VETERANS LAW JOURNAL

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

In Defense of an Appropriate Effective Date for Supplemental Claims Following Final VA Rating Decisions

by Brandy Disbennett-Albrecht

[Editor's Note: The following is an opinion piece on an issue of interest to our readers. The Bar Association takes no position on the matter.]

In August 2017, Congress passed the Appeals Modernization Act, Public Law 115-55 (AMA), in an attempt to fix the broken VA appeals system that has led to an overwhelming appeals backlog of more than 400,000 appeals. In doing so, Congress provided three lanes from which a claimant may choose if he or she disagrees with the VA's Rating Decision. Two of these three lanes involve Regional Office level post-decision actions known as the Supplemental Claim and the Higher Level Review. The third lane is the direct appeal to the Board of Veterans' Appeals.

Generally, a Rating Decision becomes final and unappealable after one year from the date of mailing. But under the new system during the one year time period the claimant may elect any of the three lanes and maintain the original effective date of the claim. Under the AMA, this is referred to as "continuously pursuing" the claim. If the year passes, however, without the claimant taking one of the three actions, the decision becomes final and is then subject to revision only under the provisions of 38 CFR § 3.156. Specifically, under 38 CFR § 3.156(d), a claimant may move to revive a claim after a final decision on a given issue by filing a Supplemental Claim and submitting new and relevant evidence. *See* 38 CFR §§ 3.156(d) and 2501.

Thus a Supplemental Claim may be filed (1) within one year of the rating decision, or (2) any time after the one year time period of the rating decision. The only difference between the two opportunities is the effective date of the benefit, should the result of the claim be a grant. In the first instance, the effective date will be the date of the initial claim, but if the Supplemental Claim is filed beyond one year after the date of the Rating Decision, the effective date

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

TABLE OF CONTENTS

will be the date the Supplemental Claim was received by VA.

As an example, if an initial claim was filed (received by VA) on March 1, 2019 and the Rating Decision was mailed on June 1, 2019, the claimant would have until June 1, 2020 to submit a Supplemental Claim and maintain the March 1, 2019 effective date. But if the claimant didn't submit the Supplemental Claim until, say, September 1, 2020, the effective date of any granted benefit would be September 1, 2020. This is consistent with the standard approach to effective dates under 38 CFR § 3.400, which assigns them as of the date of receipt of claim, or the date entitlement arose, whichever is later. See 38 CFR § 3.400(b)(ii)(B)(2). [*Note: the citation is a bit confusing, but it is based on the eCFR update as 38 CFR § 3.400 was revised under the AMA.*]

What is troubling is VA's interpretation of the future role of the Intent to File (ITF). The ITF, inaugurated in the 2015 Standard Claims and Appeals rulemaking when informal claims were abolished, is a means of establishing a place-holding date while evidence is developed, which then becomes the effective date for a benefit granted on a formal claim submitted within a year. 38 CFR § 3.155(b). But VA has concluded that a Supplemental Claim's effective date cannot be established with an ITF. Thus, in our example above, the claimant could not in September 2020 submit an ITF that would effectively preserve an effective date while the claimant undertakes evidence development. This seems in direct conflict with both the March 2015 Standard Claims and Appeals rulemaking, which codified the ITF, and the evidentiary burden of the Supplemental Claim under 38 CFR § 3.2501.

Revised 38 USC § 5108 specifically describes the function and requirements of the Supplemental Claim, including extending the full force and effect of VA's Duty to Assist to the claimant in the development of evidence for the Supplemental Claim. In addition, 38 USC § 5110 regarding Effective Dates of Awards states that "unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." The section further delineates the same two scenarios as above based on whether actions were taken within one year of a rating decision, or at some time after the decision became final. Before VA's subsequent rulemaking, these provisions of the AMA were not in conflict with the ITF regulations, which allowed for submission of an ITF prior to any claim for benefits, establishing a date of "application" for the purpose of the assigning an effective date.

Unfortunately, VA's subsequent interpretation of 38 USC § 5110 took a turn for the worse concerning the Supplemental Claim filed after one year of the date of the Rating Decision. VA's final rulemaking on the AMA interpreted 38 USC § 5110 to exclude the use of an ITF where a Supplemental Claim is being filed after the Rating Decision has become final. 38 CFR § 3.2501(d) expressly states that the filing date is determined in accordance with 38 CFR § 3.155 "with the exception of the ITF rule found in 3.155(b) which applies to initial claims." With a conforming amendment, 38 CFR § 3.155(b) now states that "the provisions of this section are applicable to all claims governed by part 3, with the exception that paragraph (b) of this section, regarding ITF a claim, does not apply to supplemental claims."

Lastly, in one final "kill shot" to the ITF's application to a Supplemental Claim, the M-21-1 Adjudication and Procedures Manual specifically advises adjudicators that ITFs apply only to claims for "compensation, pension, survivors pension, and DIC," and not to "supplemental claims." *See* M21-1, III.iv.5.C.1.d; *see also* M-21-1, III.ii.2.C.2.1.

Why exclude the Supplemental Claim? At least two organizations addressed this concern in comments following the proposed rule by VA, but in its final rule, VA swiftly dismissed the concern by stating that a "*claimant can maintain the potential effective date of a potential benefits award by submitting a request for review under any of the three new lanes within one year of the decision with which the claimant disagrees. Consistent with this requirement, the ITF provisions of 3.155(b) do not apply to supplemental claims because the statute prescribes a*

one-year filing period in order to protect the effective date for payment of benefits. The commenters' recommendation would allow for the submission of a supplemental claim beyond the one-year period." 84 Fed. Reg. 142.

This reasoning is illogical. First, the AMA explicitly allows for a supplemental claim to be filed "beyond the one-year period." Second, to the extent the VA is concerned about an ITF somehow reviving the original effective date of a now-final claim, an ITF filed before a claim to "reopen" could never have preserved the date of the initial (or original) claim and would not be presumed to do so under the AMA.

Additionally, VA's interpretation appears to be contrary to both the AMA's text and its intention. As stated previously, 38 USC § 5110 applies the same effective date provisions to all claims; an effective date of any claim is established either from the date of application, or the date entitlement arose, whichever is later. Congress did not provide an exception to this rule for Supplemental Claims nor did it contemplate any disturbance to the well-established ITF process. The text of § 5110 is clear, thus it would be contrary for VA to create rules that apply different provisions to the different types of claims listed in § 5110. Doing so would effectively change the meaning of "date of application" for each type of claim.

The intention behind the Standard Claims rulemaking and the invention of the ITF was to maintain a "process that remains veteran-friendly and informal." *See* 79 Fed. Reg. 57664. As the VA explained, the filing of an ITF affords a one-year time period for the claimant to prepare the claim and gather the evidence necessary for it. Thus, the VA justified the ITF process as one that "facilitate[es] the process of establishing entitlement for any additional conditions without fear that [claimants] will lose benefits by not claiming each individual condition with specificity as quickly as possible, before presenting a comprehensive package to VA for processing." *Id*. at 57665.

In effect, the 2015 rulemaking allows an ITF to fulfill the "date of application" under 38 USC § 5110 for all types of claims. But the current rulemaking under the AMA seems directly contrary to this declared intention and imposes an unnecessary punishment on a claimant who needs additional time to gather evidence for a supplemental claim. Indeed, it encourages a hasty claim versus a well substantiated claim in order to preserve the effective date, something the Standard Claims rulemaking seemed to acknowledge and wish to avoid. In addition, it seems contrary to the overarching intentions of the development of the AMA to create a faster and more efficient claims and appeals system that would meet the needs of the veteran-claimant.

While a more robust analysis under the prevailing administrative law canons could be done, in the interest of brevity, here are the reasons I believe VA's interpretation that ITFs cannot apply to Supplemental Claims is incorrect:

- The AMA specifically substituted the term "supplemental claim" for "reopened claim," and since the ITF could have been applied to a claim to reopen, it should also apply to Supplemental Claims.
- The AMA does not provide any indication that it intended to treat the supplemental claim so very differently from a claim to reopen. If a different standard or process had been intended, it would be reasonable to expect Congress to have codified that intention. Indeed, Congress at times in the Act explicitly acknowledged where standards changed, for example specifying that the change in terminology from "new and material" to "new and relevant" was not intended to create a higher burden of proof. Thus, in the absence of a new standard acknowledged by Congress, it should be assumed Congress did not intend to change the standard.
- VA should have created the rulemaking for Standard Claims in harmony with the AMA and, in the absence of language to the contrary, should have refrained from inappropriate interpretations unfriendly to veterans.
- Applying different standards for assessing and protecting an effective date for one "type" of claim versus another "type" of claim

creates an inequity and punishes a veteran who "reopens" a claim after the AMA versus one who acted before the Act was passed. This does not seem to support the non-adversarial, pro-claimant system that VA touts. Indeed, what would be the correct effective date if an ITF was submitted prior to February 2019 in reliance on developing a claim to reopen, which is later submitted as a Supplemental claim within the one year time period (but post-February 2019)?

- The current reading and interpretation encourages claimants to submit hasty, undeveloped claims to preserve an effective date and rely on the claims process delay and the option for a subsequent supplemental claim in order to develop evidence. This wastes the time and resources of both the claimant and the VA in adjudication of an undeveloped claim, only to later readdress the same issue with new evidence, all because a claimant wished to preserve an effective date, when an ITF could have avoided the entire issue.

I sincerely hope that this interpretation will be changed, either by VA or through advocacy.

Brandy Disbennett-Albrecht is the Training Manager for the Virginia Department of Veterans Services' Veteran's Benefits Service Line.

President's Message

Colleagues –

Happy Summer! The first half of 2019 is already over, and it has been a busy one! Note the size of this issue of the *Veterans Law Journal*, our biggest ever!

The CAVC Bar Association's program during the Fourteenth Judicial Conference in April was a success, and the Bar Association would like to again express its gratitude to Chairman Cheryl Mason, Richard Hipolit, Mary Flynn, and David McLenachen for sharing their insights about changes at VA following the enactment of the Appeals Modernization Act. Thank you also to Judge Falvey and his law clerk, CAVC Bar Association Secretary and Bar Association tech guru Chris Wysokinski, for the lively Q&A at the

beginning of the program. The program could not have been successful without the contributions of these folks, and we look forward to hearing from them all again in the future.

We are thrilled to offer two exciting programs this summer as well. The first, on July 17, will feature Judges Toth and Allen and will commemorate the two-year anniversary of their appointments to the bench, as well as Judge Meredith's. We anticipate that the judges will reflect on their first two years on the Court, share their visions for the future, and perhaps impart a word or two of advice about effective advocacy before the Court. Unfortunately, Judge Meredith has a scheduling conflict and will be unable to join us, but we hope to feature her in an upcoming program. In the meantime, I am personally looking forward to what is sure to be an entertaining and enlightening discussion, followed by cocktails and hors d'oeuvres at the City Tap House. The panel discussion begins at 3:00 p.m. at the offices of Finnegan, Henderson, Farabow at 901 New York Avenue. Teleconferencing will be available for our out-of-town members.

In addition, the semiannual memorial washing event will be on Saturday, August 11 at 6:30 a.m. at the Vietnam Veterans Memorial Wall. This is a wonderful opportunity to reflect on the enormous sacrifice made by so many young Americans, some of whom we all work with on a daily basis, and to give back to the community while meeting and mingling with colleagues. And, while 6:30 a.m. is

definitely early for a Saturday, there will be coffee and doughnuts to help you wake up! I will personally be attending--probably with my 3-year-old "helper"--and hope to see you there. If you plan to attend, please RSVP to info@cavcbar.net.

Finally, our Annual Meeting will be coming up soon, as are our officer and Board of Governors elections. If you are interested in running or would like to nominate someone for one of these positions, please send an email to info@cavcbar.net. Stay tuned for an announcement regarding the date and place of the meeting.

Enjoy the Summer!

Amy Odom

Message from the Chief Judge

Dear Friends:

What a fantastic Judicial Conference we had on April 11-12, 2019. To me, it was one of the best ever, and I say that as someone who has had a hand in most of the conferences since 2006. The venue was excellent and the subject matter timely and engaging. Let me take a moment to thank the Judicial Conference Program Committee—the advisory group responsible for formulating the legal content of the conference and developing the entire program. The Committee was composed of representatives from all areas of veterans law practice. In addition to several members of the Court's staff, the Committee included: Chad E. Moos, representing Disabled American Veterans, National Service & Legislative Headquarters; Karen A. Kennerly, representing the Board of Veterans' Appeals; Betsy Gwin, representing the Legal Services Center of Harvard Law School; Diane Boyd Rauber, representing the National Organization of Veterans' Advocates; Megan C. Kral, representing the CAVC Bar Association; and Shereen M. Marcus, representing the VA Office of General Counsel. Three of the Court's Judges, the Honorable Mary J. Schoelen, the Honorable Coral Wong Pietsch, and the Honorable William S. Greenberg, co-chaired the Committee. To all of you I would like to extend a heartfelt thank you for working to make the 2019 Judicial Conference such a wonderful success!

From start to finish I thought all of the conference presentations were excellent. The breakout seminars, legal trends, appeals reform, class actions, ethics, committee reports, the first ever panel discussion between BVA and CAVC judges, and our luncheon speaker Nina Totenberg—all were dynamic and educational. The CAVC Bar Association program afterwards was icing on the cake with a peek at VA "Behind the Scenes." As you can tell, I loved it all!

As I indicated during my welcoming remarks at the conference, there is much to celebrate during this, the Court's Thirtieth Year. Our thirty bound volumes of precedential law tell only part of the story. We are taking this opportunity to look back on our history and recognize, thank, and celebrate all of the people whose work in the field of veterans law has contributed to fair process for veterans and the success of the Court. In that spirit, I recommended to conference participants means of improving the administration of justice within the Court's jurisdiction. My State of the Court address promoted the theme that has been my mantra during my entire tenure as your Chief Judge: Engagement, exchange of information, and cooperative learning. In a word, TEAMWORK! This approach has placed the Court in an exceptionally vibrant and healthy state today.

That said, we do have challenges ahead. Our collective and immediate challenges include: The possibility of having a 7-Judge Court until and unless 2 positions are quickly filled; significantly increasing and unprecedented case numbers; novel class action matters; and more panel decisions. Even if the caseload demands are mitigated by appeals reform, for the foreseeable future the explosion of cases coming to the Court will create substantial challenges for all of us. The bottom line is that we all have to step up together to meet these challenges. Counsel need to sharpen their arguments to focus on the most significant issues and continue to resolve cases where appropriate early in the process. Administrative staff must

maintain accountability over every case and help the parties stay focused on moving each case forward efficiently. And Judges will need to balance the demands of increased caseloads with requests for more precedential decisions, and must efficiently provide guidance and decisions on class action matters.

We have faced great challenges before, and I know we can do the same together in the future. I have truly enjoyed being your Chief Judge. For the duration of my term, and as a Senior Judge in the future, I look forward to continuing to work with each of you on our mission to provide justice for veterans.

Regards,

Chief Judge Davis

Notes from the Clerk of the Court

by Gregory O. Block

Dear Colleagues:

Time is flying by in this year in which we continue to celebrate the Court's 30th Anniversary. And as we look back to honor the work of so many judges and counsel who have helped the Court in its first 30 years, we can't help but appreciate that the pace of appeals being filed at the Court today is unprecedented. While not a great surprise given the record number of final decisions being issued by the Board of Veterans' Appeals, we did experience another record in the month of May with 724 appeals filed, and we are more than on track to exceed 8,000 appeals filed this fiscal year (ending September 30th). Obviously, I need to say thank you to all who are making extra efforts to help us expeditiously move cases along, whether they are resolved in Rule 33 conferences or by judicial decisions following briefing and, in some cases, oral argument. Particularly regarding Rule 33 conferences, which are being held in incredible numbers, we appreciate the effort counsel are making to prepare to discuss issues at the conferences and, when the parties confer prior to the conference to discuss a remand offer, to provide staff attorneys with notice of remand offers and settlements prior to scheduled conferences.

