VETERANS LAW JOURNAL

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

Two Nominations for the CAVC Bench

By Jenny J. Tang

In August 2019, President Trump announced his intent to nominate Grant C. Jaquith and Scott J. Laurer to serve as Judges on the U.S. Court of Appeals for Veterans Claims.

Mr. Jaquith currently serves as the United States Attorney for the Northern District of New York. From 1982 to 2011, Mr. Jaquith served in the U.S. Army Judge Advocate General's Corps in several roles, including as Staff Judge Advocate, Circuit Judge, and Chief of Military Law, and he rose to the rank of Colonel. Mr. Jaquith earned his B.S., *cum laude*, from Presbyterian College and his J.D. from the University of Florida College of Law.

Mr. Laurer currently serves as Deputy Legal Advisor at the National Security Council. He previously served in the U.S. Navy as Special Counsel to the Chief of Naval Operations and as a Commanding Officer in the United States Region Legal Service Office for Europe, Africa, and Southwest Asia. Mr. Laurer earned his B.A. from Rutgers University, his J.D. from Temple University Law School, and his LL.M. in International and Comparative Law from George Washington University Law School.

The White House's full announcement may be found here: https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-united-states-marshal-nominee-4/

Jenny J. Tang is an appellate litigation attorney with Bergmann & Moore, LLC. She is also President-elect of the CAVC Bar Association.

COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

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Message from the President

Colleagues –

This month, I will step down as president and Jenny Tang will take the helm for the 2019-2020 year. I am grateful for the opportunity to work with some amazing folks on the Board of Governors and to meet so many of our members. It was a very busy year for the Bar Association, and I am proud of all the hard work that our Board of Governors and officers put into making the year a success. I am especially proud of the programming we were able to offer this year, including the Judicial Conference program in April.

Although we are still working out some kinks, we have been able to make many of our programs accessible to our remote members and we are exploring ways to be able to do so more consistently. We have made recordings of some of our programming available on our website (cavcbar.net), and plan to do so more often in the future.

This year we also finally stepped into the 2010s by updating our social media presence. Members can now follow us on Twitter (@Cavcbar) and Instagram (cavc_bar). The Publications Committee also had a very successful year, publishing several issues of the Veterans Law Journal. In fact, our latest issue (2019 Vol. II) was a whopping 40 pages long! And thanks to the Scholarship Committee, we sponsored several impressive law students so that they could attend the Judicial Conference.
None of these accomplishments would have been possible without the hard work of the great team we have on the Board of Governors. Serving as president has really been a great experience, thanks to the collegiality and dedication of my colleagues on the Board. I am confident that under Jenny's leadership, next year will be even more successful, and I look forward to seeing what is in store.

Sincerely,
Amy F. Odom

Message from the President-Elect

Greetings colleagues,

I am looking forward to leading the CAVC Bar Association in the upcoming year, as we continue our mission of supporting the CAVC and promoting justice for veterans and their families. I am privileged to build on my predecessors' accomplishments, and I am excited to work alongside the Officers and At-Large members of the next Board of Governors. I thank President Amy Odom for her leadership and for representing the bar association on the CAVC's Judicial Advisory Committee over the past year.

Over the past two decades, the CAVC Bar Association has provided collegial forums in which to discuss hot-button legal issues and matters impacting the CAVC Bench and the veterans law Bar. I am committed to promoting further collaboration by expanding our programming and by adapting our services for the bar association's growing membership.
In addition to supporting the CAVC's initiatives (such as the 30th Anniversary celebration and the portrait unveilings for Chief Judge Davis and Judge Schoelen), as well as the annual National Veterans Law Moot Court Competition, the CAVC Bar Association will sponsor regular events throughout the year.
Upcoming events include educational panels, veteran-centric community service opportunities

(e.g., war memorial washings), and networking receptions. We will also continue our quarterly publication of the *Veterans Law Journal*, which will be in the capable hands of its next Editor-in-Chief, Jillian Berner. In addition to our traditional programming, we plan to provide e-programming, to make live event recordings available, and to strengthen our online presence.

Further, I am pleased to share two of this upcoming year's highlights:

- As part of the CAVC's event series commemorating its 30th Anniversary, we will host a panel and luncheon at the U.S. Supreme Court in October 2019. Justice Breyer will provide opening remarks, and we will hear from distinguished advocates who have argued before both the CAVC and the U.S. Supreme Court.

- We will host an all-day veterans law CLE event in June 2020 in Washington, DC. We plan to provide general, writing, and ethics credits, and CLE credit for remote audience members will be available.

I look forward to seeing you at the CAVC Bar Association's Annual Meeting on September 27, 2019. I invite you to contact me if you have any concerns about general issues impacting members of this Bar, and I welcome your suggestions regarding the services we provide to the bar association membership. I can be reached at jennyjtangattorney@gmail.com.

Sincerely,

Jenny J. Tang
President-Elect
CAVC Bar Association

Message from the Chief Judge

Dear Friends in Veterans Law:

I am having a difficult time coming to grips with taking senior status with the Court when we are at such a crucial juncture of changes in the field. The Appeals Modernization Act is now up and working – whether it delivers as hoped remains to be seen. The Court has certified two class action cases recently and the White House just announced intended nominations for two new Judges who will replace Judge Schoelen and me. The leadership of the USCAVC Bar Association will transition from Amy Odom to Jenny Tang. Glenda Herl continues as the President of NOVA and the Court's Rules Advisory and Judicial Advisory Committees have a few new members joining their ranks.

While my initial inclination was to decline the opportunity to serve as Chief Judge, I have in fact loved being your Chief Judge for the past three years and am sad that my time in that role and as an active Judge is quickly coming to an end. My perspective on the role of the Court has indeed changed over the past 15 years and I believe, now more than ever, that this Court is absolutely critical to the development of veterans law. Equally as critical to veterans law are you, the practitioners.

So this is likely my final submission to the Veterans Law Journal as Chief Judge, and I want it to be about you -- the practitioners -- whether you are in private practice, with the government, at the Court, or with Veterans Service Organizations. I have watched the bar grow, mature, and develop over the past 15 years – our bar is quickly approaching 6,000 members! I have seen the quality of representation improve in leaps and bounds. And I have seen each

one of you help to move the law forward in this unique and unusual administrative law practice. What has impressed me the most is your unceasing efforts to serve your clients to the best of your ability, to advance your own knowledge and skills, and to work toward the improvement of the process overall. Significantly, the members of this Bar Association have been singularly instrumental in all aspects of improving the Court's procedures and rules. Amy Kretkowski, with the Rules Advisory Committee, has worked tirelessly with that Committee along with the members of the Judicial Advisory Committee to put together draft class action rules that are close to going out for public comment. Greg Block and the Judicial Advisory Committee have worked hard on a ground breaking recommendation to the Court that may help to change its approach to deciding more panel cases. The Bar Association programs the past year continued to be stimulating and engaging, covering topics such as "VA Behind the Scenes", a discussion on *Kisor v. Wilkie* and *Auer* deference, a look at the Court's first 15 years, and an opportunity to hear from some of the Court's newest Judges.

As a Bar Association, your professionalism is unmatched as evidenced by not only the quality of your representation over all but also by the scarcity of disciplinary proceedings. Despite the rising number of appeals filed at the Court, we have had a substantial decrease in disciplinary proceedings and, in fact, as of this writing I am happy to report that we have no active disciplinary proceedings.

So a heartfelt thank you all for the tireless hard work that you provide to the Court and to veterans law generally. I know that in your very capable hands, we will continue to move forward and make improvements to the practice of veterans law and the improvement of the claims delivery and appellate review system in this tremendously important arena of veterans benefits law. I have enjoyed my engagement with you all and hope that my mantra of engagement, cooperative learning, transparency, consensus, and action, continues to serve as a catalyst for getting things done. I will miss you all.

Chief Judge Davis

Message from the Clerk

Dear Colleagues:

We are more than half way through our 30th year as a court and we continue to see new milestones. As I have mentioned in the past, the number of new appeals being filed at the Court is unprecedented. Well on the way to exceeding 8,000 new appeals this fiscal year, we again had a record-setting month in August when 741 new appeals were filed. These numbers would quickly overwhelm the Court were it not for the work so many of you are contributing to the Rule 33 conferencing process.

In addition to unprecedented caseload, the Court's bar reached a new milestone when we added our 6,000th new member just this week–her name is Tracy Jones and she is a partner with Black & Jones in Rockford, Illinois. Tracy has degrees from Northern Illinois University and The John Marshall Law School, and her passion for representing people who were injured while working is expanding to helping veterans. Tracy has already been accredited by the Department of Veterans Affairs and has successfully taken a case to the Board of Veterans' Appeals, and by joining the Court's bar she will be ready to take cases to the Court in the future. I talked to Tracy and she is the kind of advocate who will work hard not only to advance the interests of individual veterans, but also to help the system better provide justice for all veterans. Welcome to the Court's bar, Tracy–we'll look forward to working with you in the future.

In my last column, I mentioned the Court's new YouTube channel and the excitement surrounding its launch earlier this year. Just last week, we took this technology on the road and successfully broadcast an oral argument from the University of Detroit Mercy Law School. If you

haven't had a chance to watch live broadcasts, cases are also archived for your reference. We'll convene on multiple occasions here at the Court in the fall – see the schedule on the Court's website at http://www.uscourts.cavc.gov/oral_arguments_schedule.php -- and we'll be on the road again on October 2nd when the Court convenes at The John Marshall Law School in Chicago. I encourage you to visit our channel at [https://www.youtube.com/channel/UCkhToOvwPHFaX-doZEFupog.](https://www.youtube.com/channel/UCkhToOvwPHFaX-doZEFupog)

We still have much to celebrate in this special 30th Anniversary Year. I look forward to talking and working with each of you as we continue the important work of the Court.

Regards,
Greg

Gregory O. Block is the Clerk of the Court of Appeals for Veterans Claims.

