VETERANS LAW JOURNAL

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CAVC Bar Association Hosts All-Day CLE Remotely

by Stuart Anderson

On June 11, 2020, the CAVC Bar Association hosted an All-Day Veterans Law CLE, entirely remotely for the first time. The event was sponsored by Holland & Knight, LLP.

CAVC Bar Association President Jenny J. Tang, Chief Judge Margaret Bartley, and Gordon Griffin, Partner, Holland & Knight, LLP.

The event began with remarks from the Honorable Chief Judge Margaret Bartley. She noted the Court's progress during COVID-19 in using telework for staff and livestreaming for oral argument, with video conference capability coming later this year, perhaps as soon as this summer. According to Chief Judge Bartley, the number of appeals has been holding steady this year after three years of increase. Regarding changes under the Veterans Appeals Improvement and Modernization Act (AMA), the Court has only seen one *pro se* appellant take advantage of the AMA process for direct appeal to the Court, and the Court's Central Legal Staff (CLS) attorneys have been working through how "inextricably intertwined" issues and *Kutcherousky* arguments will work under the AMA. She ended her opening by inviting suggestions, whether related to practice in a time of COVID or otherwise, either to her or to Greg Block, Clerk of Court.

Next was a panel on "Current Trends in Veterans Law" with Jonathan Hager, Veterans Law Judge at the Board of Veterans' Appeals (Board), as moderator. Sarah Fusina, Deputy General Counsel at VA's Office of the General Counsel (OGC); Dorilyn Ames, Veterans Law Judge at the Board; Richard Spataro, Director of Training and Publications at the National Veterans Legal Services

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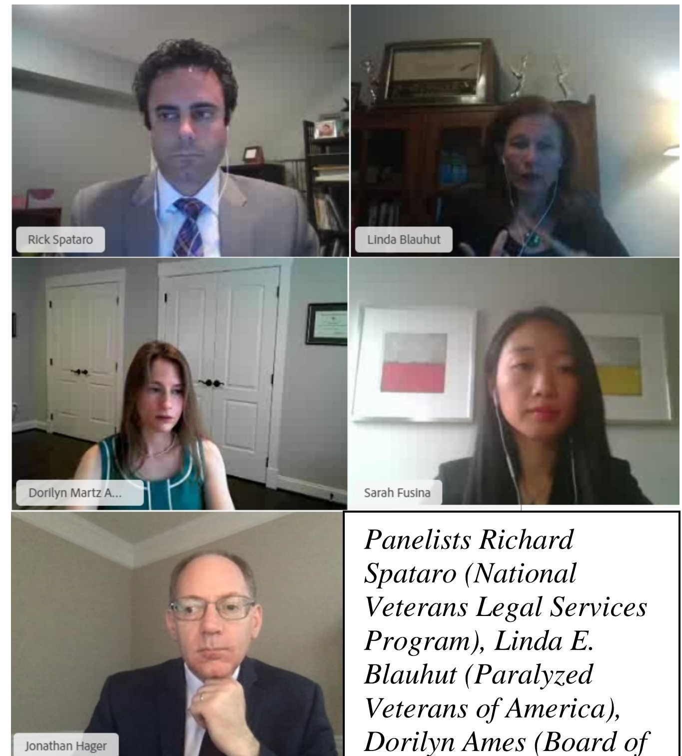
COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Program; and Linda E. Blauhut, Deputy General Counsel at Paralyzed Veterans of America, participated as panelists. The panel first addressed the changes in the legal landscape after *Saunders*, in which the Federal Circuit held that pain alone can constitute a disability. In two upcoming panel cases—*Martinez-Boden* (18-3721) and *Wait* (18-4349)—the Court will consider whether *Saunders* applies to psychiatric symptoms and whether, based on the diagnostic code, hip pain without more constitutes the functional impairment required for a disability under *Saunders*.

Next, the panel addressed the meaning of "substantially gainful employment." In the area of total disability based on individual unemployability (TDIU), after years of litigation concerning the meaning of "substantially gainful employment," the Court defined that phrase in *Ray*. To apply that definition, the Board requires solid medical evidence, including the use of VA Form 8940. The term "Protected Work Environment" does not come up as often, but the regulation provides a non-exhaustive list, so application of the regulation requires judgment and explanation. Finally, examiners' reliance on "sedentary employment" often results in a motion for remand, after the *Withers* Court required the Board to define that term.

The panel then addressed the rating of knee disabilities. There are multiple diagnostic codes that can apply in rating a single knee, from Diagnostic Codes 5257 to 5261. In *Perciavalle* (17-3766), the Court issued a panel decision, then ordered oral argument *en banc*, to decide whether VA's past denial of separate ratings for instability and limitation of range of motion constituted clear and unmistakable evidence (CUE). The Court's decision in *English* held that objective evidence is not categorically required to show instability under DC 5257. The decisions in *Mitchell*, *DeLuca*, *Sharp*, *Lyles*, and *Correia* map out the requirements for an adequate examination—to account for functional loss of range of motion, including after repeated use over time or during a flare up, and to document (when possible) range of motion in active, passive, weight-bearing, and non-weight-bearing modes.

The panel concluded with a discussion of the status of the concept of constructive possession at CAVC. In *Euzebio*, decided in August 2019, the Court declined to find that a National Academy of Sciences "science update" was before the Board because there was no "direct relationship" between that document and the case on appeal. At the same time, in a footnote, the Court observed that the Board may consider whatever it wishes. The case is currently on appeal to the Federal Circuit.



Panelists Richard Spataro (National Veterans Legal Services Program), Linda E. Blauhut (Paralyzed Veterans of America), Dorilyn Ames (Board of Veterans' Appeals), and Sarah Fusina (VA Office of General Counsel) and moderator Jonathan Hager (Board of Veterans' Appeals).

The next presentation concerned "Legal Strategy After the AMA," with a panel consisting of Brianne Ogilvie, Deputy Executive Director at the Veterans Benefits Administration (VBA) Appeals Management Office; Jennifer R. White, Veterans Law Judge at the Board; Jim Marszalek, National Service Director of Disabled American Veterans; Michael Garza, Director of Programs and Training at Bergmann & Moore. Jenna Zellmer, Managing Attorney at Chisholm Chisholm & Kilpatrick, moderated. The panel reported that the majority of the appeals seen by VBA have sought supplemental decision—72%—

with only 12% opting to go straight to the Board. The panel identified some confusion at the Regional Office level in not consistently recognizing that, under the AMA, claims on previously denied claims are now "supplemental claims." Further, the duty to assist letters under the AMA do not necessarily help veterans and practitioners identify the proper claim to file and the associated forms. The type of claim (and the needed form) depends on the history of the case and the intention of the veteran. In other news, the panel noted that the Board's virtual hearings have been successful.

After lunch, the CLE resumed with a panel on "Scope of Claims and Appeals," with a panel comprising Brent Bowker, Senior Appellate Attorney at VA's OGC; Jenny J. Tang, Senior Appellate Attorney at Bergmann and Moore; and B. Thomas Knope, Veterans Law Judge at the Board. The panel laid out some principles for determining the scope of claims before the agency, scaling between the obligation of VA to sympathetically read a claims form and the rule that the mere submission of medical records does not constitute a claim. The idea of a "guided safari" through the evidence, introduced in *Sellers*,[1] illustrates what a claimant must provide to set VA in motion to process a claim. The panel interpreted this as also requiring VA to address claims that are "reasonably identifiable." The panel also discussed inferred claims and issues, including from *DeLisio*, when a veteran claimed service connection for a condition which evidence showed was secondary to a condition that had not yet been claimed. Turning to the question of scope of appeal, the panel outlined the AMA changes to the general rule that the Board has jurisdiction over an entire appeal and AMA's creation of review of particular issues under particular AMA "lanes." The panel also noted the special rules for Board jurisdiction over TDIU claims, Special Monthly Compensation claims, implicit denials, and allegations of CUE. The panel concluded by outlining the scope of the Court's jurisdiction in class actions, remands, and referrals.

Barbara Mardigian, LPC, Deputy Clinical Director of Virginia Judges and Lawyers Assistance Program, presented the ethics portion of the CLE, "Ethics: How to Identify and Get Help Managing Stress & Anxiety." She identified the sources of stress common to legal practitioners and the common symptoms. The audience learned about the barriers to seeking help, cultural and communication, and ways to overcome those barriers. The audience also learned about tactics for self-care that we can adopt in our own lives.

The next panel presented "Best Writing Practices in the Rule 33 Process." The panel was moderated by Jenny J. Tang, in her capacity as CAVC Bar Association President, and consisted of Bryan Andersen, Managing Attorney at Bergman & Moore; Kristen King-Holland, Appellate Attorney at VA's OGC; Andrew Reynolds, Central Legal Staff Attorney at the Court; and John Crowley, Veterans Law Judge at the Board. The panel first tackled the finer points of drafting a statement of the issues (SOI) or Rule 33 Memorandum. The panel touched on the importance of building trust and rapport among the parties at all stages of the Rule 33 process and discussed how an important point for a successful conference was clarity and specificity in the SOI. Given the limited amount of time available for review by OGC attorneys and CLS attorneys, a clear statement of the error, with supporting citation to the relevant parts of the Board decision and the evidence, are essential. In contrast, the panelists said that statements of common principles of veterans law which do not bear directly on the case are not helpful. In drafting a joint motion for remand, the panel identified the importance of clear and specific instruction for the Board and VA to follow on remand. The panel provided handouts with many tips for writing Rule 33 memos and motions for remand.

In the last panel of the day, Dr. Brian Carney, MD, VA Medical Officer, and Dr. Stephanie Hyberger, Ph.D., VA Senior Mental Health Officer and Medical Disability Exam Quality and Program Management Office, presented on "VA Musculoskeletal and Psychiatric Examinations." The panel first walked the audience through disability benefits questionnaires (DBQs) for rating knee disabilities.

