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The Court Bids Farewell to Judges Davis and Schoelen

by Roya Bahrami

On December 3, 2019, Chief Judge Robert N. Davis and Judge Mary J. Schoelen retired from the Court of Appeals for Veterans Claims (CAVC or Court). Both judges began their careers at the Court 15 years ago, in December 2004. Judge Davis became the ninth Chief Judge of CAVC in October 2016. Together, they have served the Court for 30 years, and they retired the year of the Court's 30th anniversary.

Chief Judge Davis has served in several roles over his career, including as a naval officer, federal appellate attorney, law professor, judge, mediator, and arbitrator. He is a published author and is also the founder of the *Journal of National Security Law*. During his tenure at the Court as an associate and Chief Judge, he authored approximately 3,278 single judge decisions and 169 panel opinions. He also facilitated better communication between the Court, veterans service organizations, the VA General Counsel, the CAVC Bar Association, the Board of Veterans' Appeals, law school clinics, the Veterans Pro Bono Consortium, and Capitol Hill. He established the Judicial Advisory Committee, with members representing a cross section of people interested and involved in veterans law and with the Court. These members exchanged ideas on issues, problems, procedures, and improvements to the court's operations and the larger practice of veterans law. Additionally, Chief Judge Davis traveled around the country to speak on behalf of the Court and to recruit talented legal professionals into the area of veteran's law.

As a law clerk to the Chief from 2018 to 2019, I can say firsthand that the Chief really cared about his staff members and their professional development. A few memories of my time at the Court illustrate this. Following a panel hearing for which I had prepared, the Chief Judge suggested to his fellow panel members that the clerks who worked on that case be permitted to sit in on their post-argument discussion. Witnessing this portion of their decision making process helped me to gain a deeper understanding of the judges' competing concerns and thought process. Another experience I am particularly grateful for is the opportunity to attend a legal writing seminar hosted by the legendary

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Bryan Garner. The Chief encouraged his clerks to attend with him, and we discussed our reactions to Mr. Garner's suggestions afterward. The lessons we learned were extremely valuable and our chambers even implemented a new writing and citation style in our draft decisions. Finally, I was able to witness several award ceremonies that the Chief Judge held to recognize and award the various staff members for their contributions. It became very clear to me that the Chief truly valued each employee of the Court, and I am confident that each member of the Court returned his sentiment. I myself am immensely grateful for the additional perspective I've gained through my short time working for the Chief, which I have applied in my current role as Counsel at the Board of Veterans' Appeals.

Judge Schoelen came to the Court after a distinguished career working on behalf of veterans. She advocated for veterans' benefits while working for the National Veterans Legal Services Program, as well as the Vietnam Veterans of America. Additionally, she developed and implemented policies pertaining to veterans benefits while working for the U.S. Senate Committee on Veterans' Affairs, where she also oversaw the implementation of those policies. During her tenure at the Court, Judge Schoelen issued approximately 2,980 single judge decisions and wrote 132 panel opinions.

A longtime clerk of Judge Schoelen's, Charles DiNunzio, has this to say about her: "In my past several years working for Judge Schoelen, I've known her to be a genuinely kind and thoughtful jurist who is as much known for being a creative problem solver as she is for dispositions that are legally well-grounded. She has always supported her clerks in any way she can and treated us like family. In chambers, she provided us with all the tools we needed to quickly and appropriately assist her when writing cases, [and she] gave us space to have constructive dialogue with her when the proper outcome wasn't readily apparent. Outside of chambers, she continued to reach out to former clerks and interns alike and provided them with encouragement and support in the pursuit of their career goals. She also encouraged us to take part in other, more external veterans law activities, such as the CAVC Bar Association board of governors and panel discussions at academic institutions. My favorite part of working with her has been watching her tireless and thought-provoking engagement on hot button issues over the past few years, including class action litigation and the extraschedular cases. Those issues have been true academic exercises and the dedication with which she has approached them, all the way through the very end of her term, has been inspiring. She put in just as much effort on day 5,478 as she did on day 1."

Now-Senior Judge Davis passed the gavel to Chief Judge Bartley.

Chief Judge Davis and Judge Schoelen were honored at a ceremony on November 14, 2019, which also celebrated CAVC's 30th anniversary and the passing of the gavel from Chief Judge Davis to new Chief Judge Margaret Bartley. The ceremony, held at the E. Barrett Prettyman United States Courthouse, was extremely well attended; all nine judges, as well as retired and former judges Nebeker, Kasold, Hagel, Moorman, Lance, Farley, and Ivers, were seated at the bench. The Chief provided opening remarks about the Court and introduced several prominent veterans law practitioners who spoke about the CAVC's formation and its growth over the past 30 years. Both judges then gave heartfelt farewell speeches. Judge Schoelen spoke about her experience on the Court and tearfully expressed her gratitude for her staff, including Lorraine Swisher, Patty Lewis, and her many law clerks. She recognized the attendance of her father, Commander Lawrence Schoelen, U.S. Navy retired,

as well as her brother, Larry Schoelen, and husband, Brad Smith.

Chief Judge Davis thanked his mother, sister, brother in law, uncle, aunt, and friends for attending. He also identified many members of the Court staff, both former and present, and expressed his gratitude for their contributions to the Court's success. Chief Judge Davis also passed the gavel to the new Chief Judge Bartley. A video of the entire ceremony may be found here: https://www.youtube.com/watch?v=JNJTLM4PUF4.

Roya Bahrami is Counsel at the Board of Veterans' Appeals.

A Celebration of the Court's 30th Anniversary

by Jenny J. Tang

On November 14, 2019, members of the CAVC bench and bar, family, and guests celebrated the CAVC's 30th Anniversary at a special ceremony conducted at the E. Barrett Prettyman United States Courthouse. Chief Judge Davis was joined on the bench by current Judges Schoelen, Pietsch, Bartley, Greenberg, Allen, Meredith, Toth, and Falvey; Chief Judge Judge Frank Nebeker, the CAVC's first Chief Judge; Senior Judges Kasold, Hagel, Moorman, Lance; and, retired Judges Farley and Ivers.

Chief Judge Davis opened with remarks on the CAVC's creation in 1988 under Article I of the Constitution and how it began operating under Chief Judge Frank Q. Nebeker's leadership. He spoke about how the CAVC is a "grand experiment" because it is unlike any other federal appellate court in the country, with its unique characteristics as well as characteristics shared with district courts and appellate courts. He recognized judges, court staff, and practitioners for working since October 16, 1989, to ensure full, fair, and prompt judicial review for our nation's veterans and their families.

Diane Boyd Rauber and Rory Riley-Topping, co-authors of the CAVC's forthcoming history book, followed. Ms. Riley-Topping noted that the book's central theme is focused on the people who were involved. The book begins with commentary on VA's "splendid isolation" and how the Veterans Judicial Review Act of 1988 (VJRA) developed. Ms. Rauber then spoke on the book's commentary regarding the evolution of the CAVC's identity and how it has been understood over the years by Congress. Ms. Rauber noted that now the CAVC is no longer seen as an off-shoot of VA but rather as a legitimate reviewing body.

Professor William F. Fox, former law school dean, professor, and distinguished scholar of the early CAVC, then provided remarks on his background in veterans law. He noted issues that came up in the CAVC's early days, including whether to use an apostrophe in "veterans", whether there should be a space in "Vet. App.", whether it is "reasons or bases" or "reasons and bases". He spoke about early cases notable for their role in legitimizing the then-new veterans appeals processing system, and he concluded with a heartfelt thanks to the veterans law community for its service to veterans and their families.

Bart Stichman, Executive Director of NVLSP and Fourth President of the CAVC Bar Association, then provided remarks on the impact of the Court from his perspective after representing veterans for the CAVC's entire 30-year history. He provided insights on how the CAVC has quantifiably improved the quality of VA decisions, and he posited how the CAVC will have a future impact by way of precedent and its interpretations of the AMA. Mr. Stichman concluded that this 30th year is a way station on the CAVC's journey.

Jack Thompson, former Deputy VA General Counsel and First President of the CAVC Bar Association, was the final speaker. He shared how his career began as a VA Board of Veterans' Appeals staff attorney in 1973. He noted drafting of rules of practice under Chief Judge Nebeker following the VJRA's enactment, and how important it was for the VA Secretary to be the defendant in cases before the CAVC such that the appeals would not be thought of

as having low priority. Mr. Thompson concluded that taxpayers have indeed received sufficient value for their investment in the creation of judicial review of VA decisions, given how much veterans have benefited from the CAVC.

Commemorations of Chief Judge Davis's and Judge Schoelen's retirements, and the Ceremonial Passing of the Gavel, followed.

Jenny J. Tang serves as President of the CAVC Bar Association and as an appellate litigation attorney at Bergmann & Moore, LLC.

CAVC Celebrates 30th Anniversary with SCOTUS Event

by Jenna Zellmer

CAVC Bar Association President Jenny Tang recently moderated an event at the Supreme Court in recognition of the CAVC's 30th anniversary. Supreme Court Justice Stephen Breyer provided opening remarks in the East Conference Room, recollecting his support for the creation of the CAVC and acknowledging the highly-specialized, fact-driven work the Court performs today.

President Tang then led a discussion with three attorneys who have all had veterans law cases decided by the Supreme Court: J. Michael Hannon, Brian Wolfman, and Kenneth M. Carpenter.

The three panelists discussed their clients' expectations and feelings about being the subject of a Supreme Court case, their thoughts on why they felt the Court granted certiorari for their cases, and the differences between practicing at the CAVC versus the Supreme Court.

Mr. Hannon argued *Brown v. Gardner*, 513 U.S. 115 (1994), in which the Supreme Court established the "*Gardner* preference" of favoring the interpretation of a regulation that was most favorable to the veteran. The CAVC issued its decision in its first term. Mr. Hannon was therefore not surprised that the Supreme Court granted certiorari in order to provide guidance for appeals going forward. Mr. Hannon also noted that the Court's decision in *Gardner* set up the tension between the pro-veteran canon and *Chevron* deference, which eventually led to the issue the Court heard in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Mr. Wolfman argued *Scarborough v. Principi*, 541 U.S. 401 (2004), in which the Court held that a veteran can amend an EAJA application after the 30-day filing period had expired. Mr. Wolfman believed that the Supreme Court granted certiorari because there was a split in the appeals courts' holdings. Despite the appellant being a veteran, the case held national consequences beyond veterans law. But Mr. Hannon struck a balance between describing the merits of the veteran's specific case and focusing on the procedural requirements for EAJA. He noted that a key difference between practicing at the CAVC and practicing at the Supreme Court is the need to educate the high Court about veterans law.

Reverse clockwise from bottom left: Judge William S. Greenberg, Senior Judge Robert N. Davis, Chief Judge Margaret Bartley, CAVC Bar Association President Jenny Tang, attorney Ken Carpenter, attorney Brian Wolfman, Senior Judge William A. Moorman, Judge Michael P. Allen, Senior Judge Lawrence B. Hagel, Senior Judge Mary J. Schoelen, Judge Amanda L. Meredith, Judge Joseph L. Toth, Judge Joseph L. Falvey, Jr., attorney J. Michael Hannon.

Mr. Carpenter represented Mr. Kisor before the CAVC and the Federal Circuit, and continued to be involved in the Supreme Court litigation. In *Kisor*, the Supreme Court reviewed the Federal Circuit's decision applying *Auer* deference to VA's interpretation of the term "relevant official service department records" in section 3.156(c)(1). The Court declined Mr. Kisor's request to overturn *Auer* deference but nonetheless remanded his claim. It found that the Federal Circuit had too quickly declared the regulation ambiguous and too quickly applied *Auer* deference.

Supreme Court Justice Stephen Breyer

Mr. Carpenter noted that the Court's grant of certiorari was not surprising because it was clear that the continued viability of *Auer* deference was something the justices wanted to discuss. Despite losing on that issue, Mr. Carpenter remarked that the decision was a step in the right direction, and ultimately a good result for the veteran. Finally, he noted that practice at both the CAVC and the Federal Circuit involved the same level of collegiality, but that arguments at the CAVC are broader and more fact-specific than they are the Federal Circuit and the Supreme Court.

