VETERANS LAW JOURNAL

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Panel Explains Blue Water Navy Vietnam Veterans Act, Retroactive Pay

by Bryan Andersen

On February 20, 2020, the CAVC Bar Association presented a panel to discuss the Blue Water Navy Vietnam Veterans Act of 2019 and VA OGC Precedential Opinion No. 3-2019. The panelists comprised Megan C. Kral, Senior Appellate Attorney, from the VA Office of General Counsel, Appellate Litigation Group, and Jenna Zellmer, Managing Attorney, from Chisholm Chisholm & Kilpatrick. The bar association is grateful to Tom Sullivan and Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, for hosting this program. The recording can be found here: https://youtu.be/coP1-GeMHp0.

From left: Jenna Zellmer and Megan C. Kral

The Blue Water Navy Act extended the presumption of herbicide exposure, including Agent Orange, to veterans who served in the offshore waters of the Republic of Vietnam between January 9, 1962, and May 7, 1975. Beginning January 1, 2020, veterans who served as far as 12 nautical miles from the shore of Vietnam, or who had service in the Korean Demilitarized Zone, are presumed to have been exposed to herbicides, and may be entitled to service connection for any of the 14 conditions related to herbicide exposure.

The panelists primarily discussed VA's newly created Blue Water Navy Ship Locator Tool, which has replaced VA's Brown Water ship list. VA has uploaded over 800 deck logs into the Locator Tool, which in turn will identify the names and dates of ships located within 12 nautical miles from Vietnam.

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At present, VA has decided to keep the Locator Tool for internal use only. Attendees raised concerns with this decision, particularly over the inability to verify the accuracy of the information. But if the Locator Tool does not identify a Veteran's ship as having been within 12 nautical miles, then the deck logs that VA considered will be placed into his or her claims file.

The panelists also discussed VA OGC Precedential Opinion No. 3-2019, which held that the *Nehmer* stipulation operates to void a final decision on a veteran's or survivor's benefits claim only when the Secretary of Veterans Affairs establishes a new presumption of service connection. The Opinion further held that the *Procopio* decision does not establish a new presumption and accordingly does not provide authority for VA to void final decisions on benefits claims. A claimant who is granted benefits under the *Procopio* rule, however, and whose claim for the same condition was previously denied on or after September 25, 1985, may be entitled to a retroactive award if he or she submits a claim for such award in accordance with the Blue Water Navy Act. Attendees raised concerns regarding the scope of the opinion and VA's duties to actively notify potential claimants of their eligibility for benefits. The panelists agreed that, despite implementation of the Locator Tool and precedential guidelines, there still remain several legal and operational questions that must be resolved in the foreseeable future.

Bryan Andersen is Managing Attorney at Bergmann & Moore, LLC.

Message from the President

Greetings colleagues,

I hope this message finds you and your families well in these difficult times. The CAVC Bar Association had a busy early 2020, and going forward, we will continue monitoring concerns regarding COVID-19, and we will notify you of any changes to our programming calendar.

Perhaps "the show must go on…line." We were pleased to start our first ever webinar series this year, and we hope to continue webstreaming and recording our programs. Our 2020 recorded webinars and programs can be found here: https://www.youtube.com/playlist?list=PLpukzu-gLV97iwEoHIVNgN977ZI7KAxE3.

In January, James Ridgway presented on *Statutory and Regulatory Interpretation in Veterans Law.* In February, Andrea MacDonald presented on *The Nuts and Bolts of the Veterans Appeals Improvement and Modernization Act (AMA)*. More information about these webinars can be found in this issue of the VLJ.

Later in February, in Washington, DC, we presented a panel on *The Blue Water Navy Vietnam Veterans Act of 2019 and the VA OGC Precedential Opinion No. 3-2019*, featuring Megan C. Kral and Jenna Zellmer. More information about this panel is also in this issue.

In March, we hosted a *Spring Forward Networking Reception* in Washington, DC. I hope that this will not be the last opportunity for us to meet in person during my term, as these events continue to remind me that, though we may sometimes serve on opposing sides, all members of our uniquely collegial bar share the mission of doing what is right for our nation's veterans and their families.

Our current programming calendar going forward is as follows:

- On May 21, 2020, we hope to present our 4th annual VA Update program. William A. Hudson, Jr., VA's Acting General Counsel, will provide remarks, and VA executives from multiple VA offices will serve as panelists. The event would be held at

Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, in Washington, DC, and it would be livestreamed and recorded.

- On June 11, 2020, we hope to host an all-day Veterans Law CLE, at Holland & Knight, LLP, in Washington, DC. We plan to offer 6 CLE credits (including for livestreaming attendees outside DC) on the following topics: (1) current trends in veterans law; (2) scope of claims/ Board jurisdiction; (3) litigation strategies under AMA; (4) best writing practices in the Rule 33 process; (5) ethics; and, (6) VA psychiatric and musculoskeletal examinations (presented by two VA physicians).

- We hope to honor those who served by washing the Korean War Veterans Memorial on June 28, 2020, as well as the Vietnam Veterans Memorial on July 19, 2020, both in Washington, DC, at 6:30am EST.

- We hope to honor those who served by participating in an Honor Flight in September 2020. Please stay tuned.

- Due to concerns regarding COVID-19, our April 2, 2020, two-panel program has been postponed. We hope to reschedule this event for later this year. It will be held at Chisholm Chisholm & Kilpatrick LTD, in Providence, RI. We plan to present two panels: (1) *Representing Veterans Pro Bono* and (2) *Representing Veterans & Developing Their Claims: An Afternoon with Advocates, Experts, & Decisionmakers.* The event would be livestreamed and recorded.

We will inform you of any changes to these programs as the COVID-19 situation progresses.

On a personal note, I would like to take the liberty of recognizing my amazing brother-in-law, Nicholas W. Gumley, who was recently promoted to Major in the U.S. Air Force. He currently serves as the interim Director of Operations for the 375th Aeromedical Evacuation Squadron, Scott Air Force Base, IL. He provides oversight and technical guidance in the areas of Aircrew Scheduling, Operations, and Planning, and he leads all support functions, to include Readiness, Logistics, Information Systems, and Resource Management, to sustain a complete, deployable theater aeromedical evacuation system.

I had the privilege of attending Nick's promotion ceremony in February. Colonel Ronald J. Merchant, Chief, Medical Support Division, Office of the Command Surgeon, noted that, in his over 25 years of service, he has never seen so many family members in attendance. Those family members included veterans who have served in every American conflict since World War II.

Major Gumley will be soon be deployed to the Persian Gulf. His wonderful wife Jana and their adorable son Orion will hold down the fort in the States. Please keep the Gumley family in your thoughts and prayers.

Major Nicholas W. Gumley, his wife Jana, and their son Orion.

Finally, 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.

Take care, y'all!

Jenny J. Tang
President
CAVC Bar Association

Message From the Chief Judge

Dear Colleagues,

I hope you and your loved ones remain safe and healthy. Because the COVID-19 pandemic has disrupted in unprecedented ways our appellants' lives, our lives, and the life of the Court, I want to discuss some actions the Court has taken or is taking in relation to the current crisis.

First, you already may have received notice that on the afternoon of March 12, the Court, for the first time in our 30-year history, began implementing continuity of operations (COOP) procedures. This essentially means that for the foreseeable future almost all Court employees are working from home. COOP procedures were undertaken to protect Court employees to the fullest extent possible—to minimize the need for physical in-person contact at the Court and to alleviate the potential for staff exposure to the virus while commuting to and from work. So far, we are successfully keeping our operations continuing with little disruption.

Of course, some employees aren't telework-capable at the current time. The Court still receives quite a bit of U.S.P.S. mail, including Notices of Appeal, Declarations of Financial Hardship, filing fees, and other case-related communications from pro se appellants. This means that two Court employees from the Public Office remain working onsite in order to process mail and scan various case-related documents so that they can be entered into CM/ECF. Also, three employees from the Budget and Finance Office are onsite once a week or less in order to process filing fees. In addition, Court security officers remain onsite each day. The Court is looking at ways to further minimize the need for all of these dedicated individuals to be onsite, and it is providing parking for them so that they don't need to use public transportation.

In most cases where the appellant is represented, counsel emails the Notice of Appeal form and electronically files via CM/ECF any Declaration of Financial Hardship. However, many unrepresented appellants mail both forms via U.S.P.S., and at the current time all filing fees are mailed via U.S.P.S. We are revising our Notice of Appeal and Declaration of Financial Hardship forms to encourage unrepresented appellants to email, instead of mail, those documents. We are working to streamline these and other aspects of filing for both represented and unrepresented appellants. Although we are able to do most of our work electronically at the current time, these few additional measures should help the Court transition to a case-opening process that is almost entirely electronic, which in the long run will be a big advantage to appellants, counsel for all parties, and Court staff and judges.

A shout-out is warranted here: to the Court's IT Office, headed by Kendyll Benson and seconded by Ken Rowland, and staffed by a great group of techies! The Court would not be operating now without their essential help. Also, credit is due to many previous Chief Judges and Court employees who made possible this smooth transition to operating the Court off-site. Former Chief Judge Greene, and staff including Anne Stygles, Vladimir Bunyakin, Kerry Benton, and Sherry Lanuza, among others, were instrumental in planning and implementing CM/ECF, which created the foundation for all of the work that Court staff and judges can now do from the safety of their homes. Additionally, former Chief Judges Kasold, Hagel, and Davis put a lot of effort into making sure we were moving along the road of COOP compliance—taking many smaller steps that got us to where we are today. Judge Davis really pressed tech advances at the Court when he headed the IT committee for many years. And the Clerk of the Court, Greg Block, kept working for COOP compliance as well. All of that work is paying off now, and the whole Court

extends kudos to all of the folks mentioned above, and any that I might have missed, for their foresight in this area.

As you may have heard, beginning April 21, 2020, we will transition to teleconferenced oral arguments for the foreseeable future, reassessing every few weeks. We hope to permit live, electronic access to these arguments for those who are interested, and will post recordings to the Court's website shortly after the arguments conclude. Counsel for any party in a case scheduled for teleconferenced oral argument will hear from the Clerk regarding the new procedures and we will be troubleshooting and mooting beforehand. Be sure to check the Court's website for more information on oral arguments via teleconference.

We ended up rescheduling for a later date four oral arguments that were to occur between March 18 and April 21, 2020. Three of these were to be travel oral arguments at Cornell Law School, Penn State Law, and Notre Dame Law School. Luckily, two Court law clerks were able to conference via Zoom with students at Penn State Law, to share their experiences regarding clerking at the Court and working in the veterans law field. However, I share your disappointment that most events related to these travel oral arguments were cancelled and that other cancellations or postponements of Court-related educational and collegial events have occurred. I know that many of you worked hard on planning those proceedings. But I'm hopeful that all of these will be rescheduled for a later, safer, date.

Finally, because we have CM/ECF and other technology to rely on, and because Court staff are well able to work from home, the Court decided not to universally stay proceedings or grant across-the-board filing extensions in all pending cases. That being said, when ruling on motions for stay and motions for extension in individual cases, the Court is certainly taking into consideration the exceptional challenges that unrepresented and represented appellants and counsel face in association with the COVID-19 pandemic. We are prepared to do the same when considering the timeliness of filings under Rule 4.