1 *On July 15, 2020,* Sellers *was reversed by the Fed. Cir.*

The panel discussed practices for assessing and documenting pain related to motion and during flare-ups and estimating the effects of flare-ups. The panel explained how weight-bearing and passive testing can be conducted consistent with *Correia*. The audience heard about practices for testing knee instability, the types of impairment of knee cartilage and how to assess it, and radiculopathy symptoms. The panel ended discussion of the knee DBQ by discussing how to compare the loss of use of a limb to amputation.

The panel then turned to psychiatric examinations and the associated DBQs. An examination begins with a review of the claims file and continues to the medical history, which, in an initial examination, should include pre- and post-military history. Identifying the stressor remains the most important aspect of a psychiatric examination, though it can be difficult to flesh out military sexual trauma, which can be undocumented. Regarding symptoms, the examiner must document the symptoms after exercising clinical judgment. This leads to the judgment required to make diagnosis under the DSM-V, as the diagnosis requires more than just the presence of symptoms listed in the DSM—it must be based on consideration of a full range of evidence. Finally, in cases where the veteran may be entitled to TDIU, the examiner is responsible for documenting the specific functional impairment caused by the psychiatric symptoms.

After this, CAVC Bar Association President Jenny Tang thanked the panelists, the attendees, and Holland and Knight for making the event possible. The Bar Association has recordings of the event and the handouts that may be made available to members of the bar association.

Stuart Anderson is Appellate Attorney at VA Office of General Counsel.

Bar Association Hosts Virtual Coffee Break to Update Members

by Bryan Andersen

On May 21, 2020, the CAVC Bar Association hosted a Virtual Coffee Break to discuss recent developments in veterans' law. The panelists were Caroline Fleming, Veterans Law Judge, Board of Veterans' Appeals; Stacey-Rae Simcox, Professor of Law, Stetson University College of Law; and Mark Vichich, Senior Appellate Attorney, VA Office of General Counsel.

First, the panelists discussed *Miller v. Wilkie*, 32 Vet.App. 249 (2020), a case concerning VA examinations. In *Miller*, the Court held that "[w]here the examiner failed to address the veteran's lay evidence and the Board fails to find the veteran not credible or not competent to offer that lay evidence, the proper remedy is for VA to obtain a new examination." *Id.* at 262. In reaching this conclusion, the Court recognized that the Board could make, and the Court can review, implicit factual determinations. The panelists discussed the scope of this latter holding and how it could apply to many other issues of fact and law well beyond the issue of credibility.

Panelist Mark Vichich, Senior Appellate Attorney, VA Office of General Counsel.

Second, the panelists discussed *Smith v. Wilkie*, __ Vet.App. __, No. 18-1189 (2020), in which the Court held that fair process requires notice and an opportunity to respond when the Board reverses its prior characterization, in a non-final Board remand decision, that evidence is credible. The Board had instructed a medical examiner to accept as true the claimant's lay statements. In light of

Miller and *Smith*, the panelists predicted that future instructions to examiners will need to become more factually precise and clearer as to the evidence that must be considered. Examiners may also be asked to provide alternative answers based on different factual premises.

Third, the panelists discussed *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019), where the Federal Circuit clarified that "once the veteran raises a challenge to the competency of the medical examiner, the presumption [of competency] has no further effect[.]" *Id.* at 1308. Moreover, "the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner." *Id.* Although this holding eased the burden on claimants, the panelists discussed situations where the veteran may want to challenge an examiner's competency, or may not want to do so. Although these challenges may succeed in obtaining a new examination, they may also result in further delay as VA attempts to appropriately respond to the request.

Finally, the panelists discussed the best practices for telephonic oral arguments. It was recognized that these arguments lose a degree of formality and visual cuing, requiring attorneys to exercise patience. But some perks of the changed process were recognized, including an ability to better focus on the questions asked.

The CAVC Bar Association will continue to host these virtual panel discussions in the future and warmly invites member participation.

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

Board of Governors to Open Nomination Process this Summer

Later this summer, we will begin our annual election to fill the Board of Governors, starting with an email call for nominations. You may nominate yourself or others. The election will fill the following Board positions: (1) President-Elect, (2) Treasurer, (3) Secretary, and (3) At-Large members.

Officers and At-Large members often serve on one committee, or more, providing support for organizing educational, networking, and/or volunteer programs. The Bar Association hosts educational panels, CLEs, web events, and networking events. We publish the Veterans Law Journal, which provides case reviews and notifies the membership of items of interest to the bar, among other communications. The Bar Association also organizes veteran-centric volunteer efforts and conducts law school outreach. Behind all of this work are members of the Board carefully planning and executing these events.

The Board, like the members of the Bar Association, is a collegial group of practitioners drawn from the appellants' bar, the Court, the Office of General Counsel, law school clinics, and the Board of Veterans' Appeals. Serving on the Board is a unique opportunity to get to know and work with folks outside of your day-to-day case work and benefit the broader community of dedicated veterans' advocates.

Further details will be emailed later this summer. We will use email ballots again this year and winners will be announced at the Bar Association's October Annual Meeting. If you need to check your membership status, please email Stuart Anderson, Membership Committee Chair, at stuart.anderson@va.gov.

Sincerely,

Board of Governors

Message from the President

Greetings colleagues,

These are bizarre and challenging times, and I hope that you and your families are staying safe and healthy. Since March, like the Court and the members of this bar, the CAVC Bar Association has

had to adapt to continue offering quality services to promote justice for veterans and their families.

I am so privileged to lead such excellent Board of Governors members who have risen to the challenge of adapting traditional programs, and creating new programs, for the virtual format. Before 2020, hosting our programs entirely online was uncharted territory for this bar association, but the programs have proved successful. It has been wonderful to see and hear you at each event.

In May, we hosted a Virtual Coffee Break, which generated lively discussion among the speakers and the nearly 100-person audience about various topics, including best practices for virtual oral arguments.

In June, we hosted a jam-packed All-Day Veterans Law CLE, in which we offered 6 CLE credit hours, including 1 hour of ethics credit. Topics covered included current trends in veterans law, legal strategies under AMA, scope of claims and appeals, identifying anxiety and stress, best writing practices in the Rule 33 process, and VA musculoskeletal and psychiatric exams (presented by two VA physicians). We are so thankful to our speakers for sharing their knowledge and insights on so many on-trend topics. More information about these programs can be found in this issue. Recordings of our three prior events in February and March are found on our Youtube page at this link.

I'd like to extend a special thank you to the following individuals, without whose extraordinary adaptability, time, and effort, it would not have been possible to host our All-Day Veterans Law CLE and to move it to a virtual format for the first time ever: Jon Hager, Jenna Zellmer, and Stuart Anderson, who each took the helm of a panel; Stuart Anderson and Amanda Radke, who took care of over 250 CLE registrations, the highest number in the bar association's history; Charles DiNunzio, Sarah Blackadar, and Chris Wysokinski, who each helped behind the scenes. And thank you to Gordon Griffin and Holland & Knight LLP for sponsoring the CLE and lending us Holland & Knight's IT and IT support.

The CAVC Bar Association will continue to offer virtual programming for the remainder of the October 2019-October 2020 term. Going forward, we are pleased to present the following:

- On August 20, 2020, we will host via Zoom a panel on *Representing Veterans & Developing Their Claims: An Afternoon with Advocates, Experts, & Decisionmakers*. Steven Reiss, Veterans Law Judge, Board of Veterans' Appeals; Courtney Ross, Attorney, Chisholm Chisholm & Kilpatrick LTD (CCK); and, Dr. Keri Jackson, former VA examiner, will serve as panelists. Jenna Zellmer, Managing Attorney, CCK, will moderate. More details to follow by email.

- Please pencil in September 17, 2020, for a panel on Constructive Possession, which will serve as an in-depth follow up to our June Veterans Law CLE. More details to follow.

- On October 22, 2020, in the afternoon, we will host our 4th annual VA Update panel, followed by our Annual Meeting, to be held entirely online for the first time ever. At that time, leadership of this bar association will pass to its next elected Board of Governors. More details regarding this event and the upcoming election to follow.

- We will continue to provide support to the Court and to George Washington University Law School as they organize the fall 2020 National Veterans Law Moot Court Competition. Please stay tuned!

We hope that you can join us for these programs!

Finally, as always, I invite you to contact me if you have any concerns about general issues affecting members of this Bar, so that I may share them with

the CAVC's Judicial Advisory Committee. I also welcome your suggestions regarding the services this bar association provides. I can be reached at jennyjtangattorney@gmail.com.

Sincerely,

Jenny J. Tang
President
CAVC Bar Association

Message from the Chief Judge

Dear Colleagues,

Greetings, Bar Association members! I hope you and yours have managed to remain healthy during the continuing pandemic. Here at the Court, Judges, Chambers, and Court staff continue to achieve the Court's mission, most while working remotely. I see that effort continuing for the foreseeable future until we are able to commute and work in indoor public spaces safely. As I noted in my last column, we are fortunate that in March we were able to implement a fully-developed continuity of operations plan, and at the current time almost all staff reap the benefits of that plan by working safely at home.

Although the pandemic is always in the back of our minds, I'm proud to say that the Court's business of appeals and petitions continues to be our foremost concern. Of course, all our cases and petitions are interesting and noteworthy in that they each deal with an individual's or a class's struggle for benefits, but I thought I would highlight for you a few upcoming cases and oral arguments. On July 27, the Court will hear argument in *Bailey v. Wilkie*, 19-2661, involving the intersection of VA's duty to maximize benefits and its formal claim regulations. In early September we will hear argument on the merits of *Skaar v. Wilkie*, 17-2574, our first certified class action appeal. Crucial to developing jurisprudence concerning non-legacy appeals, a RAMP appeal, *Solivan v. Wilkie*, 19-1731, was recently sent to panel to examine statutory changes to the duty to assist. And, lest we forget that CAVC Bar membership is spread throughout the country and even extends into other countries, on September 11 the Court will consider the consolidated case of *Swanagan/Turman v. Wilkie*, 19-1350(E) and 19-3258(E), where the issue is whether an increase in the EAJA statutory hourly rate is warranted for work performed in Quito, Ecuador.

