VETERANS LAW JOURNAL

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

Tenth Veterans Law Moot Court A Tremendous Success

by Jon Gaffney

Congratulations to Haley Mowdy and Stephen Carl of Baylor Law School, who won Best Team at the 2018 National Veterans Law Moot Court Competition (NVLMCC)—our 10th competition! The NVLMCC is a joint venture of the CAVC Bar Association, the CAVC, and the George Washington University Law School; this year, 19 teams from 15 law schools took part in the competition. We had one first-time school, Campbell University School of Law, and two schools—the George Washington University Law School and Stetson University College of Law—have competed in all 10 years of the competition! In addition to the 38 students who competed this year, more than 75 volunteers who donated their time and energy worked to make this year's competition a success.

During this year's competition, held November 3 and 4 at GW Law and the CAVC, the two-person teams argued against each other in the fictional U.S. Supreme Court case *Wilkie v. Hamilton*, which involved two legal issues related to a veteran whom VA found to be incompetent:

1. Does the U.S. Department of Veterans Affairs' practice of listing veterans deemed incompetent in the National Instant Criminal Background Check System database violate those veterans' Second Amendment rights?

2. When a state court has determined that a veteran is incompetent and has appointed a guardian to manage that veteran's finances, is the U.S. Department of Veterans Affairs obligated to adopt the state court's guardianship appointment?

The winning Baylor team faced off against Bryan Medema and Kuliaikanu'u Petzoldt of the George Washington University Law School. Bryan and Kulia won Best Petitioner's Brief; Best Respondent's Brief went to Travis Linthicum and William Farmer of South Texas College of Law Houston. Samuel Fox of Pepperdine University School of Law won Best Oral Advocate after earning the highest scores in the two preliminary rounds of the competition.

The final round was judged by Chief Judge Robert Davis, Judges Toth and Falvey, and Senior Judge Lawrence Hagel of the CAVC. The Semifinal rounds were judged by Judge Michael Allen of the CAVC; Amy Odom, president of the CAVC Bar Association and an attorney with Chisholm Chisholm & Kilpatrick; and Megan Kral, a past president of the CAVC Bar Association and an attorney with the Veterans Court Litigation Group at VA's Office of General Counsel.

2018 was my sixth and final year as the director or co-director of the NVLMCC, and I have been involved one way or another since the competition began in 2009. I have been incredibly fortunate to work for so long with such an amazing and inspiring group of dedicated volunteers who help to make the competition a success. For every student that competes in the competition, two volunteers work behind the scenes writing the competition problem, judging the briefs and oral argument, and providing logistical support. These volunteers are the reason our competition has earned a reputation as one of the best in the country.

Several volunteers and sponsors deserve special recognition for their roles in the 2018 competition. First, for the third year in a row, the Veterans Consortium Pro Bono Program served as our Trophy Sponsor, donating engraved brass chart weights as trophies and making sure the perpetual plaques outside the CAVC Courtroom bear the names of the newest winners. Second, Natasha Rao, our GW student liaison, worked tirelessly to make sure our Saturday rounds went off without a hitch and coordinated a team of GW students who served as technical graders for the briefs and timekeepers for the Saturday rounds. Finally, Ashley Barbier, my co-director this year, and Julie Honan, who will be taking over as director next year, made immense contributions to every aspect of this year's competition (and made my life much easier).

Thanks to all the competitors, coaches, and volunteers who made our 10th competition a tremendous success!

Competition Results and Participating Schools

Best Team
Haley Mowdy and Stephen Carl
Baylor Law School

Best Oral Advocate
Samuel Fox
Pepperdine University School of Law

Best Petitioner's Brief
Bryan Medema and Kuliaikanu'u Petzoldt
The George Washington University Law School

Best Respondent's Brief
Travis Linthicum and William Farmer
South Texas College of Law Houston

Participating Schools
American University Washington College of Law
Baylor Law School
Brooklyn Law School
Campbell University School of Law
Elon University School of Law
Emory University School of Law
The George Washington University Law School
Pepperdine University School of Law
South Texas College of Law Houston
Stetson University College of Law
Syracuse University College of Law
University of Detroit Mercy College of Law
University of Florida Levin College of Law
Widener University School of Law.

Jon Gaffney is a judicial law clerk for the CAVC.

From the President

Colleagues,

I hope that this message finds you getting ready to wrap things up for the year in the office and to enjoy some time with friends and family for the holidays. We all work so hard all year round for our nation's veterans, and this year has been a remarkable one. The Board of Veterans' Appeals issued an astonishing 81,000 decisions in Fiscal Year 2018, and the Court has seen over 6,000 appeals since January 2018. All the while, many of us are preparing our practices for Appeals Reform, which is scheduled to go live approximately two months after the date of publication of this issue of the VLJ. It's been a record year for our little corner of the legal universe, and I, for one, am looking forward to a little down time before the new year, which is shaping up to be another busy one.

The Bar Association also had a busy Fall. In September, we presented a program on burn pits that featured a panel of experts from VA and the appellants' bar. Highlights of the program included hearing from VA doctors about the current state of the medical and scientific research, and from NOVA's Executive Director about developments on the legislative front. We received great feedback on the program, and we are very grateful to Skadden, Arps for hosting the program.

In October, we were pleased to host a networking reception that coincided with the NOVA conference.

It was a great opportunity for our out-of-town membership to meet and mingle with some of our local members. The reception also presented the opportunity to introduce the Bar Association to prospective members, and we hope to see our membership grow as a result.