Despite the substantial increase in the number of cases being litigated, the Court is gratified that the grievance numbers, and the portion that result in discipline, have significantly fallen in the most recent three-year period. Specifically, in the past three and a half years (January 2016 to June 2019), thirteen grievances have been filed. Six were filed by appellants or their representatives. Five were filed by judges or the clerk. One was filed by an attorney's co-worker, and one was self-reported. Twelve of the thirteen cases have already been resolved. Of the twelve resolved grievances, three led to discipline or the practitioner's resignation from the Court's bar. In comparison, in the prior three-year period (January 2012 to December 2015) the Court saw a total of twenty-one grievances filed. Of those, three members of the Court's bar were disciplined with consequences including private admonitions, public reprimands, suspensions, and disbarment. In some cases, as an alternative to discipline, the subject attorney received a counseling letter from the clerk.

Clearly, the scarce number of disciplinary cases is a tribute to the hard work and professionalism of attorneys across our practice community. And while grievance numbers have fallen, the predominant

types of conduct that are the subject of most of the grievances have stayed consistent. Between 2012 and 2015, of the twenty-one grievances filed, eight concerned attorney competence (e.g., *poor quality and untimely filing of required documents in accordance with the Court's Practice and Procedure Rules and ABA Model Rules 1.1 and 1.3*), while seven of the grievances concerned attorney professionalism (e.g., *failing to remain in good standing with a state bar where an attorney is admitted to practice*). The other six concerned matters such as fees and attorney-client communication. There were similar category percentages in the more recent period from 2016 to the present. Of the thirteen grievances filed, five concerned attorney professionalism, four concerned competence, and four arose from fee or communication matters. For more detail, please see the Court's website, at the "Information About Practitioners" tab and then the "Compendium of Disciplinary Grievances" subtab.

In my last column, I mentioned that we were on the cusp of introducing live video streaming of our oral arguments as part of our effort to maintain transparency and provide access to judicial process. Since then, we have live-streamed 6 oral arguments beginning with the inaugural broadcast of Casey v. Wilkie (CAVC Case No. 18–1051) on April 23, 2019, with Chief Judge Davis presiding. Chief Judge Davis proudly announced this historic development and advised counsel, "you are on TV!" Since this first broadcast, oral arguments have been viewed over three thousand times, and we also have 170 subscribers to the Court's YouTube channel. Those who subscribe to the Court's YouTube channel will receive email alerts for all streamed events. I encourage you to visit our channel at https://www.youtube.com/channel/UCkhToOvwPHFaX-doZEFupog.

Also on the subject of technology, we've been asked by several practitioners to try to bring online payment procedures to the Court. Although prior efforts have not panned out, we are restarting our relationship with Pay.Gov and working on several online forms to facilitate online processing and electronic payment. The first form available will be the Request for Certificate of Good Standing, a form that is about to be posted to the forms section of our website. New to this form is the ability to fill out the form and use Pay.Gov to complete your request (something that previously involved mailing in a check). We anticipate bringing a similar process to the Application for Admission of an Attorney to the Bar and the Application for Admission of a Non-Attorney to Practice Before the Court, and our goal will be to create the capability to pay filing fees online, too. Please continue to check the Court's announcements section for activation dates.
Finally, with the benefit of public comment and input of the Rules Advisory Committee, the Court has revised our Rules of Practice and Procedure that speak to timeliness of appeals (see Miscellaneous Order 09-19, published on June 21, 2019 at http://www.uscourts.cavc.gov/miscellaneous_orders.php). In concert with previous amendments, these revisions liberalize filing requirements in two ways. First, an otherwise untimely Notice of Appeal will be treated as timely if the Secretary does not move to dismiss the appeal within 45 days after the Board decision is filed. Second, an otherwise untimely Notice of Appeal will be treated as timely if the Secretary moves to dismiss within 45 days after the Board decision is filed and (a) the appeal was received within 30 days of the expiration of the standard 120-day filing requirement and the appellant can demonstrate good cause or excusable neglect for failing to file on time, or (b) in cases where the appeal was received more than 30 days after expiration of the standard 120-day filing requirement and equitable tolling is warranted.

I genuinely appreciate the constructive comments and feedback members of the bar continue to provide to me – it was great to see and talk with so many of you at the Judicial Conference – and I look forward to working with each of you as we continue this special 30th Anniversary Year.

Regards,
Greg

Gregory O. Block
Clerk of the Court

Celebrating Change and Thirty Years of Service

by Adam J. Duso

"There's never been a time of greater change and growth for our Court. . ." This was the gist of the remarks of Chief Judge Robert N. Davis to a packed audience of over four-hundred attorneys, judges, government officials, and other stakeholders at the outset of the Court's 14th Judicial Conference. This theme of change and unprecedented growth was present throughout the conference held this year at the National Press Club in Washington, DC. Special focus at the conference was given in large part to the VA's Appeals Modernization Act, the efforts to certify class action claims, and a body of evolving jurisprudence affecting veterans.

The VA Appeals Modernization Act. The newly enacted Appeals Modernization Act played a role virtually throughout the conference, ranging from its expected effects on the processing of veteran benefit appeals to less-often-considered topics such as VHA claims processing. The appeals reform panel of consisting of Bradley Hennings, Brianne Ogilvie, and Rachel Sauter very efficaciously laid out the intended process changes and intended end-state outcomes. But it was the CAVC Bar Association panel consisting of Cheryl Mason, Richard Hipolit, Mary Ann Flynn, and David McLenachen that drew a barrage of "what-ifs" and "how would the VA handle *this*?" from the audience. Watching the exchange, it was clear that there is a long road ahead in working through the innumerable fact patterns and circumstances that the AMA seeks to address.

Class Actions on the Horizon. At the close of the conference, Chief Judge Davis called attention to the inevitable issues presented by class actions at the Court. His statement seemed to serve to the audience as a clarion call to the community assembled that it's time to get prepared to handle these complex litigation cases before the storm. The panelists for the class actions presentation laid out the significance of the holding in *Monk v. Shulkin*, compared and contrasted the benefits of the aggregate resolution process, and discussed versus alternatives. Additionally the recent amendment to the Federal Rules of Civil Procedure related to class actions was discussed in detail. It was clear from the presentations that, while class actions may be inevitable, how the Court addresses and resolves them, how aggregate claims will affect the VA claims and appeals process, and the long term effects of class actions on the field of veterans law is not yet fully known.

Recent Case law: interpretation. The first panel of the conference highlighted a number of evolving legal trends having an impact on the direction of the Court and the field of law. Many of these recent cases involved how the VA has formulated and implemented policy via interpretation—from the watershed Federal Circuit holding in *Procopio v. Wilkie* to the resolution of ambiguous language in the code of federal regulation in *Kisor v. Wilkie*, to the resolution of ambiguous language in procedural manuals such as M21-1 in *Gray v. Wilkie*. Review of these cases by the panel revealed a pattern and a message to the VA: if you create or fail to resolve ambiguity, the courts will become involved (and you may not like the result).

Impressions: Learning and Laughter. Overall, the conference reflected the important achievements of the Court over the past thirty years. The number of cases brought before the Court continues to climb, and the growing pains associated with the maturing of the AMA and other recent litigation promises to continue this trend. Other highlights of the conference included Nina Totenberg regaling the audience with a lunchtime discussion on her reporting of the U.S. Supreme Court and perceptions on past and present Justices. I found a sense of camaraderie among what is clearly a fairly tight knit community of practitioners in this niche area of the law. The CAVC Bar Association played an instrumental role in making the conference a success and made for an insightful two days.

Adam J. Duso is a law student at the University of Florida School of Law.

Impressions of the Judicial Conference

by Jarmeika Taylor

I wanted to attend the CAVC Judicial Conference because when I tell people what I want to do after graduation I get two basic responses. First, "that is a noble idea, but you can't make a living doing it." The second response is normally that veterans law is not a "real" area of the law. Attending this conference gave me a better insight into the veterans law community.

This was my first conference regarding veterans law. One of the best things about attending the conference was how welcoming everyone was to me. Board of Veterans' Appeals Judge Hager met up with some of the scholarship recipients the night before the conference just so we would have a familiar face when we arrived the next morning for the conference. During this meeting Judge Hager showed that he knew everything about our applications. He had read our essays and really wanted to discuss the subjects of the essays.

Networking is one of my least favorite things to do. But for the Friday evening networking event I challenged myself to connect with ten people I had not met earlier in the day. While this networking event was mostly like any other networking event, there was one difference. I was finally face to face with people who have already established themselves doing exactly what I want to do. I spoke with partners of a Texas firm who were kind enough to explain their process to me. Hearing someone share their story about how they got started gave me hope. Their partnership is about six years old. They took a leap of faith when they perceived that the area of law was growing and veterans are underserved. They have been able to become successful by their measure. More important to me, they are working exclusively with veterans and on VA claims.

The best thing I received from attending this conference is confirmation that I am on the right track. While this may not seem like a popular area of law or an "attractive" area of law, it is an area with a very deserving client base. It is an area with a very gracious attorney community. It is the area of law I want to work in.

Thank you for the opportunity to attend the U.S. Court of Appeals for Veterans Claims 14th Judicial Conference.

Jarmeika Taylor is a third-year law student and President of the Military Law Society at Southern Illinois University Law School.

Student Found Session on Discharge Upgrades Helpful

by Allyson Brown

The Fourteenth Judicial Conference, hosted by the U.S. Court of Appeals for Veterans Claims, presented sessions covering several important veteran issues including toxic exposure, appeals of VHA decisions, bad paper discharges, and substantiating military sexual trauma (MST) claims. The sessions were led by experts from the VA, private practice, and veteran interest groups. As a future advocate who has worked on discharge upgrades, I found the session on bad paper discharges extremely beneficial.

The session was presented by three different speakers, who offered different perspectives on the issue. First, Laurine Carson, the Deputy Executive Director for Compensation Services in the VBA, explained the fundamentals of this vital area of veterans law. In order to qualify as a "veteran" for VA purposes, a service member must have completed qualifying military service and obtain a discharge or release under conditions other than dishonorable. When that has not occurred, there are two pathways to secure benefits for a veteran with a bad paper discharge: 1) obtaining a discharge upgrade by a military Discharge Review Board (DRB) or Board for Correction of Military/Naval

Records (BCM/NR), and 2) obtaining a favorable Character of Discharge Review (COD) by VA.

A discharge upgrade by a DRB or BCM/NR is binding on the VA and changes character of service listed on the veteran's DD 214. DRBs have the authority to change the character of service based on principles of equity or propriety. Veterans have fifteen years from the date of discharge to apply for an upgrade to a DRB. BCMRs, in comparison, have a three-year waivable statute of limitations and are authorized to grant relief on the bases of error or injustice. During this session, Robert Powers, Secretary to the Naval DRB, discussed both the process for applying for a DRB determination and the best way for advocates to prevail. The procedure differs when an Applicant claims PTSD, TBI, MST, or other mental health condition as a factor in the discharge. In these cases, DRB will include on the panel a physician, clinical psychologist, or psychiatrist, who will address the four questions listed in the 2017 Memorandum from Under Secretary of Defense Anthony Kurta.

Powers advised advocates to maintain a clear theory of their case, lead with equity arguments, and focus on the nexus of any misconduct and mitigating factors. He strongly advised addressing the factors identified in then Under Secretary of Defense Wilkie's 2018 Guidance Regarding Equity, Injustice, or Clemency Determinations. In this memo, DRBs and BCM/NRs are directed to consider a number of factors in determining relief including post-conviction conduct, acceptance of responsibility, remorse, or atonement, letters of recommendation, and the character of applicant.

A COD, by comparison, is a determination by VA as to whether a service member is barred from receiving VA benefits due to a negative discharge characterization. Post-service conduct generally has little bearing on a COD review. Instead, VA is primarily concerned with the circumstances surrounding the discharge. A COD review does not result in a change to a veteran's DD 214, but it allows access to health care, disability compensation, and other benefits.

Dana Montalto, an attorney and clinical instructor at the Harvard Law School Veterans Legal Clinic, spoke on when to pursue a discharge upgrade or COD, or both. First, she pointed out that VA's standards of "at least as likely as not" and "benefit of the doubt" apply to CODs, whereas DRBs decide cases based on equity and propriety. Even though DRBs obtain military personnel files and may obtain additional records, VA's duty to assist applies in a COD review. If a veteran seeks a hearing, DRBs guarantee the right to a personal hearing, BCM/NRs grant hearings on a discretionary basis, and a COD review only grants hearings to address evidentiary matters. A discharge upgrade case before a military board typically takes one to three years to complete, while a COD review takes around two years. Determining which path would be more beneficial depends on many factors, but advocates can pursue both simultaneously. Neither option is a "quick fix" for a veteran in crisis but the value of a favorable determination is substantial and good advocacy can make a significant difference.

Allyson Brown is a recent graduate of the University of Missouri School of Law.

Auer Deference: Battered by *Kisor*, But Not Broken

by Caleb R. Stone

Reporting on *Kisor v. Wilkie*, 588 U.S. ___ (June 26, 2019).

On June 26, 2019, the United States Supreme Court issued a decision reviewing a Federal Circuit decision that had applied deference to a Board of Veterans' Appeals interpretation of 38 C.F.R. § 3.156(c)(1). That regulation allows for the possibility of earlier effective dates for benefits by permitting disability claims to be "reopened on the submission of relevant official service department records."

The veteran, James Kisor, submitted new documents documenting his participation in Operation Harvest Moon. He argued that these service records were

"relevant" because they went toward proving a required element of his claim: that he had experienced a PTSD stressor while in service. The Board disagreed, stating that the records Mr. Kisor submitted were not "relevant" because they did not prove that he had PTSD and thus did not address the reason for the original denial. Slip op. at 2-3.

Mr. Kisor lost at both the Court of Appeals for Veterans Claims (via memorandum decision) and the Court of Appeals for the Federal Circuit. Citing *Auer v. Robbins*, 519 U.S. 452 (1997), the Federal Circuit stated that the Board's decision was entitled to deference because both interpretations of the ambiguous regulation were reasonable. *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017).

In a highly-fragmented opinion, all nine justices agreed that *Kisor* should be remanded to the Federal Circuit for further deliberation. Justice Kagan delivered the majority's edict, with Justices Breyer, Ginsburg, and Sotomayor joining all of it and Chief Justice Roberts agreeing with parts of it. The majority opinion expressly declined to jettison *Auer* deference, but did wish to "reinforce its limits[,]" noting that it "is sometimes appropriate and sometimes not." Slip op. at 13.

It seems that most of these limitations revolved around taking some types of agency action out of *Auer*'s realm entirely. First, Justice Kagan wrote, only ambiguous regulations can lead to the application of *Auer*, since unambiguous regulations simply "mean what [they] mean." Slip op. at 13. Further, "a court must exhaust all the 'traditional tools' of construction," carefully considering a regulation's history, purpose, structure, and text, before it can correctly hold that a regulation is ambiguous. Slip op. at 14. Even if the regulation is "truly ambiguous," an agency's reading of it should still be reasonable before it is entitled to deference, which is "a requirement an agency can fail." *Id.*

She also explained that, though Congress intended courts to defer to agencies when interpreting their own ambiguous regulations, courts should not do so when the usual reasons for deference do not apply or when "countervailing reasons outweigh them." Slip op. at 12. In those cases, she stated, an agency's interpretation of a rule gets no deference except for its power to persuade. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140).

Justice Kagan then listed three specific requirements for *Auer* deference. First, courts can only defer to the agency's "authoritative" or "official position," and not to an "ad hoc statement not reflecting the agency's views," because Congress delegated rulemaking power "to the agency alone." Slip op. at 15. Second, the agency's interpretation must involve its "substantive expertise." *Id.* at 16. Finally, an agency's rule interpretation "must reflect 'fair and considered judgment'"—rationalizations made during litigation to justify an agency's actions *post facto* and interpretations that create "unfair surprise" to the litigants being regulated should not receive deference. *Id.* at 17.