As always, we invite you to join in and listen to our telephonic oral arguments, either while they are streaming or afterwards at your leisure. (Because I now have a few extra hours that I don't spend commuting, I often take a walk with my earbuds and re-listen to oral arguments, especially for the panel cases that I'm not on ☺).

I want to update you about some other issues we're occupied with. We have experienced a steady increase in the number of appeals—for about a year and a half we have been receiving over 700 appeals per month, and beginning in 2020 we have had two months with over 800 appeals. We are operating with seven active judges and authorization to fill our two vacancies expires on December 31, 2020. The Court's legislative committee (consisting of Judges Meredith and Falvey) and I are working to encourage a full Senate vote on the Court's two judicial nominees. In a recent conversation with staff members of the Senate Committee on Veterans' Affairs, staff expressed an interest in hearing from groups who support the prompt confirmation of judges for the Court.

As you may know, the Court received authorization to fill a special master position to assist with class action cases. As the Court considers various ways to use a special master, we hope to benefit from input within and outside the Court. The Judicial Advisory Committee is brainstorming ideas, and a committee consisting of Judges Greenberg, Allen and Toth, is

consulting with experts and planning a briefing for the Board of Judges. We also are getting very close to completing our work on proposed class action rules.

Turning to an issue that affects us all, Black Lives Matter protests have recently become a focus of the country's energy. The changes taking place are, I hope, fundamental and permanent, and they go to the heart of issues that are central to our work as judges and lawyers. So, to all of us that are involved in veterans law, let's continue to move racial equality and racial justice forward, in both our personal lives and our work lives.

In closing, as the virus moves through the country, affecting different areas at different times, I'm especially mindful of the fact that we serve a favored population, veterans and their family members and survivors, who are scattered throughout the 50 states and beyond. I know that you, members of the CAVC Bar Association, are spread far and wide as well. I hope the favored group that we serve, and all of you, maintain good health as we move forward.

All the best,

Meg

Message from the Clerk of Court

Dear Colleagues,

While the summer sun is (usually) shining here in D.C., we all remain under the cloud of the COVID-19 pandemic. And although the pandemic has constrained personal experiences, it's very fair to say that the pandemic has not curtailed interest in filing appeals at the Court – June 2020 is only the second month in the Court's history when appeals filed have exceeded eight hundred (814 to be exact)! As a result, the Court and its community of government and private practice counsel remain extremely busy, not just filing briefs and motions, etc., but engaging in increasingly frequent Rule 33 conferences, and oral arguments, too.

Regarding oral arguments, I hope that all of you know we did restart live broadcasts via the Court's YouTube channel (access it through https://www.youtube.com/channel/UCkhToOvwPHFaX-doZEFupog). Oral arguments are audio only for now, but counsel appear to have mastered the art of participating remotely, and all have been grateful not to have to travel to D.C. during these challenging times.

With the number of appeals filed climbing, Rule 33 conferences – required in all cases where appellants are represented – are also booming. The Court does not publish official resolution rates for Rule 33 pre-briefing staff conferences, but the Court does acknowledge that the Rule 33 conferences play a very important role in managing the overall appeals pending before the Court.

For those new to Rule 33, our Chief CLS Staff Attorney, Cynthia Brandon-Arnold, describes the process:

Counsel for the appellant, not later than 14 days prior to the conference, submits to the Secretary's counsel and the CLS attorney a summary of the issues (SOI) that he or she intends to raise in the appeal. The SOI should include citations to relevant legal authority and pertinent documents. The SOI cannot exceed 10 pages; the 10-page limit does not include submissions of pertinent material in the record before the agency. Counsel for the appellant and the Secretary must consult with their clients in good faith to determine whether joint resolution or settlement is possible. At the conference, counsel must either possess authority to enter into a joint resolution or settlement to the extent authorized by the client or be in immediate contact with the person having the authority. During the conference, both parties and the CLS attorney discuss the SOI and the possibility of joint resolution or settlement. Also during the conference, counsel for the Secretary is required to respond to the issues raised in the SOI and to make known his or her

position as to the possibility for joint resolution or settlement. Because the parties have thoroughly prepared to discuss the SOI prior to the conference, have anticipated each other's counter arguments, have sought input from the CLS attorney during the conference, have negotiated joint resolutions in other appeals before this Court, and understand that joint resolution may be the best outcome for both parties in an appeal, the parties are more willing to resolve cases through joint resolution. An agreement to enter into a joint resolution may require the parties to participate in more than one pre-briefing conference. If the parties remain open to the possibility of joint resolution, the CLS staff attorneys are available to conduct additional conferences to that end.

More often than not, the Rule 33 process does lead to successful resolution of a case and, as a result, the parties in represented cases file more joint resolutions than briefs in appeals before the Court. The process clearly does help preserve the judicial resources of the Court, and that is a testament to fact that the attorneys who represent the appellants, the attorneys who represent the Secretary, and the CLS attorneys – trained and certified mediators - who represent the Court are all committed to making it work.

We are grateful for all you are doing to help the Court respond to what is now unprecedented demand for judicial review. As each of you continue to struggle to get work done in the middle of this pandemic, please take note of hurdles you are experiencing and call me if you have suggestions for how we might make court processes more efficient.

In the interim, stay safe,

Greg Block
Clerk of the Court

Court Applies "Excusable Neglect" in Considering Equitable Tolling for Untimely Notice of Appeal

by Jillian Berner

Reporting on *Benson v. Wilkie*, No. 18-6819 (June 4, 2020).

The Court of Appeals for Veterans Claims (Court), *per curiam*, examined the "excusable neglect" provision of the Court's own Rules of Practice and Procedure governing untimely Notices of Appeal, to find that a surviving spouse appellant timely filed a Notice of Appeal where she demonstrated that her three-day delay in filing was due to extraordinary circumstances.

In September 2017, the Board of Veterans' Appeals (Board) denied Sherry Benson's request to be recognized as the surviving spouse of veteran Charles Ray Benson for Dependency and Indemnity Compensation (DIC) benefits. Mrs. Benson filed a Motion for Reconsideration with the Board on February 1, 2018, which the Board denied on July 6, 2018. Mrs. Benson filed her NOA with the Court on November 6, 2018—123 days after the Board issued its denial of her Motion for Reconsideration.

The Secretary filed a Motion to Dismiss Mrs. Benson's appeal for lack of jurisdiction, because she had not asserted a compelling reason for her failure to timely file her NOA. In response to the Court's order that she respond to the motion, Mrs. Benson asserted that she experienced "severe circumstances" that prevented her from timely filing her NOA. She later supplemented her response, expounding the "severe circumstances." She had left her job in May 2017 after experiencing sexual harassment and filing a complaint regarding the harassment, moved in with her sister for a time, then found a new job and a new home—and was fired on the first day of her new job. She also averred that she was evicted from her new home in January 2018.

On October 17, 2019, the Court convened a panel to consider whether equitable tolling was warranted.

Mrs. Benson obtained an attorney, who filed his appearance in February 2020 and a supplemental response in March 2020.

The Court determined that Mrs. Benson's Motion for Reconsideration had been filed 128 days after the September 2017 Board decision. Because the Motion for Reconsideration was not filed within 120 days of the Board decision, the finality of the initial Board decision was not abated. *Threatt v. McDonald*, 28 Vet.App. 56, 60 (2016) (per curiam order). If the Motion for Reconsideration had been filed within 120 days of the initial Board decision, the appellant could have timely filed an NOA to the Court within 120 days after the mailing of the Board's decision regarding the Motion for Reconsideration. Therefore, Mrs. Benson's NOA was not timely and the Court could only continue to consider her appeal if she could demonstrate that equitable tolling applied to at least 8 of the 128 days between the September 2017 Board decision and the date she filed her Motion for Reconsideration, and if she could demonstrate "good cause and excusable neglect" for her delayed filing.

The Court agreed with Mrs. Benson that she experienced "extraordinary circumstances" when she was sexually harassed, left her job, moved in with her sister, lost another job, and was evicted during the period prior to and surrounding the issuance of the September 2017 Board decision and immediately preceding the NOA deadline for that Board decision. The Court determined that the harassment, which was out of Mrs. Benson's control, and the ensuing situation constituted extraordinary circumstances which prevented her from timely filing her Motion for Reconsideration, although she diligently attempted to timely file the Motion. Accordingly, the Court tolled the 120-day deadline to file the Motion for Reconsideration in response to the September 2017 Board decision.

The Court also applied the four-factor test as found in *Pioneer Investment Services* to Mrs. Benson's case to find that her misguided belief that she had 4 months, rather than 120 days, to file her NOA constituted "excusable neglect." First, the Court held that VA was not prejudiced by the determination of a timely appeal. Second, the Court held that the 3-day delay was "short and insignificant to judicial proceedings." Third, the Court noted that Mrs. Benson was *pro se*, although the delayed filing was not out of her control. Finally, the Court held that Mrs. Benson acted in good faith in attempting to timely file her NOA. Accordingly, the Court denied the Secretary's Motion to Dismiss the Appeal.

Judge Greenberg issued a concurrence with the ultimate result, though he disagreed with the equitable tolling framework applied by the Court.

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

Court Determines 38 C.F.R. § 4.114, Diagnostic Code 7343 to be Prospective in Nature

By Katherine Kiemle Buckley

Reporting on *Breland v. Wilkie*, No. 18-5980 (May 29, 2020).

In *Breland*, the CAVC (Court) addressed a June 27, 2018 Board decision, which had denied a compensable rating for service-connected squamous cell carcinoma of the tongue (tongue cancer) during two periods, from August 1, 2007 to January 16, 2008 and from September 1, 2008 to present.

