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Looking Back at the Appeals Modernization Act

by James Ridgway

Although we are just at the beginning of the new appeals process established by the Appeals Modernization Act (AMA), the beginning of this new chapter is the end of the lengthy story of how the AMA came to be. Understanding the background of how the new system was designed helps to understand the new process, as everyone works to see how the outline has been turned into reality. This is not a guide to the new process itself, but rather an origin story for those who have a basic familiarity with the three-lane structure and want to know how it came to be this way.

For many years before the AMA started to take shape, there were concerns that the old appeals process was not performing well. As the number of initial claims began to triple starting two decades ago, the time to resolve appeals and the number pending began to climb faster. The procedures that had accumulated incrementally since the Board was created in July 1933 began to show their age and lack of overall cohesiveness. Furthermore, medicine and information technology transformed the landscape within which the process operated, overwhelming a process where evidence files had long been relatively modest in size.

In 2015, then-Deputy Secretary Sloan Gibson asked what it would take to bring the appeals system to a stable steady state by 2020. The answer was billions and billions of dollars to increase staffing several times over. Although there was great willingness to do right by veterans, addressing the problem with resources alone could not be justified. As it stood, so much of the effort in the process was wasted on decisions that were null as soon as the next person looked at them because something had changed and further development had to be ordered, often through a remand from the Board that deferred review of the merits.

In that context, VA called major stakeholders — including traditional Veterans Service Organizations and attorney groups such as NOVA and NVLSP— together for a marathon three-day meeting to discuss a complete overhaul of the process. Although everyone participated in good faith with the same goal of achieving the best results for veterans, the meeting was exhausting and often contentious. In crafting the AMA, some topics were debated for hours. The problem of how best to reach a delicate balance between speed and accuracy in a process that should also feel informal and veteran-friendly did not lend itself to an obvious solution. Even though an outline of three lanes of review emerged early, the details were the products of compromise and none of the participants were comfortable with every choice. Nonetheless, the need to try something was apparent.

To best understand the AMA and how to operate within its framework, it helps to understand how the conversation began and the three issues that were crucial in the conversation. I believe that the meeting succeeded only because it was *not* framed as a conversation about how to fix the old process. Instead, VA began the conversation with a statement and a question: We [the Agency] know that you [the stakeholders] can never agree to a new appeals process unless you would be able to explain to all your staff who assist veterans today what they would be doing in any new system. What is it that your folks already do that actually helps veterans, and how can we design a process around that?

This was, in essence, a human-centered design process. It was a long conversation, but fundamentally it was built around imagining what happens when a veteran comes to a VSO or attorney seeking help with an unfavorable rating decision. The goal was to maximize the value the representative could provide at that point and minimize the time and effort to fix problems and reach the right result. That said, there was also a constant discussion that the system should not trap

pro se veterans, even if an experienced representative could handle it more efficiently.

The answer from the stakeholder community to the kickoff question was that we [veterans' representatives] do three main things to help veterans with an unfavorable decision: (1) We help them submit additional evidence when there is a gap, often because a veteran was proceeding pro se at the initial claim level and did not know what to submit; (2) we bring simple errors to the attention of more experienced staff at the regional offices who can fix them quickly; and (3) we take medically and legally complex cases to the Board of Veterans' Appeals. Based on the different goals of those three services, fundamentally, the AMA was designed to replace having one process for all problems with three different options for those different needs.

To make this framework succeed, a number of issues had to be addressed. First, to make an intelligent choice between the review options, a veteran and his or her representative need to understand the basis of the denial. Accordingly, the AMA includes detailed requirements for rating decisions that allow for a quick evaluation of what the problem is and how best to resolve it. VA actually agreed to more detailed notice letters early in the discussions once a three-lane solution was being discussed, as it was obvious that everyone's life was easier when veterans made good choices and problems were addressed during the first review.

The second and most contentious issue that had to be dealt with was how to handle the duty to assist. When the Board was created, medical treatment was rare, and even into the latter part of the twentieth century medical records—if they existed—were the property of the doctor and not usually obtainable by patients. In a twenty-first century world of frequent follow-up and the exponential growth of computer-generated records, the remand rate of the Board reached two-thirds in large part because the agency was constantly being made aware of new treatment records. This issue created a related problem for those working to reduce error rates because Board remands did not identify where errors were occurring in the field because the Board was typically looking at a much different record by the time it reached the merits of a case.

The compromise on this point was certainly the most difficult to reach, but it was absolutely essential to the design. Fear of "closing the record" was the boogeyman that had prevented reform for years. But it came to be understood that limiting review to a closed record was not only essential to giving veterans final answers but also to improving the system generally; it creates feedback loops in which higher-level RO and Board decisions actually generate data on where the problems are by making decisions based upon the same evidence. Of all the features of the AMA, this is the one that fails to get the attention it deserves because the best way to handle appeals is to avoid mistakes from the beginning. Designing feedback loops into the system helps veterans and reduces the burden on the Agency at the same time. Under the AMA, 100% of Board remands constitute data that a mistake was made below and, therefore, patterns of remands represent issues in need of systemic fixes.

The third contentious issue was that there was recognition that much of the pathology of the prior process was driven by the fear of deserving claimants losing their effective dates, particularly when appeals often take five years or more to resolve. Fundamentally, Board denials became such high-stakes affairs that many appellants became trapped in loops of repetitive remands, hoping that turning over just one more stone might lead to a favorable outcome. Therefore, the biggest conceptual breakthrough of the AMA was extending effective date protections for a year after unfavorable decisions, to lower the stakes of an unfavorable decision and allow them to become educational opportunities. Under the AMA, an unfavorable Board decision can be an opportunity to explain what evidence could change the outcome, so that veterans can better understand if the claim has merit and is worth pursuing further. The Board will still correct development errors, but it need not remand for fishing expeditions.

Of course, there is no guarantee that the process will function as expected in practice. During this long process, many people asked me how I could think

that this new design was not complex. I would always respond that this new design *is complex*. Moreover, the definition of a complex system is that it is impossible to anticipate in advance precisely how it will behave. The AMA was not designed to achieve perfection, and, in fact, the stakeholders never agreed upon the details of what perfection would look like. Instead, the AMA was just designed to be better than what it was replacing.

In the end, simplicity was never achievable for a process that must manage a body of substantive law as complex as veterans benefits, which handles enormous volumes of medical evidence across fact patterns often spanning many decades. But positive outcomes resulted, and an overlooked accomplishment of the legislation was to divide the work within the Agency to isolate different issues, so that data can be generated to better understand how to make further improvements. No longer do the parts of the process exist in relative isolation, which encourages finger pointing rather than problem solving. That can give us hope that future conversations on how to continue improving the process will be less contentious than the three days in 2016 in which we were locked in a conference room together finding common ground. The AMA at least allows us to generate data to more accurately diagnose what is wrong with the system and what is likely to fix it down the road.

James Ridgway is of counsel at Bergmann & Moore, LLC, and was formerly a Veterans Law Judge at the Board of Veterans' Appeals, where he served as Chief Counsel for Policy and Procedure and later Chief Counsel for Strategy, Innovation, and Programs, while the AMA was being negotiated with stakeholders and moved through the legislative process.

From the President

Colleagues –

It's hard to believe that the first quarter of 2019 is already over, but here we are! Appeals Management is in full swing, and the Fourteenth Judicial Conference is coming right up. I am very much looking forward to learning more about the Appeals Management Act during the Conference, as well as class actions, VHA appeals, and toxic exposures. The discussion between the CAVC judges and the BVA members looks especially interesting.

As we have in past years, the CAVC Bar Association is proud to sponsor a reception on the evening of the first day of the Conference, as well as a program on the second day of the Conference. The CAVC Bar Association program on Friday, April 12, will feature top officials from VA providing behind-the-scenes insights. The program will also feature a Q&A session with Judge Falvey. Members are encouraged to submit questions for Judge Falvey to JFCAVCEVENT@outlook.com. The event will be recorded and made available on the internet at a later date for our members who are unable to attend in person.

This year the Bar Association and the Veterans Pro Bono Consortium sponsored seven scholarships for law students to attend the conference. The scholarships covered not only the students' registration costs, but also some travel expenses. We had 30 applications for the 7 available spots. The finalists are a very impressive group and hail from George Washington University, Yale Law School, University of Iowa, University of Florida (GO GATORS!), Southern Illinois University, University of Missouri, and Notre Dame University.

In addition to preparing for the Judicial Conference, the Board of Governors has also been busy planning additional programing for the year. In March, the Bar Association co-sponsored a program with the Administrative Law and Agency Practice Community of the DC Bar Association. The program featured an oral argument recap and discussion of *Kisor v. Wilkie*, the first veterans law case to be heard by the U.S. Supreme Court in eight years. The CAVC Bar Association was well-represented at the event, and we hope to co-sponsor other relevant programs in the future.

The first of our semiannual DC monument washing events is coming up soon as well. Stay tuned for further details.

Finally, the Technology Committee has been hard at work developing new ways to connect with our membership. You can now find us on Instagram and Linked In. Please follow us on social media where we will share news, photos, and other updates!

Sincerely,

Amy F. Odom
President

Message from the Chief Judge

Dear Friends in Veterans Law:

I am excited about the Court's Judicial Conference and the variety of subjects we are exploring, from the traditional favorites of Legal Trends and Ethics, to new areas like Class Actions and Appeals Modernization. I'm also looking forward to our keynote conversation with Nina Totenberg, legal affairs correspondent and Supreme Court analyst for National Public Radio. What a great way to continue our year-long celebration during this, the 30th anniversary of the creation of the Court. To that end we have a number of events scheduled for the rest of 2019 recognizing this exciting milestone, and I hope each of you will make time to participate in these celebratory activities.