Having set forth these limitations, Justice Kagan opined that "abandoning *Auer* deference would cast doubt on many settled constructions of rules." Slip op. at 26. She further stated that Congress is free to eliminate *Auer* deference if it does not like what the Court has decided in these matters. *Id.* at 27. She then gave two major reasons for remanding Mr. Kisor's case. First, she stated that the Federal Circuit had "jumped the gun" in declaring the regulation ambiguous, as it had not used every interpretative tool necessary to make such a finding. *Id.* at 28. Second, she found that the Federal Circuit was hasty in deciding that the result from the Board of Veterans' Appeals was the type of agency action that should receive deference. *Id.* at 29. At the end of her opinion, she hinted that a decision from a Veterans Law Judge may not meet this requirement because there are roughly 80,000 of them annually, all of them are made individually, and none of them have precedential value. *Id.*

Justice Gorsuch wrote a spirited concurrence that advocated for the complete abandonment of *Auer* deference's "systematic judicial bias in favor of the federal government . . . against everyone else[,]" calling the majority's result "more of a stay of execution than a pardon" and noting that the narrow majority only upheld *Auer* because of *stare decisis*. Slip op. (Gorsuch) at 1. He lamented that the Court's previous decisions had "invented" *Auer*

deference "almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution." *Id.* Finding that the majority's decision "zombified" *Auer*, he stated his hope that lower courts would find "courage" and realize that the Court "transformed *Auer* into a paper tiger." *Id.* at 2-3.

It may be the other two short concurrences that best explain how the result of *Kisor* may be eventually understood by lower courts and the lawyers who practice before them. Chief Justice Roberts wrote a separate concurrence, in which he "suggested that the distance between the majority and Justice Gorsuch is not as great as it may initially appear." Slip op. (Roberts) at 1. Justice Kavanaugh wrote a concurrence agreeing with that statement. Using a familiar metaphor for the proper role of the judiciary, he noted that "[u]mpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules." Slip op. (Kavanaugh) at 2. He stated that he would have rejected *Auer* outright, but that "rigorously applying" the majority's opinion would "lead in most cases to the same general destination." *Id.*

Time will tell what the Federal Circuit will make of the Court's instructions. A Veterans Law Judge's interpretation of 38 C.F.R. § 3.156(c)(1) could still stand even without being entitled to deference. The only thing that seems certain is that the next opinion explaining the result for Mr. Kisor is going to be more thorough.

Caleb R. Stone is a Professor of the Practice in the Lewis B. Puller, Jr. Veterans Benefits Clinic at William & Mary Law School.

Federal Circuit Rules That Notice Requirements of Section 3.103(e) Demands Clear Identification of Claim Being Denied

by Justin T. North

Reporting on *Ruel v. Wilkie*, 2019-2562 (Fed. Cir., March 15, 2019).

On March 15, 2019, the Federal Circuit issued a decision in *Ruel v. Wilkie* which reversed the Board and the CAVC in response to Mrs. Ruel's request for an effective date of 1984 rather than 2009 for her Dependency and Indemnification claim. In issuing this opinion, the court held that, under 38 C.F.R. Section 3.103(e)(1984), an explicit denial must identify in some manner the claim that is being denied.

Richard Ruel was a United States Marine who served from March of 1966 through May of 1969, during which he twice deployed to the Republic of Vietnam and was exposed to Agent Orange. Mr. Ruel died from ischemic heart disease on June 23, 1984.

Following Mr. Ruel's death, Mrs. Ruel submitted Form 21-534 "Application for Dependency and Indemnification Compensation or Death Pension by Surviving Spouse or Child." On that form she circled the phrase "Death Pension by Surviving Spouse." Further, box 11(b) on that form asked whether the claimant was "claiming that the cause of death was due to service," to which she replied "no." In response to this form, the VA Regional Office (RO) informed her that her claim for death benefits had been denied because her income exceeded the permissible limit. Subsequently, she submitted a form 21-530 application for burial benefits. Upon receipt of this letter, the RO sent a three-sentence response that authorized $150 as an allowance for "plot or internment expenses," noted that Mr. Ruel's death was not service connected, and directed the reader to "see reverse for procedural and appellate rights." Mrs. Ruel never appealed any of the RO's 1984 determinations.

Ischemic heart disease was not among the many diseases on the presumptive lists related to herbicide exposure in Vietnam under either 38 U.S.C. § 1116(a)(1)(B) or 38 C.F.R. § 3.309(e) until 2009. Upon this change, Mrs. Ruel submitted another Form 21-534, this time seeking DIC benefits retroactively to 1984, because 38 C.F.R. § 3.816(d)(2) establishes that a benefit's effective date will be assigned retroactively to the later of the date the

claim was initially filed or the death occurred. The claim was denied, and the denial was affirmed by the Board and the Veterans Court.

The government argued that Mrs. Ruel's initial Form 21-534 from 1984 constituted a claim for both death pension and DIC benefits, which were denied. Further, it noted that she had received notification of her appellate rights on the reverse side of the separate letter regarding her application for burial benefits. The government contended that this provided her notice of the denial of her DIC claim. Accordingly, she could not be assigned an effective date for DIC before 2009.

But the Federal Circuit held that the VA's notice in 1984 did not meet the notice requirement under then § 3.103(e), which, according to its decision in *Cogburn v. McDonald*, 809 F.3d 1232, 1237 (Fed. Cir. 2016), "mirrors constitutional due process." The court held that "a single sentence that does not name the claim that it allegedly decided and contains only an unadorned factual finding" was insufficient to advise the claimant of the denial. The court held that notice under section 3.103(e)(1984) [now subsection (f)] requires explicit identification of which claim is being denied, in addition to the reason for the decision, the date effectuated, and notice of appellate rights.

As a result of this ruling, the DIC claim remained pending and the correct effective date is 1984 rather than 2009, which results in a significant amount of back-payments due to Mrs. Ruel which the VA has been directed to dispense accordingly.

Justin North is a Marine Veteran, a recipient of a CAVC Judicial Conference Scholarship, a 3L at Notre Dame Law School, and a Summer Law Clerk at Fox Rothschild's Denver Office.

CAVC Panel Remands Extraschedular Issue

By Matthew Hebert

Reporting on *Morgan v. Wilkie,* No. 17-0098, (May 16, 2019).

In *Morgan v. Wilkie*, the United States Court of Appeals for Veterans Claims (Court) addressed whether the Board of Veterans' Appeals (Board) had erred when it did not remand for referral to the Director of Compensation the issue of entitlement to an extraschedular rating for bilateral hearing loss pursuant to 38 C.F.R. § 3.321(b)(1). The VA Regional Office (RO) had granted Mr. Morgan's claim for bilateral hearing loss in 2012 and assigned a noncompensable rating.

After the veteran's timely disagreement with that decision, the RO continued Mr. Morgan's noncompensable rating in a 2013 Statement of the Case. He subsequently appealed the decision and the VA awarded a 10 percent rating.

During an audiological examination of record, Mr. Morgan reported not being able to hear his preacher or his grandchild. Additionally, he claimed that he had to roll down his car windows in order to hear traffic.

During his Board hearing, the veteran testified that he often had to ask others to repeat themselves when they spoke to him and that his hearing loss caused difficulty maintaining work and social relationships with others.

The Board denied the claim for an increased schedular rating for his hearing loss and acknowledged the issue of entitlement to an extraschedular rating, writing that it had considered whether referral for an extraschedular rating was warranted but that "[n]either the facts of this case nor the Veteran's allegations raise the issue of extraschedular consideration, and a referral for an extraschedular analysis is not necessary."

Mr. Morgan then appealed this matter to the Court. On appeal, he argued that the Board erred by not referring him for extraschedular consideration. He contended that the issue of extraschedular referral was reasonably raised by the record because the evidence of his need to roll down the windows of his car in order to hear traffic raised safety concerns.

The Secretary argued that the Board did not err because it was not obligated to consider an extraschedular referral. The Secretary explained that "[t]he functional effects of the Appellant's hearing loss did not reasonably raise the issue[.]"

The Court identified the threshold issue as "whether the Board was obligated to address extraschedular referral at all." The Court noted that, because the veteran did not contend that he explicitly raised the issue of extraschedular referral before VA, he could only take issue with the Board's analysis if the record reasonably raised the issue. But the Court noted that the Board stated both that it had considered the issue but also that it had found that neither the facts of the case nor the veteran's allegations raised the issue of extraschedular consideration. This inconsistency left the Court unable to determine the precise basis of the Board's decision, and a remand was therefore warranted.

The Court then considered the Board's obligations on remand and, in doing so, emphasized VA's duty to maximize benefits, citing 38 C.F.R. § 3.103(a); *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008); and *AB v. Brown*, 6 Vet. App. 35, 38 (1993) (noting that "Veterans are generally [] presumed to be seeking the maximum benefit allowed by law and regulation[.]"

The Court emphasized that VA has "ready-made" schedular tools that *must* be exhausted *before* addressing the issue of extraschedular referral. These tools include, but are not limited to: (1) the consideration of secondary service connection; (2) the use of analogous ratings, (3) assigning the higher evaluation when there is a question as to which of two evaluations should be applied; (4) resolving reasonable doubt in favor of the veteran when assigning a rating; (5) rating a single disability under multiple diagnostic codes without pyramiding; (6) issuing an award based on the veteran's individual unemployability; and (7) awarding special monthly compensation.

While it is not necessary for the Board to address each of these tools in every case, the Court stated that the Board must do so when extraschedular rating is raised explicitly by the Veteran or when it is reasonably raised by the record. The Court held that the Board must address all applicable schedular avenues before the analysis of extraschedular referral is triggered.

Additionally, if the Board determines that entitlement to an extraschedular rating has not been explicitly raised or reasonably raised by the record, it should not adjudicate that issue on the merits. In such a situation, the Board should avoid language suggesting that an extraschedular referral has been denied on the merits.

Matthew Hebert is a Law Clerk at the Board of Veterans' Appeals.

[*Editor's Note:* The Court had stayed a number of cases involving extraschedular rating pending resolution of *Morgan*. When the Court abandoned *en banc* consideration and instead issued this panel decision, it stayed all the cases pending resolution of *Long v. Wilkie*, No. 16-1537.]

Court Ordered Writ for Unreasonable Delay by VA after Class Certification

by Michael P. Gonzalez

Reporting on *Godsey v. Wilkie*, No. 17-4361 (June 13, 2019).

In June 2019, the Court certified a class action and ordered a writ of mandamus for pending legacy appeals facing unreasonable delay in certification and transfer to the Board.

In November 2017, the petitioners filed a petition for extraordinary relief in the nature of a writ of mandamus. They argued that the Secretary's failure to timely certify their cases to the Board violated their right to procedural due process under the Fifth Amendment, constituted agency action unlawfully withheld or unreasonably delayed within the meaning of 38 U.S.C. § 7261(a)(2) and 5 U.S.C. § 555(b), and violated their statutory right under 38

U.S.C. § 7107(a)(1) to have their appeals "considered and decided [by the Board] in regular order according to its place upon the docket." They argued that such "extreme" certification delays are typical of the legacy appeals system and likely affect hundreds, if not thousands, of claimants.

The Court noted that in 2017 it took VA, on average, 773 days to certify a case to the Board after receiving a Substantive Appeal, and an additional 321 days after that to transfer the appellate record. Also as an initial matter, the Court made clear that by deciding class certification and the merits of the petition in a single order, it was not adopting a general policy or framework for deciding such matters concurrently in future cases. After outlining the VA processes at issue in the dispute, including pre-certification review, additional development, actual certification, transfer to the Board, and receipt and docketing at the Board, the Court turned to the question of certifying a class.

Mootness. The Court concluded that, although the petitioners have each had their cases resolved or certified to the Board, their petition was not moot because they presented a live case-or-controversy at the time they filed their petition, and the Secretary's failure to timely certify cases is inherently transitory in nature. The Court reached this decision because the petitioners' claims are not only unavoidably time-sensitive but are also "acutely susceptible to mootness" due to the Secretary's history of mooting petitions before judicial resolution. It noted that the Federal Circuit has indicated that this is the type of situation where class action is most appropriate to avoid such mootness concerns. *Citing Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017).

Class Certification. The Court relied on *Monk v. Wilkie*, 30 Vet. App. 167, 170 (2018) and Rule 23 of the Federal Rules of Civil Procedure as guides for class certification. It concluded that a modified class of claimants waiting more than 18 months since filing their Substantive Appeals satisfied the Rule 23(a)(2) commonality requirement. The Secretary conceded that the modified class met the remaining 23(a) requirements: numerosity because the class was sufficiently numerous; typicality because there were no longer any unique defenses among the class members that would prevent aggregate resolution of the petition; and adequacy of representation, as the petitioners would be adequate representatives of the class because they did not have any interests adverse to the putative members of the modified class.

The Court determined that class certification is appropriate under Rule 23(b)(2) as a more efficient and effective vehicle for resolving this case than a precedential decision; the Court also determined that petitioners' counsel would adequately represent the class under Rule 23(g)(2).

Merits of the Petition. The Court concluded on the merits that the petition met the conditions set forth in *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). In addition to the Secretary's concession that the petitioners have no adequate alternative means to obtain relief, the Court was convinced that issuance of a writ was warranted in this case to ensure that the class members received timely pre-certification review of their appealed cases so that any necessary further development may occur, or so that certification may proceed.

The Court began its analysis with whether unreasonable agency delay was present. The Federal Circuit has held that the Court may use its mandamus authority to compel the VA Secretary to act. *See Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018); *citing analysis in Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). The Court found that the first and "most important" *TRAC* factor weighed heavily in the petitioners' favor because the delay consisted of nothing but waiting in line: no development, no adjudication, no action whatsoever on the part of VA. The Court determined that the third, fourth, and fifth *TRAC* factors supported a finding of unreasonableness: benefits claims inherently involve health and human welfare, making the alleged delay in conducting precertification review "less tolerable." The remaining factors did not tip the scales towards a finding of reasonableness, and no bad faith was alleged. Although the second *TRAC* factor weighed in the Secretary's favor, because Congress has declined to impose an appeal certification timeline on VA, this was not sufficient

to overcome the other factors in favor of the petitioners. The Court thus concluded that the current time it takes the Secretary to initiate a pre-certification review after the filing of a Substantive Appeal is *per se* unreasonable.

The Court did not address the petitioners' other arguments.

The Court ordered that the class proposed by the petitioners is to be modified consistent with the decision and certified the class of all VA benefits claimants who filed a Substantive Appeal at least 18 months or more prior to the date of the order and who are waiting for VA to initiate pre-certification review of their cases. Petitioners' counsel was appointed as class counsel. The Court further ordered the Secretary to conduct pre-certification review of all the cases that fit within the class definition, and for each class member, within 120 days after the date of this order, either (1) certify his or her case, or (2) affirmatively initiate any development or adjudication activities necessary for certification or resolution at the Regional Office. The Court further directed that within 60 days of the date of the order the Secretary file with the Court a status update which includes the names and the VA claims numbers of all members of the class; the number of cases in the class still waiting pre-certification review; the number of cases in the class that have been processed in compliance with the order; and any other information the Secretary deems relevant to comply with the Court order.

Dissent. Judge Pietsch dissented both as to class certification and grant of the petition on the merits. She expressed concern that certifying and managing a class at an appellate Court would be troublesome, particularly where the Court has still not adopted any rules to govern how a class, once certified, will proceed or be administered at the Court.

With respect to commonality of the class being certified, while Judge Pietsch agreed with the majority that a class certification analysis under Rule 23(a) involves overlap with the merits, she did not agree that the class should be modified so that it will be successful on the merits. She stated That, by modifying the class, the majority seemed to skip the commonality analysis, instead modifying the class so that commonality exists, with almost no analysis as to why.

She agreed with most of the majority's analysis concerning reasonableness of the time the Secretary takes to begin the pre-certification review after a claimant has filed a Substantive Appeal, but she disagreed with the weight given to the second and fourth *TRAC* factors, which were deciding factors for her. She noted that Congress has chosen not to impose a timeline on VA for certifying appeals to the Board. Absent evidence of failure of the Secretary's plan to address the legacy appeals, she saw no need for the Court to interject itself. She opined that the Court's ordering of the Secretary to act on these cases within a much shorter time frame than VA had planned and budgeted, while simultaneously certifying the Court's first class action as part of the decision, will cause confusion and delay as both the Court and Secretary deal with class actions.

Michael P. Gonzalez is an Associate Counsel at the Board of Veterans' Appeals.