Finally, the annual Veterans Law Moot Court Competition was held in November, and, as always, it was a great success. This VLJ issue includes a more detailed recap of the competition, but I would like to give a big thanks to our members who answered the call to serve as judges. As a former moot court team member myself, I know how important the competition is to the students, and your time and effort helped to make it a rewarding experience for them.

We have more exciting programs and networking opportunities planned for 2019, including a program to complement the Judicial Conference in April. Please check your email for future announcements about that program and others.

Until next year,

Amy F. Odom
President

Message from the Chief Judge

by Robert N. Davis

Thank you all for the outstanding contributions you make to the field of veterans law every day. I am overwhelmed by your engagement and active participation in improving this exploding field of veterans law. When I joined the Court in 2004, the USCAVC Bar Association's then President Bart Stichman had written a letter to the Chief Judge, Donald Ivers, asking for the Court to participate in more Bar association activities because the judges and staff simply did not engage much beyond the walls of the Court and its written decisions. I was surprised that the Bar Association felt that there was a need to write such a letter because coming straight from law school teaching my mindset has always been to talk with people, engage, discuss issues and learn. In my own mind engagement helped to inform, and that in turn helped to improve. Thus began my effort to try to make sure that, as a new judge, I reached out and better communicated with all of our constituency groups in this field. My approach included a willingness to attend more functions, and encourage better communication between the Court, VSOs, the VA General Counsel, the Bar Association, the clinics, Board of Veterans Appeals, the Pro Bono Consortium and the Hill. In the beginning, many of my colleagues did not approve. Some thought our opinions should speak for themselves and judges' interaction outside of the courtroom should be narrowly confined. While we all must be mindful and careful about the ethical prohibitions of ex parte communication and talking about cases under consideration, we certainly cannot and must never disengage.

When I became the Chief Judge in October 2016 I said I would operate on three guiding principles; transparency, consensus, and action. I made a point to engage and better communicate with all of our constituency groups. I believe it has made a difference, because our engagement with each other has become contagious. I perceive that a greater sense of cooperation and communication is becoming not such an anathema to all of us. We are

more willing to pick up the phone and talk to each other, to discuss issues and seek amicable resolution. To host panels and events that tackle the challenging questions we grapple with daily. In my view, this engagement will help us improve the provision of fair and efficient justice for veterans. We have a long way to go as we work to streamline our claims processing and appellate systems, and many challenges remain as the Appeals Modernization Act launches in February 2019. We have, however, recently witnessed a lot of "Firsts." Just a few weeks ago, I participated in the USCAVC Bar Associations Annual Meeting and listened to a fascinating panel presentation on Burn Pits. That excellent panel of Kerry Baker, Keith Hancock, Diane Boyd Rauber and Dr. Erick E. Shuping discussed medical, appellant's bar, VA policy, and legislative perspectives on issues related to exposure to toxic substances in operational environments. The C. Boyden Gray Center for the Study of the Administrative State then hosted a program largely organized by Professor James Ridgway titled: The Veterans Appeals Process, A case of Administrative Crisis and Possible Reforms. While I could not participate in person because of another speaking engagement, I viewed the program subsequently and thought that it was, in a word, exceptional! The morning panel focused on examining current problems within the administration of veterans benefits and the prospects for reform aided by modern technology. The afternoon panel reflected on current issues in judicial review of veterans claims and the broader trends in administrative law. Panelists included Phillip Carter, Daniel E. Ho, Brian Griffin, David Marcus, Gerald Ray, James D. Ridgway, Thomas E. Sullivan, Michael Wishnie and Adam White moderated. My own colleague, the Honorable Mary J. Schoelen was the keynote speaker and she discussed some of the challenges the court is facing in the class action arena.

If these exciting programs were not enough to whet ones' appetite, a panel of three USCAVC judges held live oral argument in front of an audience of about 400 people at the National Organization for Veterans Advocates conference in October 2018, in Washington, D.C., another first. Thereafter, another panel traveled to Stetson Law School's two Florida campuses and heard two cases, one on the Gulfport campus and another on the Tampa campus. The Gulfport oral argument had more than 300 people in attendance and the Tampa oral argument saw many Federal Bar Association members in attendance as well as United States District Court Judge, the Honorable Elizabeth A. Kovachevich. The Gulfport visit also coincided with a dedication to the new space for the Veterans Law Institute at Stetson. On another note, planning for the 14th Judicial Conference is well underway and it promises to be another fantastic conference.

I would also like to take just a moment to thank some of the excellent law firms who have hosted and supported various meetings and events involving veterans law and our efforts for improvement. Firms like Skadden Arps and the Finnegan firm have hosted important meetings. Other firms like Fulbright & Jaworski, Williams & Connolly and Holland & Knight among others have been significantly involved in the veterans' pro bono support programs, programs that provide a tremendous service to veterans around the country. As outgoing bar association President Dave Boelzner passed the baton to incoming President Amy Odom, we have been fortunate to have consistently very talented and capable leadership to count on. This year also marks the first time in the court's history that we have reached 7000 cases.

While we have many challenges ahead, I am encouraged because I see all of us as a team working together to provide the best and most efficient representation, claims processing, adjudication and appellate review system possible. The Department of Veterans Affairs claims processing system is far from perfect, but I am certain as we continue to make improvements at all levels, we will eventually have a much better claims processing and appellate review system to offer our veterans. What I currently see, are many component parts of this system we call veterans law, working and firing on all cylinders! All component parts of the field of veterans law are moving in great unison and no single action by anyone group is out of synch with those of all the others. Whether you are a veterans advocate in the private bar, a VSO, a member of the Department of Veterans Affairs, VA Office of

General Counsel, part of the BVA or a legislative staff member on the Hill, everyone is engaged. In rowing it's called finding the "swing," in tennis its playing in the "zone,", and in baseball it's the "perfect game." I am thrilled that we are all communicating with each other at a level that we have not seen before and I encourage us to continue on this path. As we continue to better communicate with each other about problems and issues, as we continue to engage on the difficult challenges ahead, I am certain that we will find the solutions. We are making a difference.