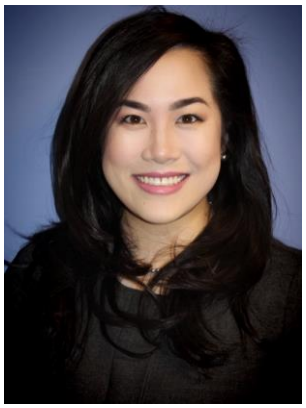
Following the panel, attendees enjoyed lunch in the West Conference room, followed by a private tour of the Courtroom and a lecture about the history of the Supreme Court Building. The Bar Association thanks Justice Breyer, and the Supreme Court, for hosting such a wonderful event.

Jenna Zellmer is a managing attorney at Chisholm, Chisholm, and Kilpatrick, LTD and an At-Large member of the CAVC Bar Association Board of Governors.

Message from the President

Greetings colleagues,

It has been an exciting year so far for the CAVC Bar Association. As part of a series of events commemorating the CAVC's 30th Anniversary, in October, we hosted our first ever program at the U.S. Supreme Court, *Veterans Law at the U.S. Supreme Court*. It was a privilege hearing from Justice Breyer on the creation of the CAVC, and our distinguished and lively panelists shared their experiences practicing before both the CAVC and the U.S. Supreme Court.



In November, the CAVC hosted a beautiful 30th Anniversary ceremony. We learned much about the CAVC's history, and we all got a bit misty-eyed as Chief Judge Davis and Judge Schoelen spoke on their retirements. We will miss them both dearly, and we look forward to working with incoming Chief Judge Bartley to continue supporting the CAVC's initiatives.

Going forward, the CAVC Bar Association will provide many more opportunities to meet and learn. In January 2020, we will host a web program on statutory/ regulatory interpretation. Soon thereafter, by popular demand, we will host a web program on the nuts and bolts of how the Veterans Appeals Modernization and Improvement Act (AMA) works. We will also host in-person programs

throughout the year, and we plan to stream/ video record these for our members outside DC. Please stay tuned.

Also, please save the date for our all-day Veterans Law CLE, June 11, 2020, in DC (web streaming available). We will offer CLE credit for six panels on the following topics: (i) current trends in veterans law; (ii) scope of claims/ Board jurisdiction; (iii) litigation strategies under AMA; (iv) best writing practices in the Rule 33 process; (v) ethics; and, (vi) VA psychiatric and musculoskeletal examinations (presented by two VA C&P physicians).

In the meantime, we hope to see you at our Holiday Networking Reception on December 17th. As always, I invite you to contact me if you have any concerns about general issues impacting members of this Bar, so that I may share them with the CAVC's Judicial Advisory Committee. I also welcome your suggestions regarding the services this bar association provides. I can be reached at jennyjtangattorney@gmail.com.

Sincerely,

Jenny J. Tang
President
CAVC Bar Association

Message from the Chief Judge

Dear Bar Association Members,

Recently the Court convened in ceremonial session to celebrate the 30th anniversary of the creation of the Court and to recognize the achievements and retirements of my colleagues, Judges Davis and Schoelen. At that time, the symbolic gavel was passed to me and on December 4, 2019, I officially became Chief Judge of the Court. I approach this position with enthusiasm and a tremendous sense of responsibility, and I share some initial thoughts with you here.

Everyone involved in the Bar Association has a common goal: To ensure that veterans and survivors of veterans receive exacting justice as to their benefits claims. I see the Court as a backstop for those seeking VA benefits, and I commit to doing my best to ensure that each appeal and petition receives fair consideration and a just decision. I was a practitioner before my appointment to the Court, and in that capacity I strived to safeguard the rights of each claimant I encountered and to teach that philosophy to the practitioners I trained. As a judicial law clerk at the Court, I was taught the importance of giving every appeal and petition the time and attention it deserved to decide it both correctly and swiftly. And I know that VA staff at all levels work in this field because they too desire a correct outcome for those who served. As Chief Judge, I now have broader responsibilities with the operation of the Court, but I continue to see my primary objective as affording veterans and their survivors full and fair judicial review.

The members of the Bar Association face fresh challenges, including navigating new procedures below under the Appeals Modernization Act; making or reviewing decisions under the Blue Water Navy Vietnam Veterans Act; and anticipating pioneering Court determinations on veterans law class actions and, where necessary, their implementation by VA. I look forward to programs where we can discuss these and other topics. We are fortunate to have a Bar Association with consistently strong leadership and varied constituencies where all can share ideas on how to best operate within the veterans law framework. I am ready to listen to your ideas. If you see problems or have suggestions on how we can improve what we do at the Court, I would like to hear them and to consider ways to make improvements.

I know there is great interest in some quarters in promoting more Court precedent. The judges of the Court are engaged in thoughtful discussion on the issue, and I welcome more insight on the pros and cons of our current balance of single-judge and panel decisions. In recognition of the Court's 30 years, I also want to make it a priority to honor those individuals and institutions who have made outstanding contributions over the years in the field of veterans law and those who are doing so now. I am considering awards or naming opportunities, and I welcome your ideas on how to honor the legacies of the heroes in our field.

I encourage you to connect with the Court by following us on Twitter (@UscavcL) (that's for USCAVC Library), where we share our decisions and other official business, and subscribing to our YouTube channel for livestreams and videos of the Court's oral arguments and special events. In addition, I appreciate this Veterans Law Journal column as a way to communicate with Bar Association members, and I hope to use this space in subsequent publications to allow you to hear from other sectors within the Court, such as the Clerk's office, the Public Office, the Court's Office of General Counsel, the Court's Counsel to the Board of Judges, the Central Legal Staff, etc.

Thank you for the enthusiastic reception I have received upon becoming Chief Judge. Thirty years of history for a Court that many individuals fought long and hard for is a milestone to celebrate. I look forward to beginning the history of the next 30 years of the Court and to working with each of you.

Chief Judge Bartley

The Opportunity for Meaningful Participation in Simultaneously Contested Claims

by Andrew Strickland

Reporting on the consolidated cases of *Bettie A.P. Sapp v. Wilkie*, No. 16-2104 (Nov. 27, 2019), *Debra B. Sapp v. Wilkie*, No. 18-0701 (Nov. 27, 2019), and *Debra B. Sapp v. Wilkie*, No. 16-3558 (Nov. 27, 2019).

Debra Sapp ("Debra") and Bettie Sapp ("Bettie") each claimed entitlement to survivor benefits related to the death of the same veteran, Donald Sapp. Each claimant alleged that she was the surviving spouse of the Veteran.

The Board issued three decisions regarding simultaneously contested survivor benefits on appeal on February 17, 2016. In Docket No. 16-3558, the Board denied Debra B. Sapp the status of surviving spouse. In the other cases the Board recognized Bettie Sapp as surviving spouse but denied her entitlement to survivor benefits. At the CAVC level, in Docket No. 16-2104, a joint motion for partial remand (JMPR) was filed and granted by the Court on February 17, 2017, and the Court subsequently granted an EAJA application. The three cases were *sua sponte* referred to a panel of the Court upon a motion to consolidate Debra Sapp's cases where Bettie Sapp had intervened in both.

In the consolidated case, CAVC addressed the heightened notice and procedural requirements of simultaneously contested claims in relation to providing claimants with a meaningful opportunity to participate. The Court held that the Secretary had failed to comply with these requirements, which prejudiced the appellants. The Court also held that *sua sponte* consolidation is appropriate where, in a simultaneously contested claim for survivor benefits, a common question of law or fact necessitates a single remand to correct a Due Process violation. Entitlement to veterans disability benefits is protected under the Fifth Amendment's Due Process Clause as a property interest. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

The Court noted that, pursuant to 38 U.S.C. § 101 (3), there may only be one surviving spouse. Thus, the Court deemed the claims simultaneously contested.

Generally, meaningful participation in an adjudication of a claim is facilitated by notice, such as notice of required information and evidence to substantiate a claim, timely notice of a decision

affecting the provision of benefits, and notice of the right to appeal and the procedure for how to do so. But claimants in a simultaneously contested claim are afforded heightened procedural protections. *See* 38 U.S.C. 7105A(a). Specifically, statutes and regulations require that prompt notification be given to all parties of interest, at their last known addresses, of action taken by the agency of original jurisdiction, *id.*, 38 C.F.R. § 19.100 (2018); that any Statement of the Case be furnished to all interested parties and their representatives and contain only that information directly affecting the "payment or potential payment of the benefit(s) which is (are) the subject of that contested claim," 38 C.F.R. §§ 19.8, 19.101 (2018), 38 U.S.C. 7105A(a); and that notification be given to all interested parties concerning the right to appeal and time limits for initiation of an appeal by any claimant, 38 C.F.R. § 19.100, *Thurber v. Brown*, 5 Vet. App. 119, 123 (1993).

The Court, citing *Overton v. Nicholson*, noted that "[a] fundamental role at the very essence of the nonadversarial, pro-claimant VA adjudication system is 'affording a claimant a meaningful opportunity to participate effectively in the processing of his or her claim'," 20 Vet. App. 427, 435 (2006). Therefore, claimants must be afforded the opportunity to respond to arguments of other parties and are entitled to a hearing on their claims, both at the RO and the Board; interested parties may present evidence and argue, but may not cross-examine.

Here, the Secretary conceded, and the Court agreed, that VA did not properly develop and adjudicate the simultaneously contested claims on appeal in the three cases. Specifically, the RO did not provide to the claimants the adequate notice, information, opportunity to respond, or opportunity to participate. Similarly, the Board did not notify the claimants of hearings involving the other claimant, notify the claimants of their right to respond and participate in those hearings, or, importantly, issue a single decision on the issue involved in the contested claim sent to both claimants. The Court emphasized that issues unique to each individual appellant must be addressed in a separate decision sent only to the affected individual appellant; otherwise, any issue that directly affects all parties in a contested claim must be addressed in a single decision sent to all parties of interest. 38 C.F.R. § 19.8 (2018). Thus, the Court determined that the Board erred in finding that VA substantially complied with the procedural safeguards in each case.

The Court then turned to whether the error was prejudicial to the parties. First, the Court found that the error deprived Debra of participation in hearings with Bettie as well as an opportunity to provide a response to Bettie's arguments regarding the simultaneously contested claim. The error also caused a disparate adjudication where Debbie testified at three Board hearings compared to Bettie's one; neither were provided a single hearing in which both could attend and participate. Finally, the error caused three separately appealed dockets at different stages of the appellate process.

The Court noted that it could not speculate as to whether Debra could prevail as the surviving spouse, because the Board had made a finding based on the absence of any evidence "contrary to Bettie's assertions that the break in continuity of cohabitation was due to the misconduct of the veteran and that divorce proceedings between the veteran and Bettie were never finalized."

After finding prejudicial error, the Court discussed the appropriate remedy in this consolidated case. First, the Court found good cause and *sua sponte* recalled the orders granting the JMPR and the EAJA application in Docket No. 16-2104. Recall was necessary for the purposes of consolidation and remand for proper notice, procedures, and issuance of a single Board decision.

With the orders recalled, the Court *sua sponte* consolidated all three pending cases. The Court reiterated that the simultaneously contested claims are for survivor benefits, rather than recognition as surviving spouse, which is an element of survivor benefits.

The Court ultimately set aside the corresponding Board decisions and remanded the consolidated case for further development, as necessary, and readjudication.

The Court noted that the recalled Orders and ultimate remand were due to a determination that the VA did not comply with the heightened procedural safeguards in simultaneously contested claims. The Court expressed no opinion as to the merits of any factual findings regarding the status as a surviving spouse.