Equally thrilling to me is the continued growth and maturity that I see in the field of veterans law. During the three years that I have been Chief Judge, I have taken action to encourage more engagement between the Court and all of our constituent organizations and other veterans groups. I have heard the enthusiasm in response from those organizations, and their clear message: We are all better when we talk to each other more. Engagement, exchange of information, and cooperative learning, are goals I have sought to accomplish since my early days on the bench, and I believe we have made great strides in that regard. While a couple of specific examples come to mind, the cooperative spirit that has permeated all that we do is very obvious to me based on the conversations I hear and the energy levels we experience at many of our functions.

This past February, I was asked to give a presentation at the American Bankruptcy Institute's conference in Tampa, Florida. I invited Ed Glabus, the Executive Director of the Veterans Consortium Pro Bono Program, and Professor Stacey-Rae Simcox, the Director of the Veterans Law Institute and Veterans Advocacy Clinic at Stetson University College of Law, to join me, and we gave a joint presentation on various aspects of veterans law and the pro bono representation opportunities in the field. Our collaborative program was an overwhelming success.

In March, the Court had plans to travel to the University of Montana Law School to hold oral argument as part of our outreach program. When the case scheduled for argument resolved just a few weeks before the travel date, we quickly changed gears and put together a veterans law education team who presented as part of a Montana Law School Continuing Legal Education program. The beauty of that effort was that the team included Judges and law clerks from the Court; Amy Odom, President of the Bar Association; Ken Walsh, Deputy Chief Counsel with the VA Office of General Counsel's CAVC Litigation Group; and University of Montana Law School Professor and Director of the Veterans Advocacy Clinic, Hillary Wandler. I'm looking forward to another collaborative effort at our Judicial Conference when Judges from the Court and Members from the Board of Veterans' Appeals will, for the first time, engage in a panel discussion to exchange information and cooperatively learn from each other.

I am convinced that engagement, exchange of information, and cooperative learning will continue to propel us to higher heights as we all strive to provide the best representation and a more efficient claims resolution and appeals system for our Nation's veterans. I look forward to more opportunities to spend time with you all.

Regards,

Chief Judge Davis

Notes From the Clerk of the Court

Dear Colleagues:

This year the Court celebrates its 30th anniversary, a milestone that is bringing with it unprecedented change in the Court's practice. As the Judges of the Court wrestle with an expanded number of panel cases and explore the nature of new class actions, the Court's Public Office has its hands more than full keeping track of a record number of new appeals. At the same time, our Central Legal Staff is trying to stay ahead of an explosion in demand for Rule 33 conferences. While the latter has resulted in a tremendous increase in JMRs that have kept chambers from being overwhelmed, our practice community is clearly stressed by the volume of cases coming to the Court and relief is not on the horizon. As we collectively work to contain this unprecedented volume of cases, it goes without saying that the common thread in all that we do is the hard work and professionalism of our Appellant's Bar and the counsel of the VA OGC CAVC Practice Group.

Although the Bar is stressed, I continue to be amazed at the efforts being made to keep cases moving smoothly. Even with case numbers through the roof, we have not seen a corresponding increase in noncompliant pleadings. Yes, we continue to see practitioners challenged by the Rule 28(a) requirements for the Table of Authorities (the format in Form 18 in our Appendix of Forms is the answer!), and motions for extensions often don't include a recitation of extensions already granted as required by Rule 26(b)(1)(D), but we otherwise have seen counsel make a concerted effort to seek assistance when they are unsure of proper procedures, and to promptly remedy deficiencies when they are identified. As you work your way through your cases, please try to be as precise as you can on the Summary of Issues being shared as part of the Rule 33 process – we can't overstate the impact these summaries have on efficiency and productivity. And finally, while juggling many cases as part of a busy practice is very challenging, I note that we have seen a significant increase in number of extensions being requested, particularly from appellant's counsel - please be sensitive to the impact these requests have on a process that is already perceived by some as too lengthy. I've talked before about our effort to monitor practitioner efforts to comply with our Rules of Practice and Procedure on an ongoing basis. This non-disciplinary process involves sending notices if problems persist, but we continue to issue very few notices, something that reflects – despite the volume of cases now at the Court - the heightened effort all practitioners have been making to comply with the Court's Rules.

While we are busy with a record number of cases, we are still trying to improve our operations in ways that enhance efficiency and transparency – let me highlight two examples. First, our CM/ECF user community, and Apple computer users in particular, continue to be challenged by filing problems associated with web browser support for Java – this issue is soon to become a thing of the past. We are

about to fully field software changes that will allow users to connect to CM/ECF with browsers such as Safari, Firefox or Chrome (i.e., not just Internet Explorer 11), and improved access to CM/ECF should be an immediate result. Watch for a notice and instructions – again, particularly for Apple users – on our website. Second, some of you have already heard that we are on the cusp of opening a YouTube channel dedicated to videostreaming the Court's oral arguments. Although we won't be the first Court to videostream arguments, we are excited about bringing oral arguments to our nation's veterans, almost all of whom didn't enlist from home towns in the D.C. area.

It remains a privilege for me to support the important work done by the Court and the Court's Bar. Thanks to the entire Bar for your support, and a special thanks to the many of you who have taken the time to reach out to me to share thoughtful and constructive comments.

I'll look forward to visiting with many of you at the upcoming Judicial Conference, and working with all of you in this very special 30th Anniversary Year.

Regards,

Greg

Gregory O. Block
Clerk of the Court/Executive Officer

Federal Circuit Invalidates Its Previous Decision and VA's Rule Regarding Blue Water Navy Service Near Vietnam

by Patrick A. Berkshire

Reporting on *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019).

On January 29, 2019, the U.S. Court of Appeals for the Federal Circuit reversed VA's long standing rule concerning who qualifies as having served in the Republic of Vietnam for the purpose of presumptive herbicide (Agent Orange) exposure. Specifically, the Federal Circuit held that, for the purposes of the Agent Orange Act, codified at 38 U.S.C. § 1116, service in the Republic of Vietnam included service in the territorial waters off the coast of Vietnam. As a result, VA's rule that had limited presumptive herbicide exposure to those who had set foot on the landmass of the Republic of Vietnam or who had served on ships in Vietnam's inland waterways was overturned.

The decision stemmed from the case of Mr. Alfred Procopio, Jr., who had served in the United States Navy during the Vietnam Era. In July 1966 he was aboard the U.S.S. Intrepid while it was stationed offshore the landmass of the Republic of Vietnam. In October 2006, he sought service connection for prostate cancer and diabetes mellitus— both conditions eligible for presumptive service connection based on presumed exposure to herbicide agents under 38 C.F.R. § 3.309(e). VA at both the local level and at the Board of Veterans' Appeals (BVA) denied presumptive service connection because it found that Mr. Procopio's service off the coast of Vietnam did not count as service in the Republic of Vietnam, as he had not set foot on the land mass and the Intrepid had not entered the inland waterways. As a consequence, he was not entitled to a presumptive finding of exposure to herbicide or presumptive service connection under 38 U.S.C. § 1116. Mr. Procopio appealed to the U.S. Court of Appeals for Veterans Claims (CAVC).

The CAVC affirmed the BVA's decision, citing the Federal Circuit's earlier decision in *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008), which upheld VA's interpretation of what constituted service in the "Republic of Vietnam."

Mr. Procopio then appealed to the Federal Circuit, and in an *en banc* opinion, the Circuit overturned its prior decision in *Haas* and ruled that VA's interpretation of what constituted service in the Republic of Vietnam was in conflict with the plain meaning of 38 U.S.C. § 1116(a). Specifically, the Federal Circuit found that, by using the formal term

"Republic of Vietnam" in § 1116(a), Congress had made its intent clear that it was referring to all of the Republic of Vietnam's territory, including its territorial waters. To reach this conclusion the Federal Circuit reviewed international law, including treaties and conventions to which the United States was a party to when the Agent Orange Act was passed, and found that reference to the Republic of Vietnam would have also included reference to territory within its sovereignty, including the territorial sea extending 12 nautical miles from Vietnam's coast. The Federal Circuit also determined that the court in *Haas* had gone astray when it found ambiguity in the term "Republic of Vietnam" and then found VA's rules limiting it to the land mass or the inland waterways reasonable. Accordingly, the Federal Circuit held that Mr. Procopio was entitled to presumptive service connection based on his service aboard the U.S.S. Intrepid, reversed the CAVC's decision, and remanded for further proceedings.

Patrick A. Berkshire is a staff attorney at the National Veterans Legal Services Program.

Federal Circuit Remands for Consideration of Informal Claim

by Christa Wheatley

Reporting on *Jones v. Wilkie*, No. 2017-2120 (Fed. Cir., March 13, 2019).

On March 13, 2019, the Federal Circuit issued a precedential decision in *Jones v. Wilkie* (2017-2120), which vacated and remanded the CAVC's affirmance of the Board's denial of an earlier effective date for service connection, focusing on the CAVC's discussion of the Board's duty to assist concerning obtaining VA treatment records.

The appellant, as substitute for a deceased veteran, sought an effective date earlier than the veteran's April 2011 formal claim filing date for service connection for PTSD because the veteran had received VA treatment and a diagnosis of PTSD in 2000. The Board denied the appeal, finding that there was no prior service connection claim and that the VA treatment for PTSD in 2000 could not be considered an informal claim because nothing in the file indicated an intent to file a claim for benefits at that time. The CAVC affirmed the Board's denial, and the appellant appealed to the Federal Circuit.