I welcome your feedback on all of the information and issues that I've relayed here and I encourage you to reach out with suggestions to help us address other unique challenges posed by COVID-19. Although the pandemic has fundamentally changed life and work, I know that we're all hoping to be able to carry on assisting veterans and their families—and accomplishing the good work of the Court despite difficulties and upheaval. Take care.

Sincerely,

Meg Bartley

Message From the Clerk of Court

Dear Colleagues,

I've talked to many of you about your practice experiences, and I continue to value your constructive ideas for improving the Court's rules and processes. This focus on efficiency is particularly appropriate at a time when the Court is experiencing an unprecedented surge in case activity. This surge is reflected in the Court's FY 2019 Annual Report to Congress, now available on our Court website at http://www.uscourts.cavc.gov/report.php

Consistent with the dramatic increase in final decisions released by the Board of Veterans' Appeals - up to 95 thousand in FY 2019 - the number of appeals filed at the Court in FY 2019 increased to 8,470, up from 6,802 appeals filed in FY 2018. With two judges having recently retired, the Court is working hard to ensure that cases are resolved in a timely manner and, despite the substantial increase in cases, the median time from filing an appeal to disposition of the case by the Court increased only slightly from 7.8 months to 8.3 months. This is in

no small part attributable to the substantial number of cases resolved through JMR or JMPR after Rule 33 conferences.

On the subject of Rule 33 pre-briefing conferences, Diane O'Brien-Holcomb, the Court's Deputy Chief Staff Attorney has some information to share from the Court's Central Legal Staff (CLS) . . . over to you, Diane.

"Greetings from CLS, and thanks to all practitioners for your contributions to the Rule 33 process. As a result of the unprecedented surge in appeals filed at the Court noted above, CLS staff are indeed working hard to handle not only the increased number of motions and Rule 33 conferences, but also the increased number of pre-briefing scheduling orders. Although this has caused some delay in scheduling conferences, counsel will receive a Court order scheduling their conference before the due date for the appellant's brief. The Court is making strides in increasing the number of days between when the order is issued and the due date for the brief. Regardless, pursuant to Rule 31, once the order is issued, the deadline for the appellant's brief is automatically extended to 30 days after the completion of the conference. We will be updating the Court's Form 12, Notice to File Brief, which will make this clear."

Keeping a bead on more than 8,000 open cases is no small task, and we appreciate your efforts to help our Public Office keep cases on track. Anne Stygles, the Court's Chief Deputy Clerk, has identified some tips to watch out for . . . Anne, what can you tell counsel to help them help us?

"The Public Office is also very busy, and we know you are, too. To keep things moving, it really helps if pleadings conform to the Court's rules and primary responsibility/lead counsel for each case is clearly spelled out and kept up to date. First, with regard to compliance with Court rules, I want to remind you that if you file a pleading and then you are notified that the Public Office docket clerk has changed the filing to RECEIVED, that usually means that the pleading is deficient for some reason. We wait for four hours upon being notified of a deficient pleading before issuing a Notice of Non-Conforming Document to give you a chance to correct the pleading and refile it. If you don't know why the pleading is deficient, please call the Public Office at ((202) 501-5970 x100 + the last number of your case). Second, if you are the lead attorney on a case, please have someone else file as lead attorney before you depart from your firm or the Department of Veterans Affairs. When this doesn't happen, we end up sending notifications to someone who is no longer involved in the case. The result is often that the next pleading that is due is not filed, and the Court ends up issuing a show cause order."

Thanks again for your collective contributions to the Court. It is a privilege to work with you to provide judicial review to the nation's veterans!

Regards,

Greg Block

Attorneys Entitled to Fees in Cases Of Disability Rating Awards of Less Than 50 Percent for Veterans Receiving Military Retirement Pay

By Jason Massey

Reporting on *Rosinski v. Wilkie,* No. 17-3293 (Jan. 30, 2020).

In *Rosinski,* the CAVC (Court) issued a precedential decision written by Judge Toth (with Chief Judge Bartley concurring) holding that VA is required to pay fees to attorneys who help obtain a disability rating of less than 50 percent for veterans receiving military retirement pay.

The statute at issue, 38 U.S.C. § 5904, instructs VA, in cases where a fee agreement specifies direct payment by the Secretary to an attorney for representation before VA, to pay the attorney up to "20 percent of the total amount of any past-due benefits awarded on the basis of the claim." But another statute, 38 U.S.C. § 5304, specifically prohibits veterans who receive military retirement

pay from also receiving VA disability compensation unless the veteran either obtains a disability rating of 50 percent or greater or has waived military retirement pay. This case marked the fourth in a line of attorney fee decisions that have examined VA's obligations to pay attorney fees under Section 5904.

Attorney Rosinski claimed payment of the 20 percent portion of past due benefits pursuant to a fee agreement made with Mr. Grall, the veteran. VA found that he was entitled to fees in the amount of $3,549, which reflected his efforts in obtaining an increase in Mr. Grall's service-connected migraine evaluation from 30 percent to 50 percent between May 2011 and June 2015. Mr. Rosinski challenged the methodology used by VA to tabulate his award. Mr. Grall was subsequently awarded a 60 percent combined disability rating, thereby making him eligible for back pay in the amount of $32,499. VA ruled that, because Mr. Grall had received military retirement pay in the amount of $14,745 during that time, the past due amount must be reduced by that amount because it had already been paid. VA calculated the attorney fees at 20 percent of the reduced amount paid to Mr. Grall after discounting his retirement pay. Mr. Rosinski claimed that he should have been paid 20 percent of the total award of back pay ($32,499), rather than 20 percent of the reduced amount ($17,754).

In September 2017, the Board affirmed the payment of $3,549 in attorney fees, ruling that VA had paid all past-due benefits owed to Mr. Grall and that no other retroactive benefits were due. The Board contended that Section 5904 did not "authorize VA to pay attorney fees 'as if' a veteran's claim resulted in an award of retroactive VA benefits payments where a veteran does not, in fact, receive a retroactive payment of VA benefits." Additionally, the Board ruled that VA was prevented from paying attorney fees under 38 C.F.R. § 14.636(h)(1), which establishes that no cash payment will be made to veterans unless there is a corresponding waiver in retirement pay.

The Court reversed the Board decision, finding this matter indistinguishable from that addressed in *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007), where the Federal Circuit held that 38 U.S.C. § 5313, a statutory limitation on payments to incarcerated veterans, did not alter VA's obligation to pay attorney fees under Section 5904(d)(1), because Section 5313 served only as a withholding device for full payment of benefits otherwise lawfully established. The Board had contended in its decision that Mr. Rosinski's situation differed from the one in *Snyder* because the veteran was not entitled to a cash payment of benefits under Section 5304, due to his receipt military retirement pay at the time of his disability award. The Court determined, however, that, because *Snyder*'s reasoning, as explained further in *Jackson v. McDonald*, 635 F. App'x 858 (Fed Cir. 2015), and *Gumpenberger v. Wilkie*, 31 Vet. App. 33 (2019), applied equally to Section 5304, the Board had erred in denying attorney fees to Mr. Rosinski under Section 5904(d)(1).

The Court acknowledged that *Jackson* was unpublished but noted that it provided useful insights on how *Snyder*'s reasoning applied in other situations. In *Jackson*, the veteran had died prior to VA's payment of any past-due benefits he was awarded based on a grant of service connection. The Federal Circuit determined that Section 5904 did not require payment to the veteran for the fee-supporting benefit award to exist. The Federal Circuit thus reversed the CAVC's affirmance of VA's ruling that the attorney was not entitled to fees. In *Gumpenberger*, the Court held that, for the purpose of determining an attorney's fee under a direct-fee pay agreement, the "total amount of past-due benefits awarded on the basis of the claim" did not depend on the amount ultimately payable to a claimant but is to be determined by VA "when the claim is granted and is not affected by an impediment to payment like the statutory bar in *Snyder* or the veteran's death in *Jackson*." *Gumpenberge*r, 31 Vet. App. at 38. Past-due benefits means "the total amount of benefits that were 'unpaid' or owed to the claimant." *Id*.

The Court then moved to an analysis of 38 U.S.C. § 5304 and 10 U.S.C. § 1414. It concluded that, when read together, Sections 5304 and 1414 established that a veteran who obtained a disability rating of 50 percent or greater had a "qualifying service-connected disability" under Section 1414 and thus was not subject to Section 5304's prohibition against receiving both retirement pay and disability compensation where the veteran did not waive retirement pay. The Court stated that "[t]he operative distinction is between entitlement to benefits generally and entitlement to payment for benefits: Section 1414 provides that those veterans who achieve an award of 50 percent or greater are 'entitled to be paid' for such benefits."

In analyzing the Board's decision in this case, the Court determined that *Snyder* and the ensuing cases were unequivocal that "an award of benefits occurred with the assignment of a rating and an effective date," and the Board's phrasing of "as if" in this matter suggested that no actual award of retroactive benefits occurred, which was erroneous.

The Court also addressed the Secretary's argument that VA was prohibited by the Appropriations Clause of the Constitution (art 1, sec 9, cl. 7) from making such payments under Section 5904. The Court explained that *Snyder* put to rest any notion that VA lacked the statutory authority to pay attorneys on successful claims even where the veteran is barred by a separate provision of law from receiving such payments. The Court found that the *Snyder* line of cases establishes that VA obligations to attorneys under Section 5904 are to be determined by the amount awarded, not by the amount a veteran is actually entitled to receive.

Judge Meredith filed a dissent in this case, observing that, although Mr. Grall was statutorily barred from receiving dual compensation and, thus, no past-benefits were unpaid or owed to him, the majority was ordering the Secretary to pay a fee, which entailed VA paying money out of the Treasury, even though no funds have been appropriated for the sole purpose of paying a veteran's attorney. Based on the attorney fee contract terms in this case, along with the undisputed fact that Mr. Grall was not paid any funds, Judge Meredith reasoned that Mr. Rosinski did not demonstrate how he was prejudiced by any alleged misapplication of *Snyder* and, therefore, VA should not be obligated to pay a contingency fee pursuant to the statute. In addition, she argued that *Snyder*'s reasoning should not be applied to Section 5304 and that the statutory bar to dual compensation is fundamentally different from the limitation on payments to incarcerated veterans at issue in *Snyder*. She concluded that, because the prohibition against dual compensation limits the total amount veterans may be paid based on a period of service, and no benefits were unpaid or owed to the veteran in this case, there was no pool of appropriated funds that could have been used to pay Mr. Rosinski.

Jason Massey is Associate Counsel with the Board of Veterans' Appeals.

Discharged Counsel Lacked Standing to Seek Attorney's Fees Under EAJA

by Madeline Becker

Reporting on *Shealey v. Wilkie*, 946 F.3d 1294 (Fed. Cir. 2020).

In *Shealey*, the Federal Circuit determined that attorneys whom the veteran discharged during his appeal at the CAVC lacked standing to pursue a claim for attorney's fees under EAJA when the veteran objected to their claim.

Mr. Shealey served in Vietnam from February 1967 to March 1969. In July 2015, the Board found that Mr. Shealey had been dishonorably discharged from service. Mr. Shealey filed multiple times for reconsideration and eventually obtained a discharge upgrade from the Army Board for Correction of Military Records. When the Board again denied his motion for reconsideration after he received the

upgrade, the veteran sought legal counsel for an appeal to the CAVC.