Mr. Breland originally filed a claim of entitlement to service connection for tongue cancer in December 2006. His claim was eventually granted in a September 2015 rating decision, in which the Regional Office assigned a 100 percent rating from December 26, 2006 to August 1, 2007, based on active malignancy and the subsequent treatment period. A September 2015 rating decision assigned a noncompensable (zero percent) rating for tongue cancer from August 1, 2007, based upon inactive disease. In an August 2016 Notice of Disagreement, Mr. Breland expressly disagreed with the noncompensable rating assigned from August 1,

2007. Following a VA examination in September 2017, a November 2017 rating decision granted service connection for residuals of tongue cancer including interstitial fibrosis, cervical strain, dysphagia, and hyperthyroidism. A February 2018 rating decision assigned a 100 percent rating for tongue cancer from January 16, 2008, the date of a second active cancer diagnosis, to September 1, 2008, six months after the cancer treatment was completed. Mr. Breland subsequently perfected a timely appeal.

In the June 27, 2018 decision, the Board recognized that 38 C.F.R. § 4.114, DC 7343 mandated a VA examination to determine the extent and severity of cancer residuals after treatment. But the Board determined that VA examinations could not have been conducted at the end of the 6-month period following the cessation of Mr. Breland's treatment because the 100 percent tongue cancer rating had been retroactively assigned. The Board therefore concluded that August 1, 2007 was the appropriate effective date because the medical evidence established that Mr. Breland suffered from tongue cancer residuals from August 1, 2007, the date of cessation of the first 100 percent rating for tongue cancer.

On appeal to the Court, Mr. Breland argued that, based on the plain meaning of the Note to DC 7343, he had the right to retain the 100 percent rating for tongue cancer until VA obtained the mandated examination and thereafter determined separate disability ratings for identified residuals. In contrast, the Secretary argued that, pursuant to *Tatum v. Shinseki*, 24 Vet. App. 139 (2010) and *Reizenstein v. Peake*, 22 Vet. App. 202 (2008), aff'd sub nom. *Reizenstein v. Shinseki*, 583 F.3d 1331 (Fed. Cir. 2009), the 100 percent rating assigned pursuant to DC 7343 is prospective in nature and therefore does not require the retroactive assignment of a 100 percent rating until VA is able to perform the requisite examination.

The Court noted that the rating code under which Mr. Breland's service-connected tongue cancer is rated, DC 7343 (malignant neoplasms of the digestive system, exclusive of skin growths), provides that malignant neoplasms of the digestive system, exclusive of skin growths, are initially rated at 100 percent. A Note to DC 7343 specifies that an evaluation of 100 percent shall continue beyond the cessation of any surgical, x-ray, antineoplastic chemotherapy or other therapeutic procedure, and six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. If there has been no local recurrence or metastasis, the condition is to be rated on its residuals.

Based upon a detailed reading of the plain meaning of the Note to 38 C.F.R. § 4.114, DC 7343, the Court determined that Mr. Breland's contentions would lead to compensation based on "pure regulatory presumption and unmoored from any medical reality." The Court explained that, in Mr. Breland's situation, such an approach would award him a 100 percent rating for active cancer for nearly a decade, when his cancer was not actually present. The Court indicated that it had already rejected a similar result in *Rossiello v. Principi*, 3 Vet. App. 430, 433 (1992) (holding that the 100 percent rating cannot continue past the 6-month period following cessation of treatment because "the basis for the 100 percent rating, in the absence of 'local recurrence or metastases,' no longer exists," quoting 38 C.F.R. § 4.97, DC 6819, Note (1991)).

The Court additionally determined that the history and purpose of 38 C.F.R. § 4.114, DC 7343 reinforces its reading of the Note. Specifically, the Court explained that the Note previously provided that the 100 percent rating would continue for one year following cessation of treatment. In its Proposed Rule revision, VA explained that the reason behind the examination requirement at 6 months after cessation of treatment was to ensure that the assigned evaluation reflected actual medical findings rather than a regulatory presumption. 65 Fed. Reg. 48,205, 48,206 (2000). The Court determined that Mr. Breland's interpretation, which would maintain his 100 percent rating for tongue cancer for nearly a decade, during which he did not actually have active cancer and was not receiving treatment, "would eviscerate the purpose behind the examination," which is to prospectively obtain medical information that VA may rely upon when assigning a rating, either for continuing the 100 percent rating because

the cancer has recurred/metastasized, or based upon the cancer residuals.

The Court determined, as in *Reizenstein*, that because the Note to DC 7343 contemplates prospective action, the prospective procedures contained therein are inapplicable to retroactively awarded cancer benefits where such an application would impose unnecessary procedure. The Court further noted that, although it may not be possible to conduct a VA examination 6 months after treatment ceases for a retrospective award, VA should ascertain from the available record: (1) if the cancer recurred or metastasized; (2) when treatment ended, and (3) if there are any residuals, when those began, and the severity of those residuals.

Lastly, the Court noted that VA must still have adequate evidence to rate a veteran's tongue cancer and any residuals. The Court emphasized that the point of the examination prescribed in DC 7343 is to obtain a clear picture of a veteran's health and ensure that VA assigns cancer and residual ratings and effective dates based on actual medical findings, rather than on a set presumptive period. To this end, the Court noted that, as the VA had much evidence of Mr. Breland's medical history, VA was able to retroactively establish the dates of active cancer and the 6-month periods following cessation of treatment, as well as the onset of residuals and the severity thereof.

Judge Greenberg concurred with the Court's analysis of the regulation, but dissented from affirmance of the Board's decision, because he believed that the Board erred by not performing the proper analysis in its assignment of a disability rating. Judge Greenberg declared that the medical evidence of record was insufficient to establish that Mr. Breland was cancer-free for 6 months following treatment as required by the regulation. Thus, Judge Greenberg contended that, contrary to the purpose of the regulation, Mr. Breland's tongue cancer had not been rated based on actual medical findings.

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Federal Circuit Decides Issue of Payment of Attorney's Fees Based on Clear Statutory Language

By Alayna Carroll

Reporting on *Ravin v. Wilkie*, No. 2019-1532 (April 20, 2020).

In *Ravin v. Wilkie*, an attorney representing a veteran for past-due disability benefits sought to collect attorney's fees under 38 U.S.C. § 5904(d). The Federal Circuit held that because the attorney did not comply with the regulatory filing requirement, and those regulations were consistent with the language of their authorizing statute, VA was not obligated to withhold the attorney's fees from the veteran's past-due benefits and pay those fees directly to the attorney.

The attorney (appellant) represented the veteran before VA on a claim for past-due disability benefits. On December 1, 2009, the veteran and attorney entered into an attorney fee agreement entitling the attorney to a contingent fee of past-due benefits "awarded due to or flowing from" his representation of the veteran. The fee agreement further provided that VA would withhold the contingent fee amount from any past-due benefits awarded and pay that amount directly to the attorney. The attorney sent a copy of the executed fee agreement to the Board of Veterans' Appeals (Board), which date-stamped it as b received on December 11, 2009. A copy of the fee agreement, however, was not submitted to the Regional Office (RO) as required by 38 C.F.R. § 14.636(g)(3) and (h)(4).

The Board granted the claim in March 2010. In April 2010, the RO implemented that decision by awarding past-due benefits to the veteran. On April 13, 2010, the Attorney Fee Coordinator at the RO searched for any attorney fee agreement on file but did not find one. As a result, it was concluded that no attorney fee decision was required, and all

retroactive benefits were subsequently paid to the veteran.

On April 27, 2010, the attorney mailed a copy of his direct-pay fee agreement with the veteran to the RO and requested direct payment of his attorney's fees from the veteran's past-due benefits. He was later informed that the RO had not withheld his attorney's fees and, thus, it would not directly pay those fees, as the attorney had not timely filed the fee agreement in accordance with 38 C.F.R. § 14.636(g)(3) and (h)(4).

The issue before the Federal Circuit related to the interpretation of 38 U.S.C. § 5904(d) and 38 C.F.R. § 14.636(g)(3) and (h)(4). 38 U.S.C. § 5904(d) provides in relevant part that parties may agree that a contingent fee "is to be paid to the agent or attorney by the Secretary directly from any past-due benefits awarded on the basis of the claim." The statute also indicates that, in such an agreement, "[t]o the extent that past-due benefits are awarded in any proceeding . . . the Secretary *may* direct that payment of any fee to an agent or attorney . . . be made out of such past-due benefits." 38 U.S.C. § 5904(d)(3). Section 5904(c)(2) states that an attorney who represents an individual before VA must file a copy of any fee agreement with VA "pursuant to regulations prescribed by the Secretary."

One such regulation is 38 C.F.R. § 14.636(g)(3), which requires attorneys to file a copy of a direct-pay fee agreement with "the agency of original jurisdiction within 30 days of its execution." 38 C.F.R. § 14.636(h)(4) contains similar language.

The attorney conceded that he did not comply with the regulatory requirement of filing the fee agreement with the RO within 30 days of execution of the agreement. The attorney's main contention was that 38 U.S.C. § 5904(d)(3) requires VA to withhold and directly pay attorney's fees from past-due benefits awards when there is an otherwise valid direct-pay fee agreement, and that CAVC misinterpreted 38 C.F.R. § 14.636(g)(3) and (h)(4) to override 38 U.S.C. § 5904(d)(3).

The Federal Circuit first reviewed the statutory language and determined that the plain language of § 5904(d)(3) cannot be read as mandatory, because of the use of the term "may." Given that the statutory language provides a clear answer on whether § 5904(d)(3)'s directive is mandatory or permissive, the Federal Circuit concluded that the analysis ends there and the attorney's argument fails.

The Federal Circuit observed that the Secretary has the authority to enact such regulations. 38 U.S.C. § 501(a) states that the Secretary "has authority to prescribe all rules and regulations which are necessary or appropriate to carry out" Congress's statutory directives. Moreover, Congress expressly confirmed the Secretary's authority in this matter by providing that an attorney must file a copy of any fee agreement with the Secretary pursuant to regulations prescribed by the Secretary. 38 U.S.C. § 5904(c)(2). The Federal Circuit determined that this was consistent with the holding of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 843-44 (1984), that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Thus, the Federal Circuit agreed with the CAVC that the Secretary has explicit authority to enforce the 30-day filing requirement of 38 C.F.R. § 14.636(g)(3) and (h)(4), and that the regulation is reasonable.