The appellant argued that the CAVC used too high a threshold to determine that the duty to assist did not require efforts to obtain VA treatment records, which she argued may contain an earlier informal claim from 2000 or 2001. Although the veteran had admitted that he did not file a (formal) claim until 2011, the Federal Circuit noted that an informal claim was allowed under 38 C.F.R. § 3.155 as in effect prior to March 24, 2015, and it vacated and remanded for consideration of the veteran's complete VA treatment record.

The Federal Circuit focused on the CAVC's notation that it had not reviewed the full treatment records and its finding that "even if the Board had not obtained or reviewed" the complete records, there was no need to attempt to obtain them because there was no allegation that the veteran had expressed to his doctors an intent to file a claim at that time. The CAVC had determined that the likelihood of the records containing an informal claim was "extremely low," and therefore there was no reasonable possibility of them substantiating the claim so as to trigger the duty to assist. The Federal Circuit ruled that the CAVC had applied too exacting a standard under 38 U.S.C. § 5103A(c)(1)(B) and 38 C.F.R. § 3.159(c)(3). There must only be a reasonable possibility that the records would "aid" in substantiating the claim; therefore, to trigger the duty to assist a claimant is not required to show that a particular record exists or that the record would "independently prove [the] claim". The Federal Circuit cited *Sullivan v. McDonald*, 815 F.3d 786, 790-91 (Fed. Cir. 2016), which held that VA may not consider relevance when determining whether to obtain VA treatment records. Because the veteran had sufficiently identified the records, VA was required to attempt to obtain them.

Notably, it appears that the Board actually had reviewed the veteran's full VA treatment records

from 2000 forward. The Federal Circuit relied on the CAVC's notations that it had not reviewed the veteran's complete treatment files and that the Secretary had "tacitly admit[ted]" that the complete records from 2000 to 2001 were not of record. The relevant rating decision, however, showed that the RO had obtained VA treatment records from 2000 to 2012, the Board decision noted that VA had obtained the VA treatment records, and the Board stated that the information in the VA treatment records did not constitute an informal claim. The Secretary argued before the Federal Circuit that the Board did review the full record and it was only the CAVC that did not have the full record before it for review. But the Federal Circuit stated that consideration of the completeness of the record was outside its jurisdiction, and the court would not second guess the CAVC's finding that the Board did not review the complete history.

Christa Wheatley is Counsel at the Board of Veterans' Appeals.

Fed. Cir. Addresses Whether a Fallen Mailbox Flag Can Support Equitable Tolling

by Stuart Anderson

Reporting on *James v. Wilkie*, No. 2018-1264, 2019 WL 1065039 (Fed. Cir. 2019).

In *James v. Wilkie*, the U.S. Court of Appeals for the Federal Circuit addressed whether a fallen mailbox flag could be an extraordinary circumstance that would warrant equitable tolling of the 120-day deadline to file a notice of appeal (NOA) after a Board decision. In the case, the mail carrier did not pick up Mr. James's NOA from his mailbox, where he reports placing it on the 120th day. Mr. James argued that this probably resulted from the accidental lowering of the flag on the mailbox that alerts the carrier to outgoing mail. Finding that the Court of Appeals for Veterans Claims (CAVC) had effectively and improperly applied a *per se* rule that a fallen mailbox flag is not an extraordinary circumstance that warrants equitable tolling, the Federal Circuit vacated the decision and remanded it for the CAVC to determine whether equitable tolling was warranted after an analysis of the particular facts of the case.

Mr. James filed a claim for veterans benefits for an increase in disability rating for service-connected pseudofolliculitis barbae and for service connection for lumbar spine and cervical spine disabilities. The Board of Veterans' Appeals denied his claim on January 28, 2016, and on May 27, 2016, acting *pro se*, Mr. James placed his NOA in a stamped envelope, placed the envelope in his mailbox, and raised the flag that alerts the mail carrier that there is outgoing mail. May 27, 2016, was the 120th day after the Board decision, the deadline for Mr. James to mail his NOA. *See* 38 U.S.C. § 7266(a). The same day, a Friday, Mr. James left town, to return on Monday, May 30. On his return, Mr. James found the NOA still in his mailbox. That night he took it to the post office, where it was post-marked on May 31, 2016.

The CAVC ordered Mr. James to show cause why his appeal should not be dismissed for failure to timely file an NOA. After obtaining counsel, Mr. James responded, arguing that the 120-day filing window should be equitably tolled because an "errantly" lowered flag on his residential mailbox constituted an extraordinary circumstance out of his control. Mr. James submitted evidence that he had placed the NOA in the mailbox and raised the flag, and that the postman had not picked up the NOA because the flag was not raised.

In a divided opinion, the CAVC dismissed Mr. James appeal due to untimely filing of the NOA. The majority found that "a fallen mailbox flag" was not an extraordinary circumstance beyond Mr. James's control but rather an "ordinary hazard" of last-minute mailing, which could have been avoided. Accordingly, equitable tolling was not warranted. The dissent argued that equitable tolling should apply because, but for circumstances outside of Mr. James's control, his actions would have sufficed to ensure timely mailing.

Addressing first the question of jurisdiction, the Federal Circuit determined that it did have

jurisdiction over the appeal because Mr. James argued that the CAVC erred as a matter of law in creating a categorical rule that a fallen mailbox flag could not be an "extraordinary circumstance." The Federal Circuit rejected the CAVC's framing of its decision as a matter of case-by-case analysis to find that the lower court had, in fact, erroneously applied a categorical ban foreclosing the possibility that a fallen mailbox flag could ever be an extraordinary circumstance warranting equitable tolling.

The Federal Circuit also ruled that the CAVC erred by looking too closely at the facts of past decisions in which court found extraordinary circumstances instead of considering the argument on its own merits. This analysis was too narrow to support the CAVC's decision. The Federal Circuit next rejected the argument, advanced by the Government, that circumstances were only out of Mr. James's control because he elected to wait until the last day of the 120 to mail his NOA. There was no requirement that Mr. James mail his NOA before the 120th day, and that Mr. James could have mailed the NOA earlier was irrelevant to the extraordinary circumstance analysis. The Federal Circuit rejected Mr. James's argument that equitable tolling was warranted under the law and that a fallen mailbox flag was an extraordinary circumstance, returning the matter to CAVC for an analysis of the facts. The Federal Circuit concluded by identifying the CAVC's error of law as its "impermissible categorical determination that a particular set of facts" will never warrant the tolling of a filing deadline.

Sturt Anderson is a member of the Court of Appeals Litigation Group at the Department of Veterans Affairs Office of General Counsel.

CAVC Bars CUE Claims Based On The Retroactive Application Of *Wagner* Rule On Aggravation

By Kaitlyn C. Degnan

Reporting on *George v. Wilkie*, 30 Vet.App. 364 (2019).

In *George*, the Veteran appealed a Board decision that found no clear and unmistakable error (CUE) in a September 1977 Board decision denying entitlement to service connection for schizophrenia.

Mr. George enlisted in the U.S. Marine Corps in June 1975. Shortly thereafter, he was diagnosed with schizophrenia and discharged in September 1975. He filed a claim for disability benefits, but was denied in a 1977 Board decision finding that his schizophrenia clearly and unmistakably preexisted service and was not aggravated during service. In December 2014 Mr. George filed a motion to revise the 1977 Board decision on the basis of CUE. He alleged that the 1977 Board clearly and unmistakably erred when it denied his claim without rebutting the presumption of soundness with clear and unmistakable evidence that his condition was not aggravated by service.

At the time of the 1977 Board decision, 38 U.S.C. § 1111 was interpreted by 38 C.F.R. § 3.304(b) (1977), which required only clear and unmistakable evidence that a condition preexisted service to rebut the presumption of soundness. In 2003, VA issued a precedential counsel opinion that required clear and unmistakable evidence that a condition preexisted service and was not aggravated by service in order to rebut the presumption of soundness. OGC Precedential Opinion 3-2003 (July 16, 2003). 38 C.F.R. § 3.304(b) was amended accordingly. And in 2004, the Federal Circuit interpreted 38 U.S.C. § 1111 to require clear and unmistakable evidence both that a condition preexisted service and was not aggravated by service to rebut the presumption of soundness. *Wagner*, 370 F.3d at 1097.

The Board relied on *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005) to deny Mr. George's motion to revise based on CUE. The Federal Circuit in *Jordan* held that CUE cannot arise from a new regulatory interpretation, as the Board viewed the change to 38 C.F.R. § 3.304(b).

The Veteran appealed to the CAVC, relying on the *Patrick* line of cases. In *Patrick v. Shinseki*, 668 F.3d 1325, 1328 (Fed. Cir. 2011) (*Patrick VI*), the Federal Circuit explained that in its earlier decision in the

same litigation it had made clear that "[u]nlike changes in regulations and statutes, which are prospective, our interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment." As a result, the Federal Circuit had reversed the CAVC's affirmance of the Board's denial of a motion to revise based on CUE, concluding that the *Wagner* interpretation of 38 U.S.C. § 1111 applied retroactively because the claim was based directly on the statute itself and not the regulatory interpretation.

In *George*, the CAVC concluded that the Federal Circuit's pronouncement in *Patrick VI* regarding the effect of *Wagner* on CUE motions was dicta. It found that the *Wagner* pronouncement "cannot defeat the finality of a 1977 Board decision" because "consideration of CUE requires the application of law as it was *understood* at the time of the 1977 decision." *George*, 30 Vet.App. at 373 (emphasis added). The 1977 Board was required to apply the law as it existed at that time, including 38 C.F.R. § 3.304(b) (1977).

The CAVC explained that "it would defy reason to hold" that the 2003 change in 38 C.F.R. § 3.304(b) cannot form the basis of a CUE challenge, but that the 2004 statement of statutory interpretation can." It further reasoned that the "impact of allowing judicial decisions interpreting statutory provisions issued after final VA decisions to support allegations of CUE would cause a tremendous hardship on an overburdened VA system." *Id*. at 376.