Agency Practitioners Take Note: The Presumption of Competency Remains Alive, Well, and Avoidable.

By John Niles

Reporting on *Francway v. Wilkie*, 930 F.3d 1377 (Fed. Cir. 2019).

The Federal Circuit repeatedly has held that the Board of Veterans' Appeals may presume a medical examiner's competency unless the veteran challenges it. Failing to challenge an examiner's competency during agency proceedings typically forecloses the veteran from raising the issue on later appeal to the Veterans Court or Federal Circuit. In *Francway v. Wilkie*, the Federal Circuit reiterated and to some extent clarified these principles.

Mr. Francway claimed service connection for a low-back disorder. In March 2013, the Board remanded his claim for development, including an etiological opinion from an "appropriate medical specialist." On remand, Mr. Francway received a VA medical examination from an orthopedist and a VA addendum medical opinion from an internist. He argued on return to the Board that the internist's medical opinion was inadequate. He did not then, however, explicitly challenge the internist's competency. The Board denied service connection.

On appeal to the Veterans Court, Mr. Francway argued that the internist had not been an "appropriate medical specialist" to opine on his low-back disorder. A Memorandum Decision by Judge Meredith rejected the argument, concluding that the presumption of competency precluded it and, in any event, that Mr. Francway failed to demonstrate prejudicial error.

The Federal Circuit affirmed. A unanimous panel of Chief Judge Prost, Judge Lourie, and Judge Dyk reiterated that "[t]he presumption of competency requires nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raise the issue." The doctrine then "has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must then make factual findings regarding the qualifications and provide reasons and bases" for its conclusion as to the examiner's competency.

Whether an examiner is *competent* and whether an examination or opinion is *adequate*, the Federal Circuit cautioned, "are two separate inquiries." The panel discerned no legal error in the Veterans Court's analysis in *Francway*. It concluded that it lacked jurisdiction to assess the decision's factual correctness.

Nor, the Federal Circuit held, does the presumption of competency apply differently when the veteran must receive a VA examination or opinion from a specialist. Whether or not the examiner is to be a specialist, the "presumption is that the VA has properly chosen an examiner who is qualified to provide competent medical evidence in a particular case absent a challenge by the veteran." Raising that challenge during agency proceedings thus continues

typically to be essential to preserving it for later appeal.

John Niles is Special Counsel to the National Veterans Legal Services Program.

CAVC Addresses Whether a Veteran Must be Present at a Board Hearing

by Hilary S. Styer

Reporting on *Atilano v. Wilkie*, No. 17-1428 (July 3, 2019)

In *Atilano v. Wilkie,* the United States Court of Appeals for Veterans Claims (Court) addressed whether a veteran must be present at his or her hearing before the Board of Veterans' Appeals (Board) pursuant to the relevant statutes and regulations.

Mr. Atilano requested an in-person hearing before the Board in Washington, D.C. in connection with his appeal. Although he failed to appear at the Board hearing, his attorney and an expert witness present on the veteran's behalf requested to proceed with the hearing. The Veterans Law Judge adjourned the hearing and attempted to reschedule it in order for Mr. Atilano to be present. The veteran responded through counsel that he did not wish to participate in a hearing, although he did wish his expert witness to testify. No hearing subsequently took place.

The Board held in an April 2017 decision, citing 38 C.F.R. §§ 20.700(b) and 20.702(d), that Mr. Atilano's hearing request must be treated as withdrawn due to his failure to appear and show good cause for his absence in a timely manner.

On appeal to the Court, Mr. Atilano argued that the Board's conclusion as to the withdrawal of his hearing request was contrary to the plain meaning of the relevant statutory and regulatory provisions. Specifically, he contended that a veteran does not have to be present at a hearing in order for his or her legal representative to elicit sworn testimony from witnesses before the Board. The Court disagreed and held that the Board's reasoning aligned with the plain meaning of the statute. Furthermore, the Court held that, even if the statute were silent or ambiguous, the Secretary's regulation supported the Board's finding and is a reasonable construction of the statute.

As background, the Court discussed the history of the procedure to request a hearing before the Board. In 1988, Congress codified the right to a Board hearing in 38 U.S.C. §§ 7107(b) and 7105(a). The Court highlighted the three forms that a Board hearing may take: an "in-person" hearing at the Board's central office in Washington, D.C.; a "video teleconference" between the central office and a VA facility; and a "face-to-face" hearing at a VA facility (commonly known as a "travel Board" hearing).

Aside from the statutory sections, the Court noted that Board hearings are also governed by regulations promulgated by the Secretary. Specifically, 38 C.F.R. § 20.700(b) states: "The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. It is contemplated that the appellant and witnesses, if any, will be present." This rule additionally provides that a hearing will not normally be allowed just so that argument can be submitted. *Id.* The second regulation, 38 C.F.R. § 20.702(d), provides that, if an appellant fails to appear for a scheduled hearing and no request for a postponement has previously been granted, "the case will be processed as though the request for a hearing had been withdrawn."

The Court found that Congress spoke directly to the question at hand through the text of the statute, and that the plain meaning of the statute's text requires an appellant's in-person or electronic participation. The Court explained that 38 U.S.C. § 7107 requires the appellant's participation in a Board hearing. 38 U.S.C. 7107(b) states that "The Board shall decide any appeal only after affording the appellant an opportunity for a hearing." Based on the plain meaning of the statute, the Court found that the opportunity for a hearing before the Board is not general in nature, but is "afforded" to "the appellant."

Interpreting the term "hearing" in the context of the statutory scheme, the Court found that other parts of 38 U.S.C. § 7017 support its understanding that the hearing right must be exercised by the veteran through his or her personal participation. Specifically, 38 U.S.C. § 7107(d)(1)(A)(ii) states: "The Board shall also determine whether to provide a hearing through the use of the facilities and equipment described in subsection (e)(1) or by *the appellant personally appearing* before a Board member." (emphasis added) The Court held there was no dispute that this [italicized] language meant that the veteran requesting a hearing before a Veterans Law Judge in Washington, D.C. is expected to be physically present. Therefore, the overall statutory structure of 38 U.S.C. § 7107 confirms that the veteran exercising his or her right to a Board hearing must do so by appearing personally before a Veterans Law Judge or by participating remotely via videoconference or other electronic means. Therefore, the Board's decision not to hold a hearing despite Mr. Atilano's refusal to take part in it was not erroneous.

Although this holding was sufficient to end the inquiry, the Court nevertheless addressed in the alternative, pursuant to the analytical framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), whether the regulatory provisions relied on by the Board supported its conclusions and were reasonable. The Court answered both of these questions in the affirmative. Under *Chevron*, an agency's regulation filling a statutory gap must be accepted, provided that it is "based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843.

The Court held that the regulations cited by the Board, 38 C.F.R. §§ 20.700(b) and 20.702(d), are consistent with the statutory framework of 38 U.S.C. § 7107. It found that VA's expectation that veterans will participate in their Board hearings harmonizes with what the Court has always understood to be the primary purposes of the hearing right. VA regulations that fill the gaps in the statutory text in a manner consistent with the congressional goals underlying that text cannot constitute unreasonable interpretations of the statute.

Furthermore, the Court noted that 38 C.F.R. § 20.700(b)'s requirement of the veteran's presence at a hearing does not require that he or she physically appear at the Board's offices in Washington. It reiterated that the veteran may request and participate in a hearing at the Board's central office, a "travel Board" hearing at a regional office, or a videoconference hearing. The Court held that the regulations cited by the Board are therefore consistent with the statute and are a basic tenet of administrative law that agencies should be free to design their own rules of procedure.

Hilary S. Styer is Associate Counsel at the Board of Veterans' Appeals.

Court Per Curiam Applies Misc. Order 09-19 to Claims Pending as of the Order's Effective Date

by Nathaniel Maranwe

Reporting on *McGee v. Wilkie*, No. 18-6853 (August 20, 2019).

In *McGee v. Wilkie,* the Court determined that a Notice of Appeal (NOA) filed two days late must be accepted as timely, due to the effect of a miscellaneous order by the Court. Since the administrative record was "messy" and the timeline was confusing, Mr. McGee was found to have had good cause for the late filing.

Veterans filing NOAs under the Court's current Rule 4, as amended by Miscellaneous Order 09-19, have up to 30 days after the 120-day deadline if they can show either good cause or excusable neglect. The Court, *per curiam* held that this applies to NOAs pending as of June 21, 2019 well as NOAs filed after June 21, 2019. The Miscellaneous Order revised Rule 4 as of that date, but the Order did not say whether it applied to pending claims. Interpreting the Order broadly, the Court denied the Secretary's motion to dismiss the NOA as untimely.

On December 7, 2018, appellant Anthony McGee electronically filed his Notice of Appeal. It was attached to an August 7, 2018 decision from the Board's Chairman denying rehearing of an October 19, 2015 Board decision. Mr. McGee stated that he was appealing the August 7 decision but, because he was self-represented, the Court construed his NOA as attempting to appeal both the original and reconsideration decisions. The prior motion for Board reconsideration had been timely filed, so the Court could accept an appeal of both if the December 7, 2018 NOA was timely filed.

The administrative history was, in the Court's word, "messy." Mr. McGee had alleged that he received three copies of the Board decision with different time stamps across two different days. He also stated that he had mailed a paper copy of his NOA on December 4, 2018, the day before the 120-day deadline. No paper copy was shown received by the Court. The Secretary was also "confused" about the decision dates, having initially filed a December 7, 2018 Board decision before correcting it.

The Court believed this was sufficiently confusing to show good cause for late filing. Under Misc. Order 09-19, a Notice of Appeal is considered timely if it is filed within 30 days of the deadline and there is good cause, excusable neglect, or equitable tolling. The question was whether Order 09-19 applied.

Order 09-19 was "published and effective" as of June 21, 2019. It certainly applied to claims filed after that date. But the Court interpreted it to apply also where, as here, a claim was pending as of that date.