Finally, the Federal Circuit rejected the attorney's alternative argument that the RO's failure to withhold the fees constitutes an improper "forfeiture of the attorney fee," given that none of the statutory and regulatory provisions explicitly set forth a penalty for failing to timely file a fee agreement. The Federal Circuit agreed with and quoted the CAVC in finding that the attorney had not forfeited his fees as he remained entitled to use all available remedies to obtain them, and that VA had not seized or denied the attorney his fees; rather, "it only has decided not to enter the role of paymaster because the appellant did not meet the requirements necessary for it to do so."

In sum, the Federal Circuit concluded that the plain language of the statute does not mandate that VA withhold attorney's fees in contingency fee arrangements, and that the Secretary has authority to enact (and enforce) filing requirements prior to attorney's fees being withheld in such cases.

Alayna Carroll is Associate Counsel with the Board of Veterans' Appeals.

Federal Circuit Remands Challenge to Regulation Governing Dependent Use of Education Benefits

by Jillian Berner

Reporting on *Carr v. Wilkie*, No. 2019-2441 (June 11, 2020).

Under Title 38, Part III, of the U.S. Code, 38 U.S.C. § 3695, veterans may receive a maximum "aggregate period" of 48 months of education benefits under two or more GI Bill benefits programs. The statute sets certain restrictions and rules for veterans with service-connected disabilities who are receiving vocational training and rehabilitation, who may exceed the 48-month maximum with permission of the Secretary. Additionally, surviving spouses and dependents of veterans who die of service-connected disabilities are able to receive up to 81 months of benefits under Chapter 35 and any of the other specified programs under Section 3695.

Under Chapter 33, Section 3031, an individual eligible for educational assistance who is enrolled in an educational institution operating on a quarter or semester system is entitled to extension of a period of entitlement to the end of the quarter or semester during which the entitlement would typically expire. The effective discontinuance date of benefits is the last day of the quarter or semester. For a dependent to whom benefits are transferred, the ending date of the award of educational benefits is the date that entitlement is exhausted.

Veteran Robert Carr served on active duty in the U.S. Air Force from 1976 to 1980 and earned 45 months of education benefits under the Vietnam-era GI Bill. He used 41 months and 11 days of benefits for his education, until the Vietnam-era GI Bill program expired on December 31, 1989. He re-enlisted in the U.S. Air Force Reserves after September 11, 2001, and thereby earned 6 months and 19 days of Post-9/11 GI Bill education benefits.

In 2009, Mr. Carr transferred his remaining benefits to his daughter, Samantha Carr, who used some of the benefits to study at the University of Nevada for two semesters in 2010. She was informed (incorrectly) that she had exhausted her benefits before the end of the fall 2010 semester. In August 2013, it was determined that Samantha actually had 19 days of benefits remaining. Of the 19 days, 18 days were retroactively applied to fall 2010 and one day was applied to fall 2013. Mr. Carr then paid for the remainder of the fall 2013 semester. Samantha requested an extension of benefits to the end of that semester under Chapter 33.

The Regional Office denied Samantha's request for an extension of benefits under Chapter 33. Samantha appealed to the Board of Veterans' Appeals (Board). She argued that benefits payments should have continued until the end of the semester. The Board applied the subsection of the regulation specifically addressing transferred educational benefits to find that Samantha exhausted benefits on August 26, 2013, the first day of the fall 2013 semester, and that she was not entitled to extension of benefits beyond that date.

Samantha (and her father, who was granted permission to intervene) appealed to the Court of Appeals for Veterans Claims (Court), challenging the validity of 38 C.F.R. § 21.9635(y), the subsection regarding the exhaustion date of transferred educational benefits.

A panel composed of Chief Judge Bartley and Judges Pietsch and Toth affirmed the Board decision. The panel did not address the Carrs' regulatory challenge but rather relied on the applicable statutes to hold that Section 3695 imposed a strict 48-month maximum for benefits that bars otherwise-

permissible extensions of benefits at the end of a term, if the extension would result in more than 48 months of benefits. The panel majority held that the Chapter 33 benefits were subject to the 48-month cap under Section 3695 for dual program entitlement and the end-of-term extension rule. The panel majority did note an "apparent conflict" between those two provisions and concluded that Congress did not intend for the end-of-term extension rule to serve as an exception to the 48-month cap, because Congress did not carve out an exception for such extensions and because Section 3031 does not refer to Section 3695.

Judge Pietsch dissented from the decision. She did not read Sections 3031 and 3695 as conflicting and wrote that benefits would have continued until the end of the semester in which a dual-program beneficiary completes the 48-month maximum.

The Court denied the Carrs' request for panel reconsideration and review *en banc*. The Carrs appealed to the Federal Circuit. Before the Federal Circuit, they argued that the Court incorrectly interpreted Section 3695 and that 38 C.F.R. § 21.9635(y) was invalid.

The Federal Circuit reversed and remanded for consideration of the regulatory challenge. The court held that Sections 3031 and 3695 could be read harmoniously and agreed with the Court panel majority that Chapter 33 benefits were simultaneously subject to the aggregate cap and the extension provision. The Federal Circuit held that Section 3695 "operat[es] on the 'front end'" to calculate the amount of benefits to which a veteran is entitled and defines the maximum permissible benefit period, but leaves the precise date on which entitlement expires to be determined by the chapter under which benefits are granted.

However, the Federal Circuit disagreed with the Court's interpretation of Section 3695 as an "express exception" to the 48-month maximum period of benefits established in that same provision. The Federal Circuit held that Congress could plausibly omit an exception for end-of-semester extensions under certain programs. Because Chapter 36 does not provide veterans benefits, but rather applies provisions that overlay the specific programs providing benefits, which contain their own provisions regarding accrual, duration, and termination, Congress could plausibly exclude details of termination from Section 3695 and keep those details to the benefits-providing programs. Additionally, the legislative history reveals that Section 3695's cap on aggregate benefits from multiple programs originally contained an exception for extensions at the end of educational terms. The Federal Circuit disagreed with the government's argument that Congress clearly intended to allow VA to use end-of-term extensions to exceed program-specific maximums but not the aggregate cap. The lack of clarity surrounding Congressional intent as to the aggregate cap's effect on end-of-term extensions led the Federal Circuit to suggest that the aggregate cap was not intended to control the termination of benefits, but rather the initial calculation of entitlement to benefits. The Federal Circuit found no VA interpretation of Section 3695 entitling the agency to *Chevron* deference to such an interpretation. Accordingly, it held that Section 3695's aggregate cap applied only to the initial calculation of entitlement to benefits.

Because the Federal Circuit held that the Carrs' entitlement to benefits arose from Chapter 33, Samantha was eligible for educational benefits until the end of the semester during which her entitlement expired. However, the Federal Circuit added, the regulation governing transferred benefits, 38 C.F.R. § 21.9635(y), would block Samantha from receiving an end-of-term extension, if valid. The Federal Circuit remanded the regulatory challenge to the Court, finding it lacked jurisdiction to consider it where the Court did not address the regulatory challenge or the regulation in the first instance.

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Post-Referral Extraschedular Rating Determinations and *Ray*

by Andrew Strickland

Reporting on *Smiddy v. Wilkie*, No. 16-2333 (May 28, 2020).

VA regulations provide for extraschedular evaluations in the exceptional case where schedular evaluations are found inadequate based on "governing norms," such as marked interference with employment and frequent periods of hospitalizations. 38 C.F.R. § 3.321(b)(1).

The Court, in *Thun v. Peake*, 22 Vet. App. 111 (2008), set forth a three-step inquiry to determine whether entitlement to an extraschedular rating is appropriate under § 3.321(b)(1). The first element in *Thun* requires a "comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established" rating schedule criteria for that disability to determine whether "such an exceptional disability picture is present" that schedular evaluations are inadequate. *Id.* at 115. Where the schedular evaluation is found inadequate, *Thun*'s second element requires a determination of "whether the claimant's exceptional disability picture exhibits other related factors such as those provided by the regulation as 'governing norms.'" *Id.* Where the first two *Thun* elements are satisfied, *Thun*'s third element requires referral to the Director of Compensation for "a determination of whether, to accord justice, the claimant's disability picture requires the assignment of an extraschedular rating." *Id.*

Mr. Smiddy sought an increased rating greater than 10% for his left inguinal hernia repair residuals. The diagnostic code (DC) for his disability had a maximum schedular evaluation of 10%. VA denied an increased rating and found that extraschedular referral was inappropriate. The Board reviewed the appellant's disability picture and remanded the claim for a new VA examination to determine the nature and etiology of the inguinal hernia repair residuals, left ilioinguinal nerve entrapment, and erectile dysfunction. A VA examiner opined that the appellant had moderate sensory neuropathy of the left ilioinguinal nerve. The appellant also had voiding dysfunction etiologically related to the inguinal hernia repair surgery. His disability affected the ability to work, as the pain would slow him down requiring additional time for work. His disability also limited the ability to wear tight fitting clothes, as the touch of the clothing would cause pain in his thigh.

The Board then requested that a Veterans Health Administration medical expert opine on: (1) what current disabilities were associated with the appellant's inguinal hernia repair residuals; and (2) whether the appellant's voiding dysfunction was a symptom of his service-connected inguinal hernia repair residuals. The medical expert opined that the appellant's left testicular discomfort and left thigh numbness should not interfere with employment. The medical expert also opined that it was highly unlikely that urological complaints from the appellant's voiding dysfunction were associated with the ilioinguinal nerve entrapment, as the ilioinguinal nerve is a peripheral nerve not associated with voiding dysfunction. The Board found that the appellant's "unusual or exceptional" disability picture rendered the appropriate DC inadequate requiring referral for extraschedular consideration. The Board also found that the appellant's clinical records and statements reflected significant impairment of occupational and social activities not represented by the 10% evaluation. Thus, the Board remanded the claim for referral to the Director because it concluded that Mr. Smiddy's inguinal hernia repair residuals presented "an exceptional disability picture."