This issue of the Journal, as always, is filled with stimulating articles, case notes and book reviews and I am sure you will enjoy it. I look forward to spending time with you at upcoming events and let's continue to walk this path together.

Robert N. Davis
Chief Judge
U.S. Court of Appeals for Veterans Claims

Court, 2-1, Upholds Board in Finding No Warrant to Refer for Extraschedular Consideration in Hearing Loss Case

by Daniel Smith

Reporting on *Chudy v. O'Rouke*, 30 Vet.App. 34 (2018).

In *Chudy v. O'Rouke*, the veteran sought a compensable disability rating for his service-connected bilateral hearing loss. In a December 2016 *per curiam* decision (Judges Schoelen and Pietsch), the Board denied the claim and, in the process, refused to refer the case for extraschedular consideration under 38 C.F.R. § 3.321(b). In reaching this conclusion, the Board found that symptoms of the veteran's hearing loss were adequately contemplated by the assigned rating code and that hearing loss did not result in any hospitalizations or marked interference with employment. On appeal to the Court, the veteran argued that his hearing loss resulted in symptoms such as dizziness, ear pain, ear pressure, and social and professional difficulties, symptoms arguably not contemplated by the rating table in 38 C.F.R. § 4.85 (evaluation of hearing impairment). He asserted that the Board should have referred the case for extraschedular consideration.

The Court began by reiterating that, under *Thun v. Shinseki*, 22 Vet.App. 111 (2008), referral for extraschedular consideration under § 3.321(b) is warranted only where (1) the veteran's disability picture is such that the available rating schedule is inadequate, and (2) the veteran demonstrates other related factors such as marked interference with employment or frequent periods of hospitalization. Furthermore, the Court cited *Yancy v. McDonald*, 27 Vet.App. 484 (2016), for the principle that both of the *Thun* elements must be satisfied before an extraschedular referral is warranted.

Ultimately, the Court found that the veteran failed to demonstrate error in the Board's finding that there was no marked interference with employment due to hearing loss, a reference to the second *Thun* element. Therefore, because there was no error was respect to the Board's finding as to the second *Thun* element, any error with respect to the first element was harmless.

The holding in *Chudy* makes clear that the veteran must demonstrate that both *Thun* elements are satisfied before referral under § 3.321(b) is warranted.

In dissent, Judge Greenberg noted that the Board failed to assess how a variety of the veteran's symptoms were in fact contemplated by the rating schedule. Moreover, with respect to marked interference with employment, Judge Greenberg focused on the fact that the veteran was retired, and he recognized that some of the most important medical evidence of record post-dated the veteran's retirement. Therefore, it was not surprising that this evidence did not focus more on marked interference with employment. Judge Greenberg indicated that he would have remanded the matter for development of evidence that described the veteran's occupational functioning in light of his hearing loss.

Daniel Smith, with Bosley & Bratch, represents veterans.

Editor's Note: The appellant did not argue frequent hospitalizations, so the court looked only at marked interference with employment. It noted that the issue of what "marked interference" actually means was before the court in another case, *see Smiddy v. O'Rourke,* No. 16-2333 (submitted to panel Jan. 19, 2018), but was not of concern here because the court found there was no interference with employment at all. Neither the majority nor the dissent discussed whether the regulation, in view of its "such as" language, contemplates any effects apart from marked interference or frequent hospitalizations.

SCOTUS Grants Petition for Writ of Cert to Veteran's Case to Reconsider *Auer* Deference

by Jillian Berner

Reporting on *Kisor v. Wilkie*, 869 F.3d 1360 (Fed. Cir. 2017).

Shortly before this issue went to press, on December 10, 2018, the Supreme Court released orders from its December 7, 2018, conference. At that conference, the justices of the Court added to its docket a case originating with a veteran's claim for an earlier effective date for the award of service connection for posttraumatic stress disorder.

Veteran James L. Kisor served in the U.S. Marine Corps during the Vietnam War and initially filed a claim for PTSD in December 1982. His claim was denied in May 1983 and he did not complete an appeal of that decision. In June 2006, he sought to reopen his claim. The Regional Office reopened the claim in September 2007 and assigned a disability rating with an effective date of June 2006. In November 2007, Mr. Kisor appealed the RO decision as to the effective date and disability rating and alleged that the May 1983 rating decision contained Clear and Unmistakable Error. The RO increased his disability rating in March 2009. In April 2014, the Board of Veterans' Appeals denied his claim for an earlier effective date and denied his claim for CUE. The Board held that, although VA had received service department records fitting within the purview of 38 C.F.R. § 3.156(c)(1)(i) (which allows for final claims to be reopened where "new and material evidence" is submitted), the records were not relevant or outcome-determinative.

In January 2016, Judge Lance of the CAVC affirmed the Board decision, determining that the Board did not err in its application of § 3.156(c) in denying Mr. Kisor's claim for an earlier effective date for the award of PTSD. He declined to address Mr. Kisor's argument that the Court should consider the regulatory interpretation of the phrase "that existed"

as found in § 3.156(c), because the Board decision did not turn on that question.