This interpretation was based on the "need for flexibility" and the fact that interpretive doubt must be resolved in favor of the veteran. The Court also noted that, on other occasions, revisions to the rules that were meant to apply only after a certain date have said so explicitly.

The Court did not to make any findings about whether Mr. McGee actually did mail a paper copy on December 4. Nor did it need to determine whether equitable tolling was warranted.

Nathaniel Maranwe is an attorney at Bergmann & Moore, LLC.

CAVC Defines Constructive Possession of NAS Reports

by Anna Caruso

Reporting on *Euzebio v. Wilkie,* No. 17-2879, __Vet. App.__ (August 22, 2019).

Mr. Euzebio sought entitlement to service connection for benign thyroid nodules, including as due to exposure to herbicides or water contaminants at Camp Lejeune. The issue before the Court of Appeals for Veterans Claims (Court) was whether the Board had constructive possession of a report by the National Academies of Sciences, Engineering, & Medicine (NAS) entitled *Veterans and Agent Orange: Update 2014* (2014 Update) and, if so, whether that report would have triggered a duty to obtain a VA examination with regard to the veteran's claim. The Court affirmed the Board, holding that the 2014 Update was not constructively before the Board and that the appellant had not demonstrated prejudicial error in the Board's decision to decline to obtain a medical nexus opinion.

Mr. Euzebio had requested a VA examination to evaluate whether his benign thyroid nodules are related to his military service. He is presumed to have been exposed to herbicide agents because he served in Vietnam. He asserted that his thyroid nodules may have been caused by exposure to herbicide agents because they are known to cause many different conditions and no one else in his family had thyroid problems. Private medical records also document that the Veteran reported to his physician a belief that his thyroid nodules were related to service. The Board found that a VA examination was not required.

On appeal, the Mr. Euzebio argued that the Board erred by failing to consider and discuss the 2014 Update, and that consideration of this document

would have triggered a VA examination under the standard of *McLendon v. Nicholson* because it would have provided an indication that the appellant's benign thyroid nodules may have been associated with service. The appellant also contended that the 2014 Update was constructively before the Board because the Secretary knew of the report's content.

The Secretary asserted that the 2014 Update was not constructively before the Board because it was "not specific" to the veteran's claim, as it discussed only a general relationship between hypothyroidism and herbicide agent exposure, whereas the veteran's benign thyroid nodules are a separate condition. The Secretary argued that the relationship between hypothyroidism and benign thyroid nodules is "too strained" and that the 2014 Update was not constructively before the Board merely because it discussed both a thyroid condition (hypothyroidism) and herbicide agent exposure.

The Court reviewed the development of the constructive possession doctrine in *Bell v. Derwinski*, *Bowey v. West*, *Goodwin v. West*, and *Monzingo v. Shinseki*. The Court summarized the holdings of these cases as indicating that an appellant must show that there is a "direct relationship" between the document and the claim on appeal to warrant the conclusion that the document was constructively before the Board. This is true, according to the Court, even if the document was generated for and received by VA pursuant to a statutory requirement.

Applying these principles to the facts of this case, the Court held that the 2014 Update did not have a direct relationship to the veteran's claim for entitlement to service connection for benign thyroid nodules, and thus was not constructively before the Board.

The Court also affirmed the Board's finding that a VA examination or opinion was not warranted. The parties agreed that the first two elements of the *McLendon* test were satisfied because there was competent evidence of current disability (thyroid nodules) and presumptive exposure to herbicide agents during service. The Court found that the third element, that the disability "may be associated with" service, was not satisfied, relying on the Federal Circuit's holding in *Waters v. Shinseki* that conclusory, generalized lay statements alone are not enough to trigger VA's duty to assist in this regard. Although a private treatment note indicated that the thyroid nodules were "felt to be related to AO exposure," the Board had found that this was merely a recording of the appellant's lay statement rather than a medical conclusion, and the appellant did not dispute this finding. Consequently, as there was no factual basis in the record apart from general lay statements indicating that the current disability may be associated with the veteran's herbicide agent exposure, this element of the *McLendon* test was not satisfied and a VA examination or opinion was not required to decide the claim.

Anna Caruso is Associate Counsel at the Board of Veterans' Appeals in Washington, D.C.

CAVC Declines to Extend Exception to Allow Challenge to an Examiner's Competency on Appeal

By Vanessa-Nola Pratt

Reporting on *Fears, Jr. v. Wilkie*, No. 17-2345 (August 12, 2019).

In *Fears v. Wilkie*, the United States Court of Appeals for Veterans Claims (Court) held that the Board of Veterans' Appeals (Board) was not on actual or constructive notice of an issue pertaining to a VA medical examiner's competency to render an opinion on the veteran's disability. The Court reviewed case law that addressed a variety of factual circumstances where veterans failed to object to the competency of examiners, as well as the limited exception, established by *Wise v. Shinseki*, 26 Vet. App. 517 (2014), to the rule that a challenge to the competency of a VA medical examiner cannot be made in the first instance before the Court.

After filing a claim for service connection for hepatitis in December 2009, Mr. Fears was afforded a VA examination in January 2011. After this claim

was denied, Mr. Fears timely appealed to the Board. In May 2014, the Board remanded the claim on the basis that the January 2011 VA examination was inadequate. The Board instructed that the agency of original jurisdiction (AOJ) obtain a new medical opinion by an appropriate examiner, preferably a hepatologist, to determine the etiology of the veteran's hepatitis.

A VA physician, who previously had been discharged from an Army medical residency program, rendered an opinion in July 2014, and subsequently, an addendum in December 2014. Summarily, the VA physician opined that Mr. Fears's hepatitis was most likely caused by his post-service drug use from 1986 to 1991, rather than by his in-service marijuana use or risky sexual behavior. In April 2017, after finding that the AOJ had substantially complied with the May 2014 remand order, the Board, relying on the July 2014 and December 2014 opinions, denied Mr. Fears's service connection claim for hepatitis. Subsequently, Mr. Fears appealed the Board's decision to the Court, where he challenged for the first time the competency of the VA physician who rendered the opinion.

The Court explained that an examiner who is selected by VA is presumed to be qualified by training, education, or experience in a particular field. The Court evaluated and discussed the historical background of similar appeals in which the claimant/veteran failed to timely object to an examiner's competence. It reviewed a series of its cases and those of the Federal Circuit, describing factually distinct circumstances in which a veteran's challenge to a VA examiner's competency for the first time on appeal was insufficient to rebut the presumption.

Most significantly, the Court discussed its decision in *Wise*, which had recognized a limited exception to the presumption, allowing a veteran to challenge a VA examiner's competency in the first instance on appeal before the Court. In *Wise*, the veteran had not challenged a VA examiner's qualifications before the Board, but the VA examiner had expressly called her own qualifications into question. The Court explained that in this case, an objection before the Agency was not required because, in the VA examiner's opinion, she had stated that she had no formal training or background in psychiatry, calling her opinion on psychiatric matters, "'a relative lay[ ] person's perspective.'" Finding that it was unreasonable to allow the Board to ignore this explicit denial of expertise, the Court held, as a limited exception, that where a medical professional admits that he or she lacks the expertise necessary to provide an opinion requested by the Board, that opinion creates an appearance of irregularity in the process that resulted in the selection of that medical professional, which prevents the presumption of competence from attaching. The Board must therefore address the medical professional's competency before relying on his or her opinion.

The Court further explained in *Wise* that the traditional policy concern behind the presumption of competence is that evidence about an examiner's qualifications must be produced when those qualifications are challenged, but that this was not necessary in this case because the examiner herself had explicitly questioned her own qualifications. As her qualifications were not being attacked *post hoc*, there was no need for additional evidentiary production; the record itself raised the issue of competency, which compelled the Board to address it.

Seeking application of the exception in *Wise*, Mr. Fears argued that a prior judicial finding regarding the VA physician, as well as several news articles about the VA physician's supervision of other physicians who improperly administered examinations, presented facts close enough to those in *Wise* to excuse his failure to challenge the VA physician's competence before the Board.

The Court rejected this argument, stating that the facts in Mr. Fears's case were not close enough to the facts in *Wise* to fall within the scope of its exception. The Court explained that the documents Mr. Fears relied on to attack the VA physician's competency were not provided to the Board, and he did not inform the Board of their existence. The Court also explained that it is beyond its ability to consider these documents, as the Court is precluded by statute from considering any material that is not contained in the record of proceedings before the

Secretary and the Board. The Court additionally determined that, for purposes of constituting the record on appeal, these records were not constructively before the Board. Thus the Court concluded that the documents Mr. Fears submitted in support of his challenge to the VA examiner's competency were neither actually nor constructively before the Board, and thus they could not be considered. Because the appellant neither requested information about the examiner's qualifications nor objected to them before the Board, the presumption of competence was not rebutted.

Vanessa-Nola Pratt is an Associate Counsel at the Board of Veterans' Appeals.

A Veteran's Entitlement to a Second Hearing

By Judy Clausen

Reporting on *Quinn v. Wilkie*, No. 17-4555 (July 11, 2019).

In *Quinn v. Wilkie*, the United States Court of Appeals for Veterans Claims (Court) decided that under 38 U.S.C. section 7107(b) (2016) a veteran who had had a first hearing before the Board of Veterans' Appeals (Board) that resulted in a remand to the regional office (RO) for further development was entitled to a second hearing when the RO returned the matter after completion of further development. Since section 7107(b) entitled the veteran to a second hearing and VA's denial of the hearing right was not harmless, the Court vacated the Board decision and remanded for further proceedings. After enactment of the Veterans Appeals Improvement and Modernization Act of 2017, section 7107(b) no longer has the same language, but the veteran's claims were not subject to that amendment.