In February 2017, Mr. Shealey entered into a fee agreement with two attorneys wherein the parties agreed that: (1) the attorneys would not charge a fee for their representation; and (2), if the CAVC awarded attorney's fees, the attorneys could apply for fees under EAJA and the veteran would assist them in their request for fees. The attorneys filed appearances in his appeal, reviewed the record and conducted legal research, attended the pre-briefing conference, and then advised him to file a new claim to reopen his case. Dissatisfied with this advice, Mr. Shealey discharged them and was represented by new counsel for the remainder of his appeal.

The CAVC in August 2017 issued a decision vacating and remanding the Board's decision. In September 2017, the previously discharged attorneys filed an EAJA application for attorney's fees in Mr. Shealey's appeal. Mr. Shealey filed multiple objections to that application, asserting several reasons including that the attorneys pressured him to drop his claim, delayed his appeal, and had not performed any work that contributed to the remand. The CAVC allowed the attorneys to intervene, but it dismissed their application when it found they lacked standing.

The Federal Circuit affirmed, holding that the intervening attorneys did not have standing under EAJA where the veteran, as the prevailing party in the underlying case, objected to their application for fees. It rejected three possible theories under which the intervenors might have had standing.

First, it held that the intervenors did not have standing as parties who suffered an injury in fact. The intervenors asserted that they had a legal right to reimbursement, but the Federal Circuit explained that the statutory right granted by EAJA is one limited to just the prevailing party. Here, the prevailing party was indisputably Mr. Shealey and not the intervenors.

Second, the intervenors might have had a right through assignment under the fee agreement. But a claim for fees is against the government and, under 31 U.S.C. § 3727 (the Anti-Assignment Act), claims against the government are generally prohibited from assignment unless the government expressly waives an objection. Additionally, the intervenors disclaimed that theory of potential standing at oral argument.

Third, the intervenors argued that they could pursue the claim for fees on Mr. Shealey's behalf under third-party standing, pursuant to the fee agreement. But the Federal Circuit held that the three factors assessed in determining third-party standing did not weigh in favor of standing here. The first factor, "the relationship of the litigant to the person whose rights are being asserted," weighed in favor of standing, because of the attorney-client relationship. *See Caplin & Drysdale v. United States*, 491 U.S. 617 (1989). But the Federal Circuit determined that the second ("the ability of the person to advance his own rights") and third ("the impact of the litigation on third-party interests") factors weighed against a finding of standing. *Id.* And the Federal Circuit rejected the intervenors' theory that their case was distinguishable from *Willis v. Government Accountability Office*, 448 F.3d 1341 (Fed. Cir. 2006), ultimately because it found that Mr. Shealey's rights would have been impaired had the intervenors been afforded standing to file a claim on his behalf after he had revoked their authority by objecting to their EAJA application.

The intervenors lastly argued that a merits decision from the CAVC regarding their entitlement to fees was necessary for them to pursue a claim in state court against Mr. Shealey for breach of the fee agreement. They argued that, without the CAVC establishing their entitlement to an EAJA award, they would be unable to prove damages. But the Federal Circuit rejected this argument as well. It explained that state courts are able to interpret federal law and thereafter render a binding judicial decision applying that interpretation, so no determination from the CAVC was necessary. The Federal Circuit ultimately declined to confer standing for the intervenors and affirmed the CAVC decision below.

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

The CAVC Bar Association Presents its First-Ever Webinar Series

By Jenny J. Tang

In January 2020, the CAVC Bar Association began its first-ever webinar series. We are grateful to Chief Judge Bartley and the CAVC for allowing us the opportunity to use the CAVC's webstreaming platform and conference space. Also, a special thank you to Chris Wysokinski, Secretary of the CAVC Bar Association, for setting up all the technology and logistics.

Our first webinar was in January. James Ridgway, Partner and National Director of Programs and Education, Bergmann & Moore, LLC, presented an excellent webinar on *Statutory and Regulatory Interpretation in Veterans Law*. He provided an overview of the governing interpretive framework, including since the U.S. Supreme Court's decision in *Kisor v. Wilkie*. He also enlightened us with a step-by-step how-to guide for interpreting veterans law statutes and regulations.

James generously re-recorded his presentation for those who missed the live webinar, given an audio issue we encountered on the first go. You can watch James's webinar on our YouTube page at this link: https://youtu.be/oJxqBBajoZg. If you would like a copy of his slides, please reach out to James directly at jridgway@vetlawyers.com.

Our second webinar was in February. Andrea MacDonald, Associate Director of Programs and Education, Bergmann & Moore, LLC, presented a superb webinar on *The Nuts and Bolts of the Veterans Appeals Improvement and Modernization Act (AMA)*. Not only did Andrea provide an easy-to-understand overview of AMA, but she also provided helpful answers to the many nuanced questions that audience members posed.

You can watch Andrea's webinar on our YouTube page at this link: https://youtu.be/eDQVn5XKFUo. If you would like a copy of her slides, please reach out to Andrea directly at amacdonald@vetlawyers.com.

We are grateful to James and Andrea for sharing their expertise. I invite you to contact me if you have any suggested topics or speakers for future educational webinars. I can be reached at jennyjtangattorney@gmail.com.

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

The Federal Circuit Decides on Proper Channels for a Third Party's Challenge to a Determination by the Department of Veterans Affairs

By Vanessa-Nola Pratt & Anna F. Caruso

Reporting on *Ashford University, LLC v. Secretary of Veterans Affairs*, No. 2018-1213 (March 3, 2020).

In *Ashford University v. Veterans Affairs*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) dismissed Ashford University's petition for direct review of VA's suspension of the university's accreditation to provide an educational assistance program.

VA provides educational assistance, in the form of monetary benefits, to veterans who are enrolled in an "approved course of education." Approval of educational programs must be provided by a state approving agency (SAA) for the state where the institution's main campus is located.

Ashford University (Ashford), a for-profit educational institution, provided online courses to veterans and other students but also had a campus on which it provided other courses. From 2005 to 2016, Ashford's online courses were approved by the Iowa SAA. In 2016, however, the Iowa SAA informed

Ashford that it would no longer grant approval because Ashford had closed its Iowa campus and transitioned to solely providing online courses. At the urging of VA, in June 2016, Ashford sought approval from the SAA in California, where Ashford's headquarters are located. But after the California SAA requested additional information, Ashford withdrew its application from the California SAA and subsequently applied to the Arizona SAA for approval. Arizona granted the application, effective July 10, 2017.

In November 2017, VA sent a letter (Cure Letter) to Ashford about its requirement for SAA approval. In this Cure Letter, VA advised that Ashford was not in compliance with the relevant statutes because it had not secured approval of the SAA where Ashford is located, finding that Ashford's online courses for veterans and other students had not been approved by the correct SAA, as Arizona lacked jurisdiction to approve Ashford. VA stated that failure to undertake corrective action would result in a suspension of payment of educational assistance, a suspension of approval of new enrollments and reenrollments for Ashford's online programs, and referral of the matter to the Committee on Educational Allowances to assist with the determination of whether educational assistance should be discontinued. Additionally, the Cure Letter indicated that Ashford would be provided with the opportunity for a hearing before the committee, prior to a determination. In addition, VA agreed to stay the suspension of educational assistance payments to Ashford pending the outcome of Ashford's suit against the Iowa SAA for discontinuing the approval of its online courses.

Subsequently, Ashford petitioned the Federal Circuit for direct review of VA's decisions reflected in the Cure Letter. The Federal Circuit found that the Cure Letter did not raise justiciable issues for two reasons: it did not reflect an agency action under section 502 and it did not constitute a final agency action reviewable pursuant to the Administrative Procedures Act (APA).

Ashford asserted that the Federal Circuit had jurisdiction under 38 U.S.C. § 502, which provides, in pertinent part, that an "action of the Secretary [of VA] is subject to judicial review, and that such review shall be in accordance with Chapter 7 of title 5 and may be sought only the United States Court of Appeals for the Federal Circuit." The Federal Circuit explained, however, that the APA establishes a distinction between "rules" and "adjudications." The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." The APA defines "adjudication" as an "agency process for the formulation of an order," with an "order" being "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." Adjudications, including orders made as part of adjudications, are not subject to § 502 review, whereas substantive and interpretive rules are subject to such review.

The Federal Circuit determined that the Cure Letter reflected a part of an adjudication, because it contained the "hallmarks of an adjudication," which include individualized circumstances, the effect of SAA action, and the application of existing regulations to Ashford's current situation. But since the Cure Letter did not announce a rule or policy statement, the Federal Circuit held that section 502 does not provide it with jurisdiction over Ashford's petition.

The Federal Circuit also addressed Ashford's contention that it had no path to judicial review of a VA decision to suspend or discontinue educational assistance payments because 38 U.S.C. § 511(a) precludes judicial review of VA's action in this case. Section 511(a) limits judicial review to a "decision by the Secretary under a law that affects the provision of benefits." Ashford argued that prohibiting direct review would therefore improperly insulate VA's lawmaking from review. The Federal Circuit held, however, that review was possible, and proper, via review of a decision of the Veterans Court that reviewed a decision of the Board of Veterans' Appeals (Board). The Federal Circuit explained that the "Veterans Court has 'exclusive jurisdiction' to review decisions of the Board of Veterans' Appeals", under 38 U.S.C. § 7252, and the benefits provided in

this case are "Veterans' Educational Assistance", under Chapter 34. Thus, Ashford may appeal to the Board "a decision of the Secretary" on suspension or discontinuance of benefits, and may appeal the Board's decision to the Veterans Court and the Veterans Court's decision to the Federal Circuit. The Federal Circuit rejected Ashford's argument that the Board would lack jurisdiction because Ashford is not a natural person, holding that valid claimants would include legal entities such as Ashford.

The Federal Circuit also addressed the finality of the Cure Letter. The court ruled that it would only have jurisdiction under the APA if the agency action were final. The Federal Circuit explained that, for agency action to be "final", (1) "the action must mark the 'consummation' of the agency's [decision-making] process," and (2) "the action must be one by which 'rights or obligations have been determined', or from which 'legal consequences will flow.'" The court found that the Cure Letter was neither the "consummation" of VA's decision-making process nor the determination of rights or obligations from which legal consequences would flow. Moreover, VA had not taken final action on discontinuance, because the Regional Director could not discontinue educational assistance until the Committee had made a recommendation and Ashford had had an opportunity for a hearing before the Committee. Thus, the Cure Letter contained merely a threat to suspend benefits if certain actions were not taken and it was "tentative" and "interlocutory [in] nature," and thus did not constitute a final agency action.
As the Cure letter was not an agency action reviewable under 38 U.S.C. § 502 and was not a final agency action reviewable under the APA, the Federal Circuit held that it was not subject to direct review, and it therefore dismissed the petition.

Vanessa-Nola Pratt and Anna F. Caruso are Associate Counsel at the Board of Veterans' Appeals.

Court Does Not Reach Question of Whether *Saunders* Would Entitle a Veteran to Compensation for Psychiatric Symptoms without a DSM Diagnosis

by Jillian Berner

Reporting on *Webb v. Wilkie*, No. 18-0966 (March 26, 2020).