Further, the Court distinguished this case from *Sheets v. Nicholson*, 20 Vet. App. 463 (2006), and *Medrano v. Nicholson*, 21 Vet. App. 165 (2007), which had interpreted 38 U.S.C. § 7261 (a)(4) as precluding the Court from reversing or setting aside findings of fact favorable to a claimant. The Court stated that, in the context of a simultaneously contested claim, § 7261 (a)(4) permits the Court to set aside or reverse a finding of material fact that the Court finds clearly erroneous. "The very nature of a simultaneously contested claim means that a material factual determination will be favorable to one claimant while at the same time being adverse to another." Any other interpretation in the context of simultaneously contested claims would deprive the adverse party of meaningful judicial review. Thus, the Court was within its scope of authority to set aside the factual finding regarding the surviving spouse.

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

Court Per Curiam Revokes Prior Order Granting Unusual EAJA Fees Application

by Nathaniel Pettine

Reporting on *Cornell v. Wilkie*, No. 15-3191(E) (Oct. 15, 2019).

On May 31, 2019, the Court of Appeals for Veterans Claims (Court) issued an order per curiam granting an application under the Equal Access to Justice Act (EAJA) submitted by Mr. Moberly, an intervenor, in a case with a complex procedural history. The Court discussed in its ruling the definitions of "prevailing party" and "substantially justified" under the EAJA. *Cornell v. Wilkie*, 31 Vet. App. 183 (2019).

After the issuance of the May 31, 2019 order, Mr. Moberly filed a supplemental EAJA application, and the Secretary filed a motion for full-court consideration.

Thereafter, the Court received notice that Mr. Moberly had passed away. The Court ordered Mr. Moberly's counsel to file either (1) a motion to substitute an eligible individual for EAJA purposes, or (2) a response that no eligible EAJA substitute could be located. In conjunction with this request, the Court held the Secretary's motion for full-court consideration in abeyance.

Mr. Moberly's counsel later informed the Court that, although a retainer agreement had been prepared for Mr. Moberly's widow, health concerns of Mr. Moberly's widow and son had ultimately resulted in the lack of availability of a suitable substitute. As a suitable substitute was not available, the Court issued another order per curiam on October 15, 2019: (1) revoking its May 31, 2019 order granting the EAJA award; (2) dismissing the Secretary's motion for full-court consideration as moot; and (3) dismissing Mr. Moberly's original and supplemental EAJA applications.

Nathaniel Pettine is Associate Counsel at the Board of Veterans' Appeals.

Court Narrowly Construes VA's Obligation to Adjust Benefits Following Receipt of Certification Under § 3.652(b)

by Katie M. Becker

Reporting on *Perciavalle v. Wilkie*, No. 18-3242 (Oct. 25, 2019).

The Court in *Perciavalle* interpreted 38 C.F.R. § 3.652, entitling a claimant to the continuation of benefits after submitting certification of his or her

continued eligibility. Specifically, the Court interpreted in the first instance § 3.652(b), providing that "when the required certification is received, benefits will be adjusted, if necessary, in accordance with the facts found."

The claim arose from a fee dispute in a veteran's case. In January 2014, the Regional Office ("RO") proposed to discontinue his receipt of total disability ("TDIU") and dependents' education assistance ("DEA") benefits due to his failure to certify his continued unemployment through the submission of a VA Form 21-4140. The veteran submitted the requested form in February 2014. Mr. Perciavalle, a non-attorney representative, filed a notice of appearance in March 2014. On April 22, 2014, the RO issued a rating decision continuing the veteran's entitlement to TDIU and DEA benefits.

Significantly, on April 30, 2014, Mr. Perciavalle submitted a written disagreement with the rating decision continuing TDIU and DEA, identifying the disputed issue as the "evaluation of [the veteran's] cerebrovascular accident with coronary artery disease to include special monthly compensation ("SMC")." Mr. Perciavalle specified that the veteran had been hospitalized with the loss of use of his extremities and loss of bowel control since 2008.

The RO declined to recognize the April 30, 2014, submission as a timely or valid Notice of Disagreement because the most recent rating decision to address entitlement to SMC had been issued in September 2012, the April 2014 rating decision having pertained solely to continuation of TDIU benefits. Instead, the RO interpreted the submission as a request for a rating increase for stroke residuals and determined that it had clearly and unmistakably erred in an earlier November 2011 decision by not granting service connection for bowel incontinence and by granting less than total ratings for left hand and foot weakness. The RO assigned the veteran 100% ratings for both conditions and awarded SMC for both disabilities.

Mr. Perciavalle was denied entitlement to 20% of the grant of the above benefits by the RO, as "no NOD had been filed." In a May 23, 2018 decision, the Board agreed with the RO's determination that the April 30, 2014 submission was not a timely or valid NOD.

On appeal, Mr. Perciavalle argued that the RO was obligated to consider whether the veteran was entitled to receive SMC in accordance with the plain language of § 3.652(b). Specifically, he contended that the RO's duty to adjust the veteran's "benefits . . . in accordance with the facts found" under § 3.652(b) required the RO to have adjudicated the veteran's entitlement to benefits identified and reasonably raised by facts provided in connection with his certificate of continued eligibility, including the April 30, 2014 submission in response to the rating decision continuing the grant of TDIU.

The Secretary disagreed, arguing that the scope of the veteran's "benefits to be adjusted" from facts provided in his certification was narrowly limited to those at issue in the underlying rating decision.

In an October 25, 2019 panel decision, the Court conducted a *de novo* review of the interpretation of § 3.652(b). The Court held that "the most natural understanding" of § 3.652 was that "a benefit to be reduced or terminated under paragraphs (1) and (2)" of the regulation, "or to be adjusted under subsection (b) must be one for which certification was requested in subsection (a)."
The Court determined that, "when the required certification is received" was a dependent clause that modified the verb "will be adjusted," defining the scenario of when adjustment was applicable, and requiring adjustment "in accordance with the facts found," the provision's independent clause. Thus, "since the only facts that certification can be expected to generate will pertain to the benefit for which certification is sought, VA's duty to consider adjustment under § 3.652(b) cannot reasonably be read to extend beyond that benefit."

The Court rejected Mr. Perciavalle's argument that SMC imposed a special obligation in VA's duty to adjust benefits, noting that he had failed to identify any statement of evidence before the RO in its April 2014 determination that might implicate SMC. Absent any obligation to make "a general reassessment of the veteran's potential entitlement to benefits," the Court held that Mr. Perciavalle had

failed to show "why SMC, even as an ancillary benefit, should have been addressed in the April 2014 rating decision."

The Court likewise rejected Mr. Perciavalle's argument that the use of "benefits" in the provision obligated VA to consider other benefits, "in addition to the one being certified." It noted that, "absent contrary indication," use of the singular equates to use of the plural, and vice versa.

Finally, the Court deemed VA's responses to comments in the Federal Register regarding the proposed 1997 amendment to § 3.652(b) to indicate a more limited intent in the regulation.

The Court noted that Mr. Perciavalle's argument was "double-edged" and recognized that an "overbroad reading of the agent's authority under § 3.652(b) to adjust benefits in the certification context could have unfavorable consequences for beneficiaries," including the reduction or discontinuance of benefits.

In sum, the Court held that the RO's duty to "adjust benefits . . . in accordance with the facts found" under § 3.652(b) upon receipt of the veteran's certification of continued eligibility in the context of TDIU did not impose an obligation on the RO to consider the veteran's entitlement to SMC. Mr. Perciavalle's April 30, 2014 submission in response to a rating decision granting the continuance of TDIU after receipt of a continued certification, raising facts related to the veteran's entitlement to SMC, and upon which entitlement was later granted for the period at issue, did not constitute a valid NOD. Mr. Perciavalle was thus denied fees basedon the RO's April 2014 decision.

Katie Becker is an associate attorney at Chisholm Chisholm and Kilpatrick Ltd.

The Presumption of Competency is Over?

by Kimberly Parke

Reporting on *Francway v. Wilkie*, 18-2136 (Fed. Cir. October 15, 2019) (en banc).

Background: In *Francway v. Wilkie,* 930 F.3d 1377 (Fed. Cir. July 23, 2019) (*"Francway I"*), a unanimous panel comprising Chief Judge Prost, Judge Lourie, and Judge Dyk, addressing the presumption of competency applied toVA medical opinions, 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. In *Francway I,* the panel specifically observed in a footnote that only the court *en banc* could overrule a binding precedent and stated that the panel would decide whether to ask the regular active judges to consider hearing the case *en banc*. [A full discussion of *Francway I* and its implications can be found in the fall edition of the Veterans Law Journal.]

The Federal Circuit issued this *en banc* decision and held that, to the extent that this decision was inconsistent with *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009) and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), those cases were overruled. The court stated that going forward the requirement that a veteran raise the issue of the competency of the medical examiner is best referred to simply as a "requirement" and not a "presumption of competency." Otherwise, the substance of *Francway II* is the same as the substance of *Francway I*.

Thus, while the nomenclature of the presumption of competency has changed, in practice it is unclear if there will be any substantive changes to the way in

which practitioners raise the issue of the competency of a VA medical examiner.

Kimberly Parke is a Senior Appellate Attorney at National Veterans Legal Services Program.

Pre-AMA 38 C.F.R. § 20.1304(a) Does Not Guarantee 90 Days to Submit Additional Evidence After an Appeal is Returned to the Board Following Remand to the AOJ

by Karen Kennerly

Reporting on *Williams v. Wilkie*, No. 16-3988 (September 13, 2019).

In *Williams v. Wilkie*, the Court of Appeals for Veterans Claims (Court) issued this reconsidered decision, reaffirming its previous March 19, 2019, ruling that, prior to the enactment of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), 38 C.F.R. § 20.1304(a) (allowing 90 days for the submission of additional evidence after an appeal is certified to the Board of Veterans' Appeals (Board)), does not apply to appeals returned to the Board by the Agency of Original Jurisdiction (AOJ) following Board remand.

The dispute in this case arose from the Board's issuance of a decision denying Mr. Williams's appeal prior to the expiration of 90 days, after notifying him that his appeal had been received by the Board for adjudication following a remand to the AOJ. On appeal to the Court, Mr. Williams argued that the Board erred in relying on 38 C.F.R. § 20.1304(a) because that regulation is unconstitutional on its face and as applied to him, constitutes an arbitrary and capricious interpretation of governing statues, and violates *Kutscherousky v. West*, 12 Vet. App. 369 (1999) and its progeny. The Court affirmed the Board's decision.

Initially, the Court noted that it need not address Mr. Williams's assertions challenging the validity of 38 C.F.R. § 20.1304(a) on constitutional and non-constitutional grounds, as this regulation did not apply to his case. Second, the Court stated that 38 C.F.R. § 20.1304(a) unequivocally indicates that it applies only "following the mailing of notice to [the appellant and his or her representative] that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board." *Id.* An appeal is certified to the Board only once, following receipt of the Substantive Appeal. *Compare* 38 C.F.R. § 19.35 ("Following receipt of a Substantive Appeal, the [AOJ] will certify the case to the Board[]") *with* 38 C.F.R. § 19.38 (directing that an appeal that was certified to the Board and then remanded to the AOJ be "returned to the Board," without certification, after the AOJ completes development and issues a supplemental statement of the case (SSOC)). Subsequent transfers of the same appeal to the Board are not certifications, *see* 38 C.F.R. § 19.38, even if they are accompanied by a completed VA Form 8, *see* 38 C.F.R. § 19.35. Further, the Court noted that the restrictive clause "that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board" specifies and limits the type of notice that, when mailed, begins the 90-day time period, during which additional evidence and argument may be submitted. Essentially, the only event to trigger this restrictive clause is to apply 38 C.F.R. § 20.1304(a) when an appellant is given initial notice that his or her appeal has been certified to the Board for review.

The Court further observed that, prior to the AMA amendments, 38 C.F.R. §§ 19.31(c), 19.38, and 20.302(c) expressly applied to the post-certification transfer of an appeal to the Board after a remand to the AOJ. The Court noted that, although those provisions require the AOJ to allow 30 days for response to the SSOC before returning the matter to the Board, neither they nor any other regulation mandated that the Board provide an appellant with additional time to submit evidence and argument after the appeal had been returned to Board. The Court also found that the provision of 38 C.F.R. § 20.1304(c) requiring AOJ review of newly received evidence or a waiver of that review does not expand the applicability of 38 C.F.R. § 20.1304(a).