Additionally, even if *Wagner* did apply retroactively, Mr. George failed to establish that the alleged error was outcome determinative. The CAVC therefore, affirmed the Board's denial.

In her dissent, Judge Bartley explained that "*Wagner* recognized that VA had misinterpreted the will of the enacting Congress and reaffirmed what the statute has meant continuously since the date when it became law." *Id*. at 379 (internal citations and quotation marks omitted). *Wagner* did not change the law, rather it explained what Congress had always intended the law to say. "[T]he will of Congress, not VA, should prevail." *Id*.

Moreover, she explained that the Federal Circuit's holdings in the *Patrick* cases were "unambiguous and germane guidance from [CAVC's] reviewing court," and grounded in the principle that "veteran-friendly congressional intent holds primacy over a VA interpretation that is less beneficial." *Id*. at 380. Regarding the majority's concerns with finality and administrative burden, Judge Bartley had "no reservations about requiring VA to remedy decades-old errors that prohibit otherwise deserving veterans and their dependents from receiving the benefits to which they are statutorily entitled." *Id*.

In Judge Bartley's view, each of the CUE requirements were met: the Board misapplied the law because it found the presumption of soundness rebutted without clear and unmistakable evidence of a lack of aggravation, that error was undebatable, and the error manifestly changed the outcome. "[H]ad the Board properly applied the presumption of soundness, it would have granted service connection for schizophrenia." *Id*. at 381. As a result, Judge Bartley concluded the September 1977 Board decision contained CUE, warranting reversal.

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CAVC Orders Limited Remand in Effort to Determine Class Certification, Sparking Debate over Authority to Order Remedy

by Amie Leonard

Reporting on *Skaar v. Wilkie,* No. 17-2574, __ Vet. App. __, 2018 LEXIS 156 (February 1, 2019)

Skaar v. Wilkie stems from an April 2017 Board of Veterans' Appeals decision that denied Mr. Skaar's claim for entitlement to service connection for

leukopenia, including as due to radiation exposure. After he filed his appeal, Mr. Skaar moved for aggregate resolution for a class of veterans "who were present at the 1966 cleanup of plutonium dust at Palomares, Spain[,] and whose application for service-connected disability compensation based on exposure to ionizing radiation [VA] has denied or will deny." Mr. Skaar first contends that VA's methodology used to estimate ionizing radiation doses for Palomares veterans is not "sound scientific evidence" under 38 C.F.R. § 3.311(c)(3). He also contends that VA's refusal to include the Palomares cleanup on the list of radiation-risk activities in 38 C.F.R. § 3.309(3)(ii) is reliant on scientifically flawed methodology. Mr. Skaar raised these contentions to the VA, before the Board made its April 2017 decision. The Board did not acknowledge Mr. Skaar's express challenges. The case ended up before the en banc Court.

The Court, in a six to three decision, deferred ruling on Mr. Skaar's motion for class certification and instead ordered a limited remand for the Board to provide a supplemental statement of reasons or bases answering Mr. Skaar's contention that VA uses flawed methodology to measure radiation exposure under 38 C.F.R. § 3.311. The majority determined that, without the Board's analysis of this particular question, it could not effectively and efficiently review the underlying Board decision or rule on the motion for class certification.

The Court's decision to order a limited remand was, debatably, a departure from its long standing precedent that "when th[e] Court remands for a new and discrete [Board] decision, it loses jurisdiction over the matter until such time, if at all, as a new [Board] decision is properly appealed." *Cleary. v. Brown*, 8 Vet. App. 305, 308 (1995). The Court held that it had clear authority to issue limited remands noting that "[i]t is common practice among the Courts of Appeals to retain jurisdiction over an appeal while making a limited remand for additional findings or explanations." The Court noted that limited remands are frequently used by Federal Circuit Courts to facilitate immediate review of further trial court proceedings, citing cases from the First, Third, Fifth, Seventh, Eighth, and Ninth Federal Circuits. Moreover, the Court noted that it has ordered limited remands before. *See Mayfield v. Nicholson*, 20 Vet. App. 98, 99 (2006) (per curiam order). While the majority acknowledged the Court's holding in *Cleary*, it distinguished its limited remand order by stating that it is not ordering a new "decision" or even vacating the underlying Board decision. The majority refused to lay out the circumstances in which it would employ limited remands, but concluded that a limited remand was appropriate here so the Court can evaluate class certification arising from the appeal.

In concurring, Chief Judge Davis wrote separately to emphasize the importance of overturning *Cleary*. Chief Judge Davis noted that the Court, just like other Federal appellate courts, has broad discretion to define the scope of its remand authority, noting that 38 U.S.C. § 7252(a) gives the Court authority to remand matters "as appropriate." He stated that limited remands are an important tool to be used by the Court, and therefore it should not be narrowly defined.

In a separate concurring opinion, Judge Schoelen agreed with the majority's conclusion that the Court has the power to order limited remands but wrote separately to express her concern about the Court's implicit overruling of *Cleary v. Brown* without sufficiently explaining its divergence from the precedent. Judge Schoelen was concerned that, if the Court is to overrule *Cleary*, it should not be opaque about it. In particular, Judge Schoelen noted that the Court is not simply remanding the matter for a supplemental statement of reasons and bases, but "overruling more than 2 decades of Court case law and changing long-established procedural norms in order to provide a mechanism for the Board to cure any "common" legal defects that exist in a named appellant's case in order for class action litigation to continue unencumbered."

Judge Schoelen also raised concerns regarding judicial efficiency, and offered two "limiting principles." First, the case must concern a precedential matter. Second, the issue must contain "extraordinary circumstances." Judge Schoelen determined that the threshold matter of a precedential case was met here, because the case was before the en banc Court. Second, while Judge

Schoelen refused to define "extraordinary circumstances," she found that Mr. Skaar's case contained extraordinary circumstances, considering the time already invested in litigation before the Court and the harm that could potentially befall a sizeable class of veterans.

In dissent, Judges Pietsch, Meredith, and Falvey, stated that they "believe the majority [] exercised limited remand authority in this matter without adequately confronting restrictions on its power to do so." The dissent noted that the Court offered a resolution that was not requested by either party, which focuses on the merits of the underlying Board decision rather than the class certification issue before the Court. Second, the dissent viewed the majority's response to *Cleary* as an unconvincing attempt to circumvent that decision, which made "no effort to grapple with the jurisdictional restrictions discussed in *Cleary*."

The dissent added that, to the extent that the majority's decision can be read to overturn *Cleary* in whole or in part, the majority's analysis does not contain "the reasoned justification necessary to do so." Relatedly, the dissent disagreed with the majority's use of *Mayfield* to support its limited remand order, because *Mayfield's* use of a limited remand was far narrower than the Court's. Finally, the dissent expressed several jurisdictional and practical concerns. First, the limited order leaves in full effect a Board decision that denied Mr. Skaar's benefits, and does not account for the possibility that the Board may decide to grant the claim for benefits once it answers the Court's question. Second, the Court is exceeding its jurisdiction to ensure that it can rule on a motion for class certification that is not ripe for review, where the proper remedy is to deny the motion for class certification and remand to the Board for further decision making. Third, the dissent noted that "the Court has not decided whether its jurisdiction allows it to certify a class in this matter . . ."

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Court Panel Addresses Calculation of EAJA Fees for Teleworking Attorneys

by Christa Wheatley

Reporting on *Speigner v. Wilkie*, No. 16-2811(E), 2019 U.S. App. Vet. Claims LEXIS 309 (Vet. App. Feb. 28, 2019).

In *Speigner v. Wilkie*, the Court of Appeals for Veterans Claims (Court) granted an EAJA application in a reduced amount for teleworking attorneys, in a unanimous panel decision issued by Judges Schoelen, Bartley, and Meredith on February 28, 2019. The Court rejected the appellant's arguments that his attorneys who worked in locations other than the firm's Washington, DC, main office should receive an hourly rate based on the Consumer Price Index for all Urban Consumers (CPI-U) for the DC area rather than the rate for locations where they live and telework, and that overhead costs should be calculated based on the location of the main firm facility.

The Court first held that where a teleworking attorney has worked on a case from their residence, the CPI-U should correspond to the location of the attorney's residence. The Court noted that, under the EAJA statute, reasonable attorney fees shall be based on prevailing market rates, but shall not be in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A). In determining whether a cost-of-living increase justifies a higher fee, the Court must compare the CPI-U for the locality or region where the legal services were performed when the statutory maximum rate was established with the CPI-U for the time when the legal services were provided.

The Court determined that the case law is clear that the CPI-U should correspond to the location where the attorney actually works and has an office. In doing so, the Court discussed several cases and rejected the appellant's assertion that *Parrott v. Shulkin*, 851 F.3d 1242 (Fed. Cir. 2017), supports using

the main office location for the CPI-U calculation because the teleworking attorneys identified that as their office location. In this case, the attorneys worked exclusively from their homes, which were not in the DC area, so the Court found that their residences were also their de facto offices. The Court noted that if the attorneys had also performed work at the DC offices, then it would be appropriate to bill hours worked there under the DC area CPI-U.

The Court further explained that selecting a CPI-U based on where overhead costs are incurred to support the teleworkers is not supported by the case law and would be an overly burdensome standard that frustrates the purposes of EAJA. In doing so, the Court discussed several cases and rejected the appellant's assertion that *Baldridge v. Nicholson*, 19 Vet. App. 227, 246 (2005), and *Parrott*, *supra*, support calculating overhead costs based on where the main office is located. The Court noted that the CPI-U does not measure items related to business expenses but, instead, considers all items used in everyday life. Although overhead costs are recognized as part of an attorney's fee under EAJA, this does not mean that adjustment of the maximum statutory fee for cost-of-living increases is intended to address the rising prices of an attorney's overhead costs. The Court reiterated that the case law is clear that the maximum statutory fee does not pertain to where the overhead costs are incurred, but the location where the attorney works.

