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The Future of the Constructive Possession Doctrine after *Lang*, *Euzebio*, and the AMA

by Jenna Zellmer

On September 17, 2020, attorneys from VA and the private bar participated in a lively discussion about the current state of the constructive possession doctrine, first enumerated in *Bell v. Derwinski*, 2 Vet.App. 611 (1992). The panel topic, which had been planned several months prior, turned out to be well-timed in light of the Federal Circuit's recent decision in *Lang v. Wilkie*, 2020 WL 4810099, --F.3d--, (Aug. 19, 2020).

The panel consisted of four practitioners: Brian D. Griffin, Deputy Chief Counsel, Benefits Law Group, VA Office of General Counsel; Shereen M. Marcus, Veterans Law Judge, VA Board of Veterans' Appeals; Amy F. Odom, Appellate Strategy Coordinator, Chisholm Chisholm & Kilpatrick LTD; and James Ridgway, Partner and Director of Programs and Education, Bergmann & Moore LLC.

In *Bell*, the Appellant proffered four documents, which she believed were contained within with the record of proceedings before the Board. Three of those documents were generated by VA itself, and the fourth was a letter sent to VA by the Appellant. The Court of Appeals for Veterans Claims (CAVC) found that the Secretary had "constructive, if not actual, knowledge" of these documents and therefore held, as a matter of law, all four documents were before the Board when it made its decision.

With *Bell* in mind, James Ridgway began the conversation with three general thoughts. First, he noted that the CAVC issued its holding in *Bell* when VA's claims file consisted of a single paper file shipped to the Board. At that time, it was common for the RO to receive documents of which the Board was unaware because veterans did not know to send their evidence directly to the Board. Now with

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VBMS, centralized mail, and scanning, a veteran's claims file is not limited to a single physical location. Second, Mr. Ridgway noted that the term "constructive possession" is essentially a property law term dealing with who controls an object. He used the analogy of a drug dealer who never actually possesses the illegal substance yet still maintains control over the product. Finally, he reminded the panel and the audience of the historical and statutory context in which constructive possession abides. Namely, 38 U.S.C. § 7104 dictates that the Board's decisions are to be based on 1) the entire record of proceedings; 2) upon consideration of all evidence and material of record; and 3) on applicable provisions of law and regulation. Mr. Ridgway noted that "all evidence of material of record" must mean something different than the "record of proceedings." But that statute was drafted at a time when VA law was nascent and not as centralized as it is today.

Panelists Amy Odom, James Ridgway, Shereen Marcus, and Brian D. Griffin (clockwise from top left) discussed the past and future of the constructive possession doctrine during the Sept. 17 panel presentation.

Amy Odom next summarized the Federal Circuit's decision in *Lang v. Wilkie*, which abrogated the CAVC's holding in *Turner v. Shulkin*, 29 Vet.App. 207 (2018). In *Turner*, the question before the CAVC was whether 38 C.F.R. § 3.156(b) applied to records which were created within one year of a Regional Office (RO) decision, but which were not associated with the veteran's claims file until after that one-year deadline. Ms. Odom noted that the CAVC had distinguished between the Veterans Health Administration (VHA) and the Veterans Benefits Administration (VBA) in its holding. Specifically, it recognized that VBA may not always be aware of records generated by VHA. It therefore held that VHA records are only constructively before the VBA if the RO had some knowledge that the records existed.

In contrast, the Federal Circuit in *Lang* did not distinguish between the different parts of the agency. Although it recognized that it may be difficult for VBA to keep up with VHA additions to the record, it held that administrative difficulty did not mean the law was meaningless. The Federal Circuit therefore held that records generated by VHA are considered constructively received by VBA regardless of whether VBA has sufficient knowledge that they existed.

Ms. Odom concluded, however, by noting that under the AMA, section 3.156(b) no longer exists. Regardless of the Federal Circuit's holding in *Lang*, VA now requires a triggering event to alert VBA to the existence of records. That event is the filing of a Supplemental Claim with new and relevant evidence.

Next, Brian D. Griffin provided the government's perspective on the holdings in *Lang* and *Turner*. He remarked that it is never the government's interest to win or lose a particular case. Rather, as an attorney for VA, his goal is to ensure that the system is functioning fairly, predictably, and in an administrable manner. While there may be natural resistance to the idea that VA is not responsible for documents it generated, the law must define the scope of VA's obligation to obtain those records.

Mr. Griffin noted that the issue in *Bell* could have been resolved by looking at VA's duty to assist and its obligations under 38 C.F.R. § 3.103, which requires VA to include in the record any evidence submitted by the claimant in support of a pending claim. Had the CAVC in *Bell* considered the issue as simply a record-building error, there would have been no need to establish the constructive doctrine. However, the government did not see a reason to fight the doctrine because many of the cases following *Bell* often came out in VA's favor. One example of this is *Monzingo v. Shinseki*, 26 Vet.App.

97 (2012), in which the CAVC held that the connection between the document in question and the Appellant's claim was too tenuous to reasonably expect it to be part of the record.

More recently, however, the issue of constructive possession was brought up again in the case of *Euzebio v. Wilkie*, 31 Vet.App. 394 (2019). In that case, the CAVC instilled a "direct relationship" test between the document argued to be constructively in the record and the veteran's claim. That case is currently on appeal to the Federal Circuit. Mr. Griffin argued that, rather than consider the validity of the constructive possession doctrine, the argument should be reframed around the question: "What is the record?" He pointed to 38 U.S.C. § 7252(b), which refers to a single record of proceeds before both the Secretary and the Board.

Next, Mr. Griffin remarked that the Federal Circuit's holding *Lang*, which was issued while the parties were waiting for oral argument to be scheduled in *Euzebio*, makes the argument in *Euzebio* harder. *Lang*, however, deals with records more specific to the veteran – namely, the veteran's own treatment records – while the documents at *Euzebio* were more general, a National Academy of Sciences report. He summarized the tension point remaining after *Lang*: VA documents that are not specific to the veteran are still an open question. Finally, he noted that the preamble to the AMA regulations adopts the Court's holding in *Turner*, as a reasonable way to manage the tension between the VHA and the VBA: under the AMA, adjudicators must be made aware of the evidence before it becomes a part of the record.