After the Director denied an extraschedular rating and the case was returned to the Board, the Board affirmed that an extraschedular rating was not warranted. Notably, the Board found that there was no evidence of unusual factors based on "governing norms" and that the manifestations of the disability were fully contemplated by the rating criteria.

On appeal, the Court discussed the issue of how the Board's review of *Thun* elements 1 and 2 at the

adjudication stage differ from its review at the referral stage. The Court found that neither § 3.321 nor *Thun* provide a concrete test for the Court to apply when reviewing the Board's post-referral extraschedular decision. The Court turned to *Ray v. Wilkie*, 31 Vet. App. 58 (2019), and the Board's reasons-and-bases requirement under 38 U.S.C. § 7104(d)(1) as guidance for what the Board must do in the absence of any other specified test.

In *Ray*, the Court held that "the initial extraschedular referral decision under [38 C.F.R.]§ 4.16(b) addresses whether there is sufficient evidence to substantiate a reasonable possibility that a veteran is unemployable by reason of his or her service-connected disability," whereas at the adjudication stage the decision is based on whether a "preponderance of evidence nevertheless shows that a veteran is unemployable by reasons of his or her service-connected disability." In the event the Board makes different findings at the referral and adjudication stages, the Board must adequately explain its reasoning for the difference.

The Court then extended the reasoning and holding in *Ray* in the extraschedular TDIU context to extraschedular ratings. With regard to the initial decision of whether to refer the issue of an extraschedular rating decision under 38 C.F.R. § 3.321 to the Director, the Board must address "whether there is sufficient evidence to substantiate a reasonable possibility" that "application of the regular schedular standards" is impractical because the disability is "exceptional or unusual . . . with such related factors as marked interference with employment or frequent periods of hospitalization." With regard to the Board's decision when the case is returned from the Director, the Court held, quoting *Ray*, that the Board's reasons-or-bases requirement obligates it to "explain[] its reasoning when a factual finding made at the referral stage comes out differently at the review stage." *Ray*, 31 Vet. App. at 67.

The Court noted that the Board's referral decision in this case unequivocally found that the appellant's disability picture was exceptional and the DC inadequate warranting referral for extraschedular consideration, whereas the Board's adjudication decision found the appellant's disability adequately represented by the 10% rating in the DC without addressing the contradictory finding in the Board's referral decision, though the record remained similar. The Court held that the Board must explain why it reached different results to enable the appellant to understand the precise basis for its decision. As the Board did not adequately explain its reasoning, the Court vacated the Board's decision and remanded the claim for such an explanation.

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Fair Process Required Before Board Denies Benefits Based on Adverse Findings Contrary to Favorable Findings in Prior Board Remands

by Robin J. Janofsky

Reporting on *Smith v. Wilkie*, No. 18-1189 (April 27, 2020).

In April 2020, the U.S. Court of Appeals for Veterans Claims (the Court) held that the Board must provide claimants notice and an opportunity to respond when it reverses prior findings that evidence is credible or otherwise satisfactory to establish a fact necessary to the claim, or when a prior Board remand would leave the impression that it had found the evidence credible.

In the November 2017 Board decision on appeal, the Board denied service connection for a left shoulder condition. In pertinent part, the Board found that Mr. Smith's reports of an in-service injury and continuity of symptomatology since service were not credible for several reasons. First, the Board noted that alleged in-service treatment was not recorded in his service medical records. Second, the Board found that Mr. Smith's reports of ongoing symptoms since service were inconsistent with other medical evidence that was negative or silent for left shoulder symptoms before his September 2008 report that his left shoulder pain had begun in 2007. Third, the

Board reasoned that, had Mr. Smith indeed experienced left shoulder pain since service, he would have reported it years earlier, in the context of prior VA compensation claims for knee and back disabilities. Moreover, the Board found that, even if the reported in-service left shoulder injury indeed had occurred, Mr. Smith's reports of chronic and recurring symptoms during and continuing after service were not credible. The Board concluded that the preponderance of the evidence showed that the onset of the left shoulder disability was around 2007, over a decade after Mr. Smith's December 1994 separation from active service.

Before the November 2017 decision, the Board previously had remanded the appeal to the agency of original jurisdiction (AOJ) for development. In November 2015, the Board remanded the appeal for the AOJ to obtain a VA medical opinion. In the remand instructions, the Board directed the examiner to "[p]lease accept as true…the veteran's credible lay statements regarding injuring his left shoulder in service while lowering a hatch, resulting in several weeks in a brace or sling and having intermittent shoulder pain ever since." In a December 2015 negative nexus opinion, the VA examiner focused in part on the lack of documentation in service medical records.

In September 2016, the Board remanded the appeal again for the AOJ to obtain a new medical opinion in part because it was unclear whether the December 2015 VA examiner had complied with the November 2015 remand instruction to accept as credible Mr. Smith's lay reports of an in-service left shoulder injury. Accordingly, the September 2016 remand instructions repeated the prior, November 2015 remand instructions for the VA examiner to "accept as true…the veteran's credible lay statements." In a negative, November 2016 supplemental opinion, the VA examiner acknowledged that Mr. Smith's reports of in-service injury had been "deemed credible;" however, the examiner focused on the lack of objective evidence of residuals within one year after separation.

The Court summarized case law setting forth general principles of fair process requiring notice and an opportunity to be heard at each step of VA's non-adversarial, pro-claimant claims adjudication system. *See, e.g., Thurber v. Brown*, 5 Vet. App. 119 (1993); *Bernard v. Brown*, 4 Vet. App. 384, 392-94 (1993). Specifically, the Court found that these principles entitle the veteran to notice and an opportunity to respond when the Board, in its role as *de novo* factfinder, purports to reverse its prior characterizations of evidence as credible or otherwise satisfactory to establish a fact necessary to establish entitlement to VA compensation benefits. Specifically, when VA's actions reasonably, but mistakenly, lead a claimant to conclude that VA has resolved a factual matter favorably, the Court held that the claimant 1) has not properly received notification concerning the information or evidence necessary to substantiate the claim, 2) lacks a meaningful opportunity to respond, and 3) is denied fair process.

Applying these principles to the November 2017 Board decision on appeal, the Court held that the Board denied Mr. Smith fair process because the Board's previous, favorable credibility findings in the November 2015 and September 2016 remands had led Mr. Smith to believe that the Board had found credible his reports of an in-service left shoulder injury. The Court acknowledged that Board remands are neither final nor binding. However, the Court stressed that in this case, the Board's prior remands unequivocally found that Mr. Smith's reported in-service injuries *were* credible, as opposed to merely asking the VA examiners *assume* credibility for the limited purposes of conducting examinations and providing medical opinions. Thus, the Court found that the prior remands had led Mr. Smith reasonably, but mistakenly, to conclude that the Board had resolved this issue in his favor. Thus, to the extent that the November 2017 Board decision found Mr. Smith's statements were not credible, based on a *de novo* review of the evidence, fair process principles required the Board to give him 1) notice of that proposed factual finding, and 2) an opportunity to submit evidence concerning his credibility or to support the in-service injury element of his service connection claim. The Court held that the Board's failure to do so before the November 2017 decision prejudiced Mr. Smith. Accordingly, the Court set aside the

November 2017 Board decision and remanded the matter to the Board.

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Court Declines to Award Camp Lejeune Benefits to Dependent Who Did Not "Reside" at Base

by Jillian Berner

Reporting on *Straw v. Wilkie*, No. 18-6819 (June 26, 2020).

In 2012, then-President Barack Obama signed the Honoring America's Veterans and Care for Camp Lejeune Families Act of 2012, which provides healthcare benefits for certain family members of veterans who were stationed at Camp Lejeune in North Carolina for at least 30 days from 1953 to 1987. Andrew U.D. Straw, the appellant, is the son of a veteran. The appellant was born at Camp Lejeune Naval Hospital in March 1969, he and his mother stayed at the hospital from March 19, 1969, to March 22, 1969, and his parents resided at a home in Jacksonville, North Carolina, at the time of his birth. The Board of Veterans' Appeals (Board) conceded that Straw's father, the veteran, qualified as a Camp Lejeune veteran and that Straw was related to the veteran.

The appellant asserted that his mother visited and was present at the base for at least 27 days during her pregnancy, that she visited the base after his birth, and that she was at the Camp Lejeune hospital at least eight times during the six months preceding his birth. The appellant argued that this was "constructive" residence at Camp Lejeune sufficient for him to qualify for reimbursement of his medical care.

The Board found that the statute required clear and unambiguous residence at the base and that merely visiting or spending time at the base was insufficient for eligibility under the Act.

Before the Court of Appeals for Veterans Claims (Court), the appellant argued that his father being stationed at Camp Lejeune was sufficient to entitle him to benefits; that he should be deemed to have been a resident because he was exposed to contaminated water through his mother during her pregnancy and after his birth; that the Board too narrowly construed the term "resided," inconsistent with the purpose of the statute; and that the statutory requirement of 30 days' residence at the base was unconstitutional.

The Court affirmed the Board decision. First, it conducted statutory interpretation of the Act's use of the phrase "resided at Camp Lejeune." The Court held that the ordinary meaning of "resided at" required a claimant to have actually dwelled or lived at Camp Lejeune. The Court detailed the Board's findings regarding the appellant's history, which showed that he and his parents had lived in Jacksonville, North Carolina, which was seven to eight miles from the base. The Court noted that the appellant did not contest the Board's finding that he and his mother did not reside at Camp Lejeune and concluded that the ordinary meaning of "resided" was the appropriate interpretation of the statute.