In September 2017, the Federal Circuit (Judges Reyna, Schall, and Wallach) affirmed the CAVC decision. 869 F.3d 1360 (Fed. Cir. 2017). The Federal Circuit disagreed with Mr. Kisor's argument that the CAVC and the Board had misinterpreted § 3.156(c)(1) concerning whether a record is relevant within the meaning of the regulation. The Federal Circuit held that § 3.156(c)(1) was ambiguous as to the term "relevant" and deferred to the VA's interpretation of the term because the VA's interpretation was not plainly erroneous or inconsistent with the VA regulatory framework.

In January 2018, the Federal Circuit denied Mr. Kisor's petition for panel rehearing and rehearing *en banc* (No. 16-1929). Judges O'Malley, Newman, and Moore dissented from the denial and wrote that *Auer* deference to the agency interpretation of ambiguous regulations should be abandoned, as the rule does not comport with the pro-veteran canon.

The Supreme Court granted Mr. Kisor's petition for a writ of certiorari as to his first question, whether the Court should overrule the *Auer* and *Seminole Rock* deference to agency interpretation of ambiguous regulations. The Court denied the petition as to whether *Auer* deference should yield to a substantive canon of construction.

It remains to be seen how the Court handles the petition, but a ruling overturning *Auer* could have substantial impact on administrative law, including veterans law. Practitioners should stay tuned for a Court opinion by mid-2019.

Jillian Berner is Interim Director of the John Marshall Law School Veterans Legal Support Center & Clinic in Chicago, IL.

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Recent Developments in Veterans Law at the Supreme Court

by Jonathan Hager

The United States Supreme Court has occasionally addressed veterans law issues in the past. Recently, the Court declined to review one case and granted review in another. Each case raised important issues in veterans law.

In *Mathis v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) addressed the "presumption of competency," a presumption that VA has properly chosen a person who is qualified to provide a medical opinion in a particular case. In denying Mr. Mathis' claim for service connection for sarcoidosis, VA had relied on the opinion of a VA physician that the veteran's sarcoidosis was not related to his pulmonary symptoms during his military service. Before the United States Court of Appeals for Veterans Claims (CAVC), Mr. Mathis argued that VA had failed to establish that the physician, who specialized in family practice, was qualified to offer an opinion on this question involving pulmonology. In a memorandum opinion, Judge Lance noted that the presumption of competency is rebuttable but that the first step in rebutting it is to object. Because there was no such objection before the Board of Veterans' Appeals (Board), and because the mere fact that the physician was not a pulmonologist did not by itself render the opinion inadequate, Judge Lance found the opinion adequate and affirmed the Board's denial of the claim.

The Federal Circuit affirmed in an unpublished/nonprecedential opinion, *Mathis v. McDonald*, 643 Fed. Appx. 968 (Fed. Cir. April 1, 2016). The Federal Circuit framed the issue as whether it should disavow the presumption of competency as it applies to VA medical examiners. In a narrow opinion, Judge O'Malley reviewed and summarized the relevant case law and concluded that affirmance was warranted because the Federal Circuit lacked the jurisdiction to make factual findings regarding the competency of the examiner

and was bound by precedent to presume the examiner's competence. She noted that, while there may be a basis to criticize the line of cases establishing the presumption, there is a practical need for such a rule given the volume of VA benefits cases.

Judge Reyna concurred because the holding represented an application of multiple precedential decisions in this area, but expressed the wish that "the entire court should review the case law concerning the presumption of competence with the objective of eliminating it." Judge Reyna's wish was partially granted, as the Federal Circuit considered a petition for rehearing *en banc* in *Mathis v. McDonald*, 834 F.3d 1347 (Fed. Cir. 2016), and, although the petition was denied, the Judges of the Federal Circuit were able to express their views on this question. Two opinions concurring in the denial of rehearing *en banc* and two opinions dissenting from the denial were issued, reflecting a 7-5 split of the Federal Circuit Judges in regular active service as to whether the presumption should be continued or eliminated.

In the primary concurrence, Judge Hughes emphasized the limited nature of the presumption and VA's continuing obligation to develop the record and assist the Veteran. While the presumption allows VA to assume the examiners' competence, the probative weight of the examiners' reports must still be weighed by VA. Moreover, a veteran may request from VA information to challenge the competency of the examiner and if VA does not properly respond to such a request or otherwise fulfill its duty to assist the Veteran, its decisions are subject to multiple levels of review by the Board, CAVC, and the Federal Circuit. Judge Hughes noted that the Board had frequently responded to requests for examiner's qualifications by directing VA's Regional Offices to provide such information pursuant to its duty to assist and CAVC had recognized that VA's duty to assist included an obligation to develop the record regarding an examiner's competency. He also noted that neither Mr. Mathis nor the veterans in the other presumption of competency cases had both attempted to procure information about the examiners' qualifications and challenged their competency. Thus, the Federal Circuit had never, according to Judge Hughes, upheld a denial of a claimant's request for competency information where there was reason to question competency and the information was needed to answer the question. Judge Hughes concluded by noting that VA provides over one million disability evaluations every year and in 2015 had completed almost three million disability benefits questionnaires. Given these circumstances and the lack of guidance by the dissent on how elimination of the presumption would work, Judge Hughes opined that the Federal Circuit should not revise a presumption that is one small piece of a long and complicated process in a case that did not demonstrate a problem with the use of the presumption.