Shereen Marcus turned the panel discussion to another case at the CAVC, *Page v. Wilkie*, which is currently stayed pending *Euzebio*. The appellant in *Page* argued that the Federal Circuit's holding in *Sullivan v. McDonald*, 815 F. 3d. 786 (Fed. Cir. 2016), requires the Board to remand his claim in order to obtain treatment records not in the record, regardless of whether those records are relevant to the claim on appeal. Ms. Marcus noted that this take on the constructive possession doctrine raised a concern about efficiency and fairness to the veteran. In other words, does the Board have to remand for records no matter what, even if those records will not help the veteran in his claim? While the Board does not currently develop evidence, Ms. Marcus noted that there may be room to expand the Board's ability to obtain those missing records and determine whether they are relevant, thus avoiding an unnecessary remand. She referred to 38 U.S.C. § 7104, which governs the Board's jurisdiction and requires the Board decision to be based on the entire record of proceeding. This potential solution, though, may conflict with the concept of one review on appeal.

Ms. Odom then added that there is a tension between the Federal Circuit's holding in *Sullivan* and the CAVC's duty to consider harmless error. Essentially, if the records VA failed to obtain are not relevant to the veteran's claim, the Court may find that the error was harmless. But, she posed, can an error really be harmless if the error was the failure to obtain records period, regardless of relevancy? Moreover, the CAVC noted in *Sullivan* that VA is only required to obtain records that have a reasonable possibility of substantiating a claim. Thus, a finding that the records are governed by *Sullivan* necessarily suggests that those records may have made a difference in the veteran's claim.

Mr. Ridgway agreed that the issues of relevancy and constructive possession are tightly related. He noted the importance of the Federal Circuit's holding in *Moore v. Shinseki*, 555 F. 3d 1369 (Fed. Cir. 2009), which found that records about the same condition are always relevant to claim, regardless of when those records were created.

Finally, the panel took questions the audience regarding the effect of the AMA's limitation on remands for development. Questions were raised about whether the record on appeal includes metadata, and whether a supplemental claim would solve missing records issues in the future. The panelists agreed that many questions remain about the future of the constructive possession doctrine.

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

Bar Association Hosts Afternoon with Advocates, Experts, and Adjudicators to Discuss Representing Veterans, Developing Claims

by Stacy Tromble

On August 20, 2020, the Bar Association hosted a panel discussion focusing on how to represent veterans in developing their claims. The panelists were Steven Reiss, Veterans Law Judge, Board of Veterans Appeals; Courtney Ross, Attorney, Chisholm Chisholm & Kilpatrick LTD; and Dr. Keri Jackson, former Department of Veterans Affairs C&P Examiner. Jenna Zellmer, Managing Attorney with Chisholm Chisholm & Kilpatrick, moderated the discussion.

After Bar Association President Jenny Tang welcomed everyone to the virtual event, the panelists started off their discussion with a dialogue on what makes a good expert opinion in VA cases. Judge Reiss spoke to the importance of a strong rationale based on accurate facts in the record. Ms. Ross discussed the importance of having experts explain how they formed the requested opinion. Dr. Jackson stressed the need to gather a good medical history, including interviews with the veteran because the veteran is the expert on what happened to them.

Veterans Law Judge Steven Reiss participated in the discussion.

The discussion then turned to the role of lay statements in formulating medical opinions. Dr. Jackson explained how medical professionals are trained in compiling the medical facts and drafting a clinical plan, which is much different than drafting medical opinions that involves both medical and legal concepts. Ms. Ross explained the need to bridge the medical-legal gap with experts, as well as the importance of keeping open communication with your experts so that they feel free to ask questions involving legal matters. Dr. Jackson noted that it can be helpful for advocates to share cases with their experts, so the medical professional can see things from other perspectives.

The panelists then explored the role of fact gathering in drafting medical opinions and in evaluating the weight of the opinion rendered. Ms. Ross highlighted the importance of being very familiar with the facts of the case, and how helpful it is to experts if the advocate drafts a factual roadmap of the case. Such a roadmap helps to ensure that the expert bases the opinion on accurate facts. She also noted that it is important for the expert to specifically address any unfavorable opinions of record. Judge Reiss discussed the importance of the facts shared by a veteran when seeking treatment. Dr. Jackson offered insights into the military medical culture, noting that, in her experience, most of the medical problems that bother people will never make it into the service treatment record—a fact which underscores the role of the medical professional in taking a full history and asking the right questions. Dr. Jackson also suggested that advocates encourage their experts to put their reasoning in lay terms.

Courtney Ross, attorney at Chisholm Chisholm & Kilpatrick, LTD, shared the importance of developing a roadmap as a basis for a medical opinion.

The conversation then turned to the role of vocational experts, and Ms. Ross commented on the importance of such experts. Judge Reiss noted that while medical evidence can tell you what the veteran's limitations are, vocational experts can help to tie these facts together.

Finally, the panelists discussed how to present a good medical opinion on a condition that is not generally well-known. Ms. Ross explained the importance of doing research about the condition so the advocate has a foundation and a theory before seeking the medical opinion. Judge Reiss spoke to the importance of understanding concepts such as latency period and where the veteran served.

Dr. Keri Jackson is a former Compensation and Pension examiner who shared her insights.

Stacy Tromble is the Director of Court of Appeals for Veterans Claims Litigation at the National Veterans Legal Services Program.

Honoring Retired Practitioners: *Andrew Mullen, Veterans Law Judge*

Note from the Editor: In this space, the* Veterans Law Journal *will honor recently retired and departed practitioners in our field. If you are interested in providing a memory, please email berner.jillian@gmail.com.

Veterans Law Judge Andrew Mullen passed away in May 2019. He began his career at the Board of Veterans Appeals as counsel in the 1970s, and later went to the VA Office of General Counsel, where he was the Deputy Assistant General Counsel of Professional Staffing Group VII (now the Court of Appeals for Veterans Claims Litigation Group) in the early years of CAVC and judicial review. In this role, VLJ Mullen was instrumental in the development of veterans law. The decision in *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990), notes that at oral arguments he made the "analogy most helpful to an understanding of the application of the 'benefit of the doubt' rule" of it being similar to "the tie goes to the runner" in sandlot baseball. This analogy is still used when teaching and applying the benefit of the doubt rule. He was appointed as a VLJ in 1996 and retired in 2011. VLJ Mullen was a beloved colleague, mentor, and friend to many at the Board. He was generous in sharing his knowledge of the law and was kind and courteous to everyone he interacted with, including the veterans whose claims were before him.