A veteran sought disability compensation in 2008 for a psychiatric disability stemming from service in Vietnam as a funeral attendant responsible for packing and shipping bodies of dead soldiers. Following service, he experienced sleepless nights, anxiety attacks, and difficulty adjusting to daily life and relationships, resulting in two failed marriages. The veteran screened positive for post-traumatic stress disorder (PTSD) on a preventive health assessment nine months after filing his claim for compensation.

A 2010 VA PTSD examination noted several psychiatric symptoms, but the examiner opined that an Axis 1 diagnosis could not be rendered, as the objective evidence did not support a more definitive diagnosis. The Regional Office (RO) conceded exposure to an in-service stressor but denied the veteran's claim due to lack of a diagnosis. The veteran appealed to the Board of Veterans' Appeals (Board), which remanded the claim for a new examination, because the 2010 opinion finding no diagnosis was inconsistent with the veteran's reported medical history of chronic symptoms.

In 2014, the veteran underwent another VA examination, during which an examiner opined that he did not have a diagnosis conforming to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). The examiner diagnosed the veteran with unspecified cannabis use disorder and opined that he had occupational and social impairment due to mild or transient symptoms, but that his symptoms were most likely related to cannabis use. The veteran appealed to the

Board, which remanded the claim for another new examination, because the examination had failed to use the fourth edition of the DSM (DSM-IV) and failed to address the etiology of any acquired psychiatric disorder, including PTSD.

In 2016, the veteran underwent a third VA examination, during which the VA examiner opined that he did not have any mental disorder conforming to the DSM-IV, including PTSD, despite valid symptoms associated with trauma. The examiner opined that the veteran did not have re-experiencing symptoms from Criterion B of the DSM-IV PTSD criteria (persistent re-experiencing of the trauma) and only had one symptom from Criterion C of the DSM-IV PTSD criteria (persistent avoidance of stimuli associated with the trauma). The examiner diagnosed no other psychiatric diagnosis under DSM-IV.

The veteran appealed to the Board, which denied his claim for entitlement to compensation for a psychiatric disability. The Board found that DSM-IV applied to the veteran's claim, acknowledged that the claim was not limited to PTSD and encompassed any psychiatric disability, but found no valid claim where there was no proof of a current disability. The veteran appealed to the Court.

At the Court, he argued that the Board had erred by relying on the 2014 and 2016 VA examinations, because the Board had previously found the 2014 examination inadequate and because both examinations had relied on the DSM-5 instead of DSM-IV and both provided insufficient rationales for their conclusions. The veteran also argued that he experienced functional impairment due to his psychiatric symptoms, notwithstanding lack of a diagnosis, and thus was entitled to compensation pursuant to *Saunders v. Wilkie* as a "current disability." The Secretary argued that the 2016 VA examination corrected any error in the 2014 VA examination by applying the DSM-IV and that *Saunders* could not be extended beyond the facts of that case, which held that pain, absent a diagnosis, constituted a current disability, if functional loss resulted.

The Court held that it could not address whether the Board erred by relying on the 2014 and 2016 VA examinations because the Board had made no explicit findings as to the adequacy of the examinations and did not explain which examinations it relied on in denying the claim, or its reasons for doing so were not evident. The Board's failure to make such factual findings prevented the Court from appellate review. Accordingly, the Court determined that the question of whether a veteran was entitled to disability compensation for a psychiatric disability absent a diagnosis could become moot, so it could not analyze that issue and remanded the claim for the Board to provide an adequate statement of its reasons or bases.

Judge Falvey partially concurred and partially dissented, agreeing with the Court's remand but not the Court's conclusion that the issue of entitlement to compensation without a diagnosis could be moot. Judge Falvey noted that, even if the Board granted the veteran's claim for compensation for a disability under the DSM, other issues remained, including whether he would be entitled to compensation for any non-DSM-conforming symptoms and whether he would be entitled to other benefits flowing from service connection. Because the essential question of entitlement to compensation for symptoms without a DSM-conforming diagnosis flowed from Court precedent, Judge Falvey wrote that the Court or even the Federal Circuit needed to provide precedential explanation of its own caselaw.

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

An Incredible Ruling for Veterans' Credibility

by David M. Remillard

Reporting on *Miller v. Wilkie*, 18-2796 (Jan. 16, 2020)

The CAVC was called upon to determine the proper remedy when an examiner fails to account for a

veteran's lay statements but the Board did not question his competency or credibility.

In April 2011, Mr. Miller submitted a claim for service connection for joint stiffness, fatigue, and a stomach illness, asserting that these disabilities had their origin during his service in the Gulf War. Later that same year, Mr. Miller submitted a statement describing the origin of his symptoms of, *inter alia*, heartburn, indigestion, and foot problems, and his treatment, which consisted solely of over-the-counter medications. He later submitted a notice of disagreement, along with another claim for a foot disability after facing a denial of his other claims from the Regional Office.

As his claims made their way to the Board, Mr. Miller submitted more statements regarding his symptoms. The Board then remanded his claims for gastroesophageal reflux disease ("GERD"), a foot condition, and fatigue for new examinations. The C&P examiner opined that neither Mr. Miller's foot disability nor his GERD were related to his service because he had not had any complaints of either disability since he left service. However, it was clear that the examiner did not consider Mr. Miller's statements regarding his use of over-the-counter medications to treat his disabilities. Despite this, the Board relied on the examinations to deny Mr. Miller's claims.

Before delving into the merits of the case, the Court paused to provide an overview of the legal landscape regarding medical opinions to determine which case provided the proper remedy. First, the Court discussed *Barr v. Nicholson*, 21 Vet. App. 303 (2007), a case in which an examination failed to take account of a veteran's descriptions of his varicose veins. While the Court had found that examination to be inadequate, it remanded for the Board to make a credibility determination in the first instance because the Board had erroneously determined that the veteran was incompetent to describe the continuity of his varicose vein symptoms.

Next, the Court discussed *McKinney v. McDonald*, 28 Vet. App. 15 (2016). In that case, the examiner had similarly failed to account for the Veteran's lay statements but had also offered an overall inadequate rationale. Because the Board had not questioned the veteran's credibility, the Court eschewed a new credibility determination, instead remanding for a new examination to address his lay statements.

In the appeal, Mr. Miller and the Secretary agreed that remand was necessary. Their disagreement concerned the proper remedy upon remand.

The Secretary argued that the proper remedy in all cases such as this, where the Board has not made any determination on a veteran's credibility, is for the Board to make a credibility determination before it decides whether a new examination is necessary. This is so, he argued, because to remand for a new examination without the Board first making a credibility determination would lead to a possible waste of resources, since the Board could find the statements not credible. Additionally, the Secretary argued for a limited reading of *McKinney*, one that focused on the examination's inadequate rationale rather than the failure to address lay statements.

In contrast, Mr. Miller, relying on *McKinney*, contended that the proper remedy was merely for the Board to order a new examination because it had already made an implicit, positive credibility determination. He argued that an examiner's duty to address lay statements cannot depend on later determinations; instead, an examiner's opinion may inform the Board's adjudication of credibility.

The Court noted that the commonality between *Barr* and *McKinney* is that "an examination is inadequate if the medical professional fails to consider the veteran's own lay reports of symptoms." But the Court disagreed with the Secretary's arguments because in *Barr* the Board had not reached the issue of the examiner's obligation to consider lay statements, as it had found the veteran not credible, whereas, in *McKinney*, "nothing stopped the Board from reaching credibility." Although both examinations were inadequate because they did not consider the veterans' lay statements, the Court stated that it "will order a new examination if the Board never impugned the veteran's credibility," as in *McKinney*. To hold otherwise would be to isolate lay evidence from other types of evidence that an

examiner must discuss because the Board would have to make an initial, positive credibility determination before an examiner would have a duty to address those statements.

The Court then discussed the role that examiners play in the Board's adjudication of credibility. It explained that an examiner is in the best position to determine the medical feasibility of a veteran's statements. The statements may or may not align with current medical knowledge, but the examiner's judgment in this regard can help to inform the Board's ultimate credibility determination. Thus, "the examiner's obligation to address lay evidence cannot depend on a future finding of credibility."

The Court then held that "[w]hen the Board has made its decision without finding that the veteran is not competent to report symptoms, and nothing suggests that the Board failed to review the evidence at issue, we may reasonably conclude that it implicitly found the veteran credible." It noted that this holding was consistent with the "implicit denial rule," which allows the Court to review the denial of whole claims, even when the Board does not explicitly address those claims in its decision. Essentially, the Court noted that, if the Board had cause to question a veteran's credibility, it should have raised that issue, and the Court would not allow the Board to make an adverse determination based on the same record upon which it originally decided a veteran's claims.

The Court remanded the case for a new examination to account for Mr. Miller's statements regarding the treatment of his disabilities because the Board had implicitly found his statements credible. Mr. Miller's counsel had recommended alternative sets of questions: one where the examiner would accept Mr. Miller's statements as true and the other where he would reject those statements. The Court then noted that the Board may have cause to reassess Mr. Miller's credibility based on the examiner's opinion or other evidence that might later enter into the record.

Dave Remillard is an associate attorney at Chisholm Chisholm and Kilpatrick Ltd.

TDIU Effective Date Cannot Be Earlier Than the Date of Service Connection for the Disabilities Upon Which the TDIU Award Was Based

By Carrie B. Iwanowski

Reporting on *Delrio v. Wilkie*, 17-4220 (December 19, 2019)

In *Delrio v. Wilkie*, Mr. Delrio appealed a Board of Veterans' Appeals (Board) decision denying entitlement to a total disability rating based on extraschedular individual unemployability (TDIU) under 38 C.F.R. § 4.16(b) effective earlier than October 11, 2006, the effective date of his grant of service connection for fibromyalgia. The appeal was referred to a panel of the United States Court of Appeals for Veterans Claims (Court) to address whether the effective date of extraschedular TDIU can be earlier than the date of service connection for the disabilities upon which the TDIU award was based. The Court concluded it cannot. Nevertheless, because the Board provided inadequate reasons or bases for concluding that Mr. Delrio was not entitled to a TDIU prior to October 11, 2006, based on his service-connected post-traumatic stress disorder (PTSD) alone, the Court set aside and remanded that portion of the decision. The appeal arose from a July 1996 claim for service connection for PTSD. The Regional Office granted the claim based, in part, on a March 2003 VA examination report noting that the veteran's "avoidant non-social behavior" and lumbar and cervical spine disabilities "reduce[d] his employability." A 10 percent rating was assigned.

Mr. Delrio appealed the initial rating and was afforded additional examinations in November 2005 and August 2008. Based on these examinations and additional evidence, the veteran was ultimately awarded an initial evaluation of 30 percent effective September 8, 1999 – the date he was first diagnosed with PTSD – and an increased 50 percent evaluation,

effective July 29, 2015 – the date of another VA examination showing worsening.
During his appeal of the PTSD evaluation, Mr. Delrio claimed service connection for fibromyalgia in October 2006. He was granted service connection with a 10 percent rating effective from his date of claim, October 11, 2006. In October 2008, he sought an increased rating and was granted a 40 percent rating from the date of claim.

In June 2013, the Board determined that the issue of entitlement to TDIU had been raised by the record and remanded that intertwined issue for initial development and adjudication. The record at that time included evidence dated in 1996, 1997 and 2003 that the Veteran's psychiatric symptomatology was affecting his employability.