The Court explained in detail why its prior decision in *Kutscherousky, supra*, did not apply to the instant matter. That decision was based on a Board Chairman's Memorandum rather than the actual application of 38 C.F.R. § 20.1304(a), and the Court in that case did not suggest that the regulation applied to a situation other than when the AOJ certifies an appeal and initially transfers the appellate record to the Board. The Court noted that, unlike in *Kutscherousky*, in this case there are regulations that expressly govern the submission of additional evidence and argument following a remand by the Board to the AOJ, and the Court should not ignore those authorities and impose a different and contrary process. The Court also found that the reasoning underlying *Kutscherousky* regarding the "shift" of the appeal from the Court's adversarial process back to VA's non-adversarial process would not justify applying 38 C.F.R. § 20.1304(a) to appeals returned to the Board from the AOJ because no such shift in process occurs.

Finally, the Court explained that its decision in *Clark v. O'Rourke*, 30 Vet. App. 92, 97 (2018) (holding that, absent an explicit waiver from the appellant, the Board must wait the full 90 days before adjudicating the appeal when a case is returned by the Court), also undercuts the veteran's argument. There, the Court distinguished *Kutscherousky* from cases governed by 38 C.F.R. § 20.1304(a), which uses the less precise language of providing 90 days "or until the Board issues its decision, whichever comes first," to submit evidence and argument without showing good cause. The Court found that, because § 20.1304(a) did not apply to Mr. Williams's appeal, there was no need to address his challenges to the validity of the regulation. The Court further found that the veteran did not demonstrate that the Board's erroneous citation to § 20.1304(a) was prejudicial, because the veteran and his representative had ample opportunity to submit additional evidence and argument, and they affirmatively stated that they had no further evidence or argument to submit.

Karen Kennerly is Supervisory Senior Counsel at the Board of Veterans' Appeals.

When Can TDIU Count as "a Disability Rated as Total" for Purposes of Entitlement to SMC?

By Justin P. Brickey

Reporting on *Youngblood v. Wilkie*, No. 18-0378 (September 12, 2019).

In *Youngblood v. Wilkie*, the Court of Appeals for Veterans Claims issued a precedential decision affirming a Board of Veterans' Appeals (Board) decision denying an earlier effective date for veteran Youngblood's entitlement to Special Monthly Compensation. The Court addressed whether entitlement to TDIU based on multiple disabilities defined as one under 38 C.F.R. § 4.16(a) can be considered "a disability rated as total" under 38 U.S.C. § 1114(s) ("SMC(s)"). The Court built on its earlier decisions in *Bradley v. Peake*, 22 Vet. App. 280 (2008) and *Buie v. Shinseki*, 24 Vet. App. 242 (2011), holding that, when a grant of TDIU is based on multiple disabilities, it is not "a disability rated as total" because it is not based on a single disability. The Court's reasoning tracks the Federal Circuit's decision in *Guerra v. Shinseki,* which held that multiple disabilities constituting a combined rating of 100% cannot satisfy the first requirement for SMC, even if the veteran has additional disabilities beyond those included in the 100% calculation that are independently ratable at or above 60%. 642 F.3d 1046 (Fed. Cir. 2011).

Michael L. Youngblood served in the U.S. Army from September 1971 to September 1974. Youngblood argued that he met the criteria for Special Monthly Compensation as early as July 31, 2001, the effective date of his TDIU based on disabilities in both lower extremities. In November 2003, Youngblood was assigned a rating of 60% for renal insufficiency and polycystic kidney disease, with an effective date of January 22, 1999. A series of subsequent decisions increased his rating for polycystic kidney disease until he received a disability rating of 100%, effective September 3, 2012. On September 25, 2012, the RO granted Youngblood

entitlement to SMC based on the housebound criteria with an effective date of September 4, 2012.

Youngblood challenged the effective date of his entitlement to SMC, arguing that he met the criteria under 38 U.S.C. § 1114(s) on July 31, 2001, in that he had a single total disability as defined by 38 C.F.R. § 4.16(a) and additional disabilities ratable at 60%. The Court referred to the relevant provision of 38 C.F.R. § 4.16(a) as the "one disability clause." Youngblood argued that under that provision, read together with 38 C.F.R. § 3.350(i), the regulation implementing SMC(s), his lower extremity disabilities on which TDIU was based constituted a single service-connected disability rated as total, and his other disabilities, including polycystic kidney disease, were additional disabilities ratable at 60%. The Secretary argued, and the Court agreed, that the portion of § 4.16(a) referring to enumerated situations when multiple disabilities can be considered as one has no application outside of the TDIU context. The Court further explained that the "one disability clause" has no other purpose than to assist the rater in determining when the veteran has met the schedular rating requirements for TDIU, i.e., a single disability rated at 60% or multiple disabilities with at least one rated at 40% and a combined rating of 70%. Section 4.16 does not define "a disability rated as total."

Youngblood did not dispute the Secretary's interpretation of 38 U.S.C. § 1114(s). Instead he argued that his multiple disabilities in his lower extremities (total left knee arthroplasty with history of degenerative joint disease, status post-surgical procedures of the left knee, and degenerative joint disease of the right knee) constituted a single disability under 38 C.F.R. § 4.16(a) which states:

"For the above purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability: (1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable . . ." Because his TDIU was granted based on a single disability as defined by 38 C.F.R. § 4.16(a), he argued, and he had additional, separate conditions ratable at 60% or more, he was entitled to SMC under 38 U.S.C. § 1114(s) on the effective date of his TDIU.

In rejecting this argument, the Court focused on the language "[f]or the above purpose" in holding that the "one disability clause" cannot be imputed to provide a definition for a single disability in any other context, including SMC(s). Its purpose begins and ends with TDIU determinations. In short, the prefatory clause in 4.16 allows a veteran to meet the schedular rating requirements for TDIU eligibility but does not otherwise modify the definition of a single disability as found in SMC(s).

As noted above, the Court applied the law as articulated in its previous decisions and the Federal Circuit's decision in *Guerra v. Shinseki*.

In *Bradley*, the Court interpreted 38 U.S.C. § 1114(s) and the implications of TDIU in the SMC context, explaining that, while TDIU based on single disability may qualify as "a disability rated as total" for purposes of SMC, TDIU based on multiple disabilities does not. Where there is evidence that a veteran who suffers from multiple conditions may be eligible for TDIU based on a single disability, the Secretary's duty to maximize benefits requires the adjudicator to determine whether TDIU should be granted based on the single condition before relying on the combined effects of multiple conditions. Timing is important. If a veteran with multiple conditions is granted TDIU based on one of those conditions and then later the rating on their other condition(s) is increased to 60% or more, then the veteran is eligible for SMC. Bradley had been awarded TDIU in a decision that had also increased his PTSD rating from 30% to 70%. While PTSD appeared to be the basis for TDIU, the decision posited that Bradley's "disabilities rendered him unemployable." Subsequent decisions had increased the ratings for his other conditions so that he received a combined rating of 100%, at which time his TDIU was dropped. Bradley's conditions other than PTSD were ratable at 60% or more under the combined ratings table. The Court remanded Bradley's case to determine whether his PTSD alone was sufficient for TDIU, which would mean he was eligible for SMC at the time his other conditions were increased so as to be ratable at 60% or more.

In a divided decision in *Guerra*, the Federal Circuit supported the interpretation later advanced by the Secretary in *Youngblood* when it found that a veteran is not entitled to SMC under 38 U.S.C. § 1114(s) when the veteran is totally disabled under a combined rating calculation for multiple disabilities, even when the veteran has additional disabilities that are ratable at 60% or more. *Guerra* established the proposition that, unless a veteran has at least one total disabling condition (rated at 100%), he does not qualify for SMC, regardless of how many disabilities he may have. The Federal Circuit noted that 38 U.S.C. § 1114(s) "is not entirely free from ambiguity" but the Secretary's interpretation contained in the enacting regulation 38 C.F.R. § 3.350(i), which requires "a single disability rated as total," was entitled to *Chevron* deference.

[A question may be raised as to whether the Secretary's interpretation is in fact reasonable, given the pro-veteran canon and the seemingly absurd results that can arise: a veteran like Guerra—who had disabilities rated at 70% for an upper extremity gunshot wound, 70% for PTSD, 40% for injuries to his left leg and thigh, 40% for injuries to right leg and thigh, and 30% for neuropathy—does not qualify, yet a hypothetical veteran receiving TDIU because of sleep apnea (with rated hearing loss and tinnitus) who also has asthma rated at 60% would. There is no doubt that in both situations the veteran is severely disabled. That a combat veteran with multiple disabilities does not receive the additional $354 dollars per month because he has too many disabilities does not seem to follow the principles underlying the statutory scheme read as a whole. This result seems especially unjustifiable considering that Congress did not intend SMC to compensate for a loss in earning capacity, but rather "upon consideration of noneconomic factors such as personal inconvenience, social inadaptability, or the profound nature of the disability." Vet. Op. Gen. Couns. Prec. 5-89.]

Justin P. Brickey is a student at the University of Missouri School of Law and is a member of the school's Veterans Clinic. Justin joined the Clinic after several mobilizations with the U.S. Army to Iraq and Guantanamo Bay. He currently serves as a Non-Commissioned Officer in the Army Reserves, Military Police Corps.

Veterans Entitled to Use VRAP Benefits at Four-Year College or University for Courses Offered by Community College or Technical School

by Jonathan M. Meyer

Reporting on *Lacey v. Wilkie*, No 17-3296 (October 17, 2019).

In *Lacey*, the CAVC issued a precedential decision written by Judge Toth (with Judge Allen concurring), and held that courses obtained at a four-year college or university are covered under the Veterans Retraining Assistance Program (VRAP) for otherwise eligible veterans if the courses are also offered by a community college or technical school.

Mr. Lacey was a student at a four-year college and pursuing a degree in business administration in information systems. Although the veteran was awarded VRAP benefits, VA determined that those benefits did not cover his courses at a four-year college because it was not a "community college or technical school." He subsequently appealed the decision, arguing that his course was an approved "program of education" that was "offered" at a community college. In August 2017, the Board denied the veteran's claim on the same basis as the previous denial. In arriving at its conclusion, the Board invoked the negative implication canon, and construed the statute to exclude four-year colleges, given that the statute expressly listed only "community colleges and technical schools."

In reversing the Board's decision, the CAVC held that veterans are entitled to use VRAP benefits for courses at a four-year college so long as those courses are "offered" at a community college and technical school. As a threshold matter, the CAVC observed that the relevant statutory provisions

(VOW to Hire Heroes Act of 2011, Pub. L. No. 112-56, § 211, 25, 713-15) limit VRAP benefits to veterans who "pursue" a "program of education" (i.e., course(s)) that is "offered by a community college or technical school" and "leads to an associate degree or a certificate (or other similar evidence of the completion of the program or training." Therefore, the CAVC determined that Congress did not intend VRAP benefits to be limited to the attainment of a specific degree. Instead, a veteran only needs to pursue a "program of education" that "could" ultimately culminate in a degree.

Turning to the crux of the matter, upon a close examination of the statute the CAVC determined that the provisions were ambiguous as to whether an eligible "program of education" need only be "offered" at a community college or technical school, or whether a veteran seeking VRAP benefits must also be enrolled in such a "program of education" at a community college or technical school. Thus, the CAVC observed that the statute defines a qualifying "program of education" as, *inter alia*, "courses…pursued at an educational institution," including four-year colleges and universities. Further, a "plain" reading of the statute "in the most literal light," simply requires that the "program of education" be "offered" by a community college or technical school regardless of where such courses are ultimately taken. In contrast, however, the CAVC also found that a more "natural" reading of the statute implies that the "program of education" is limited to taking the courses at the community colleges and technical schools that "offered" the courses.