In the primary dissent, Judge Reyna made three arguments in favor of *en banc* review and elimination of the presumption of competence from the VA benefits system. He first challenged the line of cases creating the presumption of competency. He listed several reasons why there was no basis for CAVC to have created the presumption by applying to VA's choice of examiners via a presumption of competence the general presumption of regularity under which courts presume that "what appears regular is regular" with regard to government actions. There was no evidentiary basis that VA's selection process yielded competent examiners. The presumption of regularity has typically been applied to routine, non-discretionary, and ministerial procedures, something selecting medical examiners is not. And the presumption of competence does not apply to private health care providers yet VA has not shown a valid basis for presuming its own examiners competent while not extending the same presumption to non-VA health care providers. Judge Reyna also argued that the presumption violated the due process rights of veterans because it left them with no way to challenge a key piece of evidence that is used to deny their claims. Since a veteran must make a specific objection to an examiner's competence in order to learn his or her qualifications, but may not be able to formulate such an objection without first seeing the qualifications, this places them in "Catch-22" situation. Finally, Judge Reyna contended that removing the presumption would not overly burden

VA, for two reasons. First, there is already a standard for determining the competence of medical examiners in 38 C.F.R. § 3.159(a)(1), which provides that competent medical evidence means evidence provided by a person who is qualified though education, training, or experience to offer medical diagnoses, statements or opinions. Second, eliminating the presumption would allow the Board to have an administrative record on which it could review an examiner's qualifications and would allow a veteran to determine whether to challenge an examiner's competence based on information he or she could review in the examiner's curriculum vitae.

The Supreme Court denied a petition for a writ of certiorari, No. 17-1679, Justice Gorsuch dissenting. He noted that the presumption was not required by any statute and in fact that Congress has imposed on VA an affirmative duty to assist veterans in 38 U.S.C. § 5103A(a)(1). He also noted that in practice the presumption makes it difficult for a veteran to challenge the competence of a VA examiner and makes VA's job easier, which appears contrary to VA's general obligation to serve the interests of veterans. While the presumption's propriety has been questioned and its days may be numbered, he thought the significance of the issue warranted review by the Court: "I would not wait in hope." Justice Sotomayor disagreed. Conceding that the presumption was problematic, she felt that the lack of a request for the examiner's credentials in this case made it less than ideal for review. She said that waiting until a more appropriate case was presented to the Court would "allow the Federal Circuit and the VA to continue their dialogue over whether the current system for adjudicating veterans' disability claims can be squared with the VA's statutory obligations to assist veterans in the development of their disability claims."

This set the stage for a new case in which VA and the courts could develop a comprehensive record upon which a decision reviewing the presumption of competency could be based. That case was *Watson v. Shulkin*, No. 16-2035. There, the CAVC requested from each party a memorandum of law addressing issues relating to the presumption of competency, including the circumstances under which a claimant is required to expressly raise the issue of an examiner's competence to the Board, what the Board's duties are with regard to addressing the competence of an examiner (whether or not challenged by the Veteran), and what VA's usual process is for selecting an examiner to perform an examination and provide an opinion.

Unfortunately, after the memoranda were filed, Mr. Watson passed away. As counsel was unable to ascertain whether any eligible substitute existed, CAVC dismissed the appeal, now titled *Watson v. Wilkie*. A definitive determination as to the validity of the presumption of competency will therefore await another day.

No such wait will occur with regard to the issue of whether veterans may directly petition the Federal Circuit to review revisions to VA's Adjudication Manual. On November 2, 2018, the Supreme Court granted a petition for a writ of certiorari in the case of *Gray v. Wilkie*. In *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017), the Federal Circuit dismissed a petition for direct review by a veteran whose claims for service connection were denied based on his failure to establish that he "served in the Republic of Vietnam" as that term is defined by VA. Mr. Gray had served in the Navy on a ship that anchored in Da Nang harbor, and he filed claims for service connection in 2007. VA denied his claims because it interpreted "served in the Republic of Vietnam" as including "inland waterways," meaning "rivers, estuaries, canals, and delta areas inside the country," but excluding "open deep water coastal ports and harbors." This interpretation appeared in VA's Adjudication Manual. CAVC vacated the Board's decision because it found VA's definition in the Manual inconsistent with the regulatory purpose and irrational. VA then revised the Manual to define inland waterways as "fresh water rivers, streams, and canals, and similar waterways," and instructed that Navy personnel serving outside these waterways in ports, harbors, and open waters, be excluded from the presumption of Agent Orange exposure. This was the provision of which Mr. Gray sought direct review.

Under the Administrative Procedures Act, the Federal Circuit has jurisdiction to review agency actions that fall under 38 U.S.C. § 552(a)(1) and does

not have jurisdiction to review actions that fall under 38 U.S.C. § 552(a)(2). The question in *Gray* is, which of these provisions does the Manual provision fall within?

38 U.S.C. § 552(a)(1) provides that Federal agencies must publish in the Federal Register "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" and "each amendment, revision, or repeal of the foregoing." 38 U.S.C. § 552(a)(2) provides that federal agencies must make available in electronic format for public inspection "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" and "administrative staff manuals and instructions to staff that affect a member of the public." According to the Federal Circuit in *Gray*, the rules in the Adjudication Manual fall within the latter category.

In answering this question, the ultimate inquiry is whether the agency action in promulgating the rules "partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." The factors to be considered are the agency's own characterization of the action, whether it is published in the Federal Register or Code of Federal Register, and whether the action has binding effects on private parties or the agency.

Following its recent precedent in a case raising similar issues, *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017), the Federal Circuit held that, because they are interpretations adopted by VA, not published in the Federal Register, not binding on the Board, and contained within an administrative staff manual, the Manual provisions fall under § 552(a)(2) and not (a)(1). A key aspect of the Federal Circuit's reasoning was that, although compliance with the Manual by VA adjudicators initially affects all concerned veterans, the Board is not bound by either the adjudicators' decisions or the Manual provisions. Moreover, veterans have a remedy if they are adversely affected by a Manual provision – they can contest the validity of the provision as applied to them by appealing VA's decision to CAVC and the Federal Circuit.