Following appeal, the Board awarded TDIU on a schedular basis effective July 29, 2015, the date Mr. Delrio's combined disability rating met the requirements of 38 C.F.R. § 4.16(a). The Board remanded for extraschedular referral of the issue of entitlement to TDIU prior to that date. The VA Compensation Director determined that TDIU was not warranted and the issue returned to the Board.

In September 2017, the Board awarded extraschedular TDIU effective October 11, 2006, the effective date of the grant of service connection for fibromyalgia, because the evidence demonstrated that PTSD and fibromyalgia collectively rendered him unemployable. The Board denied extraschedular TDIU prior to that date because, at that time, "PTSD was [the veteran's] only service-connected disability, and it was not of such severity as to render him unable to secure or maintain substantially gainful employment." Mr. Delrio appealed to the Court.

As an initial matter, the Court found that the Board's TDIU analysis did not comport with the rule of *Ray v. Wilkie*, 31 Vet. App. 58, 79 (2019), that the phrase "unable to secure or follow a substantially gainful occupation" in section 4.16 has economic and noneconomic components which must be discussed if raised by the evidence). The Court also held that the Board did not lay the necessary foundation pursuant to *Fountain v. McDonald*, 27 Vet App. 258, 272 (2015), for construing the March 2003 and November 2005 VA examiners' silence as substantive evidence against the veteran. And the Board improperly relied on examiner opinions regarding unemployability, where the ultimate determination of entitlement to a TDIU is a legal determination, not a medical one. *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2014).

The Court determined, however, that the Board was not required to address Mr. Delrio's fibromyalgia when deciding whether he was entitled to a TDIU before October 11, 2006, because the veteran was not service connected for fibromyalgia prior to that date.

On that point, Mr. Delrio had argued that once VA determined that his fibromyalgia was related to service, the effective date for the grant of service connection for the condition became "irrelevant" and the only issue left to resolve was "whether the symptoms of that now-recognized service-connected disability contributed to [his] inability to engage in substantially gainful employment." His argument was premised on *Frost v. Shulkin*, 29 Vet. App. 131 (2017), where the Court held that 38 C.F.R. § 3.310 did not contain an express temporal requirement and therefore did not preclude the grant of secondary service connection for a disability based on a primary disability that was not service connected at the time of incurrence of the secondary disability. The veteran argued that, because § 4.16 likewise did not contain an express temporal requirement, VA was required to analyze a TDIU claim without regard to the effective dates of service connection for the disability or disabilities.

Mr. Delrio's argument also relied on the unique characteristics of a TDIU and the fact that § 4.16(a) refers to "ratable," rather than "rated," service-connected disabilities. In his view, these features of § 4.16 mean that a disability need only be service connectable, not service connected, to be considered in the TDIU effective date inquiry.

The Court began its analysis from the well-settled position that a TDIU is an evaluation for a service-connected disability or disabilities. *Rice v. Shinseki*, 22 Vet. App. 447, 453 (2009). The Court noted that § 4.16 specifies the criteria that must be met for

entitlement to disability compensation payment at a given rate. Inherent in each of those evaluation regulations, and the statutes that authorize payment of disability compensation, is the requirement that the disability being evaluated is service connected. *See Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997) (characterizing evaluation of a disability as a downstream issue from service connection of the disability); 38 C.F.R. pt. 4 (Schedule for Rating Disabilities). The Court stated that this base temporal requirement in part 4 means that compensation cannot be paid for a disability, at any evaluation level, before the effective date of service connection for the disability.

The Court then noted that the plain language of § 4.16(a) expressly directs that "the existence or degree of nonservice-connected disabilities … will be disregarded" when determining entitlement to a TDIU. In this case, prior to October 2006, Mr. Delrio's fibromyalgia was not service connected, and the Board was therefore required to disregard its effects when considering entitlement to a TDIU.

The Court determined that *Frost* does not compel a different outcome, explaining that the essential difference between *Frost* and this case is that *Frost* involved § 3.310, a secondary service connection regulation, whereas this appeal involved § 4.16(a), a disability evaluation regulation that prescribes a compensation payment rule. This distinction is critical because, unlike § 3.310, § 4.16 contains the additional base temporal requirement and limit on consideration of non-service-connected disabilities. Because entitlement to a TDIU under § 4.16 is subject to these additional "temporal prerequisites," it is fundamentally different from § 3.310, which is temporally limited only by the requirement that a veteran have a service-connected disability when entitlement to secondary service connection is decided. *Frost* is concerned with causation for secondary service connection purposes; it does not permit or require VA to ignore the effective date of a grant of service connection when assigning an evaluation based on that service-connected disability. Therefore, *Frost* is inapposite and Mr. Delrio's reliance on it was misplaced.

Accordingly, the Court held that the effective date of a TDIU cannot be earlier than the effective date of the award of service connection for the disability or disabilities upon which the award of a TDIU is based.

Carrie B. Iwanowski is Counsel for the Board of Veterans' Appeals.

Court Holds that Secondary Service Connection Using the Obesity "Intermediate Step" Theory Requires Consideration of Aggravation

By Mathew Galante

Reporting on *Walsh v. Wilkie*, No. 18-0495 (February 24, 2020).

In *Walsh*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential panel decision, authored by Judge Toth, holding that, where obesity is found to be the cause of a nonservice-connected disability, secondary service connection of that disability using the "intermediate step" theory requires VA to consider whether a service-connected disability caused or aggravated the obesity.

During active duty for training in the Army Reserves, Ms. Walsh injured her knees and was ultimately granted service connection for bilateral knee chondromalacia. In the following years, she was granted an increased rating for her bilateral knee disability and was service-connected for, among other things, bilateral hip arthritis and a low back disability. Eventually, she sought entitlement to service connection for hypertension and sleep apnea as secondary to her service-connected bilateral knee, bilateral hip, and low back disabilities (hereinafter, orthopedic disabilities). A VA examiner opined that the veteran's hypertension and sleep apnea were caused by her obesity instead of her service-connected orthopedic disabilities, and the Board remanded for a medical opinion on

whether the veteran's obesity was caused by or aggravated by her service-connected orthopedic disabilities.

While the claims were in remand status before the Regional Office, VA's General Counsel issued a precedential opinion, G.C. Opinion 1-2017, which held that obesity, by itself, is not a disability for VA compensation purposes, but it could be an "intermediate step" between a service-connected disability and a current disability that may be service connected on a secondary basis under 38 C.F.R. § 3.310(a). The VA medical opinion that was obtained on remand did not align with the analytical framework set forth in GC. Opinion 1-2017, so the Board remanded the claims again for a clarifying opinion. The resulting VA medical opinion concluded that, although hypertension and sleep apnea were caused by obesity, there was no clear-cut evidence that decreased physical activity due to Ms. Walsh's service-connected orthopedic disabilities resulted in her obesity. Based on this VA medical opinion, the Board denied the claims.

On appeal to the Court, the Veteran argued that VA had failed to determine whether her service-connected orthopedic disabilities *aggravated* her obesity, which then caused her hypertension and sleep apnea. The Court noted that G.C. Opinion 1-2017 did not address the concept of aggravation in the portion of the opinion that discussed obesity as an "intermediate step" and referred only to subsection (a) of 38 C.F.R. § 3.310, which addresses proximate causation, not aggravation. The Court held that there was no permissible basis in 38 C.F.R. §3.310 for concluding that obesity may be an "intermediate step" in a secondary service connection analysis when a service-connected disability *causes* it, but not when a service-connected disability *aggravates* it. The Court also found that G.C. Opinion 1-2017 was not inconsistent with 38 C.F.R. §3.310 because the opinion addressed proximate causation of obesity in accordance with subsection (a) but was silent on aggravation as set forth in subsection (b), and the Opinion did not purport to prohibit inquiry into whether a service-connected disability could aggravate a veteran's obesity.

The Court found that the VA medical opinion that the Board relied on to deny the claims was inadequate because it failed to address whether the Veteran's service-connected orthopedic disabilities *aggravated* her obesity, which had already been determined to be the cause of her hypertension and sleep apnea. The Court vacated the Board's decision and remanded the claims to the Board for further proceedings.

Mathew Galante is Associate Counsel for the Board of Veterans' Appeals.

Court Affirms Board in Finding No CUE in Lengthy Claim After Remand by Federal Circuit

by Jillian Berner

Reporting on *George v. Wilkie*, No. 16-1221 (March 26, 2020).

In a case with a lengthy appellate history, a veteran appealed a December 2015 Board of Veterans' Appeals (Board) decision finding no clear and unmistakable error (CUE) in a 2014 Board decision concerning the appropriate effective date for service-connected post-traumatic stress disorder (PTSD). After appeal to the Court, then to the Federal Circuit, and remand by the Federal Circuit, the Court in this opinion dismissed three CUE allegations and affirmed the Board's findings as to the remaining allegation.

The veteran served in the Army, including service in Vietnam. In 1997, he filed a claim for disability compensation for PTSD. The regional office (RO) denied his claim for lack of a diagnosis and for lack of confirmed in-service stressor. The decision became final when the veteran did not appeal.

In 2003, the veteran sought to reopen the claim for PTSD compensation. In 2004, the RO reopened the claim, but confirmed the previous denial. Mr. George appealed to the Board, which confirmed reopening but remanded the matter to the RO in

2005. Following several more remands, the RO obtained the veteran's service records, which confirmed the in-service stressor, and a VA examination, which confirmed a PTSD diagnosis. In 2007, the RO granted service connection for PTSD, effective September 19, 2003, relying on the 2007 receipt of service records and the 2007 VA examination.

The veteran appealed to the Board in 2008, arguing that the VA was required to reconsider the 1998 RO denial under 38 C.F.R. § 3.156(c). In 2011, the Board denied entitlement to an earlier effective date. Mr. George appealed to the Court, which granted a joint motion for partial remand in 2012, requiring the Board to consider the applicability of 38 C.F.R. § 3.156(c). In 2013, the Board remanded the claim for a retrospective medical opinion regarding the first manifestation of the veteran's PTSD. The VA examiner opined that the veteran first experienced depression in 2003 and that the veteran's alcohol abuse and violence prior to 2003 could not be attributed to PTSD, so PTSD did not manifest prior to October 2003. In 2014, the Board denied the veteran's claim for an effective date prior to September 2003 because, even though the date of claim related back to September 1997, the retrospective medical opinion found no manifestation prior to October 2003. The veteran did not appeal the 2014 decision.

In August 2015, however, he filed a motion to revise the 2014 Board decision for CUE, arguing that the Board misapplied 38 C.F.R. § 3.156(c) by (1) imposing an impermissible standard for considering lay evidence when it found that the veteran's statements lacked probative value; (2) imposing, when applying 38 C.F.R. § 3.156(c), an unreasonable requirement that medical evidence specify an onset date for PTSD; and (3) requiring that the evidence show the onset of PTSD with certainty.

The Board found no CUE in its 2014 decision. It determined that in 2014 it had found that the medical evidence did not support a finding of PTSD onset prior to 2003, even if the Board had not used the precise terms found in 38 C.F.R. § 3.156(c). In response to the veteran's first CUE allegation, the Board ruled that it had not erred in finding in 2014 that the veteran was not competent to provide a nexus between his pre-2003 symptoms and his 2003 diagnosis. The Board determined that the other two CUE allegations essentially disputed the Board's weighing of the evidence and were insufficient to prove CUE.