Similarly, the CAVC determined that the legislative history was equally ambiguous. In this case, the legislative history extensively discussed the benefits of community colleges and technical school. Nevertheless, the legislative history did not expressly limit VRAP to only those institutions and/or specifically exclude four-year colleges and universities. Additionally, the CAVC observed, there were no applicable regulations to resolve the ambiguities and fill in the "statutory gaps."

Therefore, in the absence of a clear answer from the text and structure of the statute, or a countervailing agency position to which deference is owed, the CAVC held that the pro-veteran canon of statutory interpretation necessitated the resolution of all interpretive doubts in favor of the veteran, and it concluded that the veteran's courses were covered under VRAP.

In his concurrence, Judge Allen asserted that the relevant statutory provisions were "unambiguous," and that a "straightforward" reading of the relevant provisions reflects that the courses need only be "offered" at a community college or technical school. In support, he posited that reading in the requirement that a veteran has to be "enrolled" at a community college or technical school would be wholly inconsistent with the statutory scheme, especially since Congress used the term "enrolled" in other parts of the VRAP statute.

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

CAVC Declines to Find "Extraordinary Circumstance" Meriting Equitable Tolling Where Veteran Alleges Difficulty Obtaining Records

by Mel Bonish

Reporting on *Raybine v. Wilkie*, No. 18-6117, 2019 WL 4383984 (Sept. 13, 2019).

In *Raybine*, the Court of Appeals for Veterans Claims (Court) addressed whether a veteran's difficulty obtaining records relevant to his appeal, aggravated by service-connected mental illness, rose to the level of extraordinary circumstances meriting equitable tolling. The Court granted the Secretary's motion to dismiss the appeal, holding that Mr. Raybine failed to allege any factors allowing him to invoke equitable tolling, as his mental illness did not render him incapable of handling his own affairs, nor did his difficulty obtaining records constitute an extraordinary circumstance.

Mr. Raybine appealed from an October 19, 2017 Board of Veterans' Appeals (Board) decision denying entitlement to an earlier effective date for service-connected post-traumatic stress disorder. In order to obtain Court review of the adverse Board decision, he had 120 days—until February 16, 2018—to timely file a Notice of Appeal (NOA) with the Court. Mr. Raybine's NOA was filed November 2, 2018. In response to the Court's order to show cause as to why his appeal should not be dismissed as untimely, Mr. Raybine stated that he "had difficulty obtaining additional information relevant to his claim" and that his wife "had to do everything" because he was unable to "handle things."

Mr. Raybine informed the Court that the additional information he sought was located in sealed files held by Aberdeen Proving Grounds, that the information was not otherwise available through the National Personnel Record Center, and that Aberdeen directed him to provide additional information before he would be permitted to access the files. As a result, Mr. Raybine stated that it took multiple phone calls over a period of time to obtain the files. He also appeared to indicate that his service-connected post-traumatic stress disorder contributed to his difficulty in obtaining them.

The Court, citing *Threatt v. McDonald*, 28 Vet.App. 56, 60 (2016), began its analysis by noting that Mr. Raybine was not entitled to the benefit of the motion for reconsideration exception to the general 120-day judicial appeal filing period. Typically, where an appellant files a motion for reconsideration within 120 days of the Board's initial decision, the finality of the initial decision is abated by that motion. Here, Mr. Raybine filed a motion for reconsideration on July 11, 2018, nearly five months after the conclusion of the 120-day appeal period. As a result, the Court explained, Mr. Raybine would only be able to maintain his appeal if he demonstrated entitlement to equitable tolling.

To establish entitlement to equitable tolling, an appellant has the burden to demonstrate (1) an extraordinary circumstance; (2) due diligence exercised in attempting to file; and (3) a connection between the extraordinary circumstance and the failure to timely file. *Toomer v. McDonald*, 783 F.3d 1229, 1238 (Fed. Cir. 2015). The Court noted that equitable tolling was not limited to a small and closed set of factual patterns, and that it must consider equitable tolling on a case-by-case basis, avoiding mechanical rules, and observing the need for flexibility.

The Court first addressed Mr. Raybine's mental illness claim. Equitable tolling is permissible in cases of mental illness upon a showing that mental illness rendered the appellant incapable of handling his own affairs. Although Mr. Raybine indicated that his service-connected post-traumatic stress disorder rendered him unable to "handle things," the Court found that he failed to establish that his condition rendered him incapable of handling his own affairs under the mental illness standard set out in *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed.Cir. 2004). It found that Mr. Raybine failed to show that his condition rendered him incapable of (1) rational thought, (2) deliberate decision making, (3) handling his own affairs, or (4) functioning in society. During the filing period, Mr. Raybine sold his business and two homes and "seemingly" communicated repeatedly with the VA and Aberdeen. Thus, the Court was not persuaded that his service-connected post-traumatic stress disorder rendered him incapable of timely filing his NOA.

The Court then addressed Mr. Raybine's records claim. The Court found that Mr. Raybine failed to meet the burden of proof necessary to demonstrate that his difficulty obtaining files from Aberdeen rose to the level of extraordinary circumstance. An extraordinary circumstance is one beyond the veteran's control. *McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005). The Court explained that equitable tolling was endorsed by relevant case law in instances where a veteran was prevented from filing in a timely manner by a physical or mental infirmity, or misinformation from a VA employee, but that equitable tolling was found unwarranted where a veteran failed to show that circumstances beyond his or her control prevented timely filing. The Court found that Mr. Raybine had neither produced evidence sufficient to support his claim that difficulty obtaining his files from Aberdeen constituted an extraordinary circumstance, nor indicated how this circumstance prevented him

from timely filing his appeal beyond stating his belief that the files were relevant to his appeal. Moreover, the Court opined, even if it were to consider Mr. Raybine's failure to obtain the files as an extraordinary circumstance, the files contained information from 1962 which attested to the undisputed fact that he suffered an in-service injury. Although Mr. Raybine asserted that they were relevant, the Court was skeptical about the files' ability establish that Mr. Raybine was entitled to an effective date for his service-connected post-traumatic stress disorder earlier than July 2010, when he filed his initial claim. As Mr. Raybine made no further arguments, the Court concluded that his equitable tolling argument failed.

Judge Greenberg filed a dissent, renewing his assertion that the Court continues to apply the wrong standard for equitable tolling. Judge Greenberg contends that the Supreme Court never suggested that extraordinary circumstances must exist in order to allow a veteran's untimely appeal. *Lopez v. O'Rourke*, 30 Vet.App. 103, 107 (2008)(Greenberg, J., dissenting). Instead, he urges an "intentional disregard" standard, citing the Supreme Court in *Henderson*, which "found that jurisdictional consequences were not intended to attach to the statutory 120-day limit, relying on the high degree of informality and solicitude afforded to veterans and that the veterans claims adjudication system was unusually protective of claimants." *Id*. quoting *Henderson ex. Rel. Henderson v. Shinseki*, 562 U.S. 428, 431, 437 (2011)(internal quotations omitted).

Greenberg suggests in *Raybine* that there may be an acceptable standard between his "intentional disregard" standard and the Court's "extraordinary circumstances" standard, but advises that until the Federal Circuit further defines the outer limits of what circumstances warrant tolling, he continues to believe that the Court applies a higher standard than what the Supreme Court intended.

Mel Bonish is a recent graduate of the University of Pittsburgh School of Law, currently pending admission to the District of Columbia bar.

En Banc CAVC Certifies Modified Class of Palomares Incident Survivors, Expounds on Class Action Jurisdiction

by Jillian Berner

Reporting on *Skaar v. Wilkie*, No. 17-2574 (Dec. 6, 2019).

In 1966, a U.S. Air Force bomber carrying four hydrogen bombs collided with an Air Force tanker during a mid-air refueling over the Mediterranean Sea near Spain. Three of the four hydrogen bombs carried on the bomber were found near Palomares, Spain, and two of the bombs detonated on the ground, causing plutonium contamination. After the detonation, nearly 1,400 U.S. service members cleaned up the contaminated area. Twenty-six of those (the "High 26") were determined to be the most exposed to radiation and were monitored for 18 to 24 months after the cleanup for signs of radiogenic disease.

One airman, Victor B. Skaar, was a member of the High 26. In December 1967, the Air Force informed Skaar that he was not in danger of retaining radioactivity from the cleanup. In 1998, Skaar was diagnosed with leukopenia, a blood disorder, which he attributed to radiation exposure in service. The treating physician suggested but could not definitively say that ionizing radiation exposure was the causative factor. Skaar filed a claim for VA benefits, which was denied in 2000 because leukopenia was not recognized as a radiogenic disease and because Skaar had not presented sound scientific or medical evidence linking leukopenia to radiation exposure.

Veterans who participated in a radiation-risk activity specified in 38 C.F.R. § 3.309(d)(3)(ii) are presumed service-connected for certain diseases listed in 38 C.F.R. § 3.309(d)(1). The Palomares cleanup has not been recognized by VA as a radiation-risk activity. Veterans may also establish service connection for radiogenic conditions under 38 C.F.R. § 3.311(a),

which allows claims meeting a threshold requirement to be considered by the VA Under Secretary for Benefits to determine whether "sound scientific and medical evidence" demonstrates that it is at least as likely as not that the condition was caused by ionizing radiation exposure. The Under Secretary for Benefits may obtain an advisory opinion from the VA Under Secretary for Health. The agency then considers the advisory opinion as evidence in adjudicating the claim.

In 2001, a consulting firm issued a report (the LA Report) which found that the recorded dose intakes for Palomares veterans were "unreasonably high" and excluded those veterans' intakes from overall rates included in the report. The LA Report attributed more weight to intakes collected years later from the High 26. The Air Force and Department of Defense adopted the findings of the LA Report. Skaar alleged that the exclusion of "unreasonably high" dose intakes rendered the report unsound and therefore not "sound scientific evidence" as required by Section 3.311.

In 2011, Skaar filed a request to reopen his previously-denied claim. In 2012, the Air Force estimated that it was unlikely that leukopenia could be attributed to in-service radiation exposure. Skaar's claim was denied and he timely appealed. In 2013, a private doctor provided a positive nexus opinion. Later that year, the Air Force found inconsistencies in the LA Report and reevaluated Palomares veterans' dose estimates. The Air Force provided Skaar with a revised dose estimate in 2014. In 2015, the Board of Veterans' Appeals (Board) reopened Skaar's claim based on the revised dose estimate and ordered a new opinion regarding the dose estimate. After obtaining the opinion, VA continued to deny the claim. After obtaining another positive private opinion, Skaar appealed.

In April 2017, the Board denied Skaar's claim. He appealed to the Court and moved for class certification in his single-decision appeal. Skaar first requested certification of a class to include all American veterans present at the Palomares site whose claims had been or would be denied by VA. Skaar then narrowed his request to include veterans whose claims had been denied at any level by VA, excepting those who had received final decisions at the Court; those who had been denied and whose appeal deadlines had expired; those whose claims were pending after an initial denial; those with an appeal pending before the Court; and those who had not yet filed a claim. The Secretary moved for a stay of proceedings based on the pending *Monk III* litigation, which the Court denied. A panel of the Court then submitted the motion for class certification to the full Court. The Court first ordered a limited remand to the Board for a supplemental statement of reasons or bases addressing Skaar's arguments regarding Section 3.311, which had not been addressed by the Board in the 2017 decision. The Board complied and provided a supplemental statement of its reasons and bases.

In an *en banc* decision, the Court granted Skaar's motion for class certification in part and denied the motion in part. The majority (Judges Allen, Greenberg, and Toth, Senior Judge Davis, and Chief Judge Bartley) acknowledged that class certification in the context of the appeal of an individual Board decision was an issue of first impression and determined that such certification could be appropriate.

The Court acknowledged that it had the authority to create classes, thanks to the Federal Circuit's holding in *Monk II*, but held that its unique authority to render precedential single-case decisions created a rebuttable presumption that class actions should not be certified. The Court decided that class certification should only occur where appellants demonstrated that a class was a superior method for litigation than a precedential decision.