The veteran, Vicky Quinn, appealed to the Board because she disagreed with the RO decision denying service connection for several disabilities and the rating for another. Before the Board rendered its decision, Ms. Quinn testified at a Board hearing. The Board denied Ms. Quinn's appeal concerning one of the claims and remanded other issues. On remand, the Board instructed the RO to: (1) procure relevant medical records, (2) schedule VA exams to produce new reports, (3) readjudicate Ms. Quinn's claims in light of added evidence, and (4) issue a Supplemental Statement of the Case if the RO continued to deny benefits. The RO followed the Board's remand instructions and denied the claims in the Supplemental Statement of the Case that "listed the newly developed evidence among other evidence the RO considered." Ms. Quinn disagreed with the RO's decision and asked for a second hearing so she could testify. The RO acknowledged her request but refused to schedule a second hearing, contending that section 7107(b) did not entitle Ms. Quinn to a hearing, given that she had already had one. The Board then denied Ms. Quinn's claims and did not address her hearing request.

The Court rejected VA's argument that it should refuse to hear Ms. Quinn's argument because she had raised the hearing entitlement issue for the first time on appeal. VA argued that Ms. Quinn failed to reassert directly to the Board her second hearing request, implicating the law of issue exhaustion. The Court rejected this argument, determining that Ms. Quinn did not raise the hearing entitlement issue for the first time on appeal. Rather, Ms. Quinn had requested, and was refused, a second hearing; she had therefore done everything necessary to raise the hearing entitlement issue.

Finding section 7107(b)'s hearing right "expansive," the Court gave the statutory language its "plain meaning" and concluded that a veteran has a right to a Board hearing when the Board decides any appeal. Section 7107(b) states "[t]he Board shall decide any appeal only after affording the appellant an opportunity for a hearing." The Court concluded that the word "any" is broad and modifies "appeal"; section 7107(b) requires a hearing opportunity before the Board decides any and every appeal. And Congress used "shall" when addressing the hearing right, depriving VA of the discretion to choose which appeals deserve a hearing.

After the Court found that the word "any" yielded a "broad" hearing right, the Court determined that the Board decided an "appeal" under section 7107(b) when it again reviewed the "RO's decision following the Board remand … for further development." Ms. Quinn had a right to a second hearing because the Board was again deciding her "appeal." An appeal is a "proceeding" in which a "higher authority" reconsiders a decision. The Board remand to the RO for further development and readjudication "nullif[ied] … the prior rating decision and Statement of the Case." The Board would again decide Ms. Quinn's appeal when it reviewed the RO's decision "anew," rendering the Board's new review an "appeal" under section 7107(b), thus entitling Ms. Quinn to a second Board hearing.

The Court declined to insert the words "on the merits" into section 7107(b) as VA urged. The hearing right was not only for final decisions on the merits allowing appeals to the Court. VA's interpretation would have yielded "absurd results." For example, a veteran has a right to a second hearing "following a reasons-or-bases vacatur and remand from" the Court to the Board. This is because "vacatur vitiates the Board decision's finality." A second hearing is required even though "nothing has changed." Adopting VA's interpretation would have produced the "absurd result" of denying Ms. Quinn a second hearing after "further development of the record when much has changed."

The Court concluded that depriving Ms. Quinn of the right to a second hearing was prejudicial error. Whether an error is prejudicial is "based on the entire record." An appeal's evolution "informs [the Court's] assessment of harmless error." The Court "weighed heavily:" (1) Ms. Quinn's request for a Board hearing so that she could testify, and (2) that the Board failed to even acknowledge Ms. Quinn's hearing request. The Court concluded that VA's denial of the requested hearing was inconsistent with the "solicitous guarantee of claim development" in the VA claims and appeals process. The Court rejected VA's argument that Ms. Quinn failed to show prejudicial error because she could have submitted written information to the Board; the opportunity for written submission was not "equivalent" to the hearing opportunity. Congress created hearing rights because hearings have special advantages. A hearing would have allowed Ms. Quinn "to address and respond to any specific Board member questions relating to the new evidence." A hearing would also have enabled adjudicators to "observe" Ms. Quinn's "demeanor." Depriving Ms. Quinn of the hearing opportunity was not harmless error; vacatur and remand was required.

Judy Clausen is an Army veteran and the Professor and Supervising Attorney of the University of Florida Veterans and Service Members Legal Clinic.

Veterans with Separate Periods of Qualifying Service Can Receive Full Education Benefits under Both the MGIB and Post-9/11 GI Bill

by Jonathan M. Meyer

Reporting on *BO v. Wilkie*, No 16-4134 (August 15, 2019).

In a precedential 2-1 decision written by Judge Allen (with Judge Bartley dissenting), the CAVC held that veterans who qualify for education benefits under the Montgomery GI Bill ("MGIB") and Post-9/11 GI Bill programs based upon separate periods of service, can receive education benefits under both programs, subject to an overall 48-month cap.

The veteran had separate periods of service that independently qualified him to receive benefits under both the MGIB and the Post-9/11 GI Bill. He used 25 months and 14 days of education benefits under the MGIB for his undergraduate degree. Then in 2015, he elected to receive benefits under the Post-9/11 GI Bill for a graduate program. VA awarded him education benefits for 10 months and 16 days under the Post-9/11 GI Bill – which was the amount of unused benefits he had remaining under the MGIB (i.e., 36 months minus his previously used 25 months and 14 days). He appealed that decision, arguing that he should have been awarded an

additional 12 months of education benefits up to the 48-month cap.

In July 2016, the Board denied education benefits in excess of the amount of unused benefits he had under the MGIB (i.e., 10 months and 16 days). The Board found no provision of law that authorized additional months of entitlement under the Post-9/11 GI Bill program beyond the 36 months of combined benefits under the MGIB and Post-9/11 GI Bill. The Board supported its decision by noting that, in order to qualify for benefits under the Post-9/11 GI Bill, a veteran must relinquish all eligibility under the MGIB program. Therefore, if a veteran uses some benefits under the MGIB before irrevocably electing to receive Post-9/11 GI Bill benefits, then that veteran may only be awarded the equivalent of the entitlement that remained unused under the MGIB program.

In reversing the Board's decision, the CAVC held that veterans with separate periods of qualifying service are entitled to the full benefits under both the MGIB and Post-9/11 GI Bill, subject to the 48-month cap. The CAVC invoked (1) relevant statutory provisions (38 U.S.C. §§ 3322, 3327), (2) regulatory framework; (3) congressional purpose, and (4) the pro-veteran canon as consistent with this interpretation. Regarding the relevant statutory provisions and statutory framework, the CAVC observed that the Post-9/11 GI Bill was not intended to replace the MGIB, and that both programs are to "co-exist as separate programs." While 38 U.S.C. § 3322 expressly prohibited the simultaneous receipt of benefits under both programs, the CAVC determined that the relevant statues are ambiguous as to whether they barred the receipt of benefits under both the MGIB and Post-9/11 GI Bill by a veteran with at least two separately qualifying periods of service. Similarly, the CAVC observed that the applicable regulations do not resolve this ambiguity.

Nevertheless, the CAVC found that the congressional purpose of educational benefits (e.g., an "incentive" or "acknowledgment" for service in the military), coupled with the pro-veteran canon of statutory interpretation, resolves any ambiguities. Specifically, under the previous World War II GI Bill and the Korean War GI Bill, qualifying veterans could receive a combination of benefits under both programs up to the aggregate (48-month) limit. Moreover, the CAVC analogized this to the situation in which a veteran has two different periods of service and incurs two separate injuries, thereby independently qualifying the veteran for entitlement to service connection and ratings under two different diagnostic codes (up to a 100% rating cap). Given that Congress has consistently only prohibited the concurrent, but not consecutive, usage of multiple educational benefits, the CAVC determined that receipt of benefits under one education program for one period of service does not constitute benefits duplicative of those received under another program for another period of service.

In her dissent, Judge Bartley countered that section 3322 (titled "Bar to duplication of educational assistance") is "clear and unambiguous" as it "doesn't speak in terms of periods of service but applies broadly to an individual entitled to Post-9/11 benefits who is also eligible for MGIB benefits." Therefore, she posited that a "straightforward" reading of section 3322(d) reflects that for veterans who qualify for benefits under both the MGIB and Post-9/11 programs, coordination of benefits between these programs is governed by the voluntary statutory election provisions of section 3327. In support, she observed that Congress intentionally added a single period of service requirement in other subsections of section 3322, but not in subsection 3322(d) (relating to the coordination between MGIB and Post-9/11 benefits). Accordingly, she asserted that "there is no reason to suppose that Congress intended 3322(d) to apply only to individuals with multiple entitlements based on a single period of service but not to those with multiple entitlements based on separate periods of service." Judge Bartley also observed that the majority's view regarding congressional intent was misplaced because, if their view were correct, Congress would have amended or clarified the statue when it previously amended the statute in 2010 and 2016. Lastly, she noted that the majority's interpretation is not more "veteran-friendly," because "their approach ends up assigning greater value and additional benefits to an individual with

intermittent periods of active duty service than to individuals with a continuous period of active duty service."

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

38 C.F.R. § 3.654(b)(2) is a Valid Exercise of the Secretary's Broad Rulemaking Authority

by Grace T. Raftery

Reporting on *Buffington v. Wilkie*, No. 17-4382 (July 12, 2019).

In *Buffington v. Wilkie*, the Court of Appeals for Veterans Claims (Court) issued a precedential decision affirming a Board of Veterans' Appeals (Board) decision that denied an earlier effective date for the reinstatement of VA benefits following a period of active duty. In doing so, the Court addressed whether 38 C.F.R. § 3.654(b)(2) was a valid exercise of the Secretary's rulemaking authority.

The Veteran was initially awarded VA disability benefits in March 2002 after completing active duty service in the U.S. Air Force. The Veteran subsequently served in the Air National Guard, and his unit was activated in July 2003. Accordingly, VA sent the Veteran a letter proposing to terminate his VA disability benefits. In response, the Veteran submitted a waiver electing to receive military pay and allowances in lieu of VA benefits. In doing so, the Veteran acknowledged that the waiver would remain in effect unless and until he notified VA otherwise. VA later informed the Veteran that his benefits had stopped effective the day prior to his recall to active duty and instructed him to submit a copy of his DD-214 upon release from active duty so that his benefits could be reinstated. The Veteran served two periods of active duty. He did not request reinstatement of his VA benefits until January 2009, nearly four years after the end of his most recent period of active duty. VA reinstated the Veteran's benefits effective February 1, 2008, pursuant to 38 C.F.R. § 3.654(b)(2). The Veteran disagreed with the assigned effective date and initiated an appeal.