The veteran appealed to the Court in 2016 and, in 2018, the Court affirmed the 2015 Board decision. Mr. George then appealed to the Federal Circuit, which vacated and remanded the matter to the Court in 2019 for the Court to determine whether the veteran's allegation before the CAVC of CUE in the 2014 decision was an allegation of CUE distinct from those made before the Board in the 2015 motion; if so, the Court would lack jurisdiction over the newly-raised CUE allegation.

Before the CAVC on remand, the veteran argued that that the Board, in its 2015 decision, had not "reconsidered" his PTSD claims with the new service treatment records under 38 C.F.R. § 3.156(c)(1), but rather had reviewed the effective date under 38 C.F.R. § 3.156(c)(3), and this deprived him of full readjudication, which would have put him in the position as if the service records had been considered with his original 1997 claim and also would have triggered the duty to assist. The Secretary argued that the Board did reconsider the veteran's claim in 2014, since it obtained a retrospective medical opinion. He also argued that, even if the Board's analysis in 2014 was incorrect, there was only a possibility of the new service record establishing entitlement and thus not a definitive, outcome-determinative error sufficient to satisfy the CUE standard.

In light of the Federal Circuit remand, the CAVC obtained supplemental briefing addressing its jurisdiction to consider the CUE assertions. The veteran argued that the CUE claims raised in the 2015 decision were "an averment of error" in the 2015 Board decision and that the Board failed to properly apply 38 C.F.R. § 3.156(c) in the 2014 and 2015 decisions. The Secretary argued that the Court lacked jurisdiction over the CUE allegations presented to the Court because they were distinct from the allegations raised at the agency and addressed by the Board.

In the present decision, the Court dismissed three of the veteran's CUE allegations—two for failure to argue them on appeal to the Court and one for failure to present them to the Board in the first instance. The Court affirmed the Board decision as to the remaining CUE allegation.

First, the Court addressed the three CUE allegations made by the veteran in his 2015 motion before the Board. Regarding the two allegations relating to the onset date of PTSD, the Court held that the veteran had abandoned those allegations when he made no argument about them to the Court, so the Court dismissed the appeal as to those allegations.

Regarding the allegation of CUE relating to the Board's assessment of his lay statements, the Court held that the veteran had made similar arguments before the Board and before the Court, so the Court had jurisdiction. It then determined that the Board's 2015 finding of no CUE in the 2014 decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The Court agreed with the Board's finding that the veteran simply disagreed with the Board's weighing of the evidence, which is insufficient to constitute CUE. The Court also held that a failure in the duty to assist, as argued by the veteran in the VA's failure to obtain a VA examination, is insufficient to constitute CUE. The Court noted that the Board did obtain a retrospective medical opinion considering the veteran's lay statements. Accordingly, the Court held that the veteran did not demonstrate CUE in the 2015 Board decision regarding the use of his lay statements and the Court affirmed the Board decision.

Regarding the veteran's allegations of error concerning the Board's reconsideration under 38 C.F.R. § 3.156(c), the Court first found that it had jurisdiction over this argument as concerning the 2015 Board decision only but that it lacked jurisdiction over the argument as it pertained to the 2014 Board decision. The Court held that the 2015 Board decision correctly applied 38 C.F.R. § 3.156(c) when it reviewed the 2014 Board decision and addressed the steps taken following VA's receipt of the service records, including the 2013 retrospective medical opinion and consideration of other evidence, including Social Security Administration records and lay statements. Because this type of analysis "makes sense only in the context of reconsidering a claim," the Court held that the Board correctly found in 2015 that reconsideration of the veteran's claim had occurred. Because the argument relating to reconsideration in the 2014 Board decision was not raised before the Board, the Court did not have jurisdiction to address that argument.

Judge Greenberg dissented, noting that the original VA examiner's opinion would have been different if he had had access to the veteran's later-obtained service records at the time and that the facts of the case warranted a more equitable result.

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

CAVC Finds That General Rating Formula for Diseases and Injuries of the Spine Does Not Mandate Rating the Entire Spine as a Single Unit

By Michelle V. Smith

Reporting on *Langdon v. Wilkie*, No. 18-0520 (February 5, 2020).

In *Langdon v. Wilkie*, the Court of Appeals for Veterans Claims issued a reconsidered decision, reaffirming its previous June 13, 2019 ruling affirming a Board of Veterans' Appeals decision that granted a 10 percent rating for service-connected lumbar spine but denied a higher rating. The Court held that functional impairment caused by a veteran's non-service-connected lumbar spine disability cannot be considered when rating his thoracic spine disability under 38 C.F.R. § 4.71a and the General Rating Formula for Diseases and Injuries of the Spine, where there is medical evidence distinguishing between impairments caused by the lumbar and thoracic spine disabilities.

Robert Langdon is a veteran of the United States Navy. The Regional Office granted service

connection for Mr. Langdon's thoracic spine disability and later denied service connection for a lumbar spine disability. The denial relied on a May 2016 VA examination report where the examiner concluded that Mr. Langdon's lumbar spine disability was "less likely than not" related to service. Mr. Langdon did not appeal the decision denying service connection for a lumbar spine disability, and it became final.

In the decision on appeal, the Board granted a 10 percent disability rating for the thoracic spine under 38 C.F.R. §§ 4.45 and 4.59 based on reports of painful motion. In denying entitlement to a higher rating, the Board relied on the May 2016 VA examination report, which noted that Mr. Langdon's forward flexion was not greater than 60 degrees, but found that he had "no current functional limitation related to [his] thoracic condition," and that his decreased range of motion was caused by or related to his lumbar spine condition. Mr. Langdon did not contest the adequacy of the VA examination.

On appeal to the Court, Mr. Langdon argued that the Board erred by denying a rating higher than 10 percent under Diagnostic Code (DC) 5237. He asserted that the plain language of DC 5237 requires the Board to consider his non-service-connected lumbar spine disability and rate the entire spine as a single unit, rather than separating the symptoms associated with each. Mr. Langdon further asserted that he was entitled to a 20 percent rating based on his measured range of motion for the "thoracolumbar" spine, regardless of whether such limitation was attributable to his service-connected thoracic spine or his non-service-connected lumbar spine. In so arguing, Mr. Langdon relied on a 2003 amendment to the General Rating Formula in which VA provided for rating the thoracic and lumbar spine as the "thoracolumbar" spine. He also argued that, to the extent the criteria are ambiguous, the Board erred by not resolving any ambiguity in his favor.

The Court first found that it had jurisdiction to interpret the meaning of DC 5237. The Court has jurisdiction over cases involving "an interpretation of the language in the regulations" related to the rating schedule," but is precluded from "review[ing] the schedule of ratings for disabilities adopted under section 1155…or any action of the Secretary in adopting or revising that schedule." Here, Mr. Langdon's case involved the correct interpretation of DC 5237 when read in the context of the entire regulatory scheme—namely, what "thoracolumbar" refers to when only one of the two segments of the spine is service-connected.

The Court observed that the rating schedule is a guide for evaluating only service-connected disabilities, as the purpose is to compensate only diseases and injuries "as a result of or incident to military service." The Court stated that, while DC 5237 calls for the thoracic and lumbar spines *generally* to be rated as a unit, it does not *mandate* it. The Court pointed to the Federal Register when the rating criteria were amended to the current version and its remark that it may be clinically difficult to separate limitation of motion of the thoracic and lumbar spine segments. However, because it is not impossible, if there is sufficient evidence to separate the limitations, they should be evaluated separately. Thus, DC 5237 provides for rating the lumbar and thoracic spines as a single unit only when both are service-connected, or when it is not possible to differentiate the functional limitations of a service-connected disability from the non-service-connected part of the spine. This conclusion fits squarely with the Court's holding in *Mittleider v. West*, 11 Vet.App. 181, 182 (1998).

In this case, the record contained an unchallenged VA medical examiner's opinion attributing Mr. Langdon's impairment solely to the non-service-connected lumbar section of the spine. Therefore, as the medical evidence was sufficient to differentiate the symptoms of the service-connected disability from the non-service-connected disability, the functional impairment of the latter should not be considered in rating the service-connected disability. The Court noted that the appellant's interpretation would also lead to absurd results, including circumventing the regulatory framework governing service connection and compensating disabilities for which service connection was not established or expressly denied.

Ultimately, the Court concluded that there was no ambiguity in the regulation. As there is no ambiguity, there was no need to resolve an interpretation in the veteran's favor.

Michelle V. Smith is Associate Counsel at the Board of Veterans' Appeals.

Federal Circuit Affirms Dependency Compensation Available Only for Expressly Enumerated Dependents

by Max C. Davis

Reporting on *O'Brien v. Wilkie*, No. 19-1072 (January 31, 2020).

On January 31, 2020, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that the term "dependents" in 38 U.S.C. § 1115 unambiguously is limited to spouses, children, and dependent parents as those terms are defined in 38 U.S.C. § 101.

Mr. O'Brien, a Vietnam War veteran with service-connected disabilities, applied for dependency compensation for D.B., his step-daughter's minor son of whom he had legal guardianship. Under 38 U.S.C. § 1115, dependency compensation is available where a veteran has a spouse, a child, or a parent dependent on the veteran. "Child" is expressly defined by 38 U.S.C. § 101(4)(A) as a biological child, a step-child, or a legally adopted child. The Department of Veterans Affairs denied Mr. O'Brien's application for compensation.

On appeal to the United States Court of Appeals for Veterans Claims (Court), a divided panel held that, because section 1115 plainly provides compensation for dependents only where a veteran has a spouse, a child, or a dependent parent, interpreting "dependent" any other way, such as by a dictionary definition as Mr. O'Brien offered, would be impermissible. Moreover, as the term "child" was limited by section 101(4)(A) to biological children, step-children, and legally adopted children, a person over whom one has legal guardianship does not qualify as a "child." Judge Greenberg dissented, viewing the majority's interpretation as conflicting with congressional intent to defray the cost of supporting a veteran's dependents: Mr. O'Brien, as guardian of a minor child, was obligated by state law to provide "custody, nurture, and tuition" for D.B. Judge Greenberg also noted that for Social Security purposes a "child" does include a grandchild or step-grandchild. 42 U.S.C. § 416(e).

The Federal Circuit agreed with the Veterans Court that the plain language of 38 U.S.C. § 1115 does not permit expanding "dependent" to include any person in a family for whom a veteran bears costs of dependency. Supporting this interpretation is that section 1115 specifies the amount of compensation due depending on the type of dependent, so adding another class of dependent would leave unanswered the specific amount of additional compensation due. The Federal Circuit agreed that D.B. could not qualify as a "child" under the definition in section 101(4)(A).

The Federal Circuit remarked, as the CAVC majority did, that whether dependency compensation should be available in the case of guardianships or any other family member who does not fit within Title 38's statutory scheme is a question of policy for Congress.

Max C. Davis is Associate Counsel at the Board of Veterans' Appeals.

Still Waiting for a Definition of What Constitutes a Protected Work Environment

by Jonathan C. Heiden

Despite legitimate efforts from both veterans' advocates and the Board of Veterans' Appeals, the phrase "protected environment" in the context of a claim for total disability and individual unemployability (TDIU) remains undefined. Because VA adjudicators and veterans' advocates

have not yet provided a definition that can withstand review at the Veterans Court, action is needed from VA to provide a definition, or "at the very least, a list of factors that VA adjudicators should consider in making that determination." *Cantrell v. Shulkin*, 28 Vet. App. 382 (2017).