The Court detailed five subgroups of Palomares veterans in the proposed class: Past Claimants (claims denied before reaching the Board and without perfected appeals to the Board); Expired Claimants (claims denied by the Board but not appealed to the Court and whose timelines for appeal expired); Present Claimants (claims denied by the Board and either appealed to the Court or timelines for appeal not yet expired); Present-Future Claimants (claims pending before the VA at any level that will be denied by the VA); and Future-

Future Claimants (radiogenic conditions developed but claims not yet filed). The Court held that its jurisdiction extended to include not only claimants who had received a final Board decision, but also claimants who had not, because the Veterans Judicial Review Act afforded certain procedural protections to veterans and because 38 U.S.C. § 7252(a) vested the Court with subject matter jurisdiction over Skaar's final Board decision and conduct by the VA that was collateral to that decision and other claims. The Court waived the administrative exhaustion requirement for Present-Future and Future-Future Claimants, because the parties agreed on the factual underpinnings of the common claims. But the Court excluded the Expired Claimants because waiving the 120-day appeal deadline for Board decisions would be improper. The Court held that Skaar had not presented any circumstances that precluded Expired Claimants from exercising their right to appeal to the Court and that such claimants could file Supplemental Claims with the VA instead of gaining "unfair substantive legal advantage." Past Claimants were also excluded from the class because they too lacked final Board decisions.

The Court held that Skaar lacked standing to pursue claims under 38 C.F.R. § 3.309 on behalf of the class, because his claimed condition, leukopenia, is not an enumerated radiogenic condition under Section 3.309. Even if Skaar sought inclusion on the VA Ionizing Radiation Registry, that is not an application for service-connected disability benefits from the VA and the Court is not an appropriate venue for that remedy. The Court decided that Skaar had standing, however, to pursue claims under 38 C.F.R. § 3.311 on behalf of the class because his claim qualified for Section 3.311 radiation dose estimate procedures. Skaar had challenged the VA's reliance on the Air Force's dose methodology as not meeting the standard for "sound scientific and medical evidence." The Court agreed that Skaar had shown that he had likely suffered an injury-in-fact likely traceable to VA's actions. Accordingly, the Court modified the proposed class to include only claimants pursuing under 38 C.F.R. § 3.311.

The Court held that Federal Rule of Civil Procedure (Rule) 23 guided its analysis for class certification. Rule 23 requires (1) numerosity of class members, (2) common questions of law or fact, (3) typicality, (4) fair and adequate representation of the class by the representative.

The Court decided that the class was so numerous that joinder would be impracticable, as the class contained between 22 and 1,388 veterans.

The Court held that the proposed class met the commonality requirement. The Secretary had conceded that the class, if it excluded all claimants under Section 3.311, depended on a common contention capable of class-wide resolution.

The Court determined that the proposed class met the typicality requirement because the class only included claims under Section 3.311 and Skaar's claim shared the same essential characteristics of the other class claims.

The Court decided that Skaar would fairly and adequately protect class interests, as he shared the claim, did not indicate any conflict of interest, and would advocate for class interests.

The Court held that injunctive relief would appropriately satisfy the class as a whole, as the class claimants sought a court order requiring the Secretary to comply with Section 3.311.

The Court agreed that a class action was the superior method of litigating the claim. While the Court acknowledged its limited fact-finding ability and appellate status, it outlined specific factors for determining superiority: (1) whether the challenge is collateral to a benefits claim; (2) the complexity of the factual record; (3) whether the appellate record is sufficiently developed to permit judicial review; and (4) and the sufficiency of the facts that suggest remedial enforcement. In this case, the singular aim sought by the class (addressing the deficient agency action), the voluminous and highly technical factual background, the complete nature of the record, and the need for timely remedial enforcement counseled for the superiority of class certification.

The Court decided that class counsel was adequate and appointed Michael Wishnie as class counsel.

The Court determined that generalized notice of class certification, but not opt-out rights, was required. Rule 23 typically does not require opt-out rights to be afforded to absent class members because all injunctive relief ordered in a class action applies to all class members, regardless of presence. Accordingly, notice of the pending class action was required, but was not as crucial as if class members could opt out of the class action.

In a partial dissent, Senior Judge Schoelen agreed as to the utility of class actions in the Court's appellate process, but disagreed with the majority's decision regarding the included and excluded claimants. Senior Judge Schoelen argued that claimants should be required to at least present their claims to VA to be included in the class, as a baseline jurisdictional requirement, so the majority was wrong to include Future-Future Claimants in the class. Senior Judge Schoelen also disagreed with the majority's exclusion of Past and Expired Claimants, because equitable tolling could be applied on a case-by-case basis to include otherwise-barred claimants—just as the majority waived administrative exhaustion requirements to that the Future-Future Claimants could be included in the class. Senior Judge Schoelen also would add two factors to the test for superiority of class action claims: (1) technical or scientific complexity and (2) whether the issue is so systemic that broad action will be simpler than individual claims. Senior Judge Schoelen concurred with class certification using these additional factors, as the record was sufficiently complex, even if individual action would be preferable, as the issue was not broadly systemic.

Judges Falvey, Pietsch, and Meredith dissented with most of the majority's holdings. Their dissent contended that the majority had created a class exceeding the Court's jurisdiction and that a precedential decision could provide the same relief, without the concerns of manageability and preclusion. The dissent was not satisfied with the basis of the majority's expansion of jurisdiction beyond the statutory borders. Because the statute clearly delineated jurisdiction, the dissent contended that the All Writs Act, *Monk II*, and procedural statutes could not form the basis for the Court's jurisdiction. The dissent criticized the majority's waiver of administrative exhaustion, because Section 7252 contained a nonwaivable requirement of filing a claim with VA for the Court to exercise jurisdiction. The dissent distinguished this nonwaivable requirement from the *waivable* requirement of administrative exhaustion, which is not in Section 7252. The nonwaivable nature of all elements in Section 7252 barred jurisdiction over claimants who had not yet filed claims—namely, the Future-Future Claimants and the Present-Future Claimants—and barred the Court from reviewing any records not before the VA in Skaar's claim, including other claimants' records and Skaar's supplemental record. Accordingly, the dissent maintained that Skaar did not meet the jurisdictional requirement because his claim was based on documents not properly before the Court. The dissent also affirmed that the Court's appellate procedural requirements limited its review, since it is not a trial court.

The dissent disagreed with the majority as to the utility of class actions in an appellate setting. In its view, the Court's authority to issue precedential decisions could create institutional change and efficiency, rather than shoehorning claims into an inefficient class action context—evidenced by the years-long history of Skaar's claims at the Court. The unmanageable nature of class actions would burden the Court more than trial courts, due to the Court's inability to make factual findings and conduct discovery. The dissent also contended that the proposed class did not satisfy the numerosity factor for certification, as the class might contain as few as six or seven members. Finally, as the court lacked jurisdiction over Skaar's later-submitted evidence, the dissent said that Skaar could not be an adequate representative for the class claims.

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Clinic.

CAVC Retains Jurisdiction of Merits While Class Certification is Pending at Federal Circuit

By Courtney Kass

Reporting on *Monk v. Wilkie*, 15-1280 (October 23, 2019).

On October 23, 2019, the Court of Appeals for Veterans Claims (Court) issued an *en banc* precedential order in this continuing litigation, *Monk V,* determining that the Court retained jurisdiction over the merits of the individual petitions while the Federal Circuit considered class certification. The Court dismissed the eight moot petitions and denied the only non-moot petition.

In April 2015, Mr. Monk filed a petition on behalf of himself and similarly situated individuals for a writ of mandamus to compel the Secretary to decide appeals with one year after a class member filed a notice of disagreement. Mr. Monk argued that the Secretary's delay in adjudicating claims constituted an unreasonable delay and violated the right to due process under the Fifth Amendment of the U.S. Constitution. The Court construed this petition as a motion for class action. In a May 2015 nonprecedential order, the Court denied the petition. *Monk v. McDonald* (*Monk I*), No. 15-1280, 2015 WL 3407451 (Vet. App. May 27, 2015). Mr. Monk appealed to the Federal Circuit, which reversed the denial and remanded the case. *Monk v. Shulkin* (*Monk II*), 855 F.3d 1312 (Fed. Cir. 2017). In January 2018, the Court joined eight parties as additional petitioners and putative class representatives. In August 2018, the Court denied the petitioners' motion for class certification. *Monk v. Wilkie* (*Monk III*), 30 Vet.App. 167 (2018). The issue of class certification is currently pending before the Federal Circuit. (*Monk IV*), No. 19-1094. The Court addressed whether it had jurisdiction over the merits of the individual petitions prior to addressing merits.

The Court concluded that it retained jurisdiction over the merits of the individual petitions. The analysis began with widely accepted practice in Federal appellate courts. Although there was no precedent directly on point, the Supreme Court has held that filing a notice of appeal is a significant jurisdictional event and confers jurisdiction on the court of appeals while divesting the district court of its control over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). The Court noted that this principle reflected that a case should not be in two places at once with regard to the same issue.
In applying the principle, the Court relied on a decision by the United States Court of Appeals for the Second Circuit to explain that filing a notice of appeal only divests a district court of jurisdiction with respect to the questions raised and decided in the order on appeal. *N.Y. State Nat'l Org. of Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989). The Court noted that it has previously held that the filing of a notice of appeal to the Federal Circuit divests the Court of all jurisdiction over a case. *Sumner v. Principi*, 15 Vet.App. 404, 405 (2002). The Secretary argued that this point supported the argument that the Court lacks jurisdiction over the merits of the petitions. But the Court determined that the Secretary's interpretation was too broad and that it would disregard mainstream Federal appellate court practice. In considering the bounds of class action certification, the Court highlighted that Supreme Court jurisprudence has instructed that merit questions may be considered to the extent that they are relevant in determining the Rule 23 prerequisites for class certification. *Amgen Inc. v. Comn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). Accordingly, the Court held that it retained jurisdiction over the merits of the individual petitions, as those issues are not before the Federal Circuit.

After concluding that the Court retained jurisdiction, it turned to the merits of the nine petitions. The Court ruled that eight of the petitions were moot due to VA procedural development. The ninth petition, Mr. Dolphin's, was the only case that presented an active case or controversy.

The Court classified the eight moot petitions into three categories. First, Mr. Briggs and Mr. Wood had jointly filed a motion to dismiss because the Secretary had provided the relief they sought. As their individual petitions were moot and they no longer wished to serve as class representatives, the Court granted their motion to dismiss. Second, Mr. Coyne, Mr. Merrick, and Mr. Stokes conceded that their petitions were moot but reserved the right to serve as class representatives in the matter pending before the Federal Circuit. They requested that their petitions not be dismissed. Petitioners' counsel conceded that the issue of their validity as class representatives was before the Federal Circuit, and the Court could address the merits of the petitions. Given the jurisdictional questions raised with class action certification, the Court could not weigh in on the issue of their status as class representatives. The Court dismissed the merits of their petitions due to mootness.

Finally, Mr. Monk, Mr. Hudson, and Ms. Obie argued that, although their petitions were moot, they should qualify under an exception to mootness. They advanced three exceptions. First, the exception for "capable of repetition but evading review," which applies when the duration of the action is too short to be litigated prior to cessation, and there is a reasonable expectation that the complaining party would be subject to the same action. The Court noted that the delay in their cases was not too short to be litigated because the action that was sought was completed. As the delay no longer continues, the concept of a wrong being so short as to require a rush to court did not fit comfortably with delay-based claims. The Court found no need to decide whether this would hold true for all delay-based claims. As for the second exception, the petitioners argued that future claims in VA's appeals process would result in delay. The Court considered this argument speculative and noted that these petitioners can file petitions if any future delay occurs.

Next, the petitioners advanced the voluntary-action-by-the-defendant exception, which is designed to prevent individual class representatives from being "picked off" and ultimately preventing a group of similarly situated persons from forming a class action. This exception is not applicable to the merits of the individual petitions. Further, the Court had denied class certification.