Judge Dyk dissented. Although disagreeing with the majority as to the impact of the lack of publication in the Federal Register and the form of the Manual, Judge Dyk focused on the binding nature of the Manual provisions. According to Judge Dyk, given that the Manual binds "the front-line benefits adjudicators located in each VA Regional Office (RO)," its lack of binding effect on the Board is not dispositive. He noted the more than one million claims decided by the ROs in 2015, with only a small number (about 50 thousand) appealed, thus reflecting that the Manual provisions "constitute the last word for the vast majority of veterans." Although Judge Dyk's dissent and the subsequently granted petition for a writ of certiorari each addressed the technical aspects of the relationship between sections 551(a)(1) and (2), their primary underlying reasoning was the same: VA adopts rules in the Manual that affect many veterans but are difficult to challenge through case-by-case litigation. This insulates the Manual provisions from both the notice and comment requirements for rules published in the Federal Register and challenges by veterans, who often do not appeal adverse rulings by the RO and face significant administrative hurdles and delays when they do appeal.

Thus, the Supreme Court will address many significant and interesting issues in administrative and veterans law in deciding *Gray*, and will likely do the same with regard to the presumption of competency when another case raising this issue comes before it.

Jonathan Hager is a member of the Bar Association's Board of Governors and a Veterans Law Judge with the Board of Veterans' Appeals. The views expressed here are solely his own and do not represent the views of the Board or any agency of government.

Editors' Note: On December 7, 2018, the U.S. Court of Appeals for the Federal Circuit heard argument *en banc* in *Procopio v. Wilkie*, a case involving the presumption of exposure to Agent Orange and Blue Water Navy veterans. The Federal Circuit's decision in *Procopio* is pending.

Federal Circuit Panel Divides 2-1 Against Veteran on Effective Date for *Nehmer* Disability

by David E. Boelzner

Reporting on *Robinson v. Wilkie*, No. 2017-1968 (Fed. Cir. October 4, 2018)

Mr. Robinson served as a Marine in Vietnam. After leaving service he developed heart problems and on January 26, 2003, he suffered a heart attack. In February 2006 he was seen by a VA cardiologist, who recommended that diagnostic tests be done, but they were not done. Nine months later, after a stint in the hospital for blood clots, Mr. Robinson saw the same cardiologist, who again recommended testing, which was finally accomplished on April 2, 2007, 14 months after the cardiologist's initial recommendation. No reason for the delay in testing appears in the record.

Mr. Robinson could not get benefits for his heart condition until after August 2010, when as a result of the *Nehmer* litigation VA amended its regulations to make ischemic heart disease, including coronary artery disease, a condition presumptively connected to service if exposure to herbicides was established. Having served on land in Vietnam, Mr. Robinson was eligible for the presumptions and was service connected in 2011. After an appeal of the initial ratings, VA assigned Mr. Robinson a 100% rating from January 26, 2003, the date of his heart attack, to the end of April 2003, 10% from May 1, 2003 through April 1, 2007, and 60% from April 2, 2007, the date of the testing that VA said established entitlement to the higher rating. The veteran appealed the effective date of the 60% rating.

The CAVC affirmed the Board's determination that an earlier effective date could not be awarded because the evidence did not establish that the 60% criteria had been met until the testing was done on April 2, 2007. The veteran argued on appeal to the Federal Circuit that the delay in doing the testing was not his fault but VA's, and had it been done earlier he would have been shown to meet the higher rating criteria earlier.

The Federal Circuit panel divided, based on differing interpretations of how the regulations interact. The majority (Judges Stoll and Lourie) held that Mr. Robinson's effective date was necessarily dictated by 38 C.F.R. § 3.816(c) pertaining to *Nehmer* class members, of which Mr. Robinson is one. That regulation makes the effective date of benefits for a disability the later of when the claim was received or the disability arose. In the majority's view, the three ratings assigned, 100%, then 10%, then 60%, were part of the initial decision granting the benefit and thus were all governed by section 3.816(c). The majority found no error in the CAVC's affirmation that no evidence established an earlier date for the disability's worsening.

Judge Newman dissented, contending that the majority had failed to sort out exactly what the appellant was appealing: not the initial effective date for benefits, which the *Nehmer* regulation clearly governed, but rather the date of entitlement to a staged increased rating, which is governed by the general effective date statute, 38 U.S.C. § 5110(b)(3), implemented by 38 C.F.R. § 3.400(o)(2), under which the effective date is "the earliest date as of which it is ascertainable that an increase in disability has occurred." Judge Newman urged consideration of not just the April 2007 testing but all the evidence of record, which included the fact of the heart attack in January 2003, which demonstrated a long-standing heart condition. Noting the VA's duty to provide prompt treatment, she declared it inconsistent with the benefit of the doubt and VA's duty to assist to place the consequences of the unreasonable delay in providing the testing on the veteran.

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Broad Rating Criteria Held to Contemplate Symptoms Requiring an Assistive Device

by Dana Weiner

Reporting on *Spellers v. Wilkie,* 30 Vet. App. 211 (2018).

In *Spellers,* the Veteran sought referral for consideration of an extraschedular rating for his service-connected bilateral lower extremity sciatica. The Board determined that the veteran's assigned schedular rating contemplated his instability and fatigue, for which he used assistive devices. It reasoned that the use of assistive devices is intended to alleviate symptoms and/or functional limitations a disability causes, and the rating criteria and associated regulations fully contemplated the symptoms necessitating the use of the devices. The Board therefore denied referral for the veteran's sciatica. Mr. Spellers appealed to the CAVC, arguing that the Board erred because it failed to provide an analysis as to how 38 C.F.R. § 4.120 contemplated his use of a cane and a walker, especially because 38 C.F.R. § 4.124a, diagnostic code 8520, does not explicitly contemplate the use of such devices.