Submitted by Scott J. Shoreman, Counsel at the Board of Veterans' Appeals.

Message from the Outgoing President

Greetings colleagues,

My term as President of the CAVC Bar Association ends on October 22, 2020, and it has been an honor to serve alongside excellent Board of Governors members. What a busy year this has been! I had committed to expanding Bar Association programming and adapting our services for our growing membership, such as offering e-programming for our members outside DC. I am proud to say that we have met these goals and that we have accomplished much, despite the challenges we faced this year. I believe that we have made significant strides in our mission to promote justice for veterans and their families.

My favorite pre-pandemic event was *Veterans Law at the U.S. Supreme Court*, which was held in October 2019 at the U.S. Supreme Court to celebrate the CAVC's 30th anniversary. We were privileged to hear from special guest Justice Stephen Breyer and from a panel of Supreme Court practitioners, and we enjoyed luncheon and a courtroom tour. At the start of 2020 and before the pandemic, we began hosting online webinars, and we heard from experts

on *Statutory and Regulatory Interpretation in Veterans Law* and *The Nuts and Bolts of AMA*. We also hosted an informative panel on Blue Water Navy developments.

My favorite post-pandemic event so far was our June 2020 All-Day Virtual Veterans Law CLE, in which we offered 6 CLE credits to over 250 registrants. We hosted 6 hot topic panels that were taught by legal and medical experts. We also hosted a May 2020 *Virtual Coffee Break* on various legal developments. We were pleased to offer an August 2020 online panel on *Representing Veterans & Developing Their Claims* that focused on developing and evaluating medical evidence. Further, in September 2020, we hosted an in-depth online panel on *Constructive Possession*, with over 100 people in the audience. More information about the *Constructive Possession* panel is found in this volume.

Our 2020 recorded webinars and programs (not including the All-Day CLE) can be found here: https://www.youtube.com/playlist?list=PLpukzu-gLV97iwEoHIVNgN977ZI7KAxE3.

When the pandemic hit, the CAVC Bar Association's Board of Governors rose to the challenge, and we adapted our programming calendar to offer all virtual events. However, we had to cancel our in-person veteran service events. I must recognize Stacy Tromble, who had already organized our summer 2020 Vietnam War Memorial and Korean War Memorial washings, as well as a September 2020 Honor Flight, which is no small feat.

Our current programming calendar going forward is as follows:

- On October 22, 2020, @ 4pm ET, online via Zoom, we will host our 4th annual *VA Update* panel. We will hear from VA executives David J. Barrans, Chief Counsel, Benefits Law Group; Mary Ann Flynn, Chief Counsel, CAVC Litigation Group; Richard J. Hipolit, Deputy General Counsel, Veterans Programs; Cheryl L. Mason, Chairman, Board of Veterans' Appeals, and, Brianne Ogilvie, Deputy Executive Director, Appeals Management Office. The VA Update panel will be followed by our Annual Meeting. At that time, leadership of this bar association will pass to Jason Johns and the next Board of Governors. Further details will be provided by email.

- We will continue to provide support to the Court and to George Washington University Law School as they organize the National Veterans Law Moot Court Competition, to be held on November 13-15, 2020. Information regarding the NVLMCC has been sent by email. You can also find out more at https://www.nvlmcc.org/.

I hope you will join us for these programs!

Until October 22, 2020, I invite you to contact me if you have any concerns about general issues impacting members of this Bar, so that I may share them with the CAVC's Judicial Advisory Committee. I also welcome your suggestions regarding the services this bar association provides. I can be reached at jennyjtangattorney@gmail.com.

It has been a privilege to serve, and I look forward to what comes next for this bar association.

Jenny J. Tang
President
CAVC Bar Association

Message from the Incoming President

Hello to my fellow veteran advocates and members of the CAVC Bar,

I am thrilled to be the incoming president of the CAVC Bar Association as I enter my fifth year of service on the Board of Governors. I would much rather be speaking with you in-person at our annual membership meeting, see old friends and colleagues and make new ones. Alas, COVID-19 had something to say about that, so I will share my background and

goals for my term here in our great Veterans Law Journal.

I am an Army combat veteran of the war in Iraq (2003-04) where I received the Purple Heart and was awarded the Combat Action Badge. I have been through the VA system and personally understand the extreme challenges faced by veterans when applying for service-connected disability benefits. I have used my almost decade of military experience to fuel my desire to excel in my VA disability claims practice, fighting to assure that my fellow veterans received the benefits they have earned.

I live 15 miles outside of Madison, Wisconsin on 12 acres with my wife of 14 years, Carin, and our three children Abby (11), Ellie (11) and William (8) where I am proud to be a partner with the Wisconsin based law firm of West & Dunn. Our firm was formed by a former Army Ranger (Iraq & Afghanistan) and the daughter of a Vietnam veteran. Needless to say, our firm is very veteran-centric, and we assure that any veteran who walks through our door, whether for a VA appeal or otherwise, is treated with the utmost respect and attention. Prior to joining West & Dunn I had served as the deputy secretary for the Wisconsin Department of Veterans Affairs.

My service to my fellow veterans extends well beyond practicing law in the VA disability claims and civil law realms. I perform *pro bono* legislative advocacy work in the State of Wisconsin and in the U.S. Congress on behalf of numerous veteran service organizations and recently became the first Post-9/11 veteran to be elected the State Commander for the VFW of Wisconsin. Additionally, I am the National Vice-President for the Purple Heart Riders, sit on the Advisory Council for the University of Wisconsin Veterans Law Center and am a member of the Veterans for Smart Power National Leadership Council of the U.S. Global Leadership Coalition.