The appellant argued that the Act's extension of benefits to veterans who did not live at the base but served at the base should also include benefits for family members who did not live at the base. The Court held that the residential requirement was expressly imposed on family members, not veterans, and declined to interpret the statute otherwise. The Court also found the appellant's arguments regarding "constructive residence" at the base unpersuasive. The Court held that such an interpretation would require it to read language into the law contrary to the intent of Congress. The Court cited the plain language of the statute, which controls, despite the appellant's assertion that to interpret it otherwise would better effectuate the intent of the Act.

Finally, the Court addressed the appellant's argument that the 30-day residency requirement of

the statute is irrational and a violation of equal protection and fundamental fairness. The Court interpreted his assertion as an allegation that the Act violated the equal protection aspect of the due process clause of the Fifth Amendment to the Constitution. The Court concluded that the appellant's argument did not survive rational basis scrutiny and did not demonstrate an equal protection violation, because Congress could have adopted the residency requirement for rational reasons. Accordingly, the Court affirmed the Board decision denying the appellant's claim.

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

Irene Triplett and the Long Tail of Veterans Benefits

By Aaron Moshiashwili

When I started working in veterans benefits law, a mentor of mine told me his favorite bit of veterans benefits trivia. (Admittedly a fairly small category.) He asked me when the VA stopped paying benefits based on service in the Civil War. I made a bunch of estimates, and cautiously said the mid 1950s. (As it turns out, the last Civil War veteran did indeed die in 1956.) "Nope," he happily said, having drawn one more person into his trap. "The VA still pays benefits based on Civil War service to this day."

As of Sunday, May 31, that is no longer true. On that day, Irene Triplett passed away at age 90 and with her passing, 38 USC 1533 – which provided for a $73.13 monthly benefit to the children of Civil War veterans, and for years has existed for her sole benefit – will never again be applied.

Ms. Triplett's story, or at least the story of her unusual place in veterans benefits history, began in 1846 when her father, Mose Triplett, was born. At the age of 16 he joined the Confederate army but soon became ill, and took his convalescence as an opportunity to desert and join the Union army. (Several weeks later, 95% of his Confederate unit was killed in the Battle of Gettysburg.) After the war, Mose married, and lived with his first wife until her death some time in the 1920s. In his mid-seventies, he married a woman in her 30s, and they had five children together. Only two of them, Irene (born 1930) and a brother, survived childhood.

Ms. Triplett apparently did not like to talk about her early life, recounting that it consisted mostly of farm work, chores, and beatings both at home and at school. She did not remember much about her father, who died when she was eight, and at the age of thirteen she and her mother were forced to live in the local poorhouse. Eventually – presumably as the Social Security Act and Medicaid made poorhouses a thing of the past – she was moved into a nursing home where she lived the rest of her life. Ms. Triplett was born disabled and qualified for benefits based on her father's (Union) service upon his death in 1938.

This story is at once hard to wrap the mind around but easy to understand once you think it through. A man having a child in his 70s is rare, but almost three million soldiers served in the Civil War. The statistics seem not only plausible but probable. But while the math is easy, the human scale of it is virtually impossible to comprehend – that Ms. Triplett had a direct connection to something most of us would consider ancient history.

Ms. Triplett's story has many lessons for us. There is an uplifting one, about seeking out our collective past and realizing how long that past can impact us. On the opposite side is a dark story about the smallness of human existence – a woman died who spent most of her 90 years as a ward of the state and the only reason we're noting her passing is her connection to a man she didn't like and doesn't remember.

But there exists an even less pleasant way to look at Irene Triplett – and that's the facet of this story we need to take to heart. It's the one that we get from accountants, not storytellers. Wars have far longer tails than we imagine. We talk about a peak in costs thirty, forty, or fifty years after a war ends, and think that's the end of it. But the 150th anniversary of the Civil War came and went, and until just recently, we were still paying the cost of the war. In 2013, the Associated Press analyzed VA records and estimated that we were spending approximately $22 billion

dollars a year on care for Vietnam veterans. The war itself cost about $10 billion a year (which would be $60 billion in 2013 dollars.) That suggests that by 2020, we have spent more caring for veterans of the war than the war itself cost – and we're not at that peak yet, and nowhere near the end. There are undoubtedly children not yet living who will be born with spina bifida because their fathers were exposed to herbicides in Vietnam. My own life will likely be over before the last child eligible for benefits based on a father who served in Afghanistan is even conceived.

When people argue that we should be cautious and reluctant to use military force, moral concerns of course come first. But while we're having any discussion about the use of military force, we need to remember the lesson of Irene Triplett. The choices we make today will have reverberations not only during the few years of the war or even the decades we may pay to care for that war's veterans, but for well more than a century. Irene's lesson to us is this: today, somewhere in America, a young person is enlisting. He or she will serve for four years – and in 2176, our great-great-great-grandchildren will finally finish paying for that service.

Aaron notes he has been informed by James Ridgway that this was only his SECOND favorite piece of veterans benefits trivia and stands corrected.

Court Interprets "Incarceration" of Veteran in Mental Health Institution, Spurring Questions Regarding Other Incarcerated Veterans

by Anna Kapellan

Reporting on *Philbrook v. Wilkie*, No. 18-5628 (May 19, 2020).

Veterans compose about eight percent of persons in custody in the United States. *See* Bronson, J., et al. Veterans in Prison and Jail U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, available at https://www.bjs.gov/content/pub/pdf/vpj1112.pdf. While at first blush this percentage appears to correspond to the 7.6 percent of veterans in the U.S. overall population, the actual percentage of veterans in custody exceeds the percentage of veterans in the U.S. emancipated population by almost a quarter, since 22.6 percent of the U.S. population comprises unemancipated minors not subject to confinement at the facilities where veterans could be confined. *See* https://www.ncsl.org/blog/2017/11/10/veterans-by-the-numbers.aspx; *see also* https://www.childtrends.org/indicators/number-of-children.

Although every person "in custody" is entitled to shelter, food, medical care, clothing, and various services, veterans and other qualified individuals also retain their right to VA compensation while in custody, though that right is limited by the operation of 38 U.S.C. § 5313 and the implementing regulations. But, unlike habeas statutes, 38 U.S.C. § 5313 and implementing regulations do not use the phrase "in custody." Instead, they speak in terms of "incarceration." For example, a total disability rating based on individual unemployability (TDIU) due to service-connected disabilities cannot be assigned to a veteran while (s)he is "incarcerated" in a Federal, state, municipal, or other "correctional facility" based on "conviction" of a felony offense. 38 U.S.C. § 5313(c); 38 C.F.R. § 3.341(b). Last month, the U.S. Court of Appeals for Veterans Claims (Court) examined the meaning of the terms "incarceration," "conviction," and "correctional facility," as used in section 5313(c), in a precedential decision authored by Judge Toth on behalf of a unanimous panel in *Philbrook v. Wilkie*.

Mr. Philbrook has been service connected for posttraumatic stress disorder (PTSD) since his separation from service. Five years after his discharge, when his PTSD was rated as 50 percent disabling, he was charged under state law with attempted murder, first-degree assault, and unlawful use of a weapon. He elected to enter a plea of "guilty except for insanity," available under the penal law of the state where his criminal proceedings took place. Upon finding that Mr. Philbrook presented a

danger to others, the trial court placed him in custody of a government-contracted health institution for a period not to exceed 20 years, subject to periodic examinations by a psychiatric security review board as to determine when his mental health improved so that it would enable him to rejoin society.

Four years into Mr. Philbrook's confinement, the rating for his PTSD was increased from 50 to 70 percent disabling. While it appears that he had initially sought a TDIU rating two years beforethis increase, his second application for a TDIU rating, based on the schedular increase, was denied by VA as a matter of law under Section 5313(c) and 38 C.F.R. § 3.341(b). Mr. Philbrook then appealed the denial to the Court. By the time his appeal got underway, however, he had already been released from custody, and VA awarded him a TDIU rating effective the day following his release. In light of this award, the Secretary argued that the appeal was rendered moot. In the alternative, since the evidence before the Court suggested that Mr. Philbrook might have been released from custody earlier than what was discernable from the evidence previously available, the Secretary posited that Mr. Philbrook could litigate the effective date of his TDIU award outside his appeal of the denial. Accordingly, the Secretary invited the Court to remand Mr. Philbrook's claim for a determination of his exact in-custody period for the purposes of the Section 5313(c) analysis. The Court declined the invitation. Acknowledging that its jurisdiction only extended to a "case or controversy" and, thus, a live controversy had to be present at the onset of and throughout litigation, the Court pointed out that Mr. Philbrook's appeal had not been mooted, since a portion of his TDIU claim corresponding to the "incarceration" period had remained denied, and a grant of that portion of his claim would qualify as effectual relief. With that, the Court proceeded to analyze the terms "incarceration," "conviction," and "correctional facility," as used in Section 5313. The Court summarized the legislative history of the statute from its enactment to the 2006 amendment, which expanded the list of correctional facilities referred to in the statute to include all government-operated and contracted private "penal institution [and] correctional" facilities. The Court then quoted *Atilano v. Wilkie*, 31 Vet. App. 272, 279 (2019), which observed that such an analysis turned on "the language of the statute itself" because, "in the absence of explicit definitions, . . . words in a statute 'bear their ordinary meanings.'"

Applying this principle to Section 5313, the Court found that the terms "incarceration" and "conviction," and the phrase "correctional facility," had plain meanings. Further, examining the phrase "correctional facility," the Court reflected on the language of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), the guidance provided in *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004), and the definitions offered by Black's Law Dictionary, to conclude that the phrase "correctional facility" was a generic designation intended to be construed broadly, without regard to whether a facility at issue was used for punishment, rehabilitation, treatment, or other correctional purpose. Therefore, the Court disagreed with Mr. Philbrook's argument that his incarceration fell outside the reach of Section 5313 simply because he served his term in a mental institution rather than a prison-like facility. The Court pointed out that the mental institution was indistinguishable from a prison since he "was not free to leave" his place of confinement.