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CAVC Holds that Substitution is Allowed at Every Point of the Adjudicatory Process

By Dvora Walker

Reporting on *Demery v. Wilkie*, No. 17-3469, 2019 WL 238217 (Vet. App. Jan. 17, 2019).

In *Demery,* the Veteran's surviving spouse sought to appeal a Board decision denying the Veteran entitlement to TDIU. The issue was whether an October 2017 Notice of Appeal (NOA) was valid in light of the Veteran's August 2017 death.

Mr. Demery died after the Board decision issued but before the NOA period expired. His wife, Mrs. Demery, expressed an intent to appeal the decision, and her representative filed a timely NOA listing the Veteran as the Appellant. Thereafter, her representative filed a Notice of Appellant's Death and motion to substitute. The Secretary conceded that the movant qualified as an accrued-benefits claimant and informed the Court that he did not oppose the motion to substitute. Seeing a potential question regarding its jurisdiction, however, the CAVC raised the issue and ordered supplemental pleading. Mrs. Demery's representative then filed a motion for leave to amend the NOA, requesting that the amended notice relate back to the date the NOA was filed in the deceased Veteran's name.

The CAVC first held that the NOA was invalid as to Mr. Demery because he died before it was filed. An NOA may not be validly filed on behalf of a deceased veteran. Rather, when a veteran dies, his or her claim *as to the veteran* dies with him or her.

Next, the CAVC considered whether the NOA was validly filed on Mrs. Demery's behalf. In reaching its determination, the CAVC held that an accrued-benefits claimant may independently file an appeal of a Board decision issued to a now-deceased veteran. An accrued-benefits claimant such as Mrs. Demery is "a person adversely affected" by the Board decision. Therefore, the claimant has standing, both as a statutory matter under 38 U.S.C. § 7266(a) and as a constitutional matter under Article III of the Constitution.

The CAVC established that an accrued-benefits claimant may file an appeal on his or her own behalf during the time permitted to file an NOA, upon the death of the veteran. It recognized that to hold otherwise would mean that Mrs. Demery could not advance her own interest in her husband's claim, simply because he died between the issuance of the Board decision and the filing of the NOA. This would create the functional equivalent of a zone of

no substitution, which *Breedlove v. Shinseki*, 24 Vet.App. 7, 20 (2010), rejected.

The CAVC then set out the procedure to be followed in these types of appeals. When a veteran dies after the Board issues a decision, but before an NOA has been filed, an eligible accrued-benefits claimant should file an NOA in the accrued-benefits claimant's name within the 120-day appeal period. This filing should include a separate statement providing the veteran's name, the date of the veteran's death, and a request that the Secretary address the person's accrued-benefits status. This filing should also include a copy of the veteran's death certificate, or an explanation of why the death certificate is not yet available.

Because the NOA filed in this case does not list Mrs. Demery's name at all, the CAVC held that it was invalid as to Mrs. Demery. The only claimant identified within the four-corners of the appeal was Mr. Demery, and no attachments were filed relating to Mrs. Demery.

The CAVC determined, however, that the NOA may be amended and that amendment may relate back to the original filing date. It recognized the pro-amendment approach identified in the Federal Rules of Civil Procedure. Additionally, there was no undue delay, bad faith, nor prejudice to the Secretary in allowing the amendment. Further, allowing the amendment would not be futile because it would serve to advance the general goal of resolving matters of their merits.

The CAVC found that it was appropriate to relate the amendment back to the date the NOA was filed and not just the date the motion to amend was filed. Again, it looked to the pro-amendment approach outlined in the Federal Rules of Civil Procedure. And it found that Mrs. Demery's amendment to replace the veteran with herself as the interested party changed nothing about the underlying claim. The CAVC also acknowledged that it had more flexibility to forgive late filings through doctrines such as equitable tolling than it would if it had significant jurisdictional constraints.

Accordingly, the CAVC determined that the amendment should relate back to the original filing of the NOA. It therefore ensured that the Court had jurisdiction throughout the appeal, and it allowed Mrs. Demery to pursue her appeal at the Court. And, more broadly, it held that substitution is allowed at every point of the adjudicatory process, and set forth the procedure to be used in these appeals.

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Home Loan Guaranty Benefits are not Available to 38 U.S.C. § 1151 Beneficiaries

by Jonathan M. Meyer

Reporting on *Burkhart v. Wilkie*, No 16-1334 (Vet. App. January 3, 2019).

In *Burkhart*, the appellant was the Veteran's surviving spouse, who was a 38 U.S.C. § 1151 DIC beneficiary seeking VA home loan benefits. VA initially determined that she was eligible for VA home loan benefits and issued a certificate of eligibility (COE). But prior to the execution of a loan agreement with her lender, VA determined that she was not eligible for home loan benefits and revoked her COE. The appellant filed a new claim that was also denied. On appeal, the appellant argued that she was entitled to home loan benefits under three theories: (1) that ancillary home loan guaranty benefits are authorized for surviving spouses under section 1151; (2) that VA is barred from retracting a COE under the "incontestability" provision of 38 U.S.C. § 3721; and, (3) that traditional legal equitable principles preclude denial.

In a January 2019, 2-1 decision written by Judge Allen (with Judge Greenberg dissenting), the CAVC held that surviving spouses receiving benefits under section 1151 are not eligible for VA home loan benefits. Regarding the appellant's first argument, the CAVC observed that sections 3701 and 3702 unambiguously limit housing loan benefits to the

surviving spouses of veterans "who died from a service-connected disability." In contrast, compensation benefits are awarded to surviving spouses under section 1151 only "*as if*" the Veteran's death were service-connected. Therefore, the CAVC held that the plain meaning of the term "as if" does not redefine "service-connected" to include disabilities and deaths resulting from post-service VA medical treatment, nor does it "accord service-connected status." In support, the CAVC observed that the legislative history and prior case-law are consistent with this interpretation. Under the original "Service Readjustment Act," Congress intended to provide veterans returning home from World War II with VA home loan benefits to "help readjust to civilian life." Accordingly, in the CAVC's view, Congress purposefully did not intend to confer home loan benefits on section 1151 beneficiaries.

Further, the CAVC noted that the predecessor to section 1151 included some chapter 37 benefits, such as special adaptive housing and automotive benefits, which would indicate that Congress did not intend to include all the benefits listed in chapter 37. In arriving at this conclusion, the CAVC acknowledged that when title 38 was reorganized, section 1151 no longer expressly conferred the special adaptive housing and automotive benefits under chapter 37. Nevertheless, as the Federal Circuit Court discussed in *Kilpatrick v. Principi*, 327 F.3d 1375 (Fed. Cir. 2003), this was simply a drafting oversight as the mere reorganization of title 38 "did not evince congressional intent to deprive veterans of those benefits." Additionally, the CAVC recognized that, while it had previously held that the phrase "service-connected for death" includes qualifying disabilities under section 1151, this extension was limited to ensuring consistency between title 38 and chapter 11 and does not apply to chapter 37.

With respect to the appellant's second argument, the Court held that the "incontestability" provision of section 3721 applies to the relationship between the government and lending institutions (i.e., the eligibility of the loan itself), and not between the government and the COE recipient (i.e., the eligibility of the person to receive a loan). The "incontestability" provision also concerns a different stage in the loan process - after the COE and loan guarantee are issued. In other words, this provision is only triggered once the COE is issued to an individual recipient *and* a loan guarantee is issued to the lender. Finally, regarding the appellant's third argument, the CAVC determined that, while it does have some equitable power, the traditional equitable remedies were not available to the appellant in this case, to include forcing the Secretary to use his equitable powers.

In his dissent, Judge Greenberg countered that under a natural and plain reading of section 1151, the meaning of "as if" [it had been service-connected] is tantamount to stating that a veteran "has died from a service-connected disability." Otherwise, he argued, the words "as if" would be rendered meaningless. Second, Judge Greenberg insisted that title 38 is an "imperfect collage meant to organize decades of Congressional intent towards veterans into a consumable statutory scheme." Thus he posited that the addition of section 1151 into title 38 did not reflect the desire of Congress to limit the ancillary benefits to those specified in chapters 21 and 39. Instead, he contended that it was merely "a drafting oversight of dense litigation." Third, Judge Greenberg argued that the original intent of the "Servicemen's Readjustment Act" was not to provide a benefit to those who suffered a disability in service as discussed by the majority but instead to provide broad economic growth through the VA system.

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Equal Access for All Veterans' Representatives?

by Emily Deutsch

Reporting on *Rosinski v. Wilkie*, No. 2018-0678 (Vet. App. Jan. 24, 2019)

Whether members of the private bar should have the same right as Veterans Service Organizations (VSOs) to access draft Regional Office (RO) rating decisions was the question addressed—but

ultimately left unanswered—by the U.S. Court of Appeals for Veterans Claims (CAVC) in *Rosinski v. Wilkie*.

At issue was a provision of the U.S. Department of Veterans Affairs (VA) M21-1 Adjudication Procedures Manual that has long enabled VSOs to review rating decisions prior to promulgation to "identify any clear errors or matters of clarification that require significant discussion, and/or correction." M21-1 ("M21") Adjudication Procedures Manual, pt. I, ch. 3, sect. B(3)(a), (b) ("M21 provision). The petitioner—Douglas J. Rosinski, a private attorney who represents veterans before both VA and the CAVC—alleged that the provision was facially discriminatory, as it allowed VSOs to obtain relevant records for their clients more easily and expeditiously than could other authorized veterans representatives.