It is hard to say what sort of in-person events, activities and legal training that will be permissible during my term as your president. However, I have to applaud outgoing President Jenny Tang for her ability to shift our way of doing things when COVID hit. She rallied me and the rest of the Board of Governors around virtual seminars and legal education. It certainly provided a great resource for our members, and, in the end, I believe more members were able to participate. I plan to carry on with this format and continue to provide a valuable benefit for all of our members.

In addition to reaching more members via virtual seminars and legal education, we need to provide an easily accessible mode of sharing information and updates with our members in real time. Thus, a focus will be placed upon social media, website, and use of our e-newsletter. Further, it is clear to me that we have a significant number of members who wish to be involved in the Bar more so we will be assessing how we can expand our committee structure and volunteer opportunities to accomplish this.

The cooperation between the Bar Association and the judges of the Court is strong and is something we are very fortunate to have. I look forward to working with Chief Bartley and all members of the bench in expanding our relationship. In fact, I have already accepted an invitation from Judge Allen to sit as a judge for the semi-finals of the Court's moot court competition in November and have no doubt it will be an enjoyable experience. As I mentioned, the start of my term under the current circumstances is not something I, or any of us for that matter, envisioned when I was elected president-elect last year. And I cannot predict to what extent our activities and operations will continue to be impacted, or for how long. I can tell you however, that the mission of the practitioners who make up the membership of the CAVC Bar Association is an important and noble one. One I do not take lightly. As your new president I will work diligently to see that the brave men and women veterans of the United States Military will always have well trained, highly

motivated, and understanding professionals involved in the VA disability and compensation claims process.

Cheers,
Jason E. Johns
jjohns@westdunn.com

Message from the Chief Judge

Dear Colleagues,

Greetings everyone--I hope you all enjoyed your summer and have been able to stay well during this stage of the pandemic.

Despite the challenges that current events pose, the Court continues to process and decide appeals and petitions at an unprecedented rate. As you know, we've been operating with a remote workforce since March, with the exception of a few staff who must be physically present onsite. As has been the case during the last six months, our remote operations don't affect appellants, petitioners, or practitioners. Given our success with operating remotely, and also given the persistence of the virus, the Court will continue to operate remotely at least for the rest of 2020.

And in recognition of the fact that there is no way the Court would be able to function so smoothly through the pandemic without our IT team, in September the Board of Judges presented the Frank Q. Nebeker Outstanding Achievement Award to Kendyll Benson, the Court's IT Director, and the staff of the Office of Information Technology. In addition to Mr. Benson, the IT staff consists of Ken Rowland, Michael Biedzinski, Kerry Benton, Vladimir Bunyakin, Anika Brantley, Mohammed Rahman, James Lee, Donald Christian, Sai Gotety, Parthvee Sangra, Lionel White, and Michael Statman. The Nebeker award is named after the Court's first Chief Judge and is presented to recognize exceptional and exemplary service to the Court by a member of the Court's staff or a Court contract employee. Congrats to our IT staff—thanks to them, members of the Bar Association can rely on uninterrupted processing and decision-making during this difficult time.

Great news! As you may have heard, two new Judges recently joined the Court, bringing us back to a full complement of nine Judges. Scott J. Laurer took the oath of office on August 3, and Grant C. Jaquith was sworn in on September 2. They both had distinguished legal and military careers before joining the Court. Most recently, Judge Laurer served as Deputy Legal Advisor to the National Security Council and Judge Jaquith was the U.S. Attorney for the Northern District of New York. You can read their complete bios on the Court's website, but suffice it to say, we are thrilled to have such accomplished individuals on our bench.

Judges Laurer and Jaquith are starting at a particularly exciting time at the Court, as we have a number of noteworthy cases pending panel or en banc review and we continue to grapple with the class action arena. All nine Judges will participate in oral argument and full court consideration of *Perciavalle v. Wilkie*, 17-3766, a case regarding CUE. In *Ferguson v. Wilkie*, 19-6857, a three-judge panel of the Court will consider whether and to what extent the AMA impacts the Court's prior holding in *Rice v. Shinseki*, 22 Vet.App. 447 (2009), that TDIU is generally part and parcel of a claim for an increased evaluation for an already service-connected disability.

There are other notable developments at the Court since my last message in July. First, the Judicial Advisory Committee (JAC) is working with the Court and the Veterans Consortium Pro Bono Program to start a pilot program that would provide limited representation to pro se appellants during

the Rule 33 mediation process. As you know, at the current time self-represented appellants are not able to benefit from Rule 33 because of their pro se status. The goal of this project is to ensure that self-represented appellants receive the same benefits of the mediation process that represented appellants currently receive, and to preserve resources that would otherwise be spent briefing and deciding appeals where the appellant is pro se but VA has conceded error. Stay tuned for further information as this pilot program gets up and running. In addition, the JAC is working with a subcommittee of Judges on developing a uniform substitution rule. The subcommittee reviewed the JAC's recommendations on substitution and the group is working on clarifications. The Board of Judges hopes to see a revised proposal soon.

The Board of Judges also recently hosted a virtual briefing with a complex litigation expert, who provided recommendations on how the Court might use a special master in class action cases. As I mentioned in my July column, a subcommittee of Judges is brainstorming ideas; collaborating with a subcommittee of the JAC; and exploring the issue further.

Before concluding, I want to commend Jenny Tang and the entire Board of Governors for their work during the last year. They have kept Bar Association events moving forward even in these difficult times. Kudos, and thank you to all who were involved in the Bar Association's programs and administrative work.

In closing, I hope that you remain healthy and continue to receive personal satisfaction from your work before the Court.

Meg

Federal Circuit Affirms Limitation on PACER Fees

by Benton Jay Komins

Reporting on *Nat'l Veterans Legal Servs. Program v. United States*, Fed. Cir. Nos. 19-1081 & 19-1083 (August 6, 2020).

On August 6, 2020, the United States Court of Appeals for the Federal Circuit (Federal Circuit) affirmed that a statutory note to the E-Government Act, 28 U.S.C. § 1913 ("Section 1913 Note"), limits Public Access to Court Electronic Records (PACER) fees to the amount needed to cover expenses incurred in services providing public access to federal court docketing information.