Fed. Cir. Upholds VA Rulemaking for Extraschedular Evaluations

by Jillian Berner

Reporting on *National Organization of Veterans' Advocates, Inc. [NOVA], v. Secretary of Veterans Affairs*, 2018-1391 (Fed. Cir. June 24, 2019).

In a petition for review challenging the validity of VA's rule amending 38 C.F.R. § 3.321(b)(1), the Federal Circuit denied NOVA's bid and held that VA's 2017 amendment was not on its face arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

Prior to the 2017 amendment of the regulation, 38 C.F.R. § 3.321(b)(1) allowed extraschedular disability evaluations to be awarded "commensurate with the average earning capacity impairment due exclusively

to the service-connected disability or disabilities" where VA determined that the schedular evaluation did not contemplate the claimant's symptomatology and the claimant's disability caused exceptional circumstances like marked interference with employment or frequent periods of hospitalization. Under 38 C.F.R. § 3.321(b)(1), VA had to consider whether individual disabilities should be given extraschedular ratings. VA must also combine ratings where veterans have multiple disabilities with extraschedular ratings under 38 C.F.R. § 4.25. In *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), the Federal Circuit held that VA's policy of evaluating disabilities in isolation when considering award of extraschedular ratings, without considering the synergistic effects of multiple disabilities, was contrary to the plain language of the regulation. The holding in *Johnson* allowed VA to consider the combined effects of disabilities in determining whether extraschedular evaluation was warranted. In 2016, VA issued a Notice of Proposed Rulemaking to clarify the regulation, preserving the pre-*Johnson* interpretation. The final rule, which declined to consider the synergistic effect of multiple disabilities for extraschedular consideration, was published in December 2017.

NOVA petitioned the Court for review of the final rule. In its petition, NOVA asserted that VA was arbitrary and capricious in changing the rule because the rule fails to consider the full extent of a veteran's overall disability picture and because VA did not explain why doing so was impracticable.

The Federal Circuit held that VA had adequately explained why it changed the rule and that the regulation was not on its face arbitrary and capricious. Rejecting NOVA's contention, the court determined that the regulation allowed combination of multiple disabilities, just not in the way NOVA wished. The Federal Circuit accepted VA's explanation that allowing consideration of the synergistic effects of multiple disabilities would be difficult to consistently and logically administer. Because there are no provisions in the rating schedule which account for impairment caused by the synergistic effects of multiple disabilities, raters would not have an objective standard for assessing the adequacy of a schedular rating, which would lead to delayed adjudication of claims and subjective, inconsistent adjudication. The Federal Circuit also accepted VA's explanation that the amendment to the regulation was consistent with VA's longtime interpretation of the regulation and its predecessors.

The Federal Circuit noted that 38 C.F.R. § 4.16, which affords benefits for total disability due to individual unemployability (TDIU), allows an adjudicator to consider a veteran's overall impairment in deciding whether that veteran is unemployable, even if the veteran's schedular disability rating does not entitle him or her to a total disability rating. The court held that it was not inconsistent to allow TDIU based on multiple disabilities but to bar extraschedular consideration based on multiple disabilities outside the employment context. It faulted NOVA for failing during the rulemaking to articulate an alternative regulation with feasible standards to evaluate the combined effect of multiple disabilities on earning capacity. Because the alternative to the current rule would be *ad hoc*, case-by-case determinations, and it was permissible for the agency to conclude that rulemaking is superior for efficiency, accountability, and notice to claimants, the Federal Circuit held that the current rulemaking would stand.

The Federal Circuit noted that NOVA had failed to provide examples to support its argument that the rule change was arbitrary. NOVA's example at oral argument of a single case of the rule not accounting for a veteran's disabilities, i.e. where a veteran's service-connected tinnitus aggravated his post-traumatic stress disorder (PTSD), was insufficient to prove that the rule was facially arbitrary or capricious or that piecemeal adjudication would be necessary. The court noted that agency regulations are typically broad and are meant to be administered easily and consistently, if imperfectly.

Jillian Berner is Senior Staff Attorney at the John Marshall Law School Veterans Legal Support Center & Clinic.

CAVC Addresses Whether a Spouse's Right to Special Apportionment is Waived by Stipulations in a State Court Sanctioned Divorce Settlement

By Caitlin Kucera

Reporting on *Batcher v. Wilkie*, No. 16-0638 (April 26, 2019).

In *Batcher*, the Veteran appealed a Board decision granting special apportionment of his VA disability compensation to his ex-wife. The Court ruled that Ms. Batcher did not relinquish her entitlement to certain federal benefits (i.e. special apportionment), despite prior stipulations made in a state-court-sanctioned separation agreement. In other words, entitlement to federal benefits trumps stipulations made in state-court agreements because state courts lack the authority to divide up federal benefits. This holding follows the logic applied in the United States Supreme Court decision *Howell v. Howell*, 137 S. Ct. 1400 (2017), which, similarly, held that a veteran could not be required to reimburse his ex-spouse for funds she ceased receiving when he waived a portion of his military retirement funds (considered marital property by the state court) to receive VA disability benefits (not considered marital property). Practically, this case suggests that when negotiating and drafting separation agreements, family law practitioners should be aware that (or perhaps even assume) a special apportionment may be requested and granted at some point in the future.

The Batchers separated in September 2001 and in December 2004 Mr. Batcher filed a separation action in the Supreme Court of the State of New York (hereinafter "state court"). In March 2005, the state court entered a judgment of separation based on a stipulated agreement between Ms. Batcher and the veteran, which specified that he would pay Ms. Batcher a distributive award, monthly maintenance, and "certain benefits from the US Army." The separation judgment also indicated that "all other issues of personal properties and marital debts have been resolved." One year later, in March 2006, Mr. Batcher filed and was subsequently granted benefits on several claims with VA.

In November 2006, two months after he was awarded VA disability compensation, the state court held a maintenance hearing in which the husband and wife stipulated that Ms. Batcher would receive a lump sum payment of $7,000 in lieu of the previously agreed-upon maintenance payments. As a result, the March 2005 judgment was amended to reflect that the veteran no longer owed future maintenance or support obligations to Ms. Batcher.

Ms. Batcher's financial condition subsequently deteriorated and in April 2008 she filed a claim with VA for an apportionment of the Veteran's disability compensation benefits. The RO denied entitlement to apportionment, including special apportionment, because, although Ms. Batcher's monthly expenses exceeded her income, she had—per her separation agreement—voluntarily renounced any maintenance or support from the veteran, including future claims. She subsequently appealed the RO's decision to the Board of Veterans' Appeals (BVA).

The Board issued a decision in December 2015 reversing the RO's decision and granting a special apportionment of the Veteran's disability compensation benefits between April 2008 and December 2010, because it found, per statutory criteria, that Ms. Batcher had experienced financial hardship, including a period of homelessness and monthly expenses exceeding her income, and that the veteran had not offered any mitigating evidence of his own undue hardship. Mr. Batcher subsequently appealed the Board decision.

According to 38 U.S.C. 5307(a)(2), "all or part of the [VA] compensation, pension, or emergency officers' retirement pay payable on account of any veteran may[,]. . . if the veteran is not living with the veteran's spouse,. . . . **may** be apportioned as may be prescribed by the Secretary."

Generally, VA may apportion such benefits to a spouse if the veteran is no longer residing with his or her spouse. . . and if the veteran is not reasonably

responsibly discharging his or her responsibility for the spouse's support. 38 CFR 3.450(a)(1)(ii) (2018). Those benefits may be "specially apportioned" to the spouse without regard to any other provision regarding apportionment where hardship is shown to exist. 38 CRF 3.451. Special apportionment is awarded on the basis of the facts in the individual case as long as it does not cause undue hardship to the other person in interest (with certain exceptions). *See Hall v. Brown*, 5 Vet. App. 294, 295 (1993).

The Court noted that, in enacting Section 5307, Congress granted certain categories of a veteran's dependents the right to seek an apportionment of the veteran's VA benefits, including disability compensation; this means that these types of dependents are entitled under federal law to receive a portion of the veteran's benefits, should they meet the requisite statutory criteria. *See* 38 USC 5307(a); *Belton v. Principi*, 17 Vet. App. 209, 211 (2003). Consequently, when ex-spouses such as Ms. Batcher file for an apportionment on their own behalf they are, in fact, exercising their individual right to receive a federal benefit. Per the Court, there is clear Congressional intent to ensure that veterans' benefits be used at least in part to support veterans' spouses.

Moreover, Congress has specifically delegated to the VA secretary the responsibility of defining the criteria of entitlement for apportionment. 38 USC 5307(a)(2). In interpreting the applicable statutory language, the Court found that, once a spouse has met this criterion, entitlement to special apportionment is established and VA *must* grant that benefit to the claimant. In other words, VA is bound by its own regulations. *See Holland v. Brown*, 9 Vet. App. 324, 329 (1996); *see also Cushman v. Shinseki*, 576 F. 3d 1290, 1298 (Fed. Cir. 2009).

Mr. Batcher argued that the Board erred in granting his ex-wife special apportionment of his VA disability compensation because it failed to consider whether she had already waived her right to apportionment by stipulating to the November 2006 state court proceeding to accept a lump sum payment and purportedly resolve all past and future support obligations.

In contrast, the Secretary claimed VA was obligated to grant the special apportionment once Ms. Batcher met the statutory and regulatory criteria for that benefit, regardless of the terms of any potentially contrary contract between the Batchers made in state court. Instead, the proper remedy for the Veteran would be to return to state court to seek a modification of the separation agreement to reflect the changed circumstances of the grant of apportionment.

The Court ultimately agreed with the Secretary, holding that VA was correct in granting Ms. Batcher special apportionment once it ascertained that she met all criteria: 1) She was married but not living with the veteran; 2) she experienced hardship; 3) the veteran did not proffer any evidence that apportionment of his disability compensation benefits would cause him undue hardship.

In applying the recent United States Supreme Court decision *Howell v. Howell*, the Court explained that a claim to a federal benefit (i.e. Ms. Batcher's right to apportionment) made Mr. Batcher's spousal obligation potentially greater than he anticipated in November 2006. While he could have at the time valued that contingency in the separation agreement and negotiated a lower lump sum, he failed to do so. Therefore, he can seek redress from Ms. Batcher in the state court by either suing her for breach of contract or seeking a modification of their prior separation agreement based on the changed circumstances of the grant of special apportionment.

In the dissenting opinion, Judge Greenberg indicated that it was Ms. Batcher rather than the veteran who should be required to return to state court to modify her separation agreement. The dissent noted that the language of the statute concerning apportionment is clearly limited to spouses and therefore would have been inapplicable to Ms. Batcher once her divorce was finalized in December 2010. In applying an analogy to Article 1, Section 10 of the United States Constitution, which prohibits states from impairing contractual obligations, the dissent emphasized that an ex-spouse (via VA) should not be permitted to use a VA order as a vehicle through which to modify a state sanctioned contract. In other words, Judge

Greenberg would have held that that the state court agreements were controlling, and granting an apportionment was the equivalent of an improper impairment of a contract sanctioned by a state court.

Caitlin Kucera is Associate Counsel at the Board of Veterans' Appeals.

Fed. Cir. Holds Court Was Too Restrictive In Determining Scope of Informal Claim

by Jillian Berner

Reporting on *Shea v. Wilkie*, 2018-1735 (Fed. Cir., June 20, 2019).

In *Shea v. Wilkie*, the U.S. Court of Appeals for the Federal Circuit considered whether an informal claim for VA disability benefits is raised where a claimant refers to specific medical records and the medical records contain a reasonably ascertainable diagnosis of a disability. The claimant, Ms. Shea, argued that she was entitled to an earlier effective date for service-connected disability benefits for post-traumatic stress disorder (PTSD) because her initial filing, for physical disabilities suffered in an in-service truck accident, referred to records that contained diagnoses of adjustment disorder, anxiety, and depression, although that filing did not refer to a psychiatric disorder. Finding that the Court of Appeals for Veterans Claims (CAVC) applied too restrictive a standard in interpreting the scope of an informal claim under 38 C.F.R. § 3.155(a), the Federal Circuit vacated the CAVC decision and remanded Ms. Shea's claim for further adjudication.

Ms. Shea was diagnosed with adjustment disorder with anxiety and depressed mood in service. Four days later, while still on active duty, she incurred physical injuries from a truck accident. Following the accident, her mental health conditions were exacerbated and she began to experience memory impairment. On July 2, 2007, less than five months after the truck accident, she was discharged from the Air Force.

On October 19, 2007, Ms. Shea filed a claim for VA disability benefits, asserting that she was seeking benefits for "[p]elvic [f]ractures and transverse process fracture of L3," "[s]hortness of breath," "[r]ight and [l]eft [p]ulmonary contu[s]ions," and chest pain. She asserted that these disabilities began on the date of the truck accident and informed the VA of the hospitals and rehabilitation facilities where she had been treated for them. In February 2008, the regional office (RO) granted Ms. Shea's claims and assigned an effective date of July 3, 2007, the day after her discharge.

Ms. Shea filed a notice of disagreement on July 7, 2008, requesting a higher disability rating and noting her symptoms of memory impairment and reliving the truck accident. On September 9, 2008, she filed a claim for service connection for PTSD and clarified through a statement in support of claim one month later that her PTSD was secondary to the in-service truck accident. In February 2009, the RO granted her claim for PTSD and assigned a 50% disability rating, effective September 9, 2008—the date that she explicitly filed a claim for PTSD. In April 2009, she filed a notice of disagreement as to the effective date for service-connected PTSD.

In March 2014, the Board of Veterans' Appeals (Board) denied Ms. Shea's claim, finding that she had not filed a formal or informal claim or written intent to file a claim for PTSD prior to September 9, 2008. An appeal to the Court was resolved by grant of a joint motion for partial remand based on the Board's failure to consider Ms. Shea's July 7, 2008 statement that she had memory impairment.

In July 2016, the Board determined that the July 7, 2008 statement was an informal claim. Under 38 C.F.R. § 3.155, the Board found, the statement could be reasonably interpreted as an attempt to seek service-connected benefits for the condition causing her memory impairment. The Board granted an effective date of July 7, 2008, but found that Ms. Shea had not filed an informal claim prior to that date. The Board determined that the October 19, 2007 submission did not constitute an informal

claim, because the statement did not identify a psychiatric disability as a benefit sought and did not refer to psychiatric symptoms. The Board also found that the service and post-service treatment records did not constitute an informal claim, because Ms. Shea did not intend to file a claim for PTSD by submitting her medical records in support of her physical disabilities. Ms. Shea appealed to the CAVC.

In December 2017, the CAVC affirmed the Board decision, holding that, while Ms. Shea intended to apply for benefits in October 2007, she had not at that time "adequately identified a psychiatric disability as one of the benefits sought" such that her filing would constitute an informal claim under 38 C.F.R. § 3.155(a). The CAVC determined that the existence of a physical disability at the time of the formal claim was insufficient to constitute an initial claim for benefits.

Ms. Shea appealed to the Federal Circuit, arguing that remand was warranted because the CAVC relied on too-stringent a pleading standard inconsistent with the flexibility afforded to *pro se* claimants. The Secretary agreed with Ms. Shea to the extent that the regulation's use of "benefit sought" denotes not the recovery, but the condition giving rise to potential disability benefits.

The Federal Circuit agreed with Ms. Shea, holding that its jurisprudence requiring sympathetic interpretation of *pro se* claimants' filings allowed the requisite "identification of the benefit sought" to be done indirectly. The Federal Circuit determined that the VA was required to look beyond the claim document itself and examine any documents cited in the claim filings to determine the benefit sought from the agency. Accordingly, an informal claim could be made where a claimant's filings referred to specific medical records, which contained a diagnosis of a disability. The CAVC had erroneously required Ms. Shea's application to contain terms referring to her mental health condition, which conflicted with the flexible pleading precedent. The Federal Circuit remanded the claim to the CAVC, holding that that court had not clearly stated the legal standard upon which it relied in considering the scope of Ms. Shea's initial claim for benefits.

Jillian Berner is Senior Staff Attorney at the John Marshall Law School Veterans Legal Support Center & Clinic.

Secrecy Oath will not Circumvent Provisions of 38 U.S.C. § 5110

by Alexandra V. Dellarco

Reporting on *Taylor v. Wilkie*, No. 17-2390 (April 5, 2019).