In addition, taking note of the PLRA analyses by the U.S. Courts of Appeal for the Second and Third Circuits, the Court rejected the Secretary's position that the phrase "correctional facility" was amenable to alternative constructions based on the laws of jurisdiction where the underlying proceedings took place. The Court pointed out that finding otherwise would threaten a uniform nationwide application of Section 5313 and be inconsistent with the guidance provided in *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

Turning to the term "conviction," the Court relied on *Mulder v. Gibson*, 27 Vet. App. 10 (2014), *aff'd sub nom. Mulder v. McDonald*, 805 F.3d 1342 (Fed. Cir. 2015), and *Wilson v. Gibson*, 753 F.3d 1363, 1367 (Fed. Cir. 2014), as well as the definitions offered by Black's and Ballentine's Law Dictionaries, to clarify that a conviction is the basis to impose a punitive

measure upon establishing the guilt of the accused by means of a legal process yielding a finding "that the accused [was] guilty as charged" or otherwise subject to a punitive measure, e.g., due to the entry of a plea of *nolo contendere*. Therefore, the Court found that the legal nature of Mr. Philbrook's judgment of penal commitment was not altered for the purposes of Section 5313 either by his entry of a plea of "guilty except for insanity" or by the fact that his trial court did not use the term "conviction."

Then, addressing the term "incarceration," the Court pointed out that the court in *Woodard v. Shinseki*, No. 2011-7178, 480 F. App'x 576, 579 (Fed. Cir. 2012), read this term as interchangeable with the term "commitment" for the purposes of Section 5313, while the editions of Webster's New International Dictionary of the English Language and Black's Law Dictionary published at the time of Section 5313's enactment defined the term "incarceration" as "synonymous with 'imprisonment,'" *i.e.*, with "putting or confining a [person] in prison" or imposing a "restraint" over the person's "personal liberty." Therefore, the Court found that Mr. Philbrook's penal commitment at the mental institution qualified as "incarceration."

The Court, however, did not elaborate on the relationship between the terms "incarceration" and "conviction" in the phrase "incarceration *for* conviction," merely observing that, in *Philbrook*, the sequence of events was simple: "[h]e was . . . confined . . . following [his] criminal proceedings." The Court's use of the word "following" in a passing acknowledgement of the sequence of events in *Philbrook* appears to reflect solely the facts of Mr. Philbrook's case. Conversely, the use of the Court's word "following" is unlikely to signal a generalized *dictum* position that the phrase "incarceration for conviction" implies the portion of custody that chronologically follows conviction. Indeed, the Court's policy analysis of section 5313 invites a construction of the phrase "incarceration for conviction" consistent with the analysis employed by the habeas statutes.

Specifically, in reflecting on public policy, the Court quoted *Wanless v. Shinseki*, 618 F.3d 1333, 1337 (Fed. Cir. 2010), to point out that the purpose of Section 5313 was "to correct the perceived problem of providing hundreds and thousands of tax free benefits to veterans incarcerated for the commission of felonies when at the same time the taxpayers of this country are spending additional thousands of dollars to maintain these same individuals in penal institutions." The Court stressed that "the purpose of section 5313[] . . . is not punitive" since it merely codified a "fiscal measure." In light of the Court's public policy analysis, a construction of the phrase "incarceration for conviction" as a reference only to the portion of the in-custody period chronologically following a claimant's conviction is inconsistent with the goal of Section 5313.

For instance, one such scenario could arise where, after spending years in confinement, a veteran in receipt of VA compensation and convicted of a felony offense succeeds at vacating his/her judgment of conviction. In such a case, the veteran already victimized by the wrongful conviction and years in confinement would also be deprived of any remedy in law as to the portion of VA compensation (to include that of a TDIU rating) eliminated by Section 5313. Moreover, if the veteran had filed applications seeking full VA compensation (or a TDIU rating) while in custody, denials of such applications would not be amenable to a challenge, even on the grounds of clear and unmistakable error, because all decisions prior to vacation of the conviction would have been based on a correct finding that the veteran was "incarcerated for conviction" of a felony offense. *See, e.g.*, *Bouton v. Peake*, 23 Vet. App. 70, 71 (2008). Therefore, short of an application for equitable relief that could be granted by the Secretary or the Court, the veteran would be left without a legal recourse.

Further, while underpayment scenarios are likely to be rare, scenarios inviting an overpayment are likely to be plentiful because an inmate's prison term may *de facto* start to run long before the entry of judgment of conviction. For instance, an inmate is entitled to have his/her prison term credited for the period spent in pretrial detention, unless that period had already been credited against the inmate's other sentence. *See* 18 U.S.C. § 3585(b); *United States v. Wilson*, 503 U.S. 329, 334-35 (1992). Thus, a veteran who was paid full VA compensation during pretrial

detention might obtain a windfall if the pretrial detention period is credited against the prison term, unless the Secretary collects the overpayment upon learning of the credit when it is applied to the veteran's prison term by an authorized official (e.g., the U.S. Attorney General acting through the Federal Bureau of Prisons (BOP)).

Moreover, if a veteran in receipt of full VA compensation during the period of pretrial detention is sentenced to time served, the veteran might effectively receive a windfall corresponding to the entire period of his or her prison term. And, unless the Secretary collects the overpayment, a veteran who is denied bail, e.g., for committing a particularly grievous offense or due to being a career criminal offender, might be rewarded by a windfall based on the period of pretrial detention, while a veteran who has close ties to the community, lacks a prior criminal record, and presents no danger to the community would have no opportunity to obtain such a windfall, since this veteran is more likely to post bail or be released on recognizance pending trial.

A similar overpayment could arise if a veteran in receipt of VA compensation were sentenced for a federal felony offense while already serving a previously-imposed misdemeanor-based sentence (or consecutive misdemeanor sentences), and the federal court presiding over the felony proceeding authorized a downward departure so as to impose a retroactively concurrent sentence, essentially starting the felony-based term before the date of the felony conviction. *See, e.g.*, *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002), as clarified in U.S.S.G. § 5G1.3 app. note 3(E).

(BOP may administratively designate a state prison as an appropriate place of confinement for a federal felony where a previously-imposed state misdemeanor was served, if the felony term is imposed consecutive to the misdemeanor term. *See*, *e.g.*, *Barden v. Keohane*, 921 F.2d 476, 483 (3d Cir. 1990) (detailing the process by which BOP takes an administrative action creating a credit-like effect); *see also McKnight v. United States*, 27 F. Supp. 3d 575, 581, 583-84 (D.N.J. 2014) (providing an example of a prisoner's attempts to *de facto* start his federal term years prior to his federal conviction on felony charges by a *Barden* designation of the state prison where he served a cluster of previously-imposed state prison terms) in this scenario.

Moreover, both overpayment and underpayment concerns may arise if the basis for a veteran's confinement becomes "blended," e.g., by revocation of parole or a provision enabling a post-penal civil commitment. For example, veterans designated as Sexually Violent Predators, who are placed in civil commitment for mental treatment immediately upon expiration of their felony-based penal term, might be deprived of their full VA compensation or the availability of a TDIU rating, regardless of remaining in custody solely because of a mental disorder and after paying the debt to the society by serving the entire prison term. Because the basis for the veteran's post-penal civil commitment would be the original and renewed civil findings largely identical to those rendered by the psychiatric security review board that was regularly examining Mr. Philbrook, the sole conviction chronologically preceding the veteran's civil commitment would remain the felony conviction. *See, e.g.*, *Thomas v. Adams*, 55 F. Supp. 3d 552, 575 and n.23 (D.N.J. 2014) (noting a change in state law that eliminated a penal provision, pursuant to which convicted sex offenders were *ab initio* committed to the custody of mental institutions under a scheme analogous to that in *Philbrook*, and created a mixed penal-civil regime, under which SVPs are subject to a post-penal civil commitment immediately after expiration of their penal terms), *aff'd sub nom. Thomas v. Christie*, No. 14-4526, 655 Fed. App'x 82 (3d Cir. 2014).

Conversely, if a veteran in receipt of VA compensation is convicted of a felony and, after serving a portion of his/her term, is released on parole and violates parole by committing a misdemeanor, the veteran would be returned to custody to serve the remainder of the original felony prison term. Although the veteran's incarceration would chronologically follow a misdemeanor conviction (the actual sentence for which might run concurrently with or consecutively to that based on the felony), the veteran might be rewarded with an overpayment during the

recommitment portion of the custody period flowing from the felony conviction.

These anomalies (and similar anomalies that might arise out of a myriad of intricacies inherent to the penal/post-penal processes) are inconsistent with the goal and nature of Section 5313, as analyzed in *Philbrook*. This is especially concerning, given that the Court noted a relationship between Section 5313 and the PLRA, the goal of which was to enable the advancement of meritorious prisoners' litigation by deterring meritless claims raised by inmates taking undue advantage of the legal system. *See Woodford v. Ngo*, 548 U.S. 81, 83 (2006). In light of the Court's observations, it appears that the phrase "incarceration for conviction" would more appropriately be construed as the entire in-custody period that flows from a sustained judgment of conviction. Such a period could be determined by a habeas-like nexus analysis correlating a veteran's period in custody of a Federal, state, municipal, or contracted private institution to his/her custody-enabling instrument.

Assuming that such a construction could be implied, *Philbrook* has paved the way to balance the paternalistic nature of the veterans benefits system against the fiscal policies of Section 5313 by preventing overpayments enabled by an analysis based on a mere date of conviction and availing full payments of VA compensation or TDIU benefits to veterans placed in post-penal civil commitment due to mental disorders or held in custody under later-invalidated convictions., *Cf. Heck v. Humphrey*, 512 U.S. 477, 489-90 (1994) (the right to a § 1983 or *Bivens* claim for monetary damages arises upon a state order or federal habeas relief that invalidates the underlying conviction). Additionally, the Court's analysis in *Philbrook* reduces the risk that a career criminal offender might fare better than an otherwise-law-abiding veteran who has made a tragic mistake.

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