Three national nonprofit organizations that download public court records via PACER brought a class action against the United States, grounded in an argument that PACER fees exceed the amount that could be charged lawfully. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) denied the federal government's motion to dismiss the class action and certified one of the Class's claims—that the fees charged for accessing court records are higher than necessary and therefore violate the E-Government Act. After limited informal discovery, the Class and the federal government filed cross-motions for summary judgment as to liability. The D.C. Circuit denied the motions in part and granted the motions in part and, at both parties' request, certified the summary judgment order for interlocutory appeal.

On interlocutory appeal, a unanimous panel of the Federal Circuit wrote that the D.C. Circuit "got it right" and held that PACER fees may be used to cover only expenses incurred in services providing public access to federal court electronic docketing information. Writing for the panel, Judge Hughes provided an extensive disquisition of the history of Section 1913 Note, underscoring the key players in the development and implementation of the Act's provisions. Congress passed the original version of

Section 1913 Note in the early 1990s as an experimental program for the public to access federal court information electronically. This experiment developed into the PACER system, whereby the public has the ability to access federal court dockets, motions, pleadings, and orders online. PACER eliminated the need to travel to respective federal courthouses to gain access to such documents.

But the advent of PACER, which "revolutionized" public access, came at added administrative costs—wherein the legislative and administrative history of Section 1913 Note comes to the forefront. In December 2002, Congress amended the Act, such that it mandated the use of internet-based technology to allow for the public to access government information and services.

The Administrative Office of the United States Courts (AO) functions as an agency within the Judicial Branch, providing a broad range of support services; in contrast, the Judicial Conference serves as the national policymaking organ of the federal judiciary. When it comes to federal appropriations, the AO and Judicial Conference work in concert; with the former developing an annual federal judiciary budget and the latter providing input for congressional approval. Judge Hughes opined that the federal judiciary is a pendent branch of government, which depends largely on appropriations of taxpayer dollars from Congress in order to function. While annual appropriations for the federal judiciary cover salaries and the maintenance of courthouses, the federal judiciary self-funds certain services by charging direct fees to the public. Since its advent, PACER has operated as a self-funded, fee-driven entity. Spurred on by the encouragement of Congress, the Judicial Conference increased PACER fees from $0.07 a page to $0.08 a page in 2004, which created surpluses to invest in internet-based systems beyond PACER and the Case Management and Electronic Case Filing (CM/ECF) System.

Within this context, the Federal Circuit found that the instant appeal was one of statutory interpretation, as neither the Class nor the federal government pointed to any facts in dispute at this stage, i.e., the instant interlocutory appeal. The Class argued that the plain language of Section 1913 Note plainly and unambiguously only authorizes PACER fees in direct exchange for PACER services rendered. Stated differently, the cost of accessing PACER records online must correlate directly to the costs associated with making those PACER records available. Further, the Class argued that the E-Government Act's 2002 amendment of Section 1913 Note necessitates interpretation of the statute to restrict PACER fees from exceeding amounts to offset PACER costs. Specifically, the Class argued that the amended language of "may only to the extent necessary" limits the scope of authorization of PACER fees. To bolster this contention, the Class pointed to text far removed from "may only to the extent necessary" to fill in only to the extent necessary "to reimburse expenses incurred in providing" access to PACER.

The federal government argued that Section 1913 Note permits the assessment of PACER fees to the "extent" required to access information through automatic processing equipment. PACER fees, according to the federal government, needed to cover the costs of not only the programs which the D.C. Circuit held permissible, CM/ECF System and Electronic Bankruptcy Noticing (EBN), but also the four other programs that provide electronic access to information.

The Federal Circuit disagreed with both of these interpretations of Section 1913 Note. Congress expressly contemplated PACER, CM/ECF, and EBN when it encouraged the Judicial Branch to increase access to the courts in the late 1990s and early 2000s. Hence, the D.C. Circuit was correct in interpreting Section 1913 Note as authorizing the Judicial Conference to set PACER fees high enough to cover the costs of providing access to federal docketing information. The Class's argument concerning the E-Government Act's 2002 amendment of Section 1913 Note could not be sustained by its plain text. Rather than limiting the scope of authorization of PACER fees, "may only to the extent necessary" changed the fee structure from a mandatory to a permissible payment scheme. Prior to the 2002 amendment, the federal judiciary had to charge fees for electronic access. Post-2002

amendment, the imposition of fees for electronic access to federal court information became discretionary.

Beyond the realm of statutory interpretation, the Federal Circuit agreed with the Class and amici that the First Amendment stakes are high here. When large parts of the public cannot afford to pay the fees to gain access to court information, it will curtail the public from participating and serving as a "check" on the federal judicial process. However, the D.C. Circuit's interpretation of the permissible use of PACER fees for PACER, EM/ECF, and EBN will not result in a fee scheme that will impede, to any great extent, public access to federal judicial court information.

Upon remand to the D.C. Circuit, the Federal Circuit left open discretion to permit additional argument and discovery concerning the nature of the expenses within the ambit of CM/ECF and whether PACER fees could pay for all of them.

Benton Jay Komins is an Associate Counsel at the Board of Veterans' Appeals.

Functional Impairment under *Saunders* and the Role of VA Regulations

by Andrew Strickland

Reporting on *Wait v. Wilkie*, No. 18-4349 (August 26, 2020).

In *Wait*, the Court addressed two issues: (1) what is necessary for a clamant to demonstrate that their pain reaches the level of a functional impairment of earning capacity to constitute a disability as described in *Saunders v. Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018); and (2) whether VA's regulations contemplate, as a matter of law, the level of functional impairment of earning capacity necessary to constitute a disability. The Court held that, to establish the presence of a disability pursuant to *Saunders*, there must be competent evidence specific to the claimant tending to show that their impairment rises to a level that affects earning capacity, which may include showing manifestations of a similar severity, frequency, and duration as those VA has determined by regulation would cause impaired earning capacity in an average person. Judge Allen concurred with the majority in its legal interpretation of *Saunders* and pain as a disability but dissented with the majority in its application of law to Mr. Wait's appeal.

Mr. Wait served on active duty from January 1986 to January 1989 and from April to June 2008, when he was medically discharged from service. Service treatment records from June 2008 reflected complaints of right hip pain over two-and-a-half weeks with a severity described as seven on a scale of ten, increasing while in activity. An examination revealed that he had right hip joint pain and stiffness with soft tissue pain, deep pain in the greater trochanter, hip flexor tenderness, and pain on active external rotation; however, there was no hip weakness, dislocation, or tenderness with ambulation.