On April 5, 2019, the Court of Appeals for Veterans Claims (Court) issued a precedential decision affirming the Board's denial of entitlement to an earlier effective date in the absence of a prior claim for benefits.

During service, the Veteran participated in chemical exposure studies at the Edgewood Arsenal [hereinafter Edgewood study or study] and signed a secrecy oath declaring that he would not disclose any information about the study under penalty of court martial or prosecution. In 2006, the Department of Defense (DoD) declassified the names of the study participants, and in June 2006 VA sent the Veteran a letter notifying him that he was permitted to disclose information regarding his involvement in the study to health care providers and that he could file benefit claims for any disabilities he believed were related to the study. In February 2007, the Veteran filed a claim for service connection for PTSD identifying the Edgewood study and several other in-service stressors. The Regional Office (RO) granted service connection for PTSD as of the date of claim. Subsequently, the RO granted TDIU and assigned an effective date as of the February 2007 PTSD claim.

The Veteran challenged the assigned effective dates for the awards of PTSD and TDIU. He sought assignment of an effective date back to the day after his date of discharge from service, and contended that he was constrained from filing for VA benefits

due to the secrecy oath until he received VA's letter advising him that such claims could be filed.

The Board denied the Veteran's claim for three reasons. First, the Board found that the Veteran's diagnosis of PTSD was based on multiple stressors and not solely on participation in the Edgewood study; hence, declassification of the study did not preclude him from filing a claim for PTSD on the other in-service stressors. Second, the Board found that the Veteran disclosed his participation in the Edgewood study prior to its declassification to a treating provider. Finally, the Board found that the language of 38 U.S.C. § 5110 was controlling and the Veteran's situation did not meet the exceptions allowed under the statute.

On appeal, the Veteran argued that he was deprived of due process because there was no process by which he could have made, or substantiated, a claim for benefits prior to DoD's declassification of the Edgewood study. The Veteran further argued that 38 U.S.C. § 5110 resulted in injustice to veterans who are prohibited from filing claims by virtue of a secrecy oath and sought a remedy by which participants in the Edgewood study could retroactively file claims for benefits during the years when the study was still classified.

The Court found no basis for an award of an earlier effective date. As to a deprivation of due process, the Court acknowledged that VA disability benefits constituted a protected property interest and could not be discontinued without due process of law. However, the Court emphasized that there was no authority that established a property right in VA disability benefits before a claim is filed. As a result, the Court found no violation of due process.

As to the argument of an equitable remedy allowing the retroactive filing of benefits (in other words, the establishment of an earlier effective date for an award of benefits in the absence of a prior claim), the Court relied on *Burris v. Wilkie*, 888 F.3d 1352 (Fed. Cir. 2018) to find that there was no equitable remedy available because the Veteran was asking for monetary relief based on the assignment of an earlier effective date, thereby constituting a back payment of benefits. The Court emphasized that the grant of substantive monetary relief was not within its equitable powers. The Court further relied on *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990) to state that the payment of benefits is governed by statute, and regardless of the equities there can be no payment of benefits unless the claimant meets the statutory eligibility requirements. The Court went on to explain that the governing caselaw had foreclosed the use of equitable tolling and equitable estoppel to authorize payment outside of the requirements set forth in 38 U.S.C. § 5110. Hence, the Court found that the language of 38 U.S.C. § 5110 was controlling and no equitable relief was available to the Veteran.

In dissenting, Judge Greenberg contended that the Board's findings were erroneous. First, he opined that the Board's finding that the Veteran could have filed a claim for PTSD based on other in-service stressors, to the exclusion of participation in the Edgewood study, was a *Colvin* violation [improper reliance on its own medical judgment]. Second, he argued that it was immaterial whether the Veteran discussed the Edgewood study with a treating provider because such conduct was not akin to filing a claim for government benefits in the presence of a secrecy oath. Lastly, he noted that 38 U.S.C. § 5110 must be construed in the Veteran's favor given that there was no statutory provision provided by Congress contemplating a situation such as he is in.

Judge Greenberg's solution was to find that the government was equitably estopped from finding that the Veteran filed a claim after the date entitlement arose. He explained that this was necessary to effectuate Congress's intent that the VA benefits system is an entitlement system and not a system that endorses filing futile claims. Judge Greenberg felt that the government's conduct prevented the Veteran from filing a successful claim and Congress could not have intended that the effective date be the date of claim given the constraints on the Veteran preventing him from filing a successful claim until declassification of the Edgewood study occurred. He further indicated that *Richmond* expressly refused to find that a private citizen could never succeed on a claim of estoppel against the government, and thus the Court should

have made clear that under these extreme facts application of equitable estoppel was appropriate.

Alexandra V. Dellarco is Associate Counsel at the Board of Veterans' Appeals.

"Aggravation" under 38 C.F.R. § 3.310 Means Any Increase in Disability and Does Not Require a "Permanent Worsening"

by Kerry Hubers

Reporting on *Ward v. Wilkie*, No. 16-2157 (June 14, 2019).

In *Ward v. Wilkie*, the Court of Appeals for Veterans Claims (Court) concluded that the "permanent worsening" standard applicable to claims under 38 U.S.C. § 1153 (addressing aggravation of pre-existing conditions) "has no application in cases involving an incremental increase in disability of a non-service-connected condition proximately due to or the result of a service-connected disease or injury." Therefore, service-connection is warranted pursuant to 38 C.F.R. § 3.310 where there is "any incremental increase in disability – any additional impairment of earning capacity – in nonservice-connected disabilities resulting from service-connected conditions, above the degree of disability existing before the increase – regardless of its permanence."

This case arose out of consolidated appeals involving veterans with service-connected musculoskeletal disabilities of the lower extremities that, they alleged, caused additional musculoskeletal disabilities of the bilateral hips (Ward) and low back (Neal). The claims of aggravation under Section 3.310 were denied after the Board of Veteran's Appeals (Board) had remanded them with instructions defining "aggravation" as "permanently increased in severity beyond the natural progress of the disorder" (Ward) or "permanently made worse beyond the natural progression of the disability" (Neal).

The veterans argued that this standard contravened the Court's statement in *Allen v. Brown*, 7 Vet.App. 439 (1995) (en banc) that "the terms 'aggravation' and 'aggravated' [are] general terms referring to any increase in disability," which the *Allen* Court distinguished from the standard applicable under 38 U.S.C. § 1153 and 38 C.F.R. § 3.306 authorizing compensation for an increase in disability resulting from aggravation during service of an injury or disease that existed before service.

The Secretary argued that prior case law established that the term "aggravation" has the same meaning under 38 C.F.R. § 3.310 as it does under 38 U.S.C. § 1153 and 38 C.F.R. § 3.306. *See*, *e.g.*, *Hunt v. Derwinski*, 1 Vet.App. 292, 296-297 (1991) (indicating that the definition of aggravation found in 38 U.S.C. § 353, the predecessor statute to 38 U.S.C. § 1153, was applicable to the term as used in 38 C.F.R. § 3.310); *Davis v. Principi*, 276 F.3d 1341 (2002) (holding that a temporary flare-up or a passing change in symptoms was not sufficient to constitute an increase in disability under 38 U.S.C. § 1153).

The Court found that *Allen* makes clear that the term "aggravation" has a different meaning as used in 38 C.F.R. § 3.310 than it has in 38 U.S.C. § 1153 and 38 C.F.R. § 3.306. The Court acknowledged the confusion caused by the fact that various statutes and regulations use the term to mean different things, but it pointed out that 38 U.S.C. 38 U.S.C. §§ 1110 and 1131 (the statutes underlying section 3.310 of the regulations) only refer to "disability resulting from" service-connected conditions and do not use the term "aggravation." The Court concluded that interpreting the term "aggravation" for section 3.310 purposes in the way advocated by the Secretary would add an additional requirement for compensation that is not found in the underlying statutes. The Court found that the plain language of those statutes and section 3.310 indicate that any increase in disability constitutes "aggravation" for purposes of secondary service connection.

Also, and importantly, the Court rejected the suggestion by the Secretary that "any incremental increase in disability must be measurable, and to be measurable, the incremental disability must be

permanent." The Court noted that "[c]onditions may wax and wane in severity, but nevertheless be medically ascertainable as an incremental increase in disability, and hence compensable." The Court also rejected the suggestion that "measurable" implies a numerically quantifiable measurement by noting that the disability ratings schedule is replete with conditions that are not evaluated by any numerical measurement."

The Court set aside the Board decisions at issue and remanded the matters for readjudication under the appropriate legal standard. Finally, the Court denied the motion for class certification with the expectation that "the VA [would] take steps to immediately implement this precedential decision throughout the VA system and apply it to all cases pending before the VA where the appropriate legal standard for assessing the incremental increase in disability of a nonservice connected disability resulting from a service connected disability is relevant."

Judge Greenberg concurred in the merits of the decision with regard to the veterans before the Court, but dissented from the denial of class certification. He expressed concern with the "issue of systemic VA delay" and believed class certification would lead to a faster "implementation of the Court's holding to a broader class of veterans."

Kerry Hubers is Counsel at the Board of Veterans' Appeals.

Court Per Curiam Addresses Definition of Prevailing Party and Substantially Justified in an Unusual EAJA Fees Application

By Andrea MacDonald

Reporting on *Cornell vs. Wilkie*, No. 15-3191(E), (May 31, 2019)

In a per curiam decision, the Court of Appeals for Veterans Claims (CAVC) discussed the definition of "prevailing party" and "substantially justified" in the context of an unusual fee application. Under the Equal Access to Justice Act (EAJA), attorney fees and expenses may be awarded to the "prevailing party" unless the position of the United States was "substantially justified." 28 U.S.C. § 2412(d). In this case, the Secretary challenged the EAJA application of Mr. Moberly, Intervenor. The Secretary contended that Mr. Moberly was not a prevailing party and that the Secretary's position was substantially justified. The Court disagreed and granted Mr. Moberly's EAJA application, finding that there was an alteration in the legal relationship sufficient to make him a prevailing party and that the Secretary's position was not substantially justified.

The case's complicated procedural history at the agency level is only briefly summarized here. Attorney Cornell represented Mr. Moberly in claims for service connection and received a portion of his past-due benefits when VA granted his appeals. She then withdrew from representation of Mr. Moberly.

Mr. Moberly subsequently retained Disabled American Veterans (DAV) as his representative to file a claim for total disability based on individual unemployability (TDIU). VA apparently failed to alter its records to reflect the change in representation, and, after awarding TDIU, sent a second payment to attorney Cornell based on past due benefits. Mr. Moberly appealed this disbursement to the Board of Veterans' Appeals (Board). The Board held that attorney Cornell was not entitled to the second fee payment. Attorney Cornell then appealed to the Court. While her appeal was pending, VA paid Mr. Moberly the amount previously withheld, duplicating the previous payment to attorney Cornell.

Mr. Moberly moved to intervene in attorney Cornell's appeal before the Court, arguing that he retained an interest in attorney Cornell's appeal unless the Secretary waived the right to recoup any payment from him. The Court allowed Mr. Moberly to intervene and, after oral argument, the Court took the unusual step of announcing from the bench

that the Secretary was precluded from recouping any of the payment made to Mr. Moberly. This holding was also included in the Court's published opinion, *Cornell v. McDonald*, 28 Vet. App. 297 (2016), and was affirmed by the Federal Circuit, *Cornell v. Wilkie*, 718 F. App'x 972 (Fed. Cir. 2018). Mr. Moberly then sought EAJA fees for his participation in the underlying appeal.

The Secretary disputed that Mr. Moberly was a prevailing party because there was no change in the legal relationship between the Secretary and Mr. Moberly. "The appellate litigation of this claim ended just as it began," the Secretary argued, "with a finding that it was the Intervenor, not Appellant, who is entitled to the disputed funds." Mr. Moberly responded that he obtained the specific relief he had requested by intervening, because the Court prohibited the Secretary from recouping any disputed funds from him.

The Court agreed with Mr. Moberly, holding that the Court's order extinguishing the possibility of the Secretary to seek recoupment from Mr. Moberly was an alteration in the legal relationship sufficient to make him a prevailing party. The Court also determined that the Secretary's position was not substantially justified, because the Secretary's refusal to give assurance to Mr. Moberly that he would not be subject to recoupment was not reasonable. The Court noted that such an assurance would have avoided litigation, as Mr. Moberly repeatedly offered to withdraw from the underlying appeal if such an assurance was given.

Finally, the Court rejected the Secretary's challenge to the Court's jurisdiction to order preclusion of recoupment from the bench. The Court found the challenge to be an impermissible collateral attack on a final decision that had been affirmed by the Federal Circuit. Furthermore, the Court held that the bench order was proper because the issue of recoupment was the basis on which Mr. Moberly was permitted to intervene.

Andrea MacDonald is an Associate Director of Education and Programs at Bergmann & Moore, LLC.

Fed. Cir. Addresses the Applicability of Analogous Diagnostic Codes, including DC 5284, to Unlisted Foot Conditions

by Jonathan M. Meyer

Reporting on *Scott v. Wilkie*, 920 F.3d 1375 (Fed. Cir. 2019).

In April 2019, the U.S. Court of Appeals for the Federal Circuit issued a precedential decision in *Scott v. Wilkie*, 920 F.3d 1375, and held that, when evaluating unlisted foot conditions, the Board is required to consider assigning a rating under an analogous diagnostic code (DC), including DC 5284 (addressing "other" foot conditions), even if the Veteran has been assigned a rating for a listed foot disorder.

Mr. Scott originally filed a claim for an increased rating for his bilateral foot disability, characterized by the Regional Office (RO) as pes planus with hallux valgus. During the course of his appeal, a VA examiner noted that he also had plantar fibromas.

In January 2016, the Board increased the Veteran's bilateral foot disability rating to 50 percent. Of note, the Board concluded that a rating under DC 5284 was inapplicable because his pes planus was specifically listed in the DCs pertaining to foot disabilities. Therefore, the Board also determined that it would be impermissible to rate his pes planus by analogy under a different DC.

The Veteran appealed the decision to the CAVC, and the Veterans Court held that the Board's decision was not arbitrary or capricious because (1) the Board had considered the evidence and concluded that DC 5276 (addressing pes planus) most nearly approximated his symptoms, and (2) evaluating plantar fibromas under multiple diagnostic codes would result in impermissible pyramiding.

The Federal Circuit vacated and remanded the CAVC decision, and expressly adopted the CAVC's approach in *Copeland v. McDonald*, 27 Vet. App. 333 (2015) and *Yancy v. McDonald*, 27 Vet. App. 484 (2016). Specifically, the Federal Circuit held that if the Veteran has an unlisted foot disorder (even if it is not due to an actual "injury" to the foot), or, a listed foot disorder and an unlisted condition (as, in this case, pes planus with plantar fibromas), the Board is obligated to consider whether the unlisted disorder should be separately rated under an analogous DC, including DC 5284. Applying this reasoning, the Federal Circuit found that, while the Board had noted that the Veteran had plantar fibromas, it had not considered whether he was entitled to a separate rating for this unlisted condition. Instead, the Board had essentially treated the Veteran's plantar fibromas as a symptom of his pes planus without analyzing whether the plantar fibromas constituted a separate, unlisted condition warranting a separate rating.

The Federal Circuit acknowledged that the Board did in fact consider DC 5284, but the Board's analysis was focused solely on the applicability of DC 5284 to the Veteran's listed pes planus. It did not consider whether the Veteran's unlisted plantar fibromas could be separately rated by analogy, including under DC 5284.

Jonathan M. Meyer is Associate Counsel, Board of Veterans' Appeals.

Court Overturns *Carpenter* EAJA Offset Rule

by Meghan Brooks

Reporting on *Ravin v. Wilkie*, No. 16-2057 (Mar. 20, 2019).

In a major win for the private veterans' bar, Judge Toth, writing for a six-judge majority of the *en banc* Court, held in *Ravin* that fees awarded by the Court under the Equal Access to Justice Act (EAJA) need not be offset against contingent fees subsequently resulting from a decision by the VA. The decision squarely overturns almost twenty years of precedent, sparking dissent on *stare decisis* grounds from Judge Pietsch, and a blistering dissent on policy grounds from Judge Falvey. Judge Meredith did not participate in the case.