In a July 2017 decision, the Board denied the Veteran's claim for an effective date earlier than February 1, 2008 for the reinstatement of VA benefits. The Board concluded that, as a matter of law, VA could not resume payment of benefits more than one year prior to the date of his claim for reinstatement, which was received on January 20, 2009. The Board also found that VA had clearly informed the Veteran that failure to notify VA that he was cancelling his waiver of benefits would result in the continued waiver of those benefits. The Veteran appealed the matter to the Court.

On appeal, the Veteran asserted that the language of 38 U.S.C. § 5304(c) is clear that VA must withhold or suspend a veteran's benefits only during any period the veteran is in receipt of active service pay. He further noted that 38 U.S.C. § 1110(a) provides that VA "will pay" disability compensation benefits once service connection is established. He argued that reading these statutes together demonstrates that 38 C.F.R. § 3.654(b)(2) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because it predicates reinstatement of benefits upon notice of the Veteran.

In the alternative, the Veteran argued that equitable tolling was warranted because the Board had treated the regulation as a statute of limitations, and the Veteran had essentially been led to believe there was no deadline to notify VA that he had been released from active duty. The Veteran also argued that VA violated his constitutional right to due process because he had a property interest in VA benefits and had relied on VA's allegedly misleading notice to his detriment.

The Secretary argued that VA promulgated section 3.654(b)(2) pursuant to his broad congressional authority under 38 U.S.C. § 501 to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws." He maintained that 5304(c) does not address

recommencement of payments; rather, Congress unambiguously delegated the authority to create the procedural structure to prevent duplication of benefits to VA. In that regard, the regulation effectively establishes the nature of proof and evidence and the method of taking and furnishing them for purposes of resumption of benefits. Further, when sections 5304 and 1110 are read together, a gap remains, and VA's regulation should be afforded deference.

The Secretary explained that service connection remains in place when VA terminates compensation benefits upon a veteran's return to active duty; however, it is necessary for VA to readjudicate and evaluate a veteran's service-connected disability upon return from active duty to establish the disability's current level of severity, and VA's regulation thus reasonably requires a veteran to file a claim for recommencement.

The Court addressed the Veteran's statutory argument first, holding that 38 C.F.R. § 3.654(b)(2) is a valid exercise of the Secretary's broad rulemaking authority. The Court agreed with the Secretary that neither section 5304(c) individually, nor sections 5304(c) and 1110 together, address how interpretations in the payment of benefits shall be administered; consequently, there is a gap in the statute, and 38 U.S.C. § 501(a) confers on the Secretary broad authority to promulgate regulations to fill such gaps. The Secretary promulgated 38 C.F.R. § 3.654(b)(2) pursuant to Congress's express delegation to establish "forms of application." 38 U.S.C. § 501(a)(2). The Court pointed out that although Congress chose to govern the date that VA benefits shall be discontinued upon a veteran's return to active duty, Congress was silent regarding when and how VA shall recommence benefits after a veteran's release from active duty. In promulgating 38 C.F.R. § 3.654(b)(2), the Secretary merely filled the gap left by Congress. Therefore, contrary to the Veteran's assertion, the regulation is "necessary and appropriate" to carry out the statute.

Regarding the Veteran's alternative argument that equitable tolling was warranted, the Court noted that its own precedent and that of the Federal Circuit establishes that equitable tolling may not be applied to statutes governing the effective date of awards of VA benefits and other authorities with similar effective date provisions. The Court agreed with the Secretary that 38 C.F.R. § 3.654(b)(2) is not a bar to VA benefits and does not contain a statute of limitations that may be equitably tolled. The Court found that it operated in a similar manner as the provisions governing effective dates for awards of VA benefits, which may not be equitably tolled. The Court further noted that, while the regulation precluded an earlier effective date, it did not act as a complete bar to benefits.

Regarding the Veteran's final argument that he was deprived of due process, the Court did not reach the question of whether VA actually provided misleading notice. The Court noted that, even assuming the notice was misleading, the Veteran must also meet the threshold requirement that he relied on the misleading notice to his detriment. In this case, it was undisputed that the Veteran was aware of his obligation to notify VA that he had separated from active service. Nevertheless, the Veteran asserted that VA's 2003 correspondence was misleading because it did not explain that payments could be resumed only up to one year prior to the date of his request for recommencement of benefits. But the record did not show that the allegedly misleading notice is what resulted in his inaction; rather, the Veteran had testified that he forgot about it because the Guard had essentially become a full-time job during that time. As the record did not support a finding that the Veteran had relied on VA's allegedly misleading notice, the Court found that he did not meet his burden of showing that any due process error was prejudicial to the outcome of his appeal.

Judge Greenberg issued a short dissent in which he argued that 38 C.F.R. § 3.654(b)(2) exceeded the Secretary's statutory authority. He argued that the statute already delineates the period during which veterans may not receive VA benefits, and that the regulation creates an "unnecessary and inappropriate" impediment to a veteran's receipt of VA benefits. Judge Greenberg contended that the fact that VA could have adopted a regulation providing for recommencement of benefits without including an effective date provision was dispositive

of whether the regulation is "necessary or appropriate." For these reasons, in promulgating 38 C.F.R. § 3.654(b)(2), the Secretary exceeded his statutory authority at the expense of service-connected veterans who were called back to active duty.

Grace Raftery is Associate Counsel at the Board of Veterans' Appeals.

Court Clarifies Distinctions in Orthopedic Rating Criteria

By Amanda J. Baker

Reporting on *Tedesco v. Wilkie*, No. 18-1805 (August 16, 2019).

The veteran appealed a Board determination that denied a disability rating higher than 30 percent for a left knee disability. The issue before the Court (CAVC) was whether reference to "severe painful motion" in the criteria for a 60 percent rating under 38 C.F.R. § 4.71, Diagnostic Code 5055 is synonymous with "limitation of motion" and, if not, whether limitation of motion is taken into account in assessing the existence of severe painful motion. Diagnostic Code 5055 applies to knee replacement (prosthesis).

On appeal, Mr. Tedesco argued that the Board conflated severe painful motion with limitation of motion, which is not among the 60 percent rating criteria under Diagnostic Code 5055 and that the Board erred in not discussing evidence of severe painful motion. The Secretary countered that the Board was required to consider limitation of motion.

Based on case law and VA regulations, the Court held that limitation of motion and painful motion are distinct concepts, but that limitation of motion is a factor that may be considered in evaluation of painful motion.

Initially, the Court addressed the meaning of "severe painful motion" for a 60 percent rating under Diagnostic Code 5055. The plain language of the regulation indicates that severe painful motion and limitation of motion are distinct concepts. The 60 percent rating criteria specifically refer to "severe painful motion." In comparison, the 30 percent rating criteria refer to "pain on limitation of motion." The Court reasoned that, if intended, the Secretary would have used the specific phrase "limitation of motion" instead of "severe painful motion" in the 60 percent rating criteria. Moreover, the Court noted that prior decisions and 38 C.F.R. §§ 4.45 and 4.59 distinguish between these two concepts.

Having determined that limitation of motion and painful motion are distinct, not synonymous, concepts, the Court found that limitation of motion is a factor that may be considered in assessing whether there is severe painful motion. The Court noted, without deciding, that the Board may need to explain the meaning of "severe" under the 60 percent rating criteria in this case.

Lastly, the Court addressed Mr. Tedesco's contention that the Board failed to consider his statements of lateral knee instability when it denied a separate disability rating under Diagnostic Code 5257. The Court cited its holding in *English v. Wilkie*, 30 Vet. App. 347 (2018), that the Board cannot categorically favor objective medical evidence over lay evidence when making a rating determination under Diagnostic Code 5257. Here, the Board decision had noted Mr. Tedesco's report of instability but had found medical findings of no instability more probative. Because the Board did not explain why medical findings were more probative than lay statements, its statement of reasons or bases was inadequate under *English*. Thus, the Court vacated and remanded the Board decision on appeal, instructing the Board to discuss whether the evidence establishes "severe painful motion" warranting a 60 percent rating under Diagnostic Code 5055, and to consider whether Mr. Tedesco's lay statements warrant a separate rating for instability under Diagnostic Code 5257.

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

CAVC Certifies Class for Reimbursement of Non-VA Emergency Medical Care, Grants Writ of Mandamus

by Jillian Berner

Reporting on *Wolfe v. Wilkie*, No. 18-6091, (September 9, 2019).

In *Wolfe v. Wilkie*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (Court) considered the petition of a putative class of veterans for a writ of mandamus regarding the VA's authority to reimburse veterans for the costs of non-VA emergency medical care. The Court determined that a class was appropriate and then held that the class of veterans was entitled to relief via a writ of mandamus against the Secretary of Veterans Affairs to properly adjudicate claims for reimbursement of emergency medical treatment at non-VA facilities.

While 38 U.S.C. § 1725 originally did not allow VA to reimburse veterans for non-VA emergency medical care where the veteran had third-party insurance that covered *any* part of the medical expenses, a 2010 amendment by Congress allowed VA to reimburse veterans with third-party insurance coverage for *some* portion of the emergency expenses. In 2012, VA revised its regulations to conform to the 2010 Congressional amendment, but declined to amend 38 C.F.R. § 17.1002(f) to align with the current statute.

In 2016, a veteran challenged the VA regulation in *Staab v. McDonald*, 28 Vet.App. 50 (2016). In *Staab*, the Court held that VA's regulation was invalid as inconsistent with the amended statute because it excluded veterans who had some insurance coverage, in contravention of Congress's intent in passing the amended statute and Congress's unambiguous language in the statute. The Secretary appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) and later withdrew that appeal.