The CAVC in its decision set out the test for evaluating the Board's treatment of the first element of *Thun v. Peake,* 22 Vet. App. 111 (2008) as it pertains to the use of an assistive device for a neurological condition. The Court explained that the proper inquiry involves not only whether the symptoms and severity of the disability are contemplated under the relevant diagnostic code, but also whether they are contemplated in the language of the preface to the relevant diagnostic codes—namely, in 38 C.F.R. § 4.120.

It reviewed DC 8520, which rates diseases of the sciatic nerve causing incomplete paralysis based on whether they are mild, moderate, moderately severe, or severe, with marked muscular atrophy. These levels of severity are to be considered alongside section 4.120, which explains that disabilities listed under section 4.124a are ordinarily rated in proportion to the resulting impairment of motor, sensory, or mental function.

Because Mr. Spellers's falls, weakness, giving way, fatigue, and stiffness, which necessitated use of an assistive device, were impairments of his motor function, and his shooting pain, numbness, and tingling were sensory disturbances, the CAVC concluded that the Board's decision was adequate. The Court explained that it could not imagine a scenario where the use of an assistive device, such as a cane or walker, would not be due to symptoms related to impairment of motor or sensory function. It ultimately relied on the "broad nature" of DC 8520 to reason that the Veteran's schedular rating contemplated his symptoms, and therefore, his need for assistive devices.

The CAVC then agreed that the Board failed to specifically address the severity of the disability picture. However, it found this omission to be harmless error, and concluded that as a matter of law, the schedular rating contemplated the severity of the sciatica, which required the assistive devices, because the Veteran was not in receipt of the highest schedular rating. The decision provides the caveat that it does not preclude the possibility of extraschedular referral based on severity where a veteran is in receipt of the maximum schedular rating available for incomplete paralysis.

The CAVC declined to address the Veteran's argument that the very use of an assistive device causes additional effects that the schedular rating criteria do not necessarily contemplate. These effects, he contended, include limits on speed of ambulation, difficulty walking on uneven surfaces, an inability from turning quickly, backing up smoothly, and the inability to use the upper extremities while also using handheld assistive devices.

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Editor's Note: VA has already incorporated a revision to its M21-1 Adjudication Manual, section III.iv.5.B.2.h, based on this holding.

Reasons or Bases: Is the M21-1 Enough?

by Dale T. Ton

Reporting on *Overton v. Wilkie*, 30 Vet.App. 257 (2018).

Overton v. Wilkie represents one of the newest developments in the line of recent precedent surrounding VA's M21-1 adjudicatory manual.

In *Gray v. McDonald*, the U.S. Court of Appeals for Veterans' Claims held that VA's interpretation of 38 C.F.R. § 3.307(a)(6)(iii) designating Da Nang Harbor as an "offshore" waterway—while considering other harbors and bays "inland"—was arbitrary and capricious. 27 Vet.App. 313, 326-27 (2015).

As a result, in February 2016, VA updated the M21-1 to define *all* Vietnamese harbors and bays as "offshore" and all rivers and river deltas as "inland" for the purpose of applying the herbicide exposure presumption. Although VA's shortcut of updating the M21-1 allowed it to sidestep the additional burden of notice-and-comment rulemaking under the APA, the revised M21-1 provision does not carry the substantive force of a formal rule. *See DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017); *Overton*, 30 Vet.App. at 259. In *Overton*, the CAVC assessed the propriety of the Board of Veterans' Appeal's reliance on this revised M21-1 provision.

Veteran Patrick M. Overton served in the U.S. Navy during the height of the Vietnam War. In late 1967, he served aboard the cruiser U.S.S. Providence while it operated in Da Nang Harbor providing support to ground troops. Years later, Mr. Overton sought service connection for diabetes and ischemic heart disease, including as due to herbicide exposure from the waters of Da Nang Harbor.

In November 2016, the Board concluded that service connection was not warranted because Mr. Overton had not demonstrated either actual herbicide exposure or entitlement to presumption of herbicide exposure. The Board found that there was insufficient nexus evidence to establish direct service connection. As to presumptive service connection, the Board found that Mr. Overton did not qualify because Da Nang Harbor was designated an "offshore waterway" under the revised M21-1 provision.

On appeal to the CAVC, Mr. Overton argued that the Board improperly relied on the revised M21-1 provision instead of independently analyzing whether he was likely exposed to sufficient levels of herbicide from Da Nang Harbor to justify application of the herbicide exposure presumption. He additionally argued that, apart from presumptive service connection, he had established sufficient likelihood of actual exposure. The Secretary contended that the Board's decision was not erroneous and supported by adequate reasons or bases.

The Court determined that the Board's reliance on the M21-1 was itself insufficient to constitute an adequate statement of reasons or bases. Although the M21-1 provision was clearly relevant to the Board's adjudication, the Court held that the Board was still required to provide a "reasoned explanation" for finding the M21-1 a proper guide because M21-1 provisions are not substantive rules on which the Board may solely rely. The Court therefore remanded the case with instructions for the Board to explain why its determination was based on the likelihood of herbicide exposure.