In the context of a claim for TDIU, 38 C.F.R. § 4.16(a) allows a veteran to show that he or she can only obtain "marginal employment" if his or her disability would require a "protected environment." The regulation does not define this phrase or provide a set of criteria that VA adjudicators must apply. The only guidance provided in the regulation for what this phrase means is the nonexclusive examples of "a family business or sheltered workshop." This absence has inevitably led to confusion.

In the most recent precedential case considering this issue, *Cantrell v. Shulkin*, the Court remanded a Board decision denying a veteran's claim that his employer's accommodations for his disability constituted a protected work environment. The Court rejected the Secretary's argument that the phrase was intentionally vague to allow VA adjudicators to decide what constitutes a protected work environment on a case-by-case basis. The Court reasoned that this approach would lead to inconsistent application and inhibit meaningful review. Although the Court rejected the case-by-case approach, it did not itself provide a definition for the phrase, reasoning that "it is VA's responsibility to define the terms contained within its regulations."

Since the *Cantrell* Court rejected the case-by-case approach without supplying its own definition, VA has not provided any guidance as to what a veteran must demonstrate in order to prove that his or her disabilities either require, or their current job setting constitutes, a protected work environment. In fact, as of the date of this article, there are no rules in the Federal Register addressing 38 C.F.R. § 4.16(a)'s phrase "protected environment." This vacuum has led to efforts by both veterans' advocates and the Board to provide guidance and/or a definition. For good or ill, to date these efforts have been rejected by the Court.

Two notable efforts since the Court's decision in *Cantrell* occurred in *Evans v. Wilkie,* 17-5015 (April 4, 2018), and *Builter v. Wilkie,* 18-3935 (September 26, 2019). Both of these unpublished decisions show that, so far, alternative methods for either compelling VA to provide a definition or relying on analogous agency regulations will not resolve the problem of an absent definition.

First, in *Evans,* the veteran filed a writ of mandamus to compel VA to provide a statement of the case defining what constitutes a protected environment. The veteran argued that VA's failure to provide a definition for the phrase prohibited him from being able to successfully argue his appeal. The Court denied the writ in a non-precedential order, explaining that VA's failure to provide a definition did not foreclose other avenues by which the veteran could obtain relief—specifically, by an appeal to the Board. In addition, the Court noted that counsel for the Secretary reached out to the Policy and Regulations Chief for Compensation Service to ask about the status of the rulemaking process to define the phrase. The response noted that VA was working to address *Cantrell* but explained that it is a lengthy process and "may take 18 or more months to publish a final rule." In light of the alternative remedies available and VA's duty to comply with the lengthy rulemaking process required by the Administrative Procedure Act, the Court denied the writ.

Next, in *Builter*, a veteran appealed a Board decision that relied on both the Department of Labor's definition and Social Security Administration (SSA) regulations explaining what constitutes a protected environment. http://www.dol.gov/whd/FOH/ch64/64k00.htm (last accessed Feb. 28, 2020); 20 C.F.R. § 404.1574(a)(3). In a lengthy decision, the Board recognized the Court's decision in *Cantrell* and then relied on analogous rules from the Department of Labor and the SSA. Specifically, the Board determined that the Department of Labor and SSA regulations both suggest that a protected work environment must in some way relate to a charitable "institutional program," such as a facility operating at a loss or a facility receiving charitable contributions or government aid. Relying on these

policies and regulations from the Department of Labor and the SSA, the Board went on to deny the veteran's claim that the accommodations his employer provided constituted a protected environment, because "[t]here [was] no evidence that the purpose of the Veteran's friend's business [was] to provide employment to disabled workers."

In a non-precedential memorandum decision, the Veterans Court rejected the Board's attempt to define 4.16(a)'s phrase "protected environment." Specifically, Judge Greenberg held that the Board's definition was "inconsistent with the regulation" and he thereby implicitly rejected the Board's reliance on analogous agency definitions.

Cantrell, *Evans*, and *Builter* appear to suggest that only guidance from the Court, or ideally a new rule from VA, will solve the problem for both VA adjudicators and veterans' advocates. Furthermore, when the cases are read together, they make it unclear how advocates or the Board can show that a veteran's disabilities require a protected work environment without resorting to a factual case-by-case approach—which was explicitly rejected by the Court in *Cantrell*. This is supported by the fact that, to date, every Veterans Court decision available on Lexis and West Law that postdates *Cantrell* and where a veteran has challenged the Board's definition (or lack thereof) of a protected work environment has resulted in a remand.

Ultimately, these cases show that despite legitimate efforts by both the Board and veterans' advocates, it appears that the Court is still waiting for VA to answer the question of what constitutes a protected environment under 38 C.F.R. § 4.16(a).

Jonathan C. Heiden is an associate attorney at West & Dunn, LLC.

CAVC Holds Statutory Bars to Benefits Apply to Entire Period of Service

by Nell Robinson

Reporting on *Brown v. Wilkie*, No. 18-4508 (December 30, 2019).

In *Brown v. Wilkie*, the Court of Appeals for Veterans Claims (Court) issued a precedential decision affirming a Board of Veterans' Appeals (Board) decision that found that the character of a former army officer's discharge constituted a bar to VA benefits. In this case of first impression, the Court held that a discharge that triggers a statutory bar to benefits applies to the entire period of service.

Mr. Brown served as an army officer on active duty from August 1986 to November 1988. In July 1988, he was charged with violating the Uniform Code of Military Justice (UCMJ). Later that month, he signed an army memorandum stating that he was resigning for the good of the service. This memorandum notified Mr. Brown (then a first lieutenant) that, if accepted, his resignation would be considered as being under other than honorable (OTH) conditions and would serve as a bar to all rights under any laws administered by VA, with a few nonrelevant exceptions. In September 1988, the Department of the Army ad hoc review board's recommendation that Mr. Brown's resignation be accepted was approved. Mr. Brown's Department of Defense Form DD-214, Certificate of Release or Discharge from Active Duty (DD-214), indicates that he was discharged in November 1988 under OTH conditions as a result of conduct triable by court-martial.

He initially received VA disability benefits for injuries sustained in an August 1988 motorcycle accident (awarded after he submitted an altered DD-214 that appeared to characterize his service as honorable). But in March 1996 VA verified that he had, in fact, received an OTH discharge, and determined that this discharge was a bar to

receiving VA benefits. In August 2018, the Board ruled that 38 U.S.C. § 5303(a) barred Mr. Brown from receiving VA benefits because he was an officer whose resignation was accepted for the good of the service.

Section 5303(a) provides, in pertinent part, that the discharge or dismissal of an officer by the acceptance of the officer's resignation for the good of the service shall bar all rights of the former officer under laws administered by VA based upon the period of service from which the officer was discharged or dismissed. 38 C.F.R. § 3.12 provides that VA benefits are not payable where the former officer was discharged or separated after resigning for the good of the service, absent insanity at the time of the offense leading to the court-martial or resignation. Army Regulation (AR) 600-8-24 provides that officers normally receive OTH discharges when they resign for the good of the service in lieu of general court-martial, and that an officer under court-martial charges or under investigation with a view toward trial by court-martial will be retained on active duty until final disposition of the charges or investigation or until the resignation is approved. AR 600-8-24 also states that officers separated for the good of the service in lieu of court-martial are barred from rights under laws administrated by VA based on the period of service from which the officer resigned.

On appeal to the Court, Mr. Brown made two arguments, both premised on his assertion that his single period of active service could be bifurcated so that his August 1988 motorcycle accident would be considered as having occurred during honorable service. First, he argued that his service prior to the September 1988 acceptance of his resignation should be considered honorable. Specifically, he contended that prior to his UCMJ charges he was set to be discharged honorably under 10 U.S.C. § 631(a)(1), under which first lieutenants who are twice not selected for promotion to captain receive honorable discharges. Under this scenario, he argued, the motorcycle accident occurred when he was still on track for a section 631(a)(1) discharge, and the corresponding service time should be considered honorable. Alternatively, Mr. Brown argued that, once he signed his resignation for the good of service in July 1988, any service time after that should be considered separate (and honorable). In other words, in both arguments, Mr. Brown contended that his period of service could be bifurcated to allow the date of the motorcycle accident to be considered honorable service and thus allow him to receive VA disability benefits.

In rejecting Mr. Brown's bifurcation argument, a unanimous panel of the Court reviewed the Board's interpretation of section 5303(a) *de novo* and found that the plain meaning of that statute's phrase "based upon the service from which discharged or dismissed" is that a service member's discharge or dismissal is what triggers the inquiry into whether the character of the service is disqualifying, and that the statute cannot be read as allowing or requiring an assessment of discrete timeframes within a period of service. The Court held that the character of discharge assigned when the service member is released is dispositive of whether section 5303(a) bars benefits for any portion of that period of service. Because Mr. Brown was an officer who was discharged only once from a period of service after resigning for the good of the service, and no exceptions applied, section 5303(a) operated as a bar to benefits based on any part of that service.

Nell Robinson is Associate Counsel at the Board of Veterans' Appeals and a Judge Advocate in U.S. Army Reserve.

Is EAJA Extension on "Good Cause" Unlawful?

By Audrey Kim

Reporting on *Coley v. Wilkie*, No. 19-0678(E) (Feb. 5, 2020).

In *Coley v. Wilkie*, the Court of Appeals for Veterans Claims (Court) granted the Secretary of VA an extension of time to respond to an EAJA application, in a unanimous panel Order issued by Judges Pietsch, Allen, and Toth on February 5, 2020. The Court rejected the appellant's arguments that the

Court's use of Rule 26(b) of the Court's Rules of Practice and Procedure (Rules) in granting the Secretary an extension of time based on the standard of "good cause," while holding EAJA applicants to a standard of "extraordinary circumstance," is both contrary to the purpose of EAJA statute and an abuse of the Court's discretion. Judge Allen concurred, joining the majority in full but stressing that litigants are not entitled to an extension of time as a matter of right.

First, the Court held that the "good cause" standard under Rule 26(b) is not inconsistent with the EAJA statute, 28 U.S.C. §2412. The Court noted that in the EAJA statute Congress expressly provided a deadline for a prevailing party in litigation against the Government to file an EAJA application, but it did not do the same for the Government's response. The Court cited the rule of construction that, when Congress includes particular language in one section but omits it in another, the general presumption is that such inclusion or exclusion was purposeful and intentional. Congress's explicit decision not to address a time limit for the government gave the Court jurisdiction to fill that gap; accordingly, the Court decided to mirror the 30-days rule as it applies to the prevailing EAJA applicant, albeit at the lowered burden of "good cause." Applying the same presumption, the Court held that the Court's imposition of "good cause" for EAJA responses was lawful on the same principle as noted above: Congress said nothing on the subject. Given that the purpose of the EAJA was to place civil litigants and Government on "equal footing" to "improve citizen access to courts and administrative proceedings," and, as the appellant failed to show evidence of how the "good cause" standard deters or frustrates the purpose of enabling veteran access to the administrative process, the Court ultimately concluded that granting a brief extension of time to the Government under "good cause" could not be viewed as seriously threatening the purposes of EAJA.

