uncritical of government policy almost to the point of apologism in some areas of the chapters on Korea and Vietnam. He examines the post-WWII GI bill in light of "a century and a half of discussion about the obligations of American democracy to those who served to defend that democracy" but not in light of the very real political turmoil caused by WWI veterans, which he had just spent a chapter discussing, and which could not have helped but be in the minds of the congresspeople who had been forced to deal with that turmoil barely a decade earlier.

Generally, however, those nitpicks are minor. The book is well sourced, well organized and well worth reading if you are interested in that kind of in-depth historical analysis of the veteran experience. I'm not unread in this area and the book taught me an enormous amount, and I'm sure I'll refer to it as a source in the future. This depth does make it a harder and less fluid read than other books on veterans history, though, and not everyone may be in the market to know exactly what date every veterans' bill of the nineteenth century was passed. If you find that at all interesting, though, this is the book for you.

Aaron Moshiashwili is spending the next year getting an LLM in tax law, God help him.