The central point of divergence between the older rule from *Carpenter v. Principi* and the newly articulated *Ravin* rule is the Court's reading of EAJA's "same work" provision, which requires an attorney to return the smaller of the fees collected for the "same work" to her client. Pub. L. No. 102-572, 106 Stat. 4506, § 506(c). In 2001, the *en banc* Court had held in *Carpenter* that because the meaning of "same work" was ambiguous, the pro-veteran canon of construction required the court to "conclude that the representation of a claimant in pursuit of a claim at all stages of the adjudication process is the 'same work,' regardless of the tribunal before which it is performed." *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001). As a result, for almost two decades, a representative who collected attorneys' fees under EAJA for work at the CAVC resulting in a remand to the Board was required to return that award to her client if she later collected a contingency fee, derived from up to 20% of the "total amount of any past-due benefits awarded on the basis of the claim" ("section 5904" fees) by the VA, that exceeded the EAJA amount. 38 U.S.C. § 5904(d)(1)-(2).

Ravin emerges out of veteran Ira L. Easterling's appeal of a total disability rating based on individual unemployability (TDIU). In 2009, attorney Sean A. Ravin entered into a representation agreement covering Mr. Easterling's appeal to the CAVC. The Court remanded the claim in May 2011, and Mr. Ravin collected EAJA fees. Mr. Ravin and Mr. Easterling then entered a second agreement for representation before the Board on a contingency fee basis, specifically agreeing that this representation would not be considered the "same work" as representation before the CAVC. After the Board granted TDIU, Mr. Ravin challenged the EAJA offset from his section 5904 fee payment. Topeka veterans' attorney Ken Carpenter — the very same Carpenter as in the 2001 case caption — represented

Mr. Ravin before the Court. National Organization of Veterans' Advocates filed an amicus brief also challenging *Carpenter*, while the Secretary defended the case primarily on *stare decisis* grounds.

In overturning *Carpenter*, the Court first relied on contemporary dictionaries to find the meaning of "same work" in § 506(c) plain, holding that "same" means identical, and "work" "focuses on the discrete actions of the attorney rather than the broader context of those actions—such as a claim or case. Following the appellant's argument, the Court next looked to interpretation of a near-identical provision in the Social Security context, which requires no similar EAJA offset, and found that it "confirms what the plain language indicates: representation before a court is not the "same work" as representation before an agency." Finally, questioning whether the pro-veteran *Gardner* canon applies to a "statute of generally applicability at all," the Court found that in the decades since *Carpenter*, Congress has weakened its "overly paternalized" strictures on veterans' representation agreements, resulting, perhaps, in higher levels of attorney representation overall.

Although both dissents rejected the majority's "plain reading" of § 506(c) and its analogy to the Social Security context, the policy gulf between the dissenting and majority positions is most striking. Judge Pietsch defended the *Carpenter* position as in line with an intentionally "paternalistic veterans' benefits system. It was Judge Falvey, however, who directly disputed Ravin's and the amicus's argument that the *Carpenter* rule resulted in less attorney representation before the Board, and he contended that, because work on remand involves the same claim file and the same legal theories, an attorney's work at the CAVC is in fact substantially the same as his work at the Board, making a full section 5904 award both duplicative and "unreasonable." Judge Falvey stated that he might have supported a rule that requires the attorney to identify precisely what of his work on remand is distinct, but he concluded, "I will not join the majority in judicially amending a statute to make it less favorable to veterans.

Meghan Brooks graduated from Yale Law School in May 2019, where she was a member of the Veterans Legal Services Clinic. This fall, she will join New York Legal Assistance Group as a Justice Catalyst fellow, where she will bring strategic litigation on behalf of low-income veterans, including at the CAVC.

Court Panel Finds that Board Must Address Apparent Deficiencies of Oft-Cited IOM Report

by Donald M. Badaczewski

Reporting on *McCray v. Wilkie*, No. 17-1875, (June 18, 2019).

In *McCray v. Wilkie*, the Court of Appeals for Veterans Claims (Court) vacated and remanded a June 2017 Board decision that had denied service connection for hearing loss disabilities. In a unanimous panel decision issued by Judges Davis, Schoelen, and Bartley, the Court held that the Board erred in its denial for left side hearing loss when it relied on a negative medical opinion but failed to assess the impact of apparently qualifying or contradictory statements found in a medical text relied upon by that medical opinion. Moreover, the Court ruled that the appellant's failure to include an argument in a 2015 Joint Motion for Remand (JMR) did not preclude him from raising that argument in a subsequent appeal to the Court. The Court also found that the Board erred in connection with the denial of service connection for right ear hearing loss, as it failed to provide sufficient reasons and bases for rejecting a private examination report showing a current hearing loss disability for VA purposes.

In 2014 the Board denied service connection for Mr. McCray's bilateral hearing loss, which he timely appealed. Pursuant to a 2015 JMR, the Court vacated the 2014 Board decision and remanded for the Board to consider a private medical opinion. In 2017, the Board again denied service connection for bilateral hearing loss. With respect to service connection for left ear hearing loss, the 2017 Board denial relied on the negative opinion of a VA audiologist, who cited to a 2005 Institute of Medicine (IOM) report entitled *Noise and Military Service: Implications for Hearing*

Loss and Tinnitus for the proposition that noise-induced hearing loss occurs immediately and there is no scientific support for delayed onset noise-induced hearing loss. The Board also denied service connection for right ear hearing loss, as VA examination reports showed no current right ear hearing loss disability for VA purposes. In reaching this decision, the Board assigned limited probative weight to a private medical report and opinion that showed a bilateral hearing loss disability for VA purposes and that related this bilateral hearing loss disability to appellant's military service.

The Court first determined that it would consider the merits of the appellant's argument regarding the asserted deficiencies in the 2005 IOM report, even though that argument had not been included in the 2015 JMR. The Court cited its holding in *Carter v. Shinseki*, 26 Vet. App. 534 (2014) for the proposition that "when a represented veteran enters into a JMR that contains clear and precise directions for the Board, the JMR provides guidance as to the issues to be addressed on remand." The Court then distinguished the present facts from those in *Carter*, observing that the 2015 JMR contained a provision that authorized the appellant to present additional argument, and that also required the Board to reexamine the evidence of record and, if the Board felt it necessary, to seek other evidence. The Court explained that, while a JMR may narrow the Board's focus on remand, the parties' agreement that the Board committed a specific error does not foreclose a claimant from making additional arguments if a JMR provides for the submission of additional argument. Additionally, the Court observed that the appellant in *Carter* was represented by the same attorney throughout Board and Court proceedings, while Mr. McCray had a different attorney when he agreed to the 2015 JMR and he was not represented by counsel at all when his appeal was remanded to the Board.

Proceeding to the merits, the Court held that qualifying or contradictory statements in underlying medical text evidence may affect the probative value or adequacy of a medical opinion. Specifically, the Court noted appellant's argument that, while the 2005 IOM report had found delayed onset hearing loss unlikely based on available data, the same report had also stated that that there was insufficient evidence to determine whether permanent delayed onset hearing loss can develop and that definitive studies on that issue had not been performed. The Court held that where the issue of a contradiction or qualification in an underlying medical text is raised by a claimant or by the record, the Board must address this deficiency. The Court observed that, if the Board requires assistance in understanding or interpreting underlying medical text evidence, it may seek clarification from the author of that opinion or from another source. But the Court reminded the Board to keep in mind the benefit-of-the-doubt doctrine when considering unsettled medical questions. The Court vacated the Board's denial of service connection for left ear hearing loss and remanded that issue so that the Board could address whether and to what extent the identified contradiction in the 2005 IOM report affected the probative value and adequacy of the negative VA medical opinion.

The Court also vacated and remanded the Board's denial of service connection for right ear hearing loss, finding that the Board erred in summarily rejecting private audiogram results showing a right ear hearing loss disability for VA purposes. The Court noted that the only deficiency of the private audiogram that the Board identified was that it was at odds with a VA audiogram. The Court held that pursuant to the rule in *Savage v. Shinseki*, 24 Vet. App. 257, 264 (2011), the Board was obliged to seek clarification of the private audiogram results or explain why such development was not required. The Court explained that the Board could not, without first laying a foundation, implicitly conclude that the difference between the private and VA audiogram results was the result of the private examiner not following VA protocol.

Donald M. Badaczewski is Associate Counsel at the Board of Veterans' Appeals.

The CAVC Applies the 48-Month Limit on Education Benefits Found in 38 U.S.C. § 3695 to Chapter 33 Benefits that Run Out Mid-Semester

by Stuart J. Anderson

Reporting on *Carr v. Wilkie*, No. 16-3448 (April 16, 2019).

The daughter of a veteran appealed a Board decision terminating education benefits under a provision that limits education benefits obtained under two or more GI Bill programs to 48 months, notwithstanding another provision that authorizes the extension of education benefits for a recipient whose entitlement expires while a school term is under way.

Ms. Carr's father served in the U.S. Air Force on active duty from 1976 to 1980 and again as a reservist from 2002 to 2009. Through these two periods of service, he earned educational benefits under both chapter 34, the Vietnam Era GI Bill, and chapter 33, the Post-9/11 GI Bill. Of these benefits, Mr. Carr used 41 months and 11 days under chapter 34 and transferred the remaining 6 months and 19 days under chapter 33 to Ms. Carr. She used these benefits to pay her university tuition.

At the beginning of one semester, Ms. Carr had exactly one day of benefits remaining under her allotment. VA paid for the first day of classes but no more. The regional office informed Ms. Carr that she had run up against the 48-month cap of benefits set out in 38 U.S.C. § 3695, which limits the aggregate period for which any person may receive assistance under two or more GI Bill provisions to 48 months. Ms. Carr appealed to the Board and argued that, because she had already begun classes, 38 U.S.C. § 3031(f)(1) obligated VA to extend her benefits until the end of the semester. Section § 3031(f)(1), incorporated into chapter 33 by 38 U.S.C. § 3321(b)(2), provides that, if a period of individual entitlement expires during a semester, such period "shall be extended to the end of the quarter or semester." The Board ruled against her in a July 2016 decision and she appealed to the CAVC. The Court also allowed Mr. Carr to intervene, as he had covered her tuition for the remainder of the semester in question.

The majority of the CAVC panel (Judges Bartley and Toth) recognized an apparent conflict between § 3695 and § 3031(f)(1), but concluded that the conflict was only apparent and that § 3695, with its strict limit to 48 months of benefits, controlled where education benefits were awarded under two or more GI Bill provisions. The Court based this on three rationales: Congress expressly subjected chapter 33 benefits to the 48-month cap in § 3695; § 3031(f)(1) is not among the two exceptions contained within § 3695; and Congress did not intend § 3031(f)(1) to repeal § 3695 in situations such as this.

The CAVC began by discussing the four relevant provisions and their interplay. As noted above, § 3695 limits the aggregate period for which any person may receive assistance under two or more GI Bill provisions to 48 months, and § 3031(f)(1) establishes that if a period of individual entitlement expires during a semester, such period "shall be extended to the end of the quarter or semester." The CAVC identified 38 U.S.C. § 3321(b)(2) as the "bridge" linking the extension in 38 U.S.C. § 3031(f)(1) to the benefits in chapter 33, inasmuch as it incorporates § 3031(f)(1) into chapter 33 as to the time limits for benefits. The CAVC noted, however, that § 3321(b)(2) also incorporates § 3312, which both limits the time for chapter 33 benefits and subjects that limit to both § 3695 and § 3031(f)(1). From this, the CAVC concluded that Congress intended both provisions to apply, such that § 3695 would cap education benefits at 48 months, even where § 3031(f)(1) would otherwise extend the benefits until the end of a semester. As a matter of statutory interpretation, the CAVC chose this reading because the court had a duty to adopt an interpretation of two potentially contradictory statutes that allowed them to coexist.

The CAVC next explained why § 3031(f)(1) was not an exception to § 3695, looking first to the purpose of § 3695. The court considered that Congress enacted § 3695 to coordinate the benefit regimes in the individual chapters: "it was meant to stand

above the individual chapters and coordinate them when gaps or conflicts arose." To accomplish this, § 3695(a) provides an exhaustive list of programs, including chapters 33 and 34, and precludes recipients who qualify under two or more of the listed programs from aggregating their benefits beyond 48 months. The Court noted that there are two explicit exceptions to this limit, both included in chapter 36 and both enacted after § 3695. The CAVC concluded from this that when Congress intended an exception to § 3695 it drafted one, relying on the canon of statutory construction, "the expression of one thing implies the exclusion of others."

Finally, the CAVC determined that § 3031(f)(1) had not implicitly repealed the 48-month limit found in § 3695. The Court began by noting the Supreme Court's "aversion" to recognizing implicit repeals. Congress did not show any intent to repeal § 3695 under either of two classes of implicit repeal recognized by the Supreme Court, (1) where the new statute covers the whole subject area of the old one and is intended as a substitute, and (2) where the new statute stands in "irreconcilable conflict" with the old. The CAVC rejected relevance of the first class out of hand. As to the second theory of implicit repeal, the CAVC noted that "irreconcilable conflict" was defined narrowly, and the two provisions here could be read in a way that allowed them to coexist. Because they could coexist, the Court consider itself obliged to read them so that they did (as discussed above), and the provisions were thus not in "irreconcilable conflict" and there was no implicit repeal.

In a dissenting opinion, Judge Pietsch wrote that the CAVC should have adopted another interpretation that allowed both provisions to operate: that § 3695 provided the general limit for education benefits while § 3031(f)(1) would allow an extension of those benefits in cases where they ran out mid-term. This theory of coexistence was, like the majority's, based on statutory interpretation grounded in an understanding of how that coexistence might operate, the structure and context of the provisions, and Congressional intent. This interpretative question, in the dissenting view, should have been resolved in the manner more favorable to the veteran, that is, to grant the benefit of the extension to all beneficiaries.

Maj. Stuart J. Anderson is a member of the Court of Appeals Litigation Group at the Department of Veterans Affairs Office of General Counsel, currently on active duty at the Air Force Legal Operations Agency, Appellate Defense Division.

Court Sorts Out Presumptions of Mailing an SOC

by Amanda J. Baker

Reporting on *Crumlich v. Wilkie*, No. 17-2630 (June 6, 2019).

In *Crumlich*, the Veteran appealed a Board determination that he had not filed a timely substantive appeal. The case focuses on the provision of 38 C.F.R. § 20.302(b)(1) that presumes that the date of the statement of the case (SOC) notice letter is the same as the date of the SOC. Based on this provision, the Board found that, because VA received the Veteran's substantive appeal more than 60 days after the date printed on the SOC, the appeal was untimely.

On appeal, the Veteran argued: (1) VA's failure to date the cover letter that accompanied the SOC denied him due process; (2) the 60-day time limit to file a substantive appeal should not apply because VA failed to comply with its own procedures, which rebuts the presumption of regularity; and (3) the Board erred in declining to waive the issue of timeliness.

Initially, the CAVC noted that the regulation at issue was amended February 19, 2019 pursuant to the Veterans Appeals Improvement and Modernization Act of 2017 (AMA). Thus, the decision addresses only laws and regulations in effect at the time the substantive appeal was filed in this case, August 2015, and applies only to cases not affected by the AMA.

The CAVC then determined that the presumption in 38 C.F.R. § 20.302(b)(1) applied, rather than the more general presumption of regularity "that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations."

The CAVC then invalidated that part of 38 C.F.R. § 20.302(b)(1) which presumes that the date of the SOC notice letter is the same as the date of the SOC itself. The CAVC reasoned that, because the presumption-of-mailing provision does not ensure that all claimants receive 60 days from the date of mailing of the SOC to file a substantive appeal, as required by 38 U.S.C. § 7105(d)(3), the regulatory provision conflicted with its authorizing statute. Thus, the CAVC set aside the Board's finding that the substantive appeal was untimely and vacated the Board decision on appeal.

Having invalidated the regulatory presumption, the CAVC assumed, without deciding, that the more general presumption of regularity would now apply, and that VA could rely on it to assert that it mailed the SOC on the date of the SOC. The CAVC then addressed whether the Veteran had rebutted the presumption of regularity.