After *Staab*, VA amended its regulations to comply with the Court's rulings. VA amended 38 C.F.R. § 17.1002(f), with the new regulation dictating that reimbursement of non-VA emergency medical expenses was only allowed where the veteran had no insurance coverage that would "fully extinguish the medical liability" for the non-VA medical care. VA also amended 38 C.F.R. § 17.1005 to add a bar to reimbursement for any "copayment, deductible, coinsurance, or similar payment similar payment that the veteran owes [a] third party or is obligated to pay under a health plan contract."

Petitioner Amanda Wolfe received emergency medical treatment at a non-VA facility in September 2016, incurring over $22,000 in medical expenses. Her insurance paid nearly $20,000, leaving her owing $2,558.54, most of which was labeled "coinsurance" (the rest was deemed a "copayment"). She requested reimbursement from VA, was denied in February 2018, and appealed. VA summarily closed her case and confirmed its prior denial in a November 2018 letter. Petitioner Peter Boerschinger received emergency medical care at a non-VA facility and owed $1,340 after Medicare paid a portion of his bill. Boerschinger paid the $1,340 bill and filed a claim for reimbursement from VA, which was denied by VA in November 2018. VA denied his claim because he had other insurance coverage. Boerschinger was joined to Wolfe's petition before the Court in February 2019.

The Secretary conceded in his response to the petition that VA had not updated its templates for letters denying reimbursement for emergency non-VA medical care, but argued that VA was in the process of correcting the templates and reaching out to some 600,000 veterans whose claims were denied. The Secretary explained that VA divided these veterans into categories: those whose claims were incorrectly denied based on other health insurance, with notices matching that reason; those whose claims were denied for other reasons but whose notices contained incorrect information about other health insurance; and those whose claims were rejected as incomplete and whose notices contained incorrect information about other health insurance.

After oral argument in May 2019, the Secretary provided the Court and the petitioners with the updated templates and more information about the reimbursement system and the categories of veterans. The petitioners argued in response that the information proved that VA's reimbursements did not follow the *Staab* precedent.

In the instant opinion, the Court first held that it lacked jurisdiction over the Boerschinger Class (those who were sent correspondence by VA stating that reimbursement was only permitted where the veteran had no health insurance coverage), as no live case or controversy existed. The Court determined that the Secretary was providing the requested relief to the members of this class by sending out corrective letters to those claimants, rendering these petitioner's claims moot.

But the Court held that it did have jurisdiction over the Wolfe Class, made up of veterans whose claims were denied because the expenses were part of the deduction or coinsurance payments that the veteran was purportedly responsible for paying. The Court said that jurisdiction was appropriate under the All Writs Act because the regulation risked frustration of the Court's jurisdiction over decisions by the Board of Veterans' Appeals and because the erroneous decisions by VA would not be within the Court's jurisdiction, if unappealed. The Court stated that VA's alleged circumvention of the intended effects of *Staab* could be a "clear abuse of [administrative] discretion and disrespect for judicial power," warranting a writ. The Court held that the Secretary's arguments against jurisdiction failed, because statutory interpretation of the statutes providing the Federal Circuit with authority to invalidate VA regulations did not bar the Court from also invalidating regulations and that Congress intended to allow the Court to also hear challenges to VA regulations via class action suits.

Next, the Court certified the Wolfe Class, pursuant to Rule 23 of the Federal Rules of Civil Procedure, as counseled by the Court's decision in *Monk v. Wilkie*, 30 Vet.App. 167 (2018), and *Godsey v. Wilkie*, 31 Vet.App. 207 (2019). The Court held that the putative class satisfied the Rule 23 requirements of numerosity (potentially covering hundreds of thousands or millions of claimants); commonality (a shared contention that 38 C.F.R. § 17.1005(a)(5) is invalid under 38 U.S.C. § 1725); typicality (Wolfe's claims also rest on the denial of a reimbursement claim, making her responsible for a non-refundable payment under the regulation); and adequacy of representation (no indication of Wolfe's interests conflicting with the other putative class members' interests). The Court also determined that the proposed class was maintainable, as required by Rule 23(b), as the requested declaratory and injunctive relief would affect the entire class. The Court found that the proposed class counsel was adequate under Rule 23(g). The Court said that the proposed class action would be a superior method of adjudicating the controversy, compared with piecemeal adjudication, since all class members could enforce the precedential class action decision, allowing for consistent adjudication and quicker systemic correction. The Court declined to allow class members to opt out, which would make notice to all potential class members less crucial. Accordingly, the Court certified the class.

Upon examining the merits of the class's petition, the Court first decided that the petitioners were clearly and indisputably entitled to a writ. The Court held that VA's inclusion of "deductibles" and "coinsurance" as non-reimbursable expenses in the regulation was not based on a permissible construction of the statute, because the regulation was inconsistent with *Staab*'s interpretation of the regulation. The Court explained that *Staab* permitted reimbursement for "that portion of expenses not covered by a health-plan contract" for veterans who had partial coverage from health insurance, and it noted that the Court in *Staab* wrote that Congress intended reimbursement of that leftover portion of costs not covered by a third-party insurer for which the veteran was responsible. The Court held that the Secretary's interpretation of the regulation would erase the parts of *Staab* allowing such reimbursement. After defining a "deductible" as "a relatively large but fixed cost that an insured party pays before insurance begins to pay" and "coinsurance" as "a relatively large, variable cost that an insured party pays before insurance begins to pay," the Court determined that these costs are not similar to a copayment, further invalidating VA's

construction of the regulation (in which VA called them "similar") when considering the operative statute.

The Court also held that the class petitioner had a lack of adequate alternative means, because appealing through the Board would not allow for invalidation of the regulation. The Court determined that the writ was warranted due to the "extraordinary" circumstances presented by the petitioners' claims.

The Court granted all of the petitioners' requests for relief by declaring the regulation invalid as contrary to the statute, invalidating the Secretary's decisions made under the regulation insofar as the Secretary denied reimbursement for deductible or coinsurance expenses, and ordering the Secretary to readjudicate those claims. The Court also ordered the Secretary to stop issuing letters to veterans whose claims were incorrectly denied based on other health insurance, who had received notices matching that reason; to stop issuing letters to veterans whose claims were rejected as incomplete and whose notices contained incorrect information about other health insurance; to strike the problematic language about other health insurance from any letters; and to present a plan to correct the incorrect notices sent out previously.

Judge Falvey dissented. First, he said that mandamus relief was not warranted because a writ is not in aid of the Court's jurisdiction, as the petitioner did not argue that the Secretary was refusing to perform any action that would prevent her from going through the typical appeals challenge. Granting the petitioner's requests would allow her to essentially get around the jurisdictional requirement of a final Board decision, and the Court's "prospective jurisdiction" theory does not comport with the All Writs Act. Without a Board decision, or prospective Board decision, Judge Falvey said, the Court lacks jurisdiction. Additionally, Judge Falvey asserted that the petitioner did not demonstrate a clear and undisputable right to the writ, because the regulation and the Secretary's arguments in support of it had not yet been addressed in Court precedent. Finally, Judge Falvey wrote that the typical statutory appellate process provided the petitioner with sufficient alternative means to obtain the relief she requested. He would have declined to grant the writ to the petitioner or to the entire class.

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

The Opportunity for Meaningful Development and the Filipino Veterans Equity Compensation Fund

by Andrew Strickland

Reporting on *Dela Cruz v. Wilkie*, No. 2018-2101 (Fed. Cir. July 26, 2019).

In *Dela Cruz v. Wilkie*, the Federal Circuit addressed issues relating to verification of service of individuals who served in various Philippine military organizations during World War II. The Federal Circuit held that the VA may generally rely on a service department's decision as to verification of military service but may not rely on an Army Board for Correction of Military Records' ("Corrections Board") determination that a veteran's name is not on the Reconstructed Guerilla Roster ("reconstructed roster") without first giving the veteran a meaningful opportunity to challenge his service record. The Federal Circuit also held that the CAVC had exclusive jurisdiction to review a decision by the Corrections Board where suit is filed in the first instance and a decision of the Corrections Board affects the administration of VA benefits.

The Compensation Fund. Philippine veterans were first called into service by Executive Order of President Franklin D. Roosevelt during World War II. The veterans were recruited from various Filipino military organizations, including the Guerrilla Services. However, Philippine veterans were not entitled to those benefits made available to U.S. veterans because, after the war ended, Congress passed the First Supplemental Surplus Appropriation Rescission Act of 1946 and the Second

Supplemental Surplus Appropriation Rescission Act of 1946 stating that service by Filipino military organizations "shall not be deemed to have been active military, naval, or air service." 38 U.S.C. § 107 (a), (b). Congress subsequently created the Filipino Veterans Equity Compensation Fund ("compensation fund") for eligible Philippine veterans, which provided for a one-time payment for eligible Philippine veterans who applied for such compensation within one year of the statute's enactment.

As part of determining eligibility, VA requires relevant service department documentation or certification to verify the claimant's service. In *Soria v. Brown*, 118 F.3d 747 (Fed. Cir. 1997), the Federal Circuit affirmed VA's denial of benefits to a claimant alleging service through the Philippine Commonwealth Army, rather than the Guerilla Services, where the U.S. Army refused to certify service. It noted that "VA has long treated the service department's decision on such matters as conclusive and binding on the VA," and the proper "recourse lies within the relevant service department, not the VA." *Soria*, 118 F.3d at 749.

Reconstructed Roster. After the war, Filipino unit rosters were largely lost, destroyed, or altered. In an effort to reconstruct a roster, the U.S. Army adopted the following methodology: (1) determine which Guerilla units to include by information received from the units themselves, military orders, combat histories of the U.S. units associated, or otherwise; (2) where a particular Guerilla unit merited inclusion, they would request the roster from the unit commander; and finally, (3) where the roster appeared to be free of anomalies, the unit would be included in the reconstructed roster. The reconstructed roster has not been changed or corrected since completion. It is relied on by the U.S. Army to verify service, despite known potential for inaccuracies.