Mr. Wait also complained of pain in his right toe. He reported that his ability to work in his primary military specialty was limited by his right foot pain or a bunion. After a recommendation by a physician with the Entrance Physical Standards Board, the veteran signed a statement that he was being medically discharged for right foot pain.

In January 2013, Mr. Wait filed a disability compensation claim for his right hip, which he attributed to strenuous training and an injury during service in 2008. VA treatment records from December 2012 reflected complaints of low back and right hip pain that worsened with sitting and standing, which interfered with his quality of life by impacting his sleep, general activity, and mobility. In May 2013, VA treatment records revealed complaints of sharp, aching pain in his right hip that does not tingle or radiate but improves when walking. He described the pain from his back, right hip, and left leg as chronic with increased pain while sitting and lying down. Similarly, in a July and August 2013 emergency room visit for chronic pain, he complained of bilateral hip, low back, and left

knee pain that worsened with sitting and lying down.

In July 2018, the Board denied entitlement to disability compensation for Mr. Wait's right hip condition finding that medical evidence did not reflect a current clinical diagnosis and that he was not competent to diagnose the condition as he lacked the requisite medical training and expertise. The Board also found that Mr. Wait's pain did not rise to the level of a disability as contemplated in *Saunders*. The Board noted that Mr. Wait's right hip pain did not affect earning capacity. He reported that could walk normally despite his pain, and he had normal range of motion for all extremities.

At the Court, Mr. Wait argued that VA regulations contemplate, as a matter of law, the level of functional impairment necessary to establish a disability under *Saunders*. However, the Court disagreed and concluded that a plain reading of *Saunders* does not support such a broad interpretation. Rather, the Court stated that *Saunders* suggests that VA undertake an individualized assessment, to include a preliminary evaluation, of the degree of impairment. The Court, interpreting *Saunders*, held that although pain alone may serve as a functional impairment, the mere existence of pain is not enough to constitute a disability without an impairment to earning capacity.

The Court then turned to the role of VA's rating schedule in assessing the presence of a disability. It explained that "VA regulations invoke functional limitation as the indicator of reduced earning capacity and the barometer of disability." Thus, the Court concluded that where VA has determined by regulation that the average person with certain manifestation would suffer an impairment of earning capacity, those regulations may be relevant and instructive with regard to whether an individual with similar manifestations has functional impairment of earning capacity. The Court noted that merely pointing to a diagnostic code, that recognizes a particular symptom or manifestation, does not, as a matter of law, demonstrate the level of functional impairment necessary to establish a disability in an individual without evidence specific to the individual as to frequency, severity, or duration.

The Court held that, to establish the presence of a disability under *Saunders*, there must be competent evidence specific to the claimant tending to show that their impairment rises to a level that affects earning capacity, which may include showing manifestations of a similar severity, frequency, and duration as those VA has determined by regulation would cause impaired earning capacity in an average person.

Mr. Wait initially argued that specific regulations that contemplate sleep difficulties or disturbances, and recognize trouble sitting and painful motion, demonstrate that his pain and its resulting effects constituted a disability under *Saunders*. However, the Court concluded that Mr. Wait cannot rest solely on VA's regulations to establish that the Board erred in finding no current disability. Rather, he must show that his manifestations are of sufficient severity, duration, and frequency that they effect his ability to function under the ordinary conditions of daily life.

Mr. Wait also argued that a remand was warranted for the Board to reassess the favorable evidence showing a presence of a disability. The Secretary argued that the Board conducted the analysis required under *Saunders* when it found that Mr. Wait's pain does not rise to the level of causing functional impairment in earning capacity. Moreover, the Secretary argued that Mr. Wait has not demonstrated prejudicial error. The Court agreed that Mr. Wait had not demonstrated prejudicial error. It explained that the Board benefits from a presumption that it has considered all the evidence of record, and the Court cannot be expected to make specific factual findings that might facilitate a prejudicial error analysis. The Court noted that Mr. Wait conceded that the evidence does not clearly attribute his difficulty sitting with his right hip pain and the record is premature as to the actual cause of his functional limitation.

Mr. Wait, for the first time, asserted at oral argument that VA failed in its duty to assist by not

obtaining evidence regarding the extent of his functional limitation, and that a remand might otherwise trigger VA to develop the record. The Court declined to address this argument.

The Court then addressed the dissenting opinion's arguments. The dissenting opinion contended that the Court (1) applied a legally erroneous standard to assess whether Mr. Wait was prejudiced by the Board's decision, and (2) erred by declining to address Mr. Wait's late-raised argument concerning the duty to assist. The Court explained that in applying the harmless-error rule, Mr. Wait carried the burden to show that the Board's error was harmful and had not overcome this burden. Further, the Court explained that declining to address the late-raised argument was consistent with case law, as Mr. Wait had not raised the argument until the rebuttal portion of oral argument, it had not been briefed, Mr. Wait did not explain why the issue was not previously raised, and Mr. Wait had not pursued the issue after oral argument. The Court concluded that Mr. Wait had an opportunity to raise the duty to assist issue but did not offer a reason for the Court to otherwise address it after raising the issue at a late stage.

Judge Allen concurred with the majority in its legal interpretation of *Saunders* and pain as a disability but dissented with the majority in its application of law to Mr. Wait's appeal. Judge Allen wrote that the majority erred when it did not find prejudicial error when it decided that the evidence in concert with the VA regulations to which Mr. Wait cites was insufficient to establish functional impairment on his earning capacity. Judge Allen included an appendix to his opinion that listed evidence of how Mr. Wait's hip pain may result in difficulties sitting and sleeping. Judge Allen wrote that remand was warranted because (1) the Board did not have the benefit of the Court's opinion in Mr. Wait's case, (2) the majority should have addressed Mr. Wait's duty to assist argument given its unique impact when applying *Saunders*, and (3) the majority used a legally erroneous standard to assess harmless-error. As to (3), Judge Allen explained that the breadth, depth, and scope of the Court's factfinding goes beyond the boundaries to assess prejudicial error, especially in a case of first impression such as Mr. Wait's.