On a separate note, the Court declined to consider the Secretary's argument regarding *Auer* deference. In oral argument, the Secretary proposed that the M21-1 provision in question amounted to VA's reasonable interpretation of 38 C.F.R. § 3.307 and thus warranted deference under *Auer v. Robins*, 519 U.S. 452 (1997). Besides declining to consider the issue because it had been raised for the first time in oral argument, the Court found that *Auer* deference was inapplicable because the issue before the Court was the adequacy of the Board's explanation for relying on the M21-1, as opposed to the substance of the M21-1 provision itself.

In sum, *Overton* serves to clarify that mere reliance on the M21-1 is no exception to the Board's duty to provide adequate reasons or bases. Where the Board chooses to adopt a position from the M21-1, it must independently review the matter and properly explain the rationale for its decision.

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Book Review: *Marching Home: Union Veterans and Their Unending Civil War,* Brian Matthew Jordan (Liveright, 2014), 374 p.p.

by Aaron Moshiashwili

Marching Home, by Brian Matthew Jordan, starts with a scene that comes across as nearly mythic – Gettysburg, 1913. The "great battle-field," 50 years after the great battle. And across a wall that they had last been firing at each other over, old men from both sides of the fight extend hands, sit and share a drink, swap stories. It sounds too magical to be real (and, as Jordan explains, that is precisely the case) but it is still a perfect way to open the book. The book's close has its own magic as well, ending with the passing – in *1956!* – of the last Union veteran. But the middle tells a story we know all too well. Depressingly, though not surprisingly, the issues Union veterans dealt with 150 years ago were no different from the ones veterans deal with today. Bridging the gap with people who didn't understand what had happened to them. Overcoming those to whom the veteran represents something they wish would just go away. Dealing with life-changing injuries, both physical and emotional. Finding a meaningful civilian life. Dealing with joblessness, homelessness, alcohol, drugs, and suicide. Fighting with the government for benefits. It is almost horrifying how little has changed.

Jordan lays out the Union Veteran experience, chapter by chapter, each exploring a different key aspect of the Civil War veteran experience. He starts with the parades and celebrations, immediately after the war's end – and the difference between the experience of the veterans in the Grand Parade down Pennsylvania Avenue and the civilians watching the men go by. He dedicates a chapter to the experiences of prisoners of war (of which there were many) and the conditions those prisoners had lived through, which resemble nothing so much as the descriptions of concentration camps. Another chapter discusses the unique problems faced by amputees, and the position an "empty sleeve" held in the postwar mythologizing. And he discusses extensively the works by the Grand Army of the Republic, a service organization created by and for Union Veterans – it is fascinating to look at its similarities to modern VSOs. On the same note, the book shows the start of what would eventually become modern veterans' law – although few modern practitioners would likely apply directly to Congress for a bill granting a pension to a specific veteran! But then again, today a veteran can't lose benefits because the veteran's DD-214 was swindled or stolen away from them.

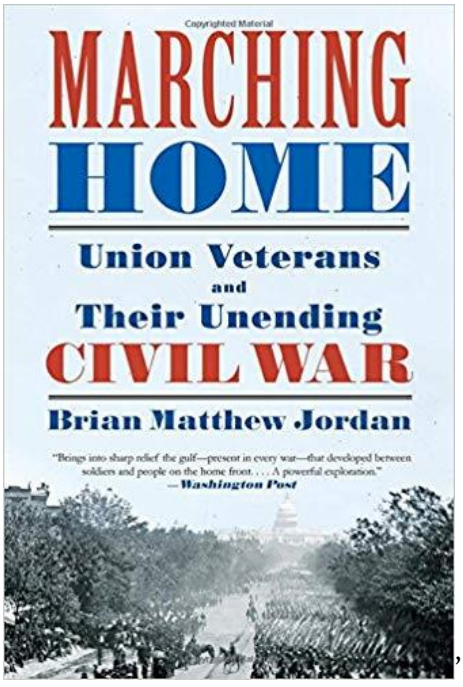
Jordan dedicates a chapter to a topic which surprised me - the importance to these men of writing. The returning Union troops wrote – and published! – enormous volumes about their experiences. They wrote articles, memoirs, regimental histories; they described Confederate prison conditions in lurid detail and advocated for national veterans policy. They did it out of feelings of responsibility to fallen comrades; they did it to earn money, or to garner fame; some even did it for rehabilitation. It truly makes me wonder – does that still happen? Surely veterans have no less a need today to process what they've been through by sharing it – is it just that in our modern mass-media landscape, accounts like this never come to our attention, where in a quieter time they might have?

Like all books, *Marching Home* has its flaws. Mr. Jordan's historical research is impressively documented. Accordingly, he can be forgiven mere errors in geography – and as a lawyer I know I am in no position to call him out for having somewhat over-florid prose. (Although I will admit to being surprised by the sheer number of "impressively bearded" Union veterans.) Where I did start getting

a bit frustrated was when names that were somewhat familiar came up, but no wider explanation of their historical significance was given. When Secretary of War Robert Todd Lincoln is mentioned, for instance, it seems worth confirming for the reader not deeply versed in 19th century history that he was, in fact, the son of the president whose election led to the Civil War. But when examining a work's flaws, it's critical that one ask if those flaws touch the core, the purpose, of the work. And here that is definitively not the case.

By the end of the book, I found myself checking back at the book's subtitle. The Confederate veteran is, of course, a presence in the book, but his experience is not touched on at all, and I wanted to know more about it. But I was hardly disappointed that Jordan stuck to the topic in his title – the book is an engaging and fascinating look at a time which feels vastly different from ours, yet far too similar.

Aaron foolishly just did a google search on "confederate veteran history" and is not feeling awesome about the state of the country. But in the meantime, if anyone knows of a good book on the confederate veteran experience, please reach out and recommend it.



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