Finally, the petitioners' asserted that the voluntary-cessation exception applied. Under this exception, a wrongdoer voluntarily ceases the unlawful conduct at issue, and reflects the principle that a court should not be deprived of jurisdiction because a wrongdoer discontinues its conduct. The Court found that this exception also did not apply. VA's alleged wrongdoing was failing to adjudicate claims that were on appeal. As VA had adjudicated their claims, any additional wrongful conduct by the Secretary would be materially different from what had allegedly transpired in the past.
As these exceptions to mootness did not apply and the relief sought had been received, Mr. Monk's, Mr. Hudson's, and Ms. Obie's petitions were dismissed.

The Court turned to the only live case or controversy, Mr. Dolphin's petition. Mr. Dolphin argued that it was unreasonable and a violation of his due process rights to wait more than 12 months after he had filed his NOD for the Board to issue a decision. In the alternative, he argued that the "years-long" delay surpassed any 'rule of reason.'

After recounting the complex procedural history, the Court's analysis began with whether unreasonable delay had occurred. The Court may issue a writ of mandamus to compel the VA Secretary to act. *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018); *citing Telecomms. Research & Action Ct. (TRAC) v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984). The Court found that the first, second, and fourth *TRAC* factors weighed in favor of the Secretary. The Court noted that the voluminous record and delay between the 2014 NOD and January 2018 DRO decision and SOC were attributed to VA complying with its legal duties and the complexity of Mr. Dolphin's appeal. The Court assigned significant weight to the first factor and concluded that, although the delay was regrettable, it was not unreasonable. While Mr. Dolphin had been waiting 8 months since his appeal was certified to the Board, the Court noted that the petitioners in *Godsey* had waited 18 months for VA to initiate pre-certification of their cases. 31 Vet.App. 207, 228 (2019). The

Court had held that the delay in *Godsey* was unreasonable because no development had been required in that case.

The Court determined that the third factor of delays where health and welfare are at stake weighed in favor of Mr. Dolphin, because it focused on the veteran's interest. But the weight was lessened by the fact that Mr. Dolphin was in receipt of 100% disability compensation for almost the entirety of the appeal.

The Court found that Mr. Dolphin had not satisfied his burden to show that he was prejudiced by the delay.
The sixth factor did not favor either party and Mr. Dolphin did not allege bad faith on the part of the Secretary.

Judge Allen and Judge Greenberg concurred with the majority on retaining jurisdiction to adjudicate the merits of the individual petitions while the issue of class certification is pending at the Federal Circuit. They also agreed that the eight petitions were moot, but they dissented from denying Mr. Dolphin a writ of mandamus. The Judges explained that the violation of the "rule of reason," along with the health and human welfare at stake, the interest of Mr. Dolphin and his claims, and VA's inability to provide any meaningful guidance for the Board weighed heavily in favor of granting a writ.
Judge Pietsch dissented as to the Court's jurisdictional holding until the Federal Circuit appeal is completed.

Courtney Kass is Associate Counsel at the Board of Veterans' Appeals.

CAVC Addresses What Constitutes a "Change of Interpretation," under § 20.1403(e), Sufficient to Foreclose CUE Claim

by Caitlin M. Milo

Reporting on *Perciavalle v. Wilkie*, No. 17-3766 (Sep. 27, 2019).

In *Perciavalle v. Wilkie*, the United States Court of Appeals for Veterans Claims (Court) addressed a denial by the Board of Veterans' Appeals' (Board) of Mr. Perciavalle's "clear and unmistakable error" (CUE) claim regarding a 1971 Board decision that had denied his claim for separate knee ratings. The Board's decision was based on a conclusion that *Esteban v. Brown*, 6 Vet. App. 259 (1994), and a VA General Counsel opinion interpreting 38 C.F.R. § 4.14 to allow for separate ratings of the knee for different symptomatology, constituted a change in the interpretation of a regulation, thus precluding a CUE finding. Specifically, the Court addressed what constitutes a "change in the interpretation" of a regulation under 38 C.F.R. § 20.1403(e) that would prevent a claimant from prevailing on a CUE claim.

CUE is established when the following conditions are met: (1) either (a) the correct facts in the record were not before the adjudicator, or (b) the statutory or regulatory provisions in existence at the time were incorrectly applied; (2) the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated"; and (3) the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the time that decision was rendered. *See Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992). In connection with whether *statutory or regulatory provisions in existence at the time were incorrectly applied*, CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a *change in the interpretation* of the statute or regulation." 38 C.F.R. § 20.1403(e) (emphasis added). The question before

the Court in *Perciavalle* was what constitutes "a change in the interpretation" of a statute or regulation, and did such a change occur in Mr. Perciavalle's case?

In 1971, the Board denied Mr. Perciavalle separate ratings for his knee disability, despite evidence of knee instability and limitation of motion. Subsequently, in 1994, the Court issued a decision in *Esteban*, 6 Vet. App. 259, explaining that conditions could be rated separately if none of the symptomatology for any one of the conditions was duplicative of or overlapping with the symptomatology of the others. In 1997, VA General Counsel clarified that, since "the plain terms of DC 5257 and 5003 suggest that those codes apply either to different disabilities or to different manifestations of the same disability, the evaluation of knee dysfunction under both codes would not amount to pyramiding." In 2015, Mr. Perciavalle filed a CUE claim, arguing that the 1971 Board should have awarded him separate ratings for knee instability and limitation of motion based on the evidence of record in 1971. The Board denied the claim, holding that *Esteban*, 6 Vet. App. 259 and the VA General Counsel opinion interpretations were not rendered until after the 1971 Board decision and thus constituted "a change in the interpretation" of a regulation.

Following oral argument, the panel of Judges, comprising Judges Bartley, Greenberg, and Toth, reversed the Board's determination that the CUE motion was prohibited as a matter of law and remanded the claim for the Board to properly adjudicate Mr. Perciavalle's CUE motion.

The Court noted that "changes in the interpretation" of a regulation is not defined, but the Court held that, in plain terms, it requires "the existence of a prior interpretation that is changed in some fashion—whether modified, further developed, or replaced in whole." Put another way, "there can be no 'change' in interpretation absent an existing interpretation from which a later interpretation deviates." The Court distinguished this scenario from one in which an initial interpretation actually introduces a new burden of proof or imposes a new factor into how a regulation should be applied, noting that such an interpretation may constitute a "change".

After defining "changes in the interpretation" of a statute or regulation, generally, the Court addressed whether a "change in the interpretation" of a regulation occurred in Mr. Perciavalle's case. The Court noted that the VA General Counsel opinion had expressly stated that it was the first occasion where the agency assumed an official position on the matter of separate ratings for the same knee. Additionally, neither *Esteban*, 6 Vet. App. 259, nor the VA General Counsel opinion imposed new burdens or factors on how the regulation should be applied. Thus, "[b]ecause a changed interpretation necessarily requires the existence of an antecedent interpretation from which a later interpretation departs, and because no prior interpretation existed, [the Court held] that *Esteban* and the VA opinion did not amount to a change in interpretation." Because there was no "change in interpretation" of a regulation, the Board erred when it concluded that § 20.1403(e) foreclosed Mr. Perciavalle's CUE claim.

Finally, the Court held that the Board's error was prejudicial because, in wrongly categorizing his CUE claim as precluded by law, Mr. Perciavalle was precluded from receiving a meaningful opportunity to participate in the adjudicative process.

Notably, on October 18, 2019, the Secretary filed a motion for reconsideration by panel or, in the alternative, *en banc* review, and the Court has not yet ruled on this motion.

Caitlin Milo is an appellate attorney at the National Veterans Legal Services Program.

When Rating a Joint Disability, the Board Must Discuss All Diagnoses Affecting the Joint, Propriety of Staged Ratings, Lay Assertions of Functional Loss, and All Evidence Indicating that Pain and Weakness Have a Functional Impact

by Kerry Hubers

Reporting on *Hansen v. Wilkie*, No. 18-0845 (May 30, 2019).

In *Hansen v. Wilkie*, the Court of Appeals for Veterans Claims (Court) affirmed the Board's decision with respect to service connection for sleep apnea but vacated and remanded the Board's denial of an increased rating for a shoulder disability.

With respect to the sleep apnea claim, the Court concluded that the Board did not err in failing to further develop a claim of "secondary causation and/or aggravation of [the Veteran's] sleep apnea by [his] service-connected medication." The Court found that the claim was not reasonably raised by the record. The Court rejected the appellant's reliance on a medical report which concluded: "CNS depressant medication was not significantly associated with obstructive sleep apnea risk." The appellant also relied on the list of his medications and his own assertion that "medications have commonly appreciated adverse effects on apnea." The Court found that the assertion was "both a medical statement made by a lay person and wholly unsupported." The Court concluded that the appellant failed to identify any evidence in the record before the Board that reasonably raised the issue of whether his obstructive sleep apnea was caused or aggravated by medications he was taking, so affirmed the Board's denial of the claim based on direct and secondary service connection theories.

On the left shoulder claim, the Court found the Board's reasons and bases inadequate because it failed to discuss favorable facts and evidence that supported the claim of entitlement to a higher rating.

First, the Board failed "to identify the nature and full diagnosis of the disorder before it." The Board labeled the condition "degenerative disease of the left shoulder," but the record contained four distinct diagnoses. The Court noted that the Board should have "described the exact nature of the disorder or disorders" and should have explained why the rating criteria that it chose to apply fully compensates the appellant for the functional impairments associated therewith.

Second, the Court also found that the Board failed to consider staged ratings despite a VA examiner's statement that the shoulder disorder "appears to have worsened considerably" over the ten (10) year period at issue. The Court found that the Board's failure to discuss the progression of symptoms was particularly egregious given an earlier remand by the Board specifically to develop evidence relating symptoms described eight (8) years previously and the copious evidence of deterioration since that time.

Third, although the Board noted the appellants' assertion that "it had been difficult to use his left arm or lift anything," the Court found that the Board should have discussed whether a 20 percent rating was adequate in light of this evidence. The Court emphasized that the Board had not found the appellant incompetent or non-credible and had not found the appellant's lay assertion unsupported or contradicted by medical evidence.

Fourth, Court found that the Board improperly relied on the appellant's statement that "his symptoms had stabilized over the previous 2 years" as evidence against the claim for an increased rating. The Court held that, considering the most recent VA examiner's opinion that the condition had "worsened considerably", the appellant's statement regarding stabilization appeared merely to mean that the shoulder condition "no longer flares" rather than that there was improvement or lack of deterioration.

Fifth, and finally, the Court held that the Board failed to adequately support its conclusion that "the record does not objectively show that the appellant's functional ability was limited to such a point that a higher evaluation is warranted based on pain or weakness." The Court noted that there were multiple pieces of evidence discussing symptoms of pain and the functional impact of that pain which the Board "did not directly consider" but should have.

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

Federal Circuit Affirms VA Secretary's Authority to Stay Pending Disability Compensation Claims for Blue Water Navy Veterans until 2020 Effective Date of 2019 Act

by Jillian Berner

Reporting on *Procopio v. Secretary of Veterans Affairs*, Fed. Cir. No. 2019-2184 (Dec. 5, 2019).

In the latest development of the lengthy court battle for Blue Water Navy veterans, the Federal Circuit denied the veterans' bid to challenge the authority of the Secretary of Veterans Affairs (Secretary) to stay pending compensation claims until January 1, 2020, the effective date specified in the Blue Water Navy Vietnam Veterans Act of 2019.

Blue Water Navy veterans are those who served on open sea ships in the waters off Vietnam during the Vietnam War. In an earlier segment of the *Procopio* litigation in 2019, the Federal Circuit ruled for the Blue Water group when it held that those veterans were entitled to the presumptions of exposure and service connection afforded by the Agent Orange Act of 1991 (the 1991 Act) for Vietnam veterans. Additionally, in June 2019, the U.S. Congress passed the Blue Water Navy Vietnam Veterans Act of 2019 (the 2019 Act), which amended the U.S. Code to expand the presumption of service connection afforded by the 1991 Act to include Blue Water Navy veterans. The effective date of the 2019 Act is January 1, 2020. In July 2019, following the issuance of the Federal Circuit opinion and the passage of the 2019 Act, the Secretary issued a memorandum staying the award of VA disability compensation benefits to Blue Water veterans with pending claims until the effective date of the 2019 Act, January 1, 2020.