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

Federal Circuit Affirms Court's Application of Section 3.156(c)(3) for Effective Date of Award Based on Newly-Discovered Service Records

by Jillian Berner

Reporting on *Jones v. Wilkie*, No. 2018-2376 (July 15, 2020).

Veteran Thomas Jones served on active duty in the Army from 1967 to 1974 and served in the Army National Guard from 1987 to 1990. Following his discharge, he filed a claim for disability compensation benefits for a nervous disorder and a right leg wound in 1994. The Regional Office ("RO") granted the veteran's claim for service connection for a right leg scar in 1994 and awarded a noncompensable disability rating. The RO denied the claim for a nervous condition, because there was no objective evidence of an in-service stressor, despite incomplete service medical records. Mr. Jones did not appeal the RO decision.

On October 7, 2002, Mr. Jones filed a request to reopen the claim for nervous disorder, which he now characterized as a claim for post-traumatic stress disorder ("PTSD"), asserting that he was mugged while stationed in Germany. The RO determined that the evidence did not establish and in-service stressor and that additional certain evidence submitted by Mr. Jones did not constitute new and material evidence sufficient to reopen the claim. Mr. Jones appealed the denial. In 2006, the VA issued a deferred rating decision directing the RO to attempt to obtain the active duty service records. The RO obtained Mr. Jones's service medical records in March 2006 and his personnel records in June 2006.

In August 2008, the Board of Veterans' Appeals ("Board") granted the Veteran's request to reopen his claim. The Board remanded the claim to obtain further information from two people with knowledge of the alleged in-service assault, to obtain all available records related to the claim's development, and to readjudicate the claim for PTSD.

In 2010, the RO granted the Veteran's claim for PTSD and a schizoaffective disorder, bipolar type, based on post-service VA medical center treatment records, but not on his active duty service records. The Veteran disputed the initial disability rating and was eventually granted a 100% disability rating, effective October 7, 2002. Mr. Jones appealed the effective date determination, seeking an effective date of June 7, 1994—the date on which he first filed his claim for benefits. In 2014, the Board denied his claim for entitlement to an earlier effective date. The Veteran appealed to the Court of Appeals for Veterans Claims ("Court"), which remanded the case for the Board to provide an adequate statement of reasons or bases for its factual findings, including whether a 1971 service medical record and a 1987 Army National Guard medical record were associated with the Veteran's file at the time of the 1994 RO decision. The Veteran died in November 2014; his wife, Florence Jones, was substituted as claimant.

On remand, the Board issued a decision in September 2016, finding that the 1987 Army National Guard record was associated with the file at the time of the 1994 RO decision. The Board held that it could not determine whether the 1971 service treatment record was associated with the file at the time of the 1994 RO decision, but that, regardless, neither of the records was the basis, partially or wholly, for the decision reopening his claim for service connection. The Board found that the RO already knew in 1994 that Mr. Jones had incurred a right leg injury in 1968, but Mr. Jones did not report the relation of PTSD to that injury until October 2002 and he had not previously reported any wounds associated with the mugging incident. Because the October 2002 report was the basis of the claim being granted, the service records did not trigger the application of 38 C.F.R. § 3.156(c)(3) and the appropriate effective date remained October 2002. Mrs. Jones appealed to the Court.

The Court affirmed the Board's ruling. The Court held that the VA had reconsidered Mr. Jones's claim pursuant to Section 3.156(c)(3) when they remanded the claim in 2008 and when the RO granted benefits in 2010. The Court affirmed the Board's determination that the service records in question were not part of the basis of the award and that the appropriate effective date was October 2002, because the decision granting the claim was based on evidence created in 2003 and 2008. Because that evidence did not exist in 1994, under Section 3.156(c)(3), the effective date could not relate back to the date on which VA received the previous claim. Mrs. Jones appealed to the Court of Appeals for the Federal Circuit (Federal Circuit).

On appeal at the Federal Circuit, Mrs. Jones argued that the Court misinterpreted Section 3.156(c)(3) and that the Court improperly held that that provision requires newly-discovered service records be the basis for both reopening the claim and granting the underlying claim, instead of simply serving as the partial basis for the claim.

The Federal Circuit affirmed the Court's decision. First, the Federal Circuit held that the Court properly found that the VA considered the 1971 service records, together with the other evidence of record, on remand. The Federal Circuit determined that Mrs. Jones failed to identify any particular evidence that the VA failed to reconsider and failed to identify what exactly the VA should have done differently to reconsider the claim. Because "reconsideration" under Section 3.156(c)(1) requires the agency to reassess the original decision in light of the newly-discovered service records, including potential additional development of evidence, and the VA did just that, the VA properly "reconsidered" the claim.

The Federal Circuit also held that the Board properly applied the Section 3.156(c)(3) standard for the effective date, as the award of benefits was not predicated on the records that were missing at the time of the original adjudication. Therefore, the

effective date could not be earlier than October 2002.

Mrs. Jones also argued that the Court improperly required that the newly-discovered service records form the basis of both the reopening of the claim and the award of the claim. The Federal Circuit disagreed with Mrs. Jones's characterization of the Board's and the Court's decisions and held that the Court did not err in its interpretation of Section 3.156(c)(3), as the Court looked to the Board's proper analysis of the basis of the eventual award of benefits, not the reopening of the claim.

The Federal Circuit affirmed the Court's determination that error by the Board in its reference to the reopening of the claim or the reconsideration of the denial of the claim on the merits was harmless, as the Board applied the proper standard in analyzing the newly-associated service records.

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"Past-due Benefits" Refers to Amount Improperly Withheld from Veteran, Not Entire Invalidated Debt, For Fee Agreements

by Annette Griffin

Reporting on *Gumpenberger v. Wilkie*, No. 19-1904 (Sept. 1, 2020).

In *Gumpenberger v. Wilkie*, the Federal Circuit held that under 38 U.S.C. § 5904(d)(1), the term "past-due benefits" referred to the amount of benefits owed or unpaid to the veteran as a result of improper withholdings of the veteran's benefits by the VA.