VA asserted that the regular process is to date the SOC notice letter with the same date as the SOC itself but conceded that sometimes notice letters are dated after the SOC. As it is undisputed in this case that the SOC notice letter was undated, VA conceded that the regular process was not followed and proper mailing could not be established. The CAVC emphasized that it was not making a finding that VA has a regular process as required for the presumption of regularity to apply, but rather, based on the undisputed fact that the SOC notice letter was undated, there was sufficient evidence for the Veteran to rebut the presumption of regularity.

In a concurring opinion, Judge Pietsch joined the majority in full and expressed frustration regarding VA's refusal to waive the 60-day filing period, despite the undated SOC notice letter, causing waste of resources. Judge Pietsch concluded, "If the paternalistic nature of VA is to be more than mere platitude, cases like this should be handled in a more empathetic manner."

Amanda J. Baker is Associate Counsel at the Board of Veterans' Appeals.

Failure to Automatically Provide Examination Report Does Not Violate Duty to Assist or Due Process

by Jamie Tunis

Reporting on *Martinez v. Wilkie*, No. 17-1551 (May 21, 2019).

In *Martinez v. Wilkie*, a case involving denial of compensation for sleep apnea based, the CAVC addressed whether the Secretary's failure to automatically provide a claimant with a copy of a VA medical examination report violates either the duty to assist under 38 U.S.C. § 5103A (2012) or the Due Process Clause of the Fifth Amendment to the U.S. Constitution. The Court determined that in this case neither section 5103A nor the Due Process Clause required the Secretary to automatically provide the veteran with a copy of the VA medical examination report before rendering the adverse decision on his claim.

Mr. Martinez served in the U.S. Army from January 1969 to December 1970, and from September 1981 to April 1988. He filed his claim for sleep apnea in May 2005, and in January 2016 he underwent a VA examination. The January 2016 VA examination report addressed whether his sleep apnea was etiologically related to his service-connected post-traumatic stress disorder (PTSD), concluding that it was not.

In a May 2016 Supplemental Statement of the Case (SSOC) the VA Regional Office (RO) continued the denial of the veteran's claim, discussing and relying on the January 2016 VA examination report and concluding that the record showed no evidence connecting sleep apnea to service or a service-connected disability. The SSOC was sent to both

Mr. Martinez and his counsel with a notification that they had 30 days to submit additional information and evidence. The case was then returned to the Board's docket, where Mr. Martinez submitted a written brief arguing that sleep apnea should be secondarily service-connected to PTSD because medical treatise evidence attached to the brief showed a causal relationship between the two conditions. However, at no point did the Veteran ask VA to provide him a copy of the January 2016 VA examination report.

In January 2017, the Board denied compensation for sleep apnea. The Board found the January 2016 VA examination report highly probative and said that Mr. Martinez's medical treatise evidence did not support his claim. He appealed the Board's decision.

On appeal, Mr. Martinez argued that: (1) 38 U.S.C. § 5103A requires the Secretary to automatically provide the claimant with a copy of a VA medical opinion whenever the Secretary intends to rely on the opinion to deny a claim; and (2) VA deprived him of his constitutional right to procedural due process by not automatically furnishing him with a copy of the VA medical opinion.

38 U.S.C. § 5103A(a)(1) states that the Secretary "shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." The veteran argued that the word "obtaining" is commonly defined as "getting or acquiring something," which, therefore, requires the VA to automatically give a copy of a medical opinion it obtains to a claimant. He further asserted that this interpretation aligns with both Congress's clear intention for the Secretary to assist a veteran and with the "theme of mutual help" that is woven throughout section 5103A.

The Secretary argued that under the circumstances of this case and in the context of the overall statutory scheme, the language of section 5103A plainly and unambiguously does not require VA to ensure that a claimant receives a copy of claims file documents like a medical examination report, absent a written request. In the alternative, the Secretary contended that the language of section 5103A is ambiguous and that the Court should defer to the Secretary's reasonable statutory interpretation.

The Court rejected the veteran's contention that section 5103A unambiguously requires the Secretary to provide a copy of a medical examination report whenever VA intends to rely on the examination to deny a claim. The plain language of the statute does not include such a requirement, but instead sets out the Secretary's general duty to assist and is silent on how or when the Secretary must distribute the records VA procures on the claimant's behalf. Additionally, the Court noted that the statute does not prohibit the Secretary from requiring a written request for such records.

The Court also found appellant's construction of section 5103A to be inconsistent with the overall statutory scheme, citing section 5103, "Notice to claimants of required information and evidence," and section 5104, which requires the Secretary to notify a claimant of adverse decisions with a statement of reasons or bases and a summary of the evidence relied on. The Court pointed to Congress's use of past tense throughout section 5104(b), which the Court interpreted as Congress's intent to provide *post-decisional* notice of the various considerations that influenced the rating decision. The Court found that such statutes read together demonstrate Congress's intention for the Secretary to gather evidence on a claimant's behalf and to notify a claimant of the substance of this evidence, but "[i]n none of these sections did Congress include a requirement that the Secretary furnish a copy of an examination obtained pursuant to the duty to assist."

The Court also looked to specific provisions that require the Secretary to send a claimant a copy of a medical examination report under certain circumstances. For example, sections 5109 and 7109 specifically entitle the claimant to receive a copy of a medical opinion obtained from an expert outside of VA. Additionally, sections 5701 and 5702 address the method used to obtain certain documents and direct that any person who would like a copy of a record that may be disclosed under section 5701 must "submit to the Secretary an application in writing for such copy." Moreover, section 5701 defines certain

circumstances in which VA must disclose all files, records, reports, and other papers and documents. The Court concluded that the veteran's broad construction of section 5103A conflicts with such provisions, and that such "broad reading of section 5103A would render superfluous, if not void, the specific statutory requirements set out in sections 5109, 5701, 5702, and 7109."

The Court further found Mr. Martinez's interpretation of section 5103A to be at odds with the "theme of mutual help," which he himself had asserted is part of the duty to assist. The Court cited *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991) ("[t]he duty to assist is not always a one-way street") and *Hilkert v. West*, 12 Vet.App. 145, 151 (1991) (en banc) (quoting *Gobber v. Derwinski*, 2 Vet.App. 470, 472 (1992)) (the duty to assist "does not encompass 'a duty to prove a claim with the claimant only in a passive role'."). In light of these principles, the Court noted that in this case, Mr. Martinez was made aware of the adverse 2016 VA medical examination report through the May 2016 SSOC, and if he had wanted a copy, he should have requested one rather than passively standing by.

The Court also found no violation of constitutional due process in this case. Although, veterans have a strong property interest in their applications for benefits that is protected by the Fifth Amendment's Due Process Clause, the Court concluded that there is "little risk" that the Secretary's practices here erroneously deprived a veteran of deserved disability compensation. The Court pointed out that the Secretary provided Mr. Martinez with detailed notice of the adverse evidence via the SSOC and provided him several meaningful opportunities to be heard. The veteran's argument failed to show how the additional safeguard of automatically mailing a copy of a medical examination report to every claimant could decrease the risk of erroneous deprivation of benefits. The Court concluded that in this case, the veteran received due process of law, and noted that its holding was consistent with *Prickett v. Nicholson*, 20 Vet.App. 370 (2006), in which the Court similarly held that because the veteran was provided notice, a meaningful opportunity to develop her claim, and several chances to challenge VA's decision, there was no violation of due process.

Last, the Court found that the Board's decision must also be affirmed because the Veteran did not demonstrate prejudice. The Court noted that an appellant bears the burden of demonstrating prejudicial error on appeal and a remand is not warranted when the appellant does not demonstrate how an error could have made a difference in the outcome of the case. Mr. Martinez failed to show he was prejudiced by VA's failure to provide him with a copy of his medical examination report, as he does not contend that the examination was inadequate. The Court held that the Veteran's argument that the right of access to government evidence is so basic that it can never be considered as harmless error was foreclosed by the Federal Circuit's determination that harmless error analysis is applicable to such allegations of due process violations.

Jamie Tunis is Special Counsel in the Office of Knowledge Management at the Board of Veterans' Appeals.

Court Addresses Whether VA May Revise Rating Decisions on the Basis of CUE While Direct Appeals are Pending

by Patrick M. Johnson

Reporting on *Young v. Wilkie*, 31 Vet. App. 51 (2019).

Mr. Young was granted service connection for degenerative disc disease of the cervical spine in a June 2012 rating decision. The rating decision assigned a 10 percent rating under diagnostic code 5243-5237 from 2003 to 2011, and a 40 percent rating thereafter. Mr. Young submitted a Notice of Disagreement with the June 2012 rating decision, seeking a 40 percent rating from 2003. In a March 2013 decision, a Decision Review Officer (DRO) determined that there had been Clear and

Unmistakable Error (CUE) in the June 2012 rating decision and proposed a reduction of the 40 percent rating to 20 percent. The reduction was effectuated in a June 2013 rating decision. In April 2017, the Board determined that the revision of the June 2012 rating decision on the basis of CUE had been proper because the evidence of record at the time of the decision did not show that Mr. Young suffered from ankylosis of the cervical spine.

The veteran appealed to the CAVC, arguing that the Agency of Original Jurisdiction (AOJ) was not permitted to revise the June 2012 rating decision on the basis of CUE because that rating decision was on appeal and thus not final. He argued that only a "final and binding" decision may be revised on the basis of CUE under 38 U.S.C § 3.105(a), and the rating decision at issue was not "final" because a "finally adjudicated claim" is one that is either not appealed within the time allotted by regulations or disposed of on appeal, pursuant to 38 U.S.C § 3.160(d). Mr. Young also argued that VA erred by not following the procedures set forth in 38 C.F.R. 3.105(e).

The Court affirmed the Board decision, holding that the AOJ may properly revise a rating decision in appellate status on the basis of CUE. The Court stated that "finality" is defined differently depending on the context and that, given the textual differences in the two regulations, there is no apparent reason to think that the different language used in 38 U.S.C § 3.160(d) and 38 U.S.C § 3.105(a) mean the same thing. While § 3.160(d) provides the definition of a finally adjudicated claim," the Court observed that § 3.105(a) says that "final and binding" decisions are subject to revision based on a finding of CUE. Instead of attributing the definition of a "finally adjudicated claim" to a "final and binding" decision, the Court considered the language of 38 U.S.C § 3.104(a), which provides that a decision of one regional office "shall be final and binding" on all other regional offices "as to conclusions based on the evidence on file" at the time VA issues notice of its decision. The Court held that "final and binding" in the context of §§ 3.104(a) and 3.105(a) "does not mean unappealable as Mr. Young contends; rather, that the AOJ's review is complete and the AOJ (or another AOJ) cannot reach a different decision on the same evidence," except as otherwise provided.

To this point, the Court noted that § 3.104(a) provides that "[a] final and binding agency decision shall not be subject to revision . . . except as provided in § 3.105 and § 3.2600," which refer to procedures for revising prior rating decisions and indicate that prior issued rating decisions are subject to revision based on CUE even if NODs have been filed, respectively. Further, § 3.2600(e) states that such a revision may be made even if it is disadvantageous to the claimant.

The Court said that the appellant's arguments that VA is not permitted to revise appealed and pending or appealable rating decisions on the basis of CUE overlooked two considerations. First, VA's regulations specifically allow VA to do so. Second, the case authorities relied on by Mr. Young referred to determinations that claimants, rather than VA, may not collaterally attack rating decisions until the appeal period has passed. The Court explained that, where a claimant wishes to challenge a rating decision, he or she should do so on direct appeal rather than through collateral attack because the standard of review is less stringent and more advantageous to the claimant. The Court also noted that it is more efficient and beneficial for claimants for VA to correct obvious errors before waiting for the one-year appeal period to pass and then pursuing an overpayment of benefits.

The Court also determined that there was no error in VA's failing to comply with the procedures set forth in 38 C.F.R. § 3.105(e). The Court held that the provisions of § 3.105(e) were not applicable in this case because the RO action wasn't a "reduction" based on later evidence showing a change in condition, but a revision based on evidence of record at the time the original decision was issued.

Judge Pietsch concurred with the outcome but disagreed with the majority's interpretation of the phrase "final and binding" in § 3.105(a). She opined that the meaning of the phrase "final and binding" pursuant to 38 C.F.R. § 3.105(a) should not have a different meaning based on who is seeking to invoke it. She stated that such an interpretation was not

proper and was unnecessary to determine the outcome of the present case. She noted that § 3.2600(e) specifically allows VA to revise a rating decision in appellate status in the manner that it did, regardless of the definition of "final and binding" in § 3.105(a).

Patrick M. Johnson is counsel at the Board of Veterans' Appeals.

CAVC Declines to Extend Cancellation of Recoupment of Overpayment to Lump-Sum Benefits Awards

by Jillian Berner

Reporting on *Casey v. Wilkie*, No. 18-1051 (June 26, 2019).

In *Casey v. Wilkie*, the Court determined that VA's recoupment of attorney's fees erroneously paid to the recipient of accrued VA benefits as part of a lump-sum award of retroactive pay does not result in a "reduction" of the benefits according to 38 U.S.C. § 5112(b)(10). The statute at issue, 38 U.S.C. § 5112(b)(10), allows a claimant to avoid recoupment of an overpayment if an erroneous award based solely on administrative error was created from an award of compensation, DIC, or pension benefits and the overpayment was based solely on administrative error. The Court held in *Casey* that the statute does not apply to a one-time lump-sum payment rather than an ongoing payment.

Nettie Casey, the appellant, was married to veteran Jared D. Casey. In October 2012, the VA granted certain claims for benefits filed by the veteran. In January 2013, the veteran died. In February 2013, Mrs. Casey entered into an attorney-client relationship with her current counsel and notified VA in March 2013. The fee agreement specified that Mrs. Casey would pay her attorney 20% of any award she received and authorized VA to withhold the fee and pay the attorney directly.

On June 12, 2013, Mrs. Casey applied for dependency and indemnity compensation (DIC) benefits, and VA awarded them on June 14, 2013, effective January 7, 2013. In July 2013, VA substituted Mrs. Casey as the claimant and granted her claim for accrued benefits in the amount of $91,066. The retroactive payment of accrued benefits was deposited into Mrs. Casey's bank account that month.

In October 2014, VA informed Mrs. Casey that her counsel had notified VA that VA had not withheld attorney's fees from the accrued benefits award. VA proposed that an overpayment of $18,213.20 had been created for the unpaid attorney's fees but informed Mrs. Casey that she could pay that sum directly to her attorney to avoid creation of an overpayment with VA.

In February 2015, without response from Mrs. Casey, VA informed her that it had created an overpayment of $18,213.20 and that it planned to withhold funds from her monthly DIC benefits. VA informed her that she had a right to request a waiver of the overpayment. She did not do so. In September 2015, Mrs. Casey filed a Notice of Disagreement and asserted that the overpayment was created by sole VA administrative error, citing 38 C.F.R. § 3.500(b)(2). That regulation states:

> The effective date of a rating which results in the reduction or discontinuance of an award will be in accordance with the facts found except as provided in § 3.105. The effective date of reduction or discontinuance of an award of pension, compensation, or dependency and indemnity compensation for a payee or dependent will be the earliest of the dates stated in these paragraphs unless otherwise provided. Where an award is reduced, the reduced rate will be effective the day following the date of discontinuance of the greater benefit.

The regulation states that the effective date for an award based solely on administrative error or error in judgment is the date of the last payment of the award.

In March 2017, the Board of Veterans' Appeals found that the $18,213.20 overpayment was validly created. The Board found that no "reduction" occurred to prevent the creation of the overpayment because there was no change in circumstance and because VA had reduced a lump-sum payment, not an ongoing benefit payment. The Board acknowledged that the VA action had been clearly erroneous but that the erroneous distribution was not a "reduction" under the statute which would lead to the improper creation of an overpayment. Finally, the Board found that any error in distribution was not solely administrative because Mrs. Casey knew or should have known that the payment was erroneous. Mrs. Casey appealed to the Court.