Mr. Rosinski petitioned the CAVC for a writ of mandamus ordering VA to grant him immediate access to draft RO rating decisions in all cases in which he was the representative of record. He had previously made the same request in February 2018 after the CAVC had dismissed his initial petition for lack of standing.

This time, a three-judge CAVC panel ruled that Mr. Rosinski had both direct and third-party standing to challenge the M21 provision. Writing for the majority, Chief Judge Davis held that the policy violated Mr. Rosinski's own statutory right to represent veterans at all stages of the claims process while depriving his clients of the due process afforded their VSO-represented counterparts.

With respect to the merits of Mr. Rosinski's petition, the majority ruled that VA had no legal basis to deny private representatives access to draft RO rating decisions while disclosing them to VSOs. But instead of granting the petition in full, the majority held that Mr. Rosinski had not demonstrated that he "lack[ed] adequate alternative means to attain his desired relief," as VA had yet to issue a formal decision on the matter. Accordingly, the panel ordered VA to render such a decision, adding the admonition that "the Secretary should consider whether he—and the veterans Congress charged him to assist—would be better served by voluntarily changing his policy, rather than by waiting for the lengthy appeals process to run its course."

Writing in concurrence, Judge Greenberg agreed with the majority on the merits of Mr. Rosinski's petition, but opined that it should have been granted in full. Observing that "the Secretary has reached a conclusion" on the M21 provision "without issuing a decision," Judge Greenberg emphasized that "[t]his distinction is without significance because the Court may set aside either." He further stressed that, as the policy "is arbitrary and capricious and must be changed . . . the Court [should] effect the proper remedy now."

Writing in dissent, Judge Pietsch opined that, despite "returning with refined legal arguments in reaction" to the CAVC's dismissal of his first petition, Mr. Rosinski had "offer[ed] no new facts" that would support a different outcome. She then criticized the majority for holding that Mr. Rosinski had direct and third-party standing to challenge the M21 provision, dismissing his assertion of having "to perform additional work to achieve the same result as a VSO" as fraught with "after-the-fact speculation," and disputing that he had "identified any obstacle preventing his clients" from "directly bring[ing] a petition on their own behalf."

Ultimately, the CAVC's ruling amounted to a pyrrhic victory for Mr. Rosinski himself, who, following its promulgation, was formally notified that VA had denied him access to the draft RO rating decisions.

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Federal Circuit Declines to Extend Service Connection for ALS to Individuals with ACDUTRA Service

by Anna Caruso

Reporting on *Hansen-Sorensen v. Wilkie,* 909 F.3d 1379 (Dec. 11, 2018).

In *Hansen-Sorensen*, the appellant was the surviving spouse of Mr. Hansen, an individual who died from amyotrophic lateral sclerosis (ALS) after serving in the National Guard with a period of active duty training (ACDUTRA). She sought entitlement to dependency and indemnity compensation (DIC) based on service connection of the cause of the Veteran's death. The appellant asserted that, because entitlement to service connection has been granted to certain individuals with only ACDUTRA service who have been exposed to herbicides while working on C-123 airplanes or water contaminants at Camp Lejeune, entitlement to service connection for ALS should also be granted to individuals with only ACDUTRA service. The appellant also contended that the denial of entitlement to service connection for ALS to individuals with only ACDUTRA service was arbitrary and capricious.

The Federal Circuit affirmed the rulings of the Court of Appeals for Veterans Claims (CAVC) and the Board of Veterans' Appeals that ACDUTRA does not constitute active military, naval, or air service under 38 C.F.R. § 3.318(a). This regulation, also known as the ALS Rule, grants entitlement to service connection to Veterans with active military, naval, or air service who are diagnosed with ALS at any time after service. The Federal Circuit distinguished this regulation from two others that grant entitlement to service connection under certain conditions to individuals with only ACDUTRA service, i.e. those exposed to herbicides on C-123 airplanes and water contaminants at Camp Lejeune.

The Federal Circuit cited *Bowers v. Shinseki*, which applied a plain language interpretation of 38 U.S.C. § 101(24) in concluding that ACDUTRA does not come within the scope of active duty. No *Chevron* or *Auer* deference was applied.

The appellant had argued that *Bowers* has been superseded by two regulations. First was 38 U.S.C. § 3.307(a)(6)(v) (C-123 Rule), which was expanded by the Secretary in 2015 to include, under specified circumstances, reservists who had worked with a specific model of airplane that was used to spray herbicides. The Secretary deemed such exposure to constitute an injury incurred during ACDUTRA. Second was 38 C.F.R. § 3.307(a)(7) (Camp Lejeune Rule), which states that reservists and members of the National Guard who served at Camp Lejeune during specified times will also be deemed to have suffered an injury during ACDUTRA for purposes of compensation by virtue of their exposure to water contaminants.

The Federal Circuit, however, held that the C-123 Rule and the Camp Lejeune Rule do not alter the *Bowers* interpretation of active military, naval or air service, but rather establish that exposure to specific toxins constitutes an injury and therefore satisfies the 38 U.S.C. § 101(24) requirement that a disease be "incurred or aggravated in [the] line of duty."

The appellant also asserted that the difference in regulatory treatment between the ALS Rule and the Camp Lejeune and C-123 Rules was arbitrary and capricious. In response, the Federal Circuit explained that, in the case of the C-123 Rule and the Camp Lejeune Rule, the Secretary used empirical evidence to make a judgment about the likely connection between certain illnesses and exposure to specific harm-causing chemicals. But, unlike diseases linked to exposure to herbicides and water contaminants at Camp Lejeune, ALS has not been deemed by the Secretary to be linked to any specific harm-causing chemical agent.

The Federal Circuit concluded that it had no basis upon which to find that the Secretary could not reasonably distinguish the ALS situation from the C-123 and Camp Lejeune situations, and therefore affirmed the decision of the CAVC.

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Direct-Pay Attorneys' Fees in Overpayment Cases at VA May Not Exceed 20 Percent of Amount of Debt Actually Collected by VA

by Katy S. Clemens

Reporting on *Gumpenberger v. Wilkie*, 2019 U.S. App. Vet. Claims LEXIS 184 (Feb. 7, 2019) (Vet. App. No. 17-0092).

Allen Gumpenberger is a VA-accredited agent who represented veteran Edward Graham in his dispute of an overpayment debt of $199,158.70, and was ultimately successful in invalidating the debt for the veteran. Mr. Gumpenberger represented Mr. Graham pursuant to a direct-pay fee agreement that provided that his fee would be 20% of all past due benefits awarded to Mr. Graham as a result of the appeal. In September 2016, the Board of Veterans' Appeals denied Mr. Gumpenberger entitlement to fees in excess of $13,092.80, and Mr. Gumpenberger appealed that denial to the CAVC.

A fee agreement under the terms agreed upon by Mr. Gumpenberger and Mr. Graham is permitted under 38 U.S.C. § 5904(d)(1) and 38 C.F.R. § 14.636, and both the Board and the parties agreed that the agreement was valid. The issue before the Court was whether, after representing a claimant in a successful appeal to invalidate an overpayment debt, an attorney or agent may collect fees equaling 20 percent of the *full amount* of the invalidated debt, or only 20 percent of the *amount of the debt that had been recouped* by VA prior to invalidation and then refunded after invalidation. In the decision on appeal, the Board had found the latter.

In a February 2019 decision, a panel of the Court held that, because "the total amount of the invalidated debt does not constitute a 'past-due benefit[] awarded' for purposes of section 5904(d)(1)," the fees could not exceed 20 percent of the amount of the debt that had already been recouped and refunded by VA. The Court therefore affirmed the Board's decision.

By the time the Board invalidated Mr. Graham's entire debt in September 2013, VA had already recouped $65,464 from him. In the decision on appeal, the Board found that $13,092.80 (20% of $65,464), rather than $39,831.74 (20% of $199,158.70) was the correct amount of fees due to Mr. Gumpenberger, because Mr. Graham "had already been awarded the $199,158.70 in disability compensation," invalidation of the overpayment debt did not constitute "the award of that amount as a new disability benefit," and only "the total monies collected to repay the debt . . . represents the past-due cash benefits awarded to the [v]eteran."

Mr. Gumpenberger argued that the phrase "past due benefits" was not exclusive to "cash" benefits, but also included the change in fugitive felon status for Mr. Graham that resulted in invalidation of the debt. He also relied in part on the Federal Circuit's decision in *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007), in which that Court held that an attorney who represented an incarcerated veteran was entitled to 20% of the total amount of past due benefits that would have been paid to the veteran if he had not been incarcerated – i.e., in that case, the retroactive payment associated with his granted 70 percent disability rating – rather than the 10 percent maximum rate payable to an incarcerated veteran.

But the Court noted that the Federal Circuit in *Snyder* also held that the "'total amount of any past-due benefits awarded on the basis of the claim' is the sum of each month's unpaid compensation," which the CAVC took to mean that, "for there to be payment of attorney fees out of the past-due benefits awarded on the basis of the claim, there must first be an award of past-due benefits that were unpaid or owed to the claimant from which those fees could be paid."

"In other words," the Court said, "attorney fees can only be paid, pursuant to a direct-pay fee agreement under section 5904(d)(1), out of those benefits that were past-due." In this case, the Court held that those benefits that were past-due or owed to the veteran were those that the VA had already recouped, not the total amount that it was planning to recoup. To hold otherwise, the Court held, "would

be to ignore Congress's clear mandate that the fees to be paid to an agent or attorney pursuant to a valid direct-pay fee agreement must come from *past-due* benefits awarded, not merely the benefits awarded, on the basis of the claim."