Shortly after the Secretary's memorandum, the petitioners filed a petition for expedited judicial review at the Federal Circuit, challenging the Secretary's authority to issue the stay. The veterans argued that the stay was premature, as the 2019 Act did not become effective until January 1, 2020, and because the 2019 Act only authorized the Secretary to stay claims under the 2019 Act—so if the 2019 Act was not yet effective, the Secretary could not have yet had the authority to issue a stay based on that statute.

The Secretary argued that the petitioners' reading of 38 U.S.C. § 552, the statute granting the Federal Circuit jurisdiction to review his substantive rules and statements of general policy or interpretations of general applicability, was too broad and that the memorandum was akin to any other agency action, all implicitly based on VA's view that it had authority to act accordingly.

The Federal Circuit held that the Secretary's memorandum issuing the stay was an interpretation of general applicability adopted by VA, entitling the court to jurisdiction under Section 552. The Federal Circuit decided that the memorandum interpreted the stay provision and demonstrated the Secretary's understanding that he had authority under the 2019 Act to issue stays based on presumptive, chronic conditions immediately, not just on or after January 1, 2020.

The Federal Circuit went on to review the Secretary's memorandum interpreting the 2019 Act, using the *Chevron* framework. First, the court looked to whether Congress directly spoke to the question at issue. The court held that Congress's intent was clear and unambiguous—the 2019 Act authorized the Secretary to stay disability compensation claims

until the 2019 Act was implemented, which all parties agreed would occur on January 1, 2020. Accordingly, Congress had empowered the Secretary to implement a stay between the date of the 2019 Act's enactment and January 1, 2020.

The Federal Circuit addressed the petitioners' concerns that the Secretary would extend the stay past January 1, 2020, by clearly stating that the Secretary could not do so and noted that the Secretary had affirmed that VA was processing and developing Blue Water claims and intended to grant them beginning on January 1, 2020.

Because the Federal Circuit held that Congress's intent was clear and the Secretary's interpretation was consistent with that intent, the court did not reach step two of *Chevron*. The court then held that the authority to stay claims under the 2019 Act extended to claims pending under the 1991 Act. The court declined to decide whether the 2019 Act *replaced* the 1991 Act, but held that the stay authority covers claims pending under each act, because the two acts govern the same list of presumptively service-connected diseases. Additionally, the 2019 Act conveyed Congressional intent to cover those same diseases, as the 2019 Act specifically referred to the list of diseases enumerated in the 1991 Act. Accordingly, the Federal Circuit held that it was not an abuse of discretion for the Secretary to expand the stay provisions of the 2019 Act to the 1991 Act.

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Clinic.

Great Expense, No Reward: Why VA Needs to Institute Limited Reimbursement Policy for Cancelled BVA Hearings

by Tyler C. Hadyniak

In June 2019, I traveled to West Virginia for a Board of Veterans' Appeals (BVA) hearing. My client drove one hundred and fifty miles, at great expense, and ultimately discovered his hearing had been cancelled a week prior. Neither my client nor my firm were notified of this cancellation. When I inquired whether my financially insecure client could be reimbursed for his considerable travel costs, the answer was no. As a result, my client incurred great hardship for nothing. Other practitioners have similar stories.

Alas, this practice is according to the rule. 38 C.F.R. 3.103(d)(1) states that "all expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant." End of story. This rule persists even though 38 C.F.R. 3.103(d)was revised by the Appeals Modernization Act of 2017 ("AMA") to be much more claimant friendly. This section now provides for hearings to be held wherever the VA has videoconference capacity, *i.e.* at medical centers, clinics, or other non-regional office locations. The benefits to both rural veterans and the Board's docket are clear.

Obviously, Congress and the VA intended to make 38 C.F.R. 3.103(d) more beneficial to the claimant, but they did not go far enough. The VA should promulgate rules that revise 38 C.F.R. 3103(d)(1) to provide for an exception to the no-reimbursement rule. At the very least, an exception for *cancelled hearings for which neither the claimant or his representative had prior timely notice* would provide for procedural fairness for the claimant, and would conform with the intent of section 3.103's claimant-friendly revisions. Veterans should not have to incur unnecessary financial hardship to attend hearings that are their procedural due-process right to attend, and then walk away empty handed after having spent potentially hundreds of dollars.

Opponents might worry that such reimbursements would be a slippery slope, or that such reimbursements may cost too much. But there are many ways the VA could prevent a no-reimbursement exception from getting out of control. For example, the VA could institute a ceiling for such reimbursements. The claimant could be reimbursed only for costs exceeding one hundred dollars, which the claimant would have to prove by providing receipts reflecting expenses. Alternatively, the VA could reimburse only if the claimant has an

income below a certain amount. Others might argue that, in electing to have a hearing a claimant assumes the risk of the hearing being cancelled. While true, this should not allow the VA to inflict considerable expense on a claimant by *providing no notice* of a cancellation to the claimant or his representative.

Congress and the VA have evidenced good intentions by making the hearing process easier for veterans. Revising 38 C.F.R. 3103(d)(1) would be an easy (and, perhaps, inexpensive) way to further their claimant-friendly goals, provide procedural fairness for claimants, and prove to claimants that the VA claim system really is veteran-friendly by owning up to its mistakes.

Tyler C. Hadyniak is a traveling VA benefits attorney with Jackson and MacNichol in South Portland, Maine. He graduated from the University of Maine School of Law in 2018.

Court Dismisses Claim for DEA Benefits for "Helpless Child" as Premature When Not Argued Before Agency

by Jillian Berner

Reporting on *Barnett v. Wilkie*, No. 17-3585 (Dec. 3, 2019).

In *Barnett*, Nia Barnett, the adult daughter of a veteran, sought dependents educational assistance (DEA) benefits from the VA. The Board of Veterans' Appeals (Board) found that because Ms. Barnett's father had not been awarded total disability until after Ms. Barnett's 26th birthday, she was not entitled to DEA benefits.

In 2000, the Regional Office (RO) had denied Ms. Barnett DEA benefits because she was not a "helpless child" (a child of a veteran who becomes permanently incapable of self-support prior to age 18). Ms. Barnett did not file a Notice of Disagreement (NOD) with that RO decision until 2008.

Before the Court, Ms. Barnett argued in an informal brief *pro se* that the Board erred in denying her status as a helpless child, because she was diagnosed with end-stage renal disease secondary to systemic lupus erythematosus at age 14, a condition she argued was totally disabling. She also argued that, as a helpless child, she should be entitled to suspend her educational program where necessary due to severe health problems and that she should be entitled to use DEA benefits after turning 26, for a period of time equal to the suspension of education caused by health problems.

After the case was sent to a panel at the Court, counsel for Ms. Barnett filed a formal brief, arguing that her 2008 NOD constituted an informal claim to reopen the previously-denied issue of helpless child status and asking the Court to remand the claim to the Board to determine whether the NOD constituted an informal claim sufficient to reopen the 2000 rating decision, since Ms. Barnett had filed new and material evidence not of record at the time of the rating decision.

The Court determined that neither the RO nor the Board had considered whether Ms. Barnett had filed an informal claim sufficient to reopen the 2000 rating decision. Accordingly, the Court did not have jurisdiction to consider this issue and dismissed Ms. Barnett's appeal in order for her to first present it to the RO. The Court also declined to address any of Ms. Barnett's arguments regarding the effect of an award of helpless child status on her eligibility for DEA benefits and dismissed the appeal as to that issue so that Ms. Barnett could develop her arguments before the RO.

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Clinic.

Book Review: *Call Sign Chaos: Learning to Lead*, Jim Mattis and Bing West, (Random House, 2019), 320 p.p.

by Chad H. Lennon

Call Sign Chaos: Learning to Lead is a memoir, but also more importantly a compendium of lessons for leaders. The authors, Jim Mattis and Bing West, were both leaders in the United States military and combat veterans. The career of Jim Mattis as a Marine and public servant has lasted over 4 decades, from a platoon commander to Secretary of Defense. Jim Mattis's call sign during his illustrious military service became Chaos. The acronym derived from Colonel Has Another Outstanding Suggestion. His book provides lessons learned from both successes and failures, not just from his own career but from what he has read and studied, and from the experiences of those who were in his chain of command, whether superior, subordinate, or peer. Along the many leadership positions, Mattis discusses the strategies and lessons that have enabled him to succeed. Although authored by military leaders and based on lessons from a military career, *Call Sign Chaos* can be applied to any industry. The book is a must read for anyone who is and seeks to be a leader. It is broken down into three clear parts: Direct Leadership, Executive Leadership, and, Strategic Leadership. A central theme in all three sections is taking responsibility by being prepared for any situation, and being willing to make the hard decision, which may be unpopular.

Mattis, also referred to as the Warrior Monk, states that leaders must study their professions and not just read about them. Reading is a great starting point, but Mattis teaches that studying a profession, and the history of the profession, will prepare you for future situations. You may not always have the answer, but you will be prepared for situations, as opposed to having to wing it. Mattis goes through a number of examples of how his studying of history properly prepared him for solutions, or at least for recognizing what are not solutions to a situation. He dove into reading about previous wars in the terrain to immerse himself in potential situations and potential solutions. He notes a lesson from George Washington: listen, learn, and help. Mattis is such a proponent of reading that he provides a personal reading list in the appendix. When reading this book, the reader should be prepared to stop and make personal notes, review a subject, or research more resources. This is in line with a theme that reading is not enough; we must study our reading.

Call Sign Chaos is about lessons learned. In the military, leaders prepare an after-action report (AAR), which reviews what happened and assesses what should be maintained or improved for future activity. Mistakes are part of growth as a leader, but the importance of mistakes is to learn from them and others around you. Mattis says a leader's role is problem solving, and if you don't like problems you shouldn't be in a leadership role. A key to solving problems is knowing your people, whether on the direct, executive, or strategic level.

By "direct leadership" Mattis means a one-on-one relationship with your subordinates and knowing them outside of just work. Direct leadership is the foundation needed to progress to the higher level of executive and strategic leadership. A building is only as strong as its foundation. Mattis addresses this level through discussing his life before the military and his formative years. He states that his initial training was built on the experiences of Vietnam era Marines. Demonstrating that you care for your people builds leadership. This attitude of caring is caught in your work environment, it is not taught. Mattis traces his experiences from the platoon level to commanding a battalion during Operation Desert Storm to Task Force 58 in Afghanistan.

At the executive leadership level you cannot know every one of your subordinates, so you must be willing to change the way you lead. You must know your subordinate leaders. Mattis describes how he would "walk the front line" of his units, where he could hear from the men and women who were on the front line of the fight how his decisions were making an impact. This approach can be used in an industry where a leader can "walk the front line" and

talk with those working the front line. Two points are key: demonstrating that you care for your people and hearing how your direction is working and any new ideas to improve the institution or company.

At the strategic level political issues and military issues intersect. This is where CEO-level leadership is developed, and readers who are not CEOs or at the strategic level can receive great insight into the thought process. A key concept is the importance of the leader conveying his or her intent across the organization. Knowing the intent of leaders, especially that of higher headquarters, allows operations to succeed without constant oversight. A unit, or company, cannot be caught flat-footed.

In conclusion, this is a must read book for any individual who seeks to build leadership skills. Jim Mattis and Bing West have put together a relevant and important AAR that will guide readers on how to continually improve themselves. Furthermore, there are multiple resources the reader can go to after completing the book. Some have stated that this book was a critique of the Obama and/or Trump administrations. but Mattis gives examples of successes and failures from multiple administrations and events throughout his career. The reader learns how to be prepared and adapt to situations that will arise in the course of business and life.

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.