Before the Court, Mrs. Casey argued that the "reduction" triggering the application of 38 U.S.C. § 5112(b)(10) was the reduction of her ongoing payments to repay the amount owed from the lump sum payment. At oral argument, her counsel maintained that the statute would still apply even if no ongoing payments were made. The Court clarified that Mrs. Casey had received accrued benefits in the amount of $91,066, which should have been the source of the attorney's fees. She also received ongoing DIC benefits, from which the overpayment was recouped. Based on 38 U.S.C. § 5314(a), the Court held that the reduction of accrued benefits was pertinent to Mrs. Casey's appeal and limited its review to the reduction of that payment.

Using statutory interpretation, the Court looked to the language of 38 U.S.C. § 5112(b)(10) and determined that a grant of accrued benefits resulting in a lump sum payment constitutes compensation, DIC, or pension under the statute. The Court noted that Congress did not define "reduction" but held that the term, using the ordinary meaning, denoted a diminishment of an amount. Using that definition, the Court held that the grant of accrued benefits could not be reduced; rather, VA could recover an excess amount paid to Mrs. Casey. VA's ability to allocate certain portions of the payment to different payees does not constitute a reduction of the overall amount paid to the claimant. Because one-time payments of accrued benefits are distinct from continuous payments of compensation, DIC, and pension benefits, Congress could not have intended for one-time payments to be subject to reduction under 38 U.S.C. § 5112(b)(10). Given that a reduction did not occur, the Court determined that 38 U.S.C. § 5112(b)(10) does not apply to overcome the otherwise-proper creation of an overpayment. The Court held that VA's failure to direct attorney's fees to Mrs. Casey's counsel was a one-time error, correctable by creating an overpayment, which aligns with the Congressional intent behind the statute in question, which protects recipients of monthly benefits payments, who are more likely affected by such VA error. Accordingly, the Court affirmed the Board's decision.

Jillian Berner is Senior Staff Attorney at the John Marshall Law School Veterans Legal Support Center & Clinic.

Doubling Down: The Need to Address the Issue of Problem Gambling Among Veterans

By Dana Weiner

VA's rating schedule recognizes that symptoms "such as" impaired impulse control are commensurate with a severe disability picture among veterans with psychiatric disabilities.[1] And in fact, research has suggested an association between military service, mental health issues, and problems with gambling.[2] Though little conclusive research exists regarding comorbidity on this topic, in light of the risk problem gambling poses, it is becoming increasingly clear that further inquiry into this association would be beneficial for the veteran community.

What is problem gambling?

Gambling is "risking something of value on the outcome of an event when the probability of winning is less than certain" and involves any betting or wagering, whether or not money is involved, where the outcome is based on chance.[3] Problem gambling is another term for gambling

addiction, and it "includes all gambling behavior patterns that compromise, disrupt[,] or damage personal, family[,] or vocational pursuits."[4] Accordingly, it is defined by the harm that results, not the amounts of money lost or the behavior itself.[5] Though different from substance abuse, in that there is no related act of consumption, an individual who suffers from a problem gambling disorder experiences the same type of high as others can feel from alcohol or drugs.[6] And just like substance abuse disorders, tolerance to gambling can build over time, requiring increasing amounts of gambling to occur to obtain the emotional high, which becomes more difficult to resist.[7]

Problem gaming and the veteran/active duty military community.

Prevalence. It is estimated that one percent of the United States' adult population are pathological gamblers, and an additional two to three percent do not meet the full diagnostic criteria but have gambling issues.[8] Yet the rates of gambling addiction among active duty and veteran populations are "significantly higher" than those of the general population.[9] As of 2015, 840,000 veterans and 36,000 active duty individuals were estimated to suffer from a gambling problem.[10] A 2010 study of 328 individuals revealed that over half of the veteran, active duty, and domestic partner participants suffered from some level of problem gaming.[11]

Access. The degree of access to games of chance affects the degree to which gambling becomes problematic, as does the type of game available. Games that involve a continual fast-paced cycle of the player betting, playing, and then either winning or losing pose a notable risk of not being able to responsibly engage in gambling.[12] The quick process makes it more likely that an individual will spend more money than initially planned, and then will spend even more money trying to recoup any losses.[13] Service men and women confront these temptations. For example, the Department of Defense has placed at least 3,000 slot machines at military installations overseas, generating over $100,000,000 in revenue yearly.[14]

Military culture. Stigmatization of behavioral health treatment, including reported punitive command responses after a service member admits a gambling problem, has contributed to the rate of problem gamblers in the military.[15] Though almost a quarter of the participants in a 2010 study were aware they could seek help from the military for problem gambling, only slightly over five percent of them actually sought such help.[16] The study surmised that the "warrior ethos embraced in the armed forces" could be relevant to the lack of prioritization of seeking treatment for this issue.[17] In fact, over half of the study participants knew an individual on active duty or a veteran whom they assessed as having an issue with gambling, though they were uncomfortable discussing gambling issues with anyone from the military.[18] And in a study conducted of more than one million veterans receiving healthcare from VA, a mere .2% were diagnosed with a gambling disorder, which may reflect a lack of screening, identification, or reporting.[19]

Substance use and mental health disorders. Veterans being treated for PTSD may be as much as 60 times more likely to have a gambling problem than their non-veteran counterparts.[20] Depression rates for veterans with pathological gaming issues has been as high as 76%.[21] Moreover, amphetamine and cocaine use have been associated with problem gambling.[22] In fact, up to a third of veterans in treatment for a substance abuse problem also suffer from a gambling issue.[23] Depression and substance abuse "may be the most common psychiatric conditions associated with gambling disorder," although generalized anxiety disorder and antisocial personality have also been associated with gambling problems.[24]

Though substance use seems to get drastically more public attention, gambling disorders are not much less common. In the United States, as of 2016, substance use disorders were about 3.8 times more common than gambling disorders, while public funding for substance abuse treatment was "about 334 times greater than public funding for all problem gambling services."[25]

Changes in the DSM-5 have shed light on the similarities between the two disorders. With issuance of the DSM-5, gambling disorder has been re-categorized from an "Impulse Control Disorder[ ] Not Elsewhere Classified" to the chapter related to alcohol and other drug use disorders.[26] The prior classification placed gambling disorder with disorders such as trichotillomania, pyromania, and kleptomania, which have little relation to a gambling disorder.[27] The Substance Use and Related Disorders Workgroup therefore decided that the reclassification would be appropriate, as gambling and substance use disorders share similar symptomatology and have been proven to be comorbid.[28]

Suicide. Suicide is the 10th leading cause of death in this country and is of acute concern among veterans.[29] Between 2008 and 2016, over 6,000 veterans committed suicide each year, and in 2016 veterans committed suicide at one and a half times the rate of adults who had not served in the military.[30] After adjusting for age and gender, 26.1 per 100,000 veterans committed suicide as opposed to 17.4 per 100,000 non-veteran adults.[31]

Problem gambling also increases an individual's suicide risk.[32] Problem gamblers have the highest rate of suicide of any addicted group.[33] According to the National Council on Problem Gaming, an estimated that one in five gambling addicts will attempt suicide; this is approximately twice the likelihood with any other addiction.[34]

Need for further meaningful action.

In light of the unique circumstances and challenges presented by service in the Armed Forces, gambling problems can pose a serious concern for service members and veterans.[35] Comorbidity and association with other obstacles that this population faces make problem gambling a serious, and likely under discussed, threat to their well-being.

It is important for clinicians to continue to continue to identify gambling problems among our veteran population, and equally important for those of us who are friends, family, and other sources of support to be aware of gambling issues as they arise. It is to be hoped that the re-categorization of gambling disorder will catalyze increased discourse and study around the issue. For further information on problem gambling and resources, please contact the National Council on Problem Gambling or your local resources.

Dana Weiner is an attorney at Chisholm, Chisholm & Kilpatrick LTD in Providence, RI.

[1] 38 C.F.R. § 4.130.
[2] *See GAO REP.* NO. 17-114 MILITARY PERSONNEL (2017); Robert Hierholzer MD & Ronna Mallios, MPH, *Pathological Gambling in Combat Veterans,* 27 Fed. Pract. 8-15 (2010).
[3] David A. Korn & Howard J. Shaffer, *Gambling and the Health of the Public: Adopting a Public Health Perspective,* 15 J. Gambling Studies, 292 (1999).
[4] National Council on Problem Gambling (NCPG), *FAQ,* https://www.ncpgambling.org/help-treatment/faq; *see* American Psychiatric Association (APA), *What is Gambling Disorder,* https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder.
[5] *Id.*; Saeyed Amir Jazaeri, et al, *Reviewing Two Types of Addiction – Pathological Gambling and Substance Use,* 34 Indian J. Psychol. Med. 5-11 (2012).
[6] NCPG FAQ*, supra*; *see* APA *What is…, supra.*
[7] *See* APA, *What is…, supra.*
[8] *National Council on Problem Gambling, supra.*
[9] National Council on Problem Gambling, *This Veterans Day Make Sure Those Who Served Get The Help They Need To Prevent and Treat Gambling Addiction,* http://www.ncpgambling.org/wp-content/uploads/2015/11/Veterans-Gambling-Addiction-November-2015.pdf.
[10] *Id.*
[11] Jennifer Zorland, et.al, *Gambling and co-occurring health compromising behaviors among past and present military and those in domestic partnerships with service members,* Ga. State U. 2 (2010).
[12] *Gambling and co-occurring health compromising behaviors among past and present military and those in domestic partnerships with service members, supra.*
[13] *Id.* at 6.
[14] *Id.*
[15] *Id.* at 7.
[16] *Id.* at 12.
[17] *Id.*
[18] *Id.* at 8-9.
[19] Seth W. Whiting, et al, *Investigating Veterans' Pre-, Peri-, and Post-Deployment Experiences as Potential Risk Factors for Problem Gambling,* 5 J. Behav. Addict., 2, at

213-20.
[20] An Overview of Gambling and Services in Rhode Island, *Rhode Island Council on Problem Gambling, Presentation by RICPG.*; *see also* Whiting, Seth W.; Potenza, Marc N; Park, Crystal L; Mazure, Carolyn M.; Hoff, Rani A., *Investigating Veterans' Pre-, Peri-, and Post-Deployment Experiences as Potential Risk Factors for Problem Gambling,* J. of Behavioral Addictions, V. 5, Issue 2.
[21] *Id.*
[22] *Id.* at 12.
[23] Disabled American Veterans, Stand Up for Vets Project, *Position Paper on Gambling Problems Among Veterans,* http://www.ncpgambling.org/files/public/Military/DAV_Gambling.pdf.
[24] *Rhode Island Council on Problem Gambling,* An Overview of Gambling and Services in Rhode Island (Nov. 20,, 2018) (unpublished presentation, on file with RICPG); *see also Investigating Veterans' Pre-, Peri-, and Post-Deployment Experiences as Potential Risk Factors for Problem Gambling, supra.*
[25] National Council on Problem Gambling, *2016 Survey of Problem Gambling Services in the United States,* https://www.ncpgambling.org/wp-content/uploads/2019/01/2016-Survey-of-PGS-in-US_FULL-REPORT-FINAL-12-19-2017-1-18.pdf.
[26] Nancy M. Petry, et al, *An overview of an rationale for changes proposed for pathological gambling in the DSM-5,* 30 J. Gambl Stud. 2 (2014), at 493-502.
[27] *Id.*
[28] *Id.*
[29] U.S. Department of Veterans Affairs, *VA National Suicide Data Report: 2005-2016,* September 2018, 1, https://www.mentalhealth.va.gov/docs/data-sheets/OMHSP_National_Suicide_Data_Report_2005-2016_508.pdf.
[30] *Id.* at 3.
[31] *Id.* at 5.
[32] *See* American Psychiatric Association, *supra.*
[33] An Overview of Gambling and Services in Rhode Island, *supra.*
[34] Northstar Alliance, *Addressing Suicide Risk Among Compulsive Gamblers,* https://northstarproblemgambling.org/2013/12/2166/.
[35] Whiting, Seth W.; Potenza, Marc N; Park, Crystal L; Mazure, Carolyn M.; Hoff, Rani A., *Investigating Veterans' Pre-, Peri-, and Post-Deployment Experiences as Potential Risk Factors for Problem Gambling,* 5 J. of Behavioral Addictions 2.

Book Review: *Final Flight, Final Fight: My Grandmother, the WASP, and Arlington National Cemetery*, Erin Miller (4336 Press, 2019), 350 p.p.

by Aaron Moshiashwili

I'm sitting down to write this at about 12:30 on a Saturday morning. At 9 last night, I sat down with my son to read together – him a Star Wars book, me *Final Flight Final Fight*, by Erin Miller. A little bit more than three hours later, my boy long since tucked in, my own bedtime long since passed, I'm fighting to stay awake and finish up the last 20 pages of this book. Traditionally, in my house, staying up till the wee hours to devour a new book in one sitting is reserved for Harry Potter and the like – not nonfiction books about recently-passed legislation. But Ms. Miller has woven a story which is interesting, poignant, educational, and ridiculously difficult to put down.

Actually, I misspeak when I say "A story." Final Flight Final Fight is actually two stories. Three, really, the third sneaked in through the cracks but just as much a part of the tapestry. Final Flight is the story of Elaine Danforth Harmon, a member of the WASP, as well as the story of the Women Airforce Service Pilots as an organization. (One thing this book taught me? "A member of the WASP" is grammatically correct; the word Pilots is already plural, so it's "The WASP," not "The WASPs." Now you know, too!) Final Fight is the story of Elaine Harmon's note upon her death – "I would like to be buried in Arlington Cemetery. Proof of my veteran status is necessary. . ." and what happened after, beginning with a petition and a social media campaign, to interviews and op-eds, and finally to a Congressional sponsor and a law.

Ms. Miller structures the book by interweaving these two threads – the chapters are all titled either "Final Flight" or "Final Fight," and she jumps back and forth between the two stories. This works perfectly;

neither story drags, and you're always excited when the story switches even as you're eager to find out what happens next in the thread you were on. And tying both threads together is the story of how the WASP were promised status as military officers during World War II but never actually granted it, and how in the late 1970s, because of advocates including Elaine Harmon, a law was passed granting them veteran status. Crucially, however, the law only applies to the VA. Arlington National Cemetery is overseen by the Department of the Army. The law granting the WASP veteran status does not apply to eligibility for inurnment in Arlington.

But as I said, this book actually contains three stories – and the third is the glue that makes it impossible to ignore the other two. It is the story of Erin Miller and her Gammy. The raw honesty she brings to their relationship, and her grandmother's end-of-life issues, is something I think will resonate with many readers. I know I can't help but see my own relationship with my Gigi (and the issues she went through leading to her death) in their interactions – as well as the same tough-as-nails Depression era attitude, though my grandmother was not quite a groundbreaking pilot.

Ms. Miller doesn't shy away from talking about herself, as well. Three things I learned about Erin Miller from this book:

- She is better at social media than I'll ever be, even though we were both born in the 1970s;
- She spends a LOT of time in her pajamas;
- She – like her grandmother - is a complete badass, and this country has been lucky to have both of them.

The straightforward manner in which she approaches a task most of us would find not just daunting, but completely laughable – "Let's go get a law passed so Gammy can be inurned in Arlington" – is beyond impressive.

I have a few quibbles – I always do. Ms. Miller's prose is fantastic. Breezy and confident, she turns a book which could easily be dull into a complete page-turner, but while her conversations with her Gammy are warm and loving, the other conversations in the book are a bit stilted. She's a lawyer, and my gut tells me that – as she likely doesn't have transcripts of these conversations – she's doing her lawyerly best to present the essence of what each person said without actually putting words in their mouths. But it flattens the writing and feels jarring. In the middle section, as the bill is picking up steam, the narrative – another sponsor, another thousand signatures – gets repetitive. Instead, I would have loved to hear more about some of the other WASP she met, who all seem like amazing women.

As I said, quibbles. But there are always quibbles. I just told you I stayed up until… 1 AM now… reading a book about the creation of a law. What are you waiting for?

Aaron also learned from this book that "inurned" - to place or bury something in an urn - is an actual word, not a typo.

The Veterans Law Journal is published quarterly by the CAVC Bar Association. Contributions are welcomed.

Cite as: Vet. L. J. (Vol. II, 2019)