The Court ended with a word of advice to attorneys and agents representing claimants in overpayment cases – that if the Secretary is not yet recouping the claimant's debt, there will be no benefits payable under a direct-pay fee agreement even if the representation is successful. In such a case, attorneys and agents should use a different type of fee agreement.

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CAVC Addresses Important Question of Board Jurisdiction: TDIU on Appeal Despite an Intervening Regional Office Award

by Jenny J. Tang

Reporting on *Harper v. Wilkie*, ___Vet. App.___, No. 18-3519 (Dec. 6, 2018).

In a positive step towards solving the puzzle of determining the scope of appeals and the limits of the Board's jurisdiction, the Court issued its decision in *Harper*. This case answers the question of whether the Board has jurisdiction in cases in which the appellant had perfected an appeal for increased rating, TDIU was raised in conjunction with the underlying appeal for increase, and the RO subsequently issued an award of TDIU effective for a portion of the appeal period under consideration for increase. The Court held that the Board has jurisdiction over the portion of the appeal period for which TDIU was not granted by RO, thus affording practitioners much-needed guidance on this question. The Court's analysis may also provide guidance on the Board's jurisdiction concerning the RO's similarly intervening awards of separate ratings for complications of diabetes, or for neurological impairments associated with spine disabilities.

Mr. Harper filed a claim for service connection for PTSD in August 2008. The regional office (RO) awarded service connection and assigned an initial rating for PTSD. Mr. Harper filed and perfected an appeal of that initial rating. Later, he requested TDIU due in part to his PTSD, and, in May 2016, the RO awarded entitlement to TDIU and assigned an effective date in February 2016. The Board eventually adjudicated the claim of entitlement to an increased rating for PTSD, but it concluded that the issue of entitlement to TDIU was not part of the underlying appeal for PTSD because Mr. Harper did not appeal the RO's May 2016 award of TDIU and the assignment of a February 2016 effective date.

Mr. Harper argued that the Board erred in determining that it did not have jurisdiction over the issue of entitlement to TDIU prior to February 2016 because TDIU was part of his appeal for an increased PTSD rating under *Rice v. Shinseki*, 22 Vet. App. 447 (2009). Essentially, Mr. Harper acknowledged that the TDIU issue was moot for the period from February 2016 forward, the issue of entitlement to TDIU before that date remained on appeal as a component of the underlying claim on appeal for PTSD.

The Secretary argued that the issue in question was more accurately characterized as entitlement to an earlier effective date for TDIU, which was a downstream issue from the RO's May 2016 grant of TDIU. The Secretary argued that the issue of entitlement to TDIU before February 2016 was not on appeal because Mr. Harper did not appeal the RO's May 2016 assigned effective date for the grant of TDIU. The Secretary posited that the claim for increased rating for PTSD was effectively bifurcated from the issue of entitlement to TDIU.

The Court agreed with Mr. Harper. It concluded that the Board did have jurisdiction over the issue of TDIU during the period before February 2016, and it held that Mr. Harper need not appeal the assignment of the effective date for TDIU because the issue of TDIU was part and parcel of the underlying claim for an increase for PTSD. The

Court adopted the Federal Circuit's reasoning in a non-precedential decision in *Palmatier v. McDonald*, 626 F. App'x 991 (Fed. Cir. 2015), to explain why the issue of TDIU was a component of the underlying appeal for PTSD, and why that issue was not bifurcated from the underlying appeal. The Court distinguished Mr. Harper's case from cases in which there is only a freestanding claim for entitlement to TDIU that was later granted by the RO, with no underlying appeal for increased rating pending on appeal before the Board.

Because Mr. Harper did not withdraw the issue of entitlement to TDIU for the period before February 2016, and because the issue of TDIU was raised in conjunction with the underlying appeal of the rating for PTSD, the RO's grant of TDIU did not bifurcate the appeal but instead simply partially granted his request for TDIU. The rest of his TDIU claim remained pending before the Board. The RO's intervening award of TDIU could not cut short a pending appeal when jurisdiction over TDIU has already been conferred to the Board.

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A *Ray* of Clarity in 4.16(b) Analysis

by Bryan Andersen

Reporting on Ray v. Wilkie, ___Vet. App.___, No. 17-0781 (Mar. 14, 2019).

The Court in *Ray v. Wilkie*, recently plunged into the waters of interpreting 38 C.F.R. § 4.16(b). Under § 4.16(b), VA adjudicators should refer claims to the Director, Compensation Service, for all veterans who are unable to secure and follow a substantially gainful occupation because of their service-connected disabilities.

In *Ray*, the Court initially held that the initial determination by the Board of Veterans' Appeals (Board) as to whether extraschedular referral is warranted is a *factual one* because it involves the application of a legal standard to the facts of a given claim. But the Court explained that this initial finding is *not binding* subsequently on the Board because that would render the Director's decision superfluous. The Court recognized that the decisions to refer and to award a rating are fundamentally different, as an initial finding is based on an evidentiary threshold that is lower than that for the decision to award an extraschedular rating. In this regard, the initial extraschedular referral decision under § 4.16(b) only addresses whether there is sufficient evidence to substantiate a *reasonable possibility* that a veteran is unemployable by reason of his or her service-connected disabilities. The Court found support for this reading of § 4.16(b) in VA's internal guidelines as well as across other areas of the law.

In addition, the Court made clear that the Board *must* ensure that it adequately explains its reasoning when a factual finding made at the initial referral stage comes out differently at the later review stage. Some factors that may lead to different results at different stages include the certainty or complexity of fact-finding in the initial referral decision and the extent to which the record has changed since the referral decision. The Court also hinted that in some cases *no* amount of explanation could overcome the Board's initial finding.

The Court next turned its focus to addressing the ambiguity of the phrase *unable to secure and follow substantially gainful employment*. The Court emphasized that this phrase is a term of art that without a concrete definition could lead to inconsistent outcomes. To provide clarification, the Court interpreted the phrase to have two components: *one economic and one noneconomic*. The economic component simply means an occupation earning more than marginal income (outside a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person. As to the noneconomic component, the Court provided the guidance that attention must be given to the veteran's history, education, skill, and training; whether the veteran has the physical ability (both exertional and nonexertional) to perform the type of activities (e.g.,

sedentary, light, medium, heavy, or very heavy work) required by the occupation at issue; and whether the veteran has the mental ability to perform the activities required by the occupation at issue. The Court emphasized that this definition was not a checklist but rather merely factors that must be discussed if the evidence raises them.

Ray has the potential to affect the course of veterans' law for years to come. In the short-term, the numerous Board decisions addressing § 4.16(b) will require additional scrutiny of the reason(s) for the initial referral and the relevant evidence that was weighed. In the long term, *Ray*'s impact may be seen in cases that examine the scope of the Court's role in interpreting ambiguous laws. For instance, a concurrence in *Ray* believed that the majority had exercised legislative rather than judicial authority by grafting onto the regulation substantive factors that did not derive from the regulation itself.

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CAVC Defines Terms in Diagnostic Code for Achalasia

by Nathan Jerauld

Reporting on *Roby v. Wilkie*, ___Vet.App. ___, No. 17-528 (Mar. 19, 2019).

In its recent decision, *Roby v. Wilkie,* the U.S. Court of Appeals for Veteran Claims (CAVC) ruled on the meaning of "Permit," "Passage" and "Liquids" in 38 C.F.R § 4.114 and Diagnostic Code (DC) 7203.

Mr. Roby is rated at 30% disability due to achalasia, an esophageal disability that inhibits the movement of a person's sphincter, the area between the esophagus and the stomach. With achalasia, the sphincter will not widen when a person swallows, which means that liquids and food may not always flow into the stomach. Thus, people who suffer from achalasia must restrict their diets to soft substances and thoroughly chew their food.

The first issue before the Court centered on the meaning of "permit" and "passage" in DC 7203, the diagnostic code in the Rating Schedule for the stricture in the esophagus. It assigns an 80% evaluation when the condition "*permits passage* of liquid only, with a marked impairment of general health," and 50% if the disability is "[s]evere, *permitting* liquids only." The Board of Veterans' Appeals required that consumables be in a liquid state when they enter a veteran's mouth to qualify for these higher ratings. Roby argued that the relevant standard should be the form in which consumables move through the esophagus. The Court agreed, based on the regulation's plain meaning, and ruled that the appropriate standard is the form in which consumables travel through the esophagus.

The second issue focused on the meaning of "liquid" in DC 7203 ("permitting liquids only"). The VA argued for a narrow definition that distinguishes "liquid food versus non-liquid food" and that prohibits foods with a textural quality (such as chewed foods). Roby advocated for a broader definition: ("if a food is not solid, then it is, by default, liquid").

The Court held in favor of the VA. The regulation's use of "liquid" created a latent ambiguity when applied to semi-solid food like purees, soft solids, and chewed food. As a result, the court deferred to the VA's interpretation under *Auer v. Robbins,* 519 U.S. 452 (1997). It found that the VA's definition of liquids was not plainly erroneous because it reflected the ordinary meaning of liquid. Additionally, it reflected fair and considered judgment because it aligned with other uses of the term by the VA. Thus, even though Roby was required to consume food in a liquid-like state, the VA could rightfully deny his claim for higher disability.

Nathan Jerauld is a third-year law student at Syracuse University.

Board is Not Required to Afford 90 Days Before Deciding Appeal

by Dan Smith

Reporting on *Williams v. Wilkie*, __ Vet.App. __, No. 16-3988 (Mar. 19, 2019).

Prior to the recent implementation of the Veterans Appeals Improvement and Modernization Act of 2017, 38 C.F.R. § 20.1304(a) provided that

> An appellant and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation.