Second, the Court held that applying the "good cause" standard in Rule 26(b) to its Rule 39(a)(1), which requires the Secretary to file a response within 30 days after the EAJA application, was not arbitrary, capricious, or otherwise unlawful. While the Court conceded that meeting the "good cause" standard was easier than the showing of "extraordinary circumstances" required of EAJA applicants, the "good cause" standard was sensible for three reasons. First, as EAJA is legislation that waives sovereign immunity, the Court is obligated to properly adjudicate the application with different institutional implications and adjudicatory demands. Therefore, it is in the interest of the Court to control EAJA litigation to ensure fair and accurate result. Second, the "good cause" standard is commonly used in Federal procedure and is therefore not arbitrary. Third, allowing the Secretary extensions based on "good cause" is consistent with the overarching purposes of the veterans benefits system, as the Government must scrutinize EAJA applications to ensure appropriate spending of funds. Adopting the "extraordinary circumstances" standards would have the same effect as forcing the Secretary to choose between efficiently and effectively addressing merits of veterans' appeals versus protecting public funds by reviewing EAJA applications. Therefore, the Court concluded that not applying "good cause" would be contrary to the purposes of the veterans' benefits system.

Having established that Rule 26(b) is lawful, the Court granted the Secretary an extension of time to file his EAJA response within 45 days of the date of the Order.

Audrey Kim is Associate Counsel at the Board of Veterans' Appeals.

38 C.F.R. § 14.636(c) is a Proper Interpretation of Congressional Intent in 38 U.S.C. § 5904

By Monica Dermarkar

Reporting on *Cameron v. Wilkie,* No. 18-2121 (January 30, 2020)

In *Cameron v. Wilkie*, the United States Court of Appeals for Veterans Claims addressed whether the

VA had properly interpreted the congressional intent of 38 U.S.C. §5904 in a regulation that allows attorneys to request compensation for services performed prior to a final Board decision, as long as the Notice of Disagreement (NOD) was filed on or after June 20, 2007.

The Court held that 38 C.F.R. § 14.636(c) is a proper interpretation of 38 U.S.C. § 5904, even though the "relevant statutory language was not codified in a specific provision of the U.S. Code but appeared as a note to section 5904."

The facts of the case are as follows. In 2004, veteran Charles G. Bolden filed a claim for service connection. He was granted service connection but assigned a noncompensable rating. In 2005, Attorney John F. Cameron filed an NOD with regard to the rating. After this was denied, the attorney appealed the decision. While the veteran's appeal was awaiting a decision by the Board, however, VA issued a decision in 2011 that increased the veteran's rating to a satisfactory level, so the issue never reached the Board. Having obtained a suitable rating for the veteran, Attorney Cameron requested attorney's fees under U.S.C. § 5904.

Under the authority of C.F.R. § 14.636(c), the Board denied attorney's fees. The Board concluded as a matter of law that, because the NOD was filed before June 20, 2007, and because there had been no final Board decision in this case, attorneys' fees were not justified. In January 2020, the attorney challenged the decision and the VA regulation.

On appeal before the Court, Cameron argued that the amendment to U.S.C. § 5904 intended merely to replace the "issuance of a final Board decision with the filing of an NOD," as the trigger for fee eligibility. Cameron maintained that the date on which the NOD was filed was not important and that "any services rendered after the [amended statute's] effective date, June 20, 2007, can warrant fees so long as an NOD was filed before rendering those services."

But the Court determined that the attorney's argument overlooked the statute's effective date provision, which "serves two functions: it establishes not just the effective date but also the claims to which the amendments were made applicable."

The Court stated that the plain reading of the law is indisputable, pointing out that the "references to sections (c)(1) and (d) [in the amendment] relate to the substantive changes…authorizing fees at an early stage in proceedings," which took effect 180 days after enactment, on June 20, 2007.

The Court further explained that "the shift from final Board decision to NOD as the clear line where attorneys may begin to charge fees was authorized only for those cases where an NOD was filed on or after that [effective] date."

Regarding Cameron's alternative argument objecting to VA's dependence in its regulation on "language not codified," the Court cited to *Ravin v. Wilkie*, 31 Vet App 104, 108 n.3 (2019), observing that the "provision placement in a note doesn't change the fact that such language bears the full weight of federal law."

The Court thus held that 38 C.F.R. § 14.636(c) is a proper interpretation of 38 U.S.C. §5904 and affirmed the January 9, 2018 Board decision.

Monica Dermarkar is Associate Counsel at the Board of Veterans' Appeals.

Book Review: *A More Unbending Battle: The Harlem Hellfighters' Struggle for Freedom in WWI and Equality at Home*, Peter N. Nelson (Civitas Books, 2009), 308 p.p.

by Aaron Moshiashwili

It's hard to know how to judge a book like *A More Unbending Battle*. It tells an important story - one which has disappeared into the mists of history. It's a story that more people should know, as it weaves together the complex threads of America's military

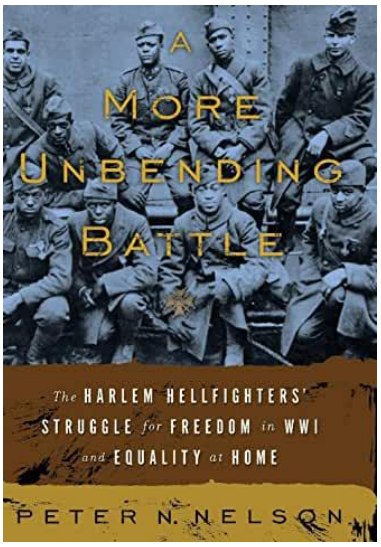
and racial history. It's a story of American heroes... and I wish this book told their story better.

The Harlem Hellfighters - the 369th U.S. Infantry - were an African-American infantry regiment during World War I. Their exploits were the equal of any soldiers in the war, and they accomplished them despite the racism which infected their recruitment, training, and even their combat service. They were the first Americans to reach the battle and the first Allied unit to reach the Rhine. Along the way, their regimental band, conducted by Jim Europe, introduced Jazz to the British and French. The stories of their valor instilled new respect for African- Americans back home. The Harlem Hellfighters deserve to have their story told.

Unfortunately, *A More Unbending Battle* is not the book to do it. It doesn't quite know which of the thousands of available stories it wants to tell - and so it tries to tell all of them. Less than 30 pages in, it has already covered the reasons for WWI, the state of race relations in America in the 1910s, and the African American music scene at the time. Every one of these topics could be a book on its own - and Nelson does not do his readers any favor by skimming over them. There's no particular need, for example, to go over the historical basis for WWI. If you must do so, it can be dispensed with in a paragraph. Nelson spends three or four pages, and rather than teaching his audience something new his analysis is so reductive that it borders on inaccurate. When it's not needed in the first place, it calls into question everything else he says.

At one point Nelson spends time talking about a secret mission the regiment was being taken away for, "despite" propaganda leaflets the Germans were dropping raising questions about why blacks, who faced so much injustice in America, would want to fight in the army. Then the chapter ends, and the next chapter picks up the story of Jim Europe, leading his band through France and bringing jazz to the French. And then the book stops **that** story and explains that the "secret mission" which had been built up then abandoned was a mistaken rumor, and the Hellfighters were simply deployed away from the front for a few days.

The leaflets were a fascinating issue, but were never explored. The introduction of Jazz to Europe would have been a good book all on its own – I don't understand why it was used as a diversion, and from a "secret mission" which turned out to be nothing, narratively speaking. The way these ideas are woven together makes them confusing, hard to read, and robs them of any depth. (I will admit the one digression I never got tired of reading about were stories of how the *lack* of racism in the French army infuriated certain American officers.)



The end of the book has problems of its own. It closes with a post-war parade through Harlem, celebrating the Hellfighters' accomplishments. As Nelson describes the parade, he tells the post-war stories of the men described earlier in the book. It's a good framing device (even if unfortunately reminiscent of the movie Animal House.) Or it would have been a good device, if it didn't – intentionally or not – come off as painfully racist. The quotes Nelson uses were in the vernacular of the time, which is at its best problematic towards its black subjects. And the Hellfighters' post-war outcomes were mostly miserable with poverty and violence for the black soldiers, and bright with political promise for the white officers.

And here's the thing. This ending could literally be the whole book. The reality of what African-American veterans faced in the 1920s - by dint of being both African-American and combat veterans - is beyond horrifying. It's angering. It's unimaginably disheartening, and to have it tossed off without examination as the book's coda is hard to stomach. "The struggle for equality at home," in the book's subtitle, is a big part of why I read the book. And it's barely there at all.

That's the overall métier of *A More Unbending Battle*. Great stories, important stories, stories every American should know. Both good and bad. Told with little depth - but still told. And I'm glad I read it.

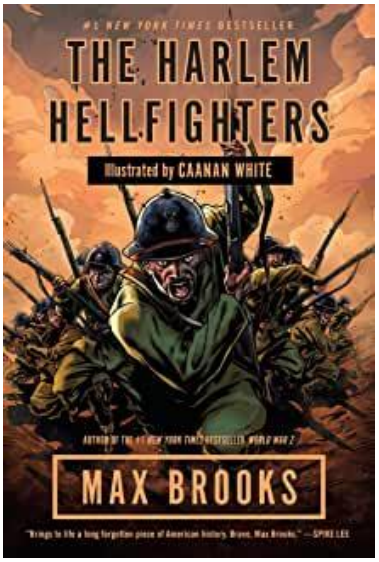
Aaron Moshiashwili is an associate at Andersen and a proud dad. For a review of a more enjoyable book about the Hellfighters, please read on!

Book Review: *The Harlem Hellfighters*, Max Brooks, Illus. by Caanan White (Broadway Books, 2014), 272 p.p.

by Benjamin Moshiashwili

I read the graphic novel, *The Harlem Hellfighters*, by Max Brooks, illustrated by Caanan White.

The Harlem Hellfighters was a group of tough, strong, disciplined Black soldiers who fought in World War I. They fought for 191 days, longer than any other World War I American unit.



They lived in a time where Black people were usually not soldiers. They did not have as many choices or rights as White people, so they could not do as much as a Black soldier today could do without trouble. For example, during their training, "White troops also got issued firearms. Spankin' new Springfields fresh from the factory. While we trained… with broomsticks."

They wanted to do better work than White soldiers. They wanted this because, at that time, they knew that if they did not fight better than the White soldiers, then White people would never give them the respect that they deserved.

Despite all the great things that the Hellfighters did, they still had to deal with a massive amount of racism. For example, three of the Hellfighters got beaten by four White men just for walking on a sidewalk, even though they were soldiers! They got beaten because they were not allowed to be on the sidewalk which, at that time, was for White people only. This made me furious, like people don't understand each other.

I loved the book for a few reasons. My first reason was as a comic book, it showed what was going on instead of just telling it. My second reason is, well, I have four words: Bad words! Gory stuff! I was able to see these things since it is a graphic novel, which was fun. My third reason is that the Hellfighters were pretty funny. Like, they just sang at the most random times. Finally, I appreciated their bravery.

I n conclusion, I loved this book! I think that adults should read it and kids will probably like it! And hey kids – you can get away with bad words and gory stuff and tell your parents it's history!

Benjamin Moshiashwili is a fifth grader in Ludlow-Taylor Elementary School.

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Stacey-Rae Simcox, Stetson University College of Law's Veterans Law Institute and Veterans Advocacy Clinic
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