Mr. Dela Cruz asserted that he served with the Filipino Guerrilla Services during World War II. As proof of his service, he submitted a "Form 23 affidavit" executed by a U.S. Army captain at the end of World War II describing his service. In addition, he submitted certification of his service from a Filipino Guerrilla unit and several affidavits asserting his service. When the VA Regional Office ("RO") requested that the U.S. Army verify Mr. Dela Cruz's service, the U.S. Army would not certify service as he did not appear in the reconstructed roster. Despite having the Form 23 affidavit in addition to the other affidavits, the U.S. Army indicated it was unable to verify his service. Ultimately, after multiple appeals and remands, the Board and the Court affirmed the denial of eligibility for compensation.

At the Federal Circuit, Mr. Dela Cruz argued that the VA should have made its own determination as to his service. However, the Federal Circuit relied on *Soria* to hold that there was no error in treating the service department's decision on the verification of service as conclusive and binding. It reiterated that the proper "recourse lies within the relevant service department, not the VA." *Soria*, 118 F.3d at 749. Mr. Dela Cruz attempted to distinguish *Soria* by arguing that the case did not involve benefits under the compensation fund which is part of a remedial legislation specifically defining "eligible person" without a requirement of service department verification. The Federal Circuit rejected this argument, as the legislation creating the compensation fund expressly provides that an application must include "such information and evidence as the Secretary may require." The Federal Circuit further stated that, had Congress intended to create an exception to the VA's longstanding regulatory requirement of service department verification in 38 C.F.R. § 3.203, it would have expressly done so.

Mr. Dela Cruz further argued that VA should have treated his Form 23 affidavit as a service department document per 38 C.F.R. § 3.203 (a). The Federal Circuit found that the Board did not err when it construed the reconstructed roster relied upon by the U.S. Army as the service department document to verify service, rather than the Form 23 affidavit. In its reasoning, the court relied on the fact that the U.S. Army treated the reconstructed roster as the definitive source.

Mr. Dela Cruz then argued that VA should not have given conclusive weight to a U.S. Army

determination based solely on the reconstructed roster without giving him a meaningful opportunity to challenge the service record. The Federal Circuit found that, ultimately, potential relief was still available to Mr. Dela Cruz through the Corrections Board. Therefore, the Federal Circuit needed to determine whether to affirm the denial or remand the case to the Court.

The Federal Circuit remanded the case to CAVC, holding that CAVC has exclusive jurisdiction to hold the case in abeyance and require resort to the Corrections Board. It reasoned that the Court, having exclusive jurisdiction over the right to compensation under the statute creating the compensation fund, also had exclusive jurisdiction to review relevant decisions from the Corrections Board.

Andrew Strickland is an Associate Counsel at the Board of Veterans' Appeals.

Movie Review: *National Bird,* dir. by Sonia Kennebeck, (Ten Forward Films, 2016), 1:31:59

by Aaron Moshiashwili

Over the last two years or so, several of the books I've reviewed have touched on the issue of PTSD among drone pilots. It's an issue that will be of growing importance, both legal and social, as the way we conduct war changes. *National Bird*, directed by Sonia Kennebeck, examines America's drone war and the impact it has had. It's a movie that definitely made me think... although I'll admit much of that thinking was about things other than what the director intended the audience to think about.

The movie follows three veterans, all of whom were involved in the drone program in some way. Their specific involvement is made a bit blurry because the program is classified and what the subjects can say is highly restricted. (This is the only film I've ever seen with a disclaimer in the credits: "No person in this film disclosed classified materials to the filmmakers.") Heather worked in a surveillance unit, identifying targets and directing the drone operators to strike or hold back. Daniel was an intelligence analyst working with JSOC and NSA. Lisa worked in data collection. (I think it's theatrics that they're only identified by the first names, at least Heather and Lisa's full names are clearly identified during the movie.) The movie doesn't focus on their military jobs, however; the movie is about what each of them has done since then. Daniel has become a whistleblower. Lisa has become active trying to aid Afghanis harmed by the drone program, and her story deals with the survivors of a mistaken attack on a group of travelling civilians. Heather advocates on behalf of veterans of the drone program who, like her, have PTSD.

But I had a problem, both in watching and reviewing the movie. When I first heard about it, I focused on the PTSD angle and it became the only one I was really interested in. Lisa's story is something I feel is well-known – drone strikes inflict tremendous human misery, and focusing on one strike and its aftereffects serves to horrify but not enlighten me. And I didn't quite get Daniel's story. Yes, the government goes way too far to silence whistleblowers. The problem is that the line is thin and the story here injects enough uncertainty that it is hard to tell whether or not to believe his motives.

But even if those two stories were an hour of blank screen, it was worth the runtime to watch Heather's story. She is an Air Force veteran who enlisted because she thought it was a route out of her rural Pennsylvania town; during filming she was training to be a masseuse, trying to ease the pain she was carrying by easing others' pain. She was speaking out – not in judgment of the morality of the drone program – but because she was frustrated at how hard she was finding it to get the treatment she needed after her service ended.

Please excuse me for a personal digression - but I can't really talk about this movie without talking about how I reacted to it. A lot of what I thought about during this movie came from the moment

when Heather – a pretty young woman, a bit goth, someone I would have dated in my twenties – looks into the camera and says "I don't know how many people I've killed."

I spent a lot of time thinking about who we – let's be honest, who *I* – consider a veteran. I wasn't happy with what I found. I found myself judging her – not just on what she was saying, but her tone, her face, her way of dressing… things that shouldn't have mattered at all. I found myself questioning her story in a way I never would with a veteran who had simply written her story down for me to read – and certainly not for a male veteran. I understand how to deal with – how to *understand* – a 24 or 64-year-old man breaking down because of the emotional weight of the people he killed. I'm not prepared, in the same way, to watch a girl who looks to be in her mid-twenties shaking and recounting the things she'd do to deal with the emotions she felt after she ordered someone to be killed.

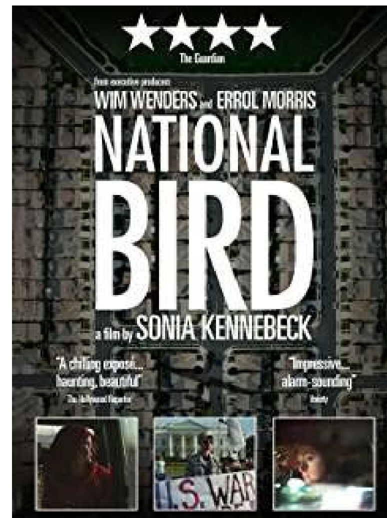
It is incredibly unfair to her. It's unfair to her service, unfair to her suffering, and unfair to you as well, because I'm writing about how I processed the movie instead of what it was about. All I can hope is that the experience makes me less judgmental about who I see as a veteran, and changes how I react to people who don't seem to fit that stereotype.

Whatever the stereotype, she is a forceful advocate for herself and for other people in the drone program. It is easy to dismiss her claim to having PTSD – after all, she never had to sit in a foxhole with bullets whizzing over her head. She was in an air conditioned room in Colorado, not listening to mortar rounds impact outside of her FOB. Many people will say (and they do, the comments section of the film's website was fairly revolting), what did she do that was so stressful, so dangerous that she got PTSD? And the unspoken question is, what is wrong with her, that she is so weak?

And so she tells you what she did. And you stop wondering why she has PTSD.

She had to watch. For hours or even days, she would watch the target. Watch a person coming and going. Sitting down to dinner. Playing with their kids. And then she would make a decision, based on grainy footage and too-limited intelligence, whether that person should die.

But she wasn't a sniper, or a pilot, or someone who fires and leaves. Whether her decision was right or wrong, she had to keep on watching afterwards. Looking at bodies blasted to pieces. She describes watching, on infrared camera, the heat slowly draining out of dismembered body parts as the hours ticked by. Of watching the target's family and friends come and pick those pieces up and wrap them in a blanket for burial.



I am writing this review using a dictation app and my voice is shaking just saying these things. She had to experience them, day in and day out. Mission after mission, without downtime or a break. Being refused transfer despite the unit psychiatrist saying that the duty was causing depression and PTSD.

At that point, I no longer questioned how someone in an air-conditioned room in Colorado could develop PTSD.

It always takes time for the military and the law to adapt to the problems caused by new technologies and new modalities of war. Maybe this movie – and specifically Heather's story – will give us a chance to get ahead of that curve for once.

Aaron Moshiashwili thinks that reviewing movies is quite a bit harder than reviewing books.

Expressly Raised Ancillary Benefits Included in the Scope of a Claim

By David E. Boelzner

Reporting on *Payne v. Wilkie*, No. 17-3439 (Aug. 9, 2019).

In *Payne*, the Court provided further guidance for determining the scope of claims. Notably, this case involved the uncommon situation where the claimant had expressly argued to VA for entitlement to ancillary benefits in conjunction with a pending claim for increased rating. Therefore, it was not necessary for the Court to discuss whether the evidence reasonably raised the issue of entitlement to ancillary benefits or whether the Board accordingly had jurisdiction over that issue.

Mr. Payne had a pending claim on appeal for entitlement to increased ratings for upper extremity disabilities. In September 2016, he expressly argued to the Board that he was entitled to SMC(k) "as a result of" his upper extremity disabilities. He proffered evidence to support his argument that he was not able to do heavy exercise due to these disabilities and that this lack of exercise contributed to his weight gain, which resulted in his morbid obesity, which in turn caused certain conditions such as cardiovascular disease, which in turn contributed to his impotence and inability to obtain a penile erection since May 2014.

The Board denied entitlement to increased ratings for upper extremity disabilities. In so doing, the Board also determined that it lacked jurisdiction to address the issue of entitlement to SMC(k) because Mr. Payne had not filed a formal claim for this benefit on a standard claim form as required by the post-2014 version of 38 C.F.R. § 3.155.