This provision clearly applies where the regional office (RO) certifies a case and then transfers it to the Board for appellate review following a claimant's submission of a Substantive Appeal. The Court in *Williams* addressed whether it applies in cases where the RO returns a matter to the Board following an earlier remand.

The Board remanded Mr. Williams's case to the RO to address in the first instance a reasonably raised theory of entitlement. In December 2015, the RO completed its review and issued a Supplemental Statement of the Case (SSOC) informing Mr. Williams that he had 30 days in which to submit additional evidence or argument. Mr. Williams filed a reply indicating that he had no additional argument or evidence to submit and that he wanted his case returned to the Board for further adjudication as soon as possible. In July 2016, the Board sent a letter to Mr. Williams informing him that his case had been placed on the Board's docket. The letter referenced § 20.1304 and indicated that Mr. Williams had 90 days from the date of the letter, or until the Board made a decision (whichever happened first), to change representation or file additional argument or evidence. The Board issued a decision 42 days later denying Mr. Williams's claim.

Before the Court, Mr. Williams challenged § 20.1304(a) on a constitutional basis and further argued that the Board should have waited the full 90-days before deciding his case. The Court determined, however, that § 20.1304(a) did not apply to Mr. Williams' case because the provision does not apply in cases returned to the Board following an earlier Board remand. To reach this conclusion, the Court observed that § 20.1304(a), by its express language, applies "following the mailing of notice to [the appellant and his or her representative] that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board." Therefore, the triggering event for the application of § 20.1304(a) is the mailing of notice that an appeal is certified and transferred to the Board. Critically, the Court compared two regulations, 38 C.F.R. §§ 19.35, "Certification of Appeals" and 19.38, "Action by Agency of Original Jurisdiction when remand received," and determined that certification occurred only once during an appeal, after the claimant files a Substantive Appeal. Because the triggering event for § 20.1304(a) is the mailing of notice that an appeal has been certified and transferred to the Board, and because certification does not occur during the processing of a Board remand, the Court concluded that § 20.1304(a) is inapplicable to matters on Board remand. The Court noted that there are other regulations in place that address evidence and argument submission following a Board remand (specifically, § 19.31(c), which describes the issuance of a SSOC following a Board remand, and §§ 19.38 and 20.302(c), both of which allow the claimant a 30-day period to submit evidence after an SSOC is issued).

Mr. Williams also asserted that the Board's July 2016 letter, which suggested that § 20.1304(a) applied to the case, afforded a substantive right to him, but the Court found that the Board's erroneous citation to § 20.1304(a) did not prejudice him.

Although appeals modernization significantly alters the manner in which cases are processed on remand, there remain a significant number of legacy cases and therefore the holding in *Williams* will continue to have relevance for the foreseeable future. In cases where VA has developed additional evidence on a Board remand, 30 days from the date of the SSOC creates a short turnaround time for the veteran or his or her representative to gather any newly-developed evidence and create a reply (which may include obtaining even more evidence). Nevertheless, advocates must be aware that VA is not obligated to hold the record open beyond the 30 days following the SSOC, and care must be exercised to ensure that any supplemental argument or evidence is timely associated with the file.

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Book Review: *Guys Like Me : Five Wars, Five Veterans for Peace,* Michael A. Messner (Rutgers University Press, 2019), 265 p.p.

by Aaron Moshiashwili

"*They* don't fight the wars, ya know. *Guys like me* fight the wars!" This quote was spoken to the author by his World War I veteran grandfather, outraged at the change from Armistice Day – a celebration of peace – to Veterans' Day, which he saw as a celebration of militarism. The sentiment not only gives the book its title, it serves as its mission statement. In *Guys Like Me*, Michael Messner profiles five veterans from five different eras of conflict - the Second World War through the global war on terror - who each became advocates for peace after their service. Messner sat for lengthy interviews with each of them and each chapter includes not only their biography before, during, and after their service, but uses their own words to describe why they wound up advocating for peace afterwards, and how they go about doing it.

Their common involvement with peace advocacy is what binds together this diverse group of veterans. The five of them are from different backgrounds, different races, different areas of the country, and different branches of the military. Even how they found themselves as part of the antiwar movement is vastly different. Gregory Ross found himself opposing the Vietnam War before he even left the service, and joined the Vietnam Veterans Against War almost immediately after his discharge. Jonathan Hutto was an activist before joining the Navy and upon leaving it added peace to the list of causes he fought for. And Ernie "Indio" Sanchez came home from WWII and got on with his life - it wasn't until more than fifty years later, when scenes of the fighting in Iraq dredged up memories of things he had done while fighting in Europe, that he felt an obligation to speak out.

Five different veterans from five different times - and five different ways of advocating for peace. For Wilson ("Woody") Powell, in addition to speeches and organizing, he felt a deep, personal need to be in touch with people from Korea who his actions may have impacted - including one who became a close friend and co-wrote a book with him. Along with being part of Veterans for Peace, Daniel Craig (representing the first gulf war) sees teaching yoga and working in a homeless clinic as equally important for managing his PTSD and rage. Each of these men recognizes that as a wartime veteran he has a unique credibility when speaking against war.

"Each of these men" - it may seem unusual, in the modern, gender-integrated military, to interview five men and no women. But Messner makes this choice very deliberately. His academic background is in gender studies and feminist theory, and he includes his own thoughts about how traditional gender roles impact not only how men act as soldiers, but in how they process the traumas of war. To be honest, I felt that this was the weakest part of the book. To me, the veterans' stories are more interesting than Messner's theories on gender identity and war. Beyond that, I - and, I think, many people who will read this book - am trapped so deeply in that gender identity that it's hard to read about how men should adopt some more feminine aspects without having an immediate negative

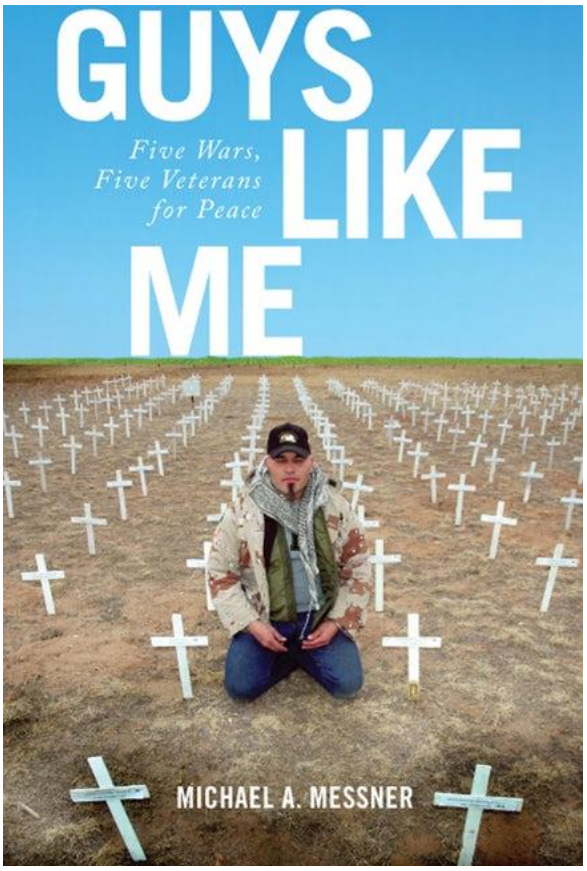
reaction. But more than either of those things, I am thankful that Messner mostly confines his academic musings to the short introduction and conclusion, because too many sentences like "Sanchez's story is also the narrative of an embodied middle-class habitus through which he distanced himself from the physically threatening and legally transgressive dimensions of his youthful street habitus…" would have made me quickly lose interest.

Fortunately, the book rarely dives that deeply into academic-speak. And even if there was nothing else to interest me about Guys Like Me, I would feel indebted to Messner for introducing me to the concept of "moral injury." Moral injury is a relative of PTSD - it is the idea that experiencing war can fundamentally shatter your conception of who you are as a person. We all think of ourselves as good people - and most of us find ways to hide or ignore the violations of that self-image we commit just by living normal lives, because those violations are just that – normal. But in addition to other traumas war can leave a veteran with, one can be left feeling like that self-image – of being a good person - has been irrevocably proved wrong. The first veteran profiled in the book, Ernie Sanchez - the WWII veteran - was moved to become active in the antiwar movement when the "Iraq war reminded me what a dirty SOB I was." Sixty years after he came home from war, even after leading a happy, successful life, he still thought of himself that way, and his chapter spends a good deal of time discussing what a burden that feeling is to bear.

Part of the reason it amazes me that I'd never come across this concept before is because it's so immediately relatable. PTSD is something that most of us can understand intellectually, but not truly comprehend because it involves experiences far from our own. Everyone I've discussed moral injury with finds it immediately relatable. As I'm writing this, a doctor I've been discussing the idea with wrote me to talk about feeling this way when forced to make choices that he felt were required by his hospital, by legal regulations, or by families - but were not, in his judgment, best for his patient. He knew any reasonable person would act the way he did - but couldn't help but think that if he were a better person, a less selfish one, he would make the best choice for his patients and damn the consequences. This struck a chord with something from *How Everything Became War*, by Rosa Brooks (which I reviewed last year) - older civilizations would use ritual to separate the person who went to war from the one you were at peace. It seems like there is value it being able to say "I, the person who goes to work and raises my kids, am not the same person as the one who out of necessity did those things for my country."

It's a unique and fascinating work, presenting a facet of the veteran experience that I hadn't previously thought much about. Where it's challenging and uncomfortable, that's probably a good thing. Each of the veterans profiled here spent their time asking themselves and others to face challenging and uncomfortable questions - the least we can do is follow their lead.

Aaron is still trying to find a good study of the Confederate veteran experience.



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