The Court held that the Board erred as a matter of law when it determined that it lacked jurisdiction over entitlement to SMC(k), because the post-2014 version of 38 C.F.R. § 3.155(d)(2) clearly and unambiguously does not require that a claimant file a formal claim to assert entitlement to ancillary benefits. The Court noted that 38 C.F.R. § 3.155 (d)(2) defines the scope of a claim as including any ancillary benefits, such as SMC, that arise "as part of" that underlying claim. In other words, the post-2014 version of § 3.155 does not change or limit VA's long-standing duty to develop a claim to its optimum.

Next, the Court analyzed whether the Board was required to address the merits of Mr. Payne's explicitly raised argument that he was entitled to SMC(k). Under 38 U.S.C. § 1114(k), "if the veteran, as a result of service-connected disability, has suffered the anatomical loss or loss of use of one or more creative organs," he or she may be entitled to SMC(k).

Mr. Payne asserted that 38 U.S.C. § 1114(k) does not preclude his theory of entitlement to SMC(k), and he had explicitly argued to the Board for entitlement to SMC(k) due to his service-connected upper extremity disabilities and he had proffered evidence to demonstrate a multi-link chain of causation between his upper extremity disabilities and his loss of use of a creative organ. The Secretary responded that the Board lacked jurisdiction over this ancillary benefit because the service-connected disability on appeal was not a condition affecting the use of a creative organ, such as erectile dysfunction or a genitourinary disability under 38 C.F.R. § 4.115b, and because Mr. Payne's loss of use was not "the result of" (immediately caused by) the upper extremity disabilities.

The Court concluded that the plain text of 38 U.S.C. § 1114(k) does not limit potential entitlement to SMC(k) to veterans with loss of use as a result of only specific service-connected disabilities. The Court also concluded that the plain text of 38 U.S.C. § 1114(k) does not preclude a theory of entitlement based on a multi-link causal chain between a service-connected disability and the loss of use a creative organ. The Court noted that caselaw supports the broad interpretation that "as a result of" requires merely a showing of "a consequence or effect." Accordingly, the Court held that the Mr. Payne's explicitly raised theory of causation was not

too tenuous for the issue of entitlement to SMC(k) to be before the Board.

David E. Boelzner is Clinical Associate Professor of Law and Co-Director of the Puller Veterans Benefits Clinic at William & Mary Law School.

Veterans Treatment Courts

By Chad H. Lennon

Veterans Treatment Courts (VTCs) began on January 15, 2008 in Buffalo, New York. The Buffalo Court sought to assist veterans with lingering issues related to their military service through a specialized criminal docket with the goal of providing treatment to the veteran. That court was modelled on community-based problem-solving courts, such as a hybrid of a drug court and mental health court. A VTC's goal is to assist veterans struggling with substance abuse, mental health issues, or a combination of both. The court consists of justice-involved veterans who voluntarily enter into a contract and are joined by a team of participants who seek to change the veteran's life in a positive manner. The team comprises court staff, health care professionals, peer mentors, and others. Few states have legislation relating to VTCs, but many local jurisdictions have established VTCs through rule or practice. This has led to a wide variety at state and federal levels concerning which veterans are approved to participate in the court and the policies for each court. Each jurisdiction has specific criteria that must be adhered to, but when a justice-involved veteran successfully completes Veteran Treatment Court, he or she may receive a non-incarceration sentence, and in some cases the charges may be dismissed.

The idea that veterans have earned special treatment from the legal system originates from the awareness that the training to overcome the natural human aversion to harming others, and frequently being deployed overseas to do that very deed, is what may have caused the mental illness and substance abuse leading to his or her presence in front of a judge.[i] Post-Traumatic Stress Disorder ("PTSD") and Traumatic Brain Injury ("TBI") are two conditions frequently seen in veterans involved in the criminal justice system. Studies have shown that these two conditions, when left untreated, can lead a veteran to becoming involved in the criminal justice system. A *RAND Institute* study stated that 300,000 veterans suffer from PTSD while another 320,000 experienced TBI while deployed. Despite a growing awareness of these two conditions, the majority of the population is left uneducated about the conditions, symptoms, and how to assist those suffering from PTSD and TBI.

Because of advances in warfare, specifically armor for personnel and equipment, more service members are returning home alive rather than dead. The *American Bar Association's* 2010 Commission on Homelessness and Poverty noted that about the same number of service members were deployed to Vietnam as have been deployed to Iraq and Afghanistan. In comparison, over 47,000 died in combat in Southeast Asia while fewer than 5,300 U.S. soldiers have been killed in Iraq and Afghanistan. But we have seen a spike in the incidence of concussions (which can involve TBIs) and other injuries due to explosions.

Veterans who have received anything less than an honorable discharge (which often happens as a result of problems in service) lose certain benefits through the VA, so finding medical providers for a justice-involved veteran may be a challenge.
Some courts will not accept into the VTC program a veteran with "bad paper", however, that court is likely missing an entire population of veterans who may need the treatment provided through the court. A VTC team can work to find medical insurance, providers, and other services outside the VA. These providers, VA or otherwise, will work with the veteran to find the underlying issue and work towards resolving it.

VTCs have grown from their start in Buffalo in 2008 to 461 nationwide in 2016, and should continue to grow in the future.[ii] Many service members have not yet returned to civilian society, and the military has been at war for over 18 years. As retirements and separations from military service continues we

may see an "incubation period" of war trauma. Furthermore, we will see service members retiring in two years who have spent an entire career at war. This leads to a possible looming mental health crisis. This crisis can be averted based on the continued efforts made to assist those veterans suffering from war trauma conditions. The Veterans Treatment Court is one of the efforts to provide treatment to those who were willing to sacrifice their lives for the country. A combat veteran has likely spent a significant amount of time in violent and/or stressful situations. Studies have shown that with incarceration it is almost certain that conditions such as PTSD and TBI will worsen and only increase the possibility of continuing the negative decision making process, leading to further legal and social issues. Moreover, it is not just the veteran who will benefit from these courts, but society benefits from reduced recidivism rates, savings of money, time and resources invested in legal proceedings. In the San Jose, California VTC, Judge Stephen Manley released a report detailing how his VTC resulted in more than $7 million in savings to the state of California through a reduction in jail time and emergency services otherwise caused by relapse and recidivism.

For a veteran to enter into VTC, the prosecutor's office must consent to the case being transferred out of a "normal" criminal docket. Once a case is in the court, the case is nonadversarial, as the focus becomes on the justice-involved veteran. The issue of whether a VTC will accept a particular individual and the terms of the contract, however, may be adversarial. The duration of contracts varies by jurisdiction, but typically we see contracts at 12 months for misdemeanors and 18 months for felonies. Calendaring of the case is based on the progress each justice-involved veteran is making. Depending on the jurisdiction, an eligible justice-involved veteran may be admitted into the VTC at any stage in a proceeding.

The prosecutor will review a case to determine if the case will be calendared for the VTC. Once a case is "approved" by the prosecutor, the Veteran Justice Outreach Specialist ("VJOS"), will schedule a day and time to interview the justice-involved veteran to determine the appropriate treatment schedule. At the next court date, the VJOS will inform the VTC team of the diagnosis and treatment schedule. The veteran will then be able to contract into the court and fully participate in the program. During the period of the contract, the VJOS keeps the VTC team up to date on the progress the veteran is making.

The leading member of the VTC team is the judge who is responsible for maintaining and running the court with the mission of assisting in rehabilitating veterans who come before the court. The Judge has the final decision in the court, but is assisted by the VJOS, prosecutor, defense attorney, and mentors. The defense attorney is required for the veteran to enter the court through the initial plea, possible sanctions, and the final sentence upon successful completion. But it is important for the defense attorney to remain part of the court team throughout the process.

The VA representative, or VJOS, is the liaison between the court and the Veterans Health Administration. As the "Captain" of the team, the VJOS is the key to a successful treatment plan. As VTCs expanded, the VA wanted more justice-focused action at the medical centers, therefore, the Veterans Justice Outreach Initiative was established to educate the criminal justice system on unique issues facing veterans. Once a veteran contracts into the court, the VJOS assists the veteran through substance abuse and mental health treatment programs, whether through the VA or civilian providers

The mentors are veterans in the local community, whether through a specific veteran's organization or individual volunteers. The mentors, who volunteer their time in court, are a source of guidance for a justice-involved veteran. The mentors are a key to success and have no obligation to the court (judge, prosecutor, or defense attorney) to disclose any conversations that have occurred with the veteran. But open communication has been used to create a team focus on the success of each veteran.

In Suffolk County, New York, when a veteran successfully completes Veterans Treatment Court, the veteran will be presented with a certificate of completion and a commemorative coin, which is a

familiar token in military life. Furthermore, veterans who are seeking a discharge upgrade may cite their successful completion of a rigorous VTC program designed to turn a life around into a success once again. The VTC does not disregard the fact that the veteran who comes before it has broken the law, and he or she must face the consequences for his or her action. Instead, the VTC substitutes closely supervised mandatory treatment for incarceration to provide the justice-involved veteran an opportunity to address and treat the underlying causes of his or her criminal action while facing the consequences for breaking the law.

Chad H. Lennon is the Director of the Veterans and Servicemembers' Rights' Clinic at Touro Law Center and is a Major in the Marine Corps Reserves.

[i] Charles Davis, Traumatized Vets Are Finding Hope in Special Courts, TAKEPART (March 6, 2015), http://www.takepart.com/feature/2015/03/06/veterans-treatment-courts.
[ii] Douglas B. Marlowe ET AL., Painting the Current Picture, A National Report on Drug Courts and Other Problem Solving Courts in the United States, National Drug Court Institute, 36 (June 2016). Veterans Health Administration, Department of Veterans Affairs, Veterans Court Inventory 2016 Update 2 (March 2017).