Mr. Graham had been in receipt of monthly disability compensation benefits since December 2001. In 2009, the VA determined that Mr. Graham had been overpaid in the amount of $199,158.70. In August 2009, the VA began withholding a portion of the veteran's monthly disability benefits to recoup the debt.

In January 2011, Mr. Graham appointed Mr. Gumpenberger as his representative. Both parties signed a direct-pay, contingency fee agreement stating that Mr. Gumpenberger's fee would be "20 percent of all past due benefits awarded to [Mr. Graham] as a result of winning [his] appeal as provided in 38 C.F.R. § 14.636."

In September 2013, the Board of Veterans' Appeals (Board) reversed the debt ruling from the Regional Office (RO). By the time the VA stopped withholding compensation from Mr. Graham's monthly benefits, the VA had recouped $65,464 from Mr. Graham.

In April 2014, the RO determined that Mr. Gumpenberger was entitled to a fee of 20 percent of $65,464, which was the amount that had been improperly withheld from Mr. Graham. Mr. Gumpenberger appealed, arguing that his fee should be based on the total invalidated debt because the benefit Mr. Graham received was the cancellation of the debt. In September 2016, the Board rejected Mr. Gumpenberger's argument and agreed with the RO's fee determination. The Court of Appeals for Veterans Claims (Court) affirmed the Board's holding that Mr. Gumpenberger was entitled to 20 percent of the amount improperly withheld from Mr. Graham's monthly benefits, instead of 20 percent of the entire invalidated debt.

The issue before the Federal Circuit related to the interpretation of the term "past-due benefits" under 38 U.S.C. § 5904(d)(1). Section 5904 allows attorneys or agents to represent benefits claimants at the VA on a contingent fee basis while also authorizing the VA to pay any fee owed to the attorney or agent "directly from any past-due benefits awarded on the basis of the claim." Under a direct-pay agreement, the fees to be paid to a veteran's agent or attorney "may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim."

The Federal Circuit determined that the plain meaning of "past-due" was "unpaid or owed," such

that "past-due benefits awarded on the basis of the claim" unambiguously referred to the amount of benefits unpaid or owed to the claimant when the claim was granted.

The Federal Circuit observed that this statutory interpretation was consistent with prior decisions. For example, the Federal Circuit previously determined that any compensation not paid to the claimant in a given month becomes a "past-due benefit." The Federal Circuit held that "the total amount of any past-due benefits awarded on the basis of the claim is the sum of each month's unpaid compensation . . . beginning on the effective date and continuing through the date of the award." The Federal Circuit thus equated the "total amount of any past-due benefit awarded on the basis of the claim" with the amount of benefits that the veteran was already entitled to receive but had not yet been paid.

Applying these principles, the Federal Circuit concluded that the plain meaning of "past-due benefit" consisted of the amount of unpaid benefit improperly withheld and now owed to Mr. Graham, or $65,464. As Mr. Graham had not been owed or entitled to receive the entire amount of the invalidated debt at any time during the appeal period, the Federal Circuit rejected Mr. Gumpenberger's argument that "past-due benefits" included the entire amount of Mr. Graham's invalidated debt and affirmed the Court's decision.

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Federal Circuit Holds Surviving Spouse of Veteran Without Service-Connected Disabilities is Ineligible for VA Home Loan Guaranty Benefits, Even Where Eligible for § 1151(a) Benefits

by Alex Hampton

Reporting on *Burkhart v. Wilkie*, 2019-1667 (August 21, 2020).

In *Burkhart*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that the surviving spouse of a veteran who died without any service-connected disability was not eligible for VA home loan guaranty benefits under title 38, chapter 37 of the United States Code, even where the surviving spouse had been awarded dependency and indemnity compensation (DIC) benefits under 38 U.S.C. § 1151(a). The Court rejected the appellant's argument that VA was barred from reversing an erroneous issuance of a Certificate of Eligibility (COE) for home loan guaranty benefits pursuant to the "incontestability" provision in 38 U.S.C. § 3721. Finally, the Federal Circuit found that the U.S. Court of Appeals for Veterans Claims (CAVC) did not err in declining to grant the appellant equitable relief.

U.S. Army veteran David Burkhart did not have any service-connected disabilities during his life. He died while under VA care in October 2003. Sally Burkhart, David's surviving spouse, subsequently filed a claim for DIC benefits pursuant to 38 U.S.C. § 1151(a), which provides for compensation for a surviving spouse due to a qualifying death of a veteran "in the same manner as if such … death [was] service-connected." Ms. Burkhart's claim was granted in an August 2007 rating decision on the basis that David's death was caused by "an event not reasonably foreseeable" while under VA care.

Ms. Burkhart then sought a COE for VA home loan guaranty benefits in 2007. Such benefits are provided for in chapter 37 of title 38 of the United

States Code. Persons eligible for such benefits include "the surviving spouse of any veteran … who died from a service-connected disability . . . ." The benefit in question amounts, in pertinent part, to a guarantee by the U.S. Government of any loan made to an eligible person for the purposes of purchasing, constructing, or refinancing a home.

VA issued Ms. Burkhart a COE in 2007, but she did not use it to enter into any loan agreement. In 2013, she again sought a COE for home loan guaranty benefits. This time, VA notified her she was ineligible, and that the 2007 COE had been issued in error. Ms. Burkhart perfected an appeal to the Board of Veterans' Appeals (Board), and in March 2016, the Board denied her claim.

On appeal to CAVC, Ms. Burkhart raised three arguments. First, she asserted that her eligibility under 38 U.S.C. § 1151(a), which provides for compensation for a veteran's death "in the same manner as if" the death was service connected, should render her eligible for benefits under chapter 37, which are available when a veteran "die[s] from a service-connected disability . . . ." That is, Ms. Burkhart argued that David's death should be treated "as if" it was service-connected for purposes of Chapter 37. Second, she contended that VA was barred from reversing its 2007 issuance to her of a COE pursuant to the "incontestability" provision contained in 38 U.S.C. § 3721, which provides that "evidence of guaranty or insurance issued by [VA] shall be conclusive evidence of the eligibility of the loan for guaranty or insurance . . . ." Third, Ms. Burkhart asserted that CAVC should exercise equitable powers to grant her home loan guaranty benefits.

CAVC rejected all three of Ms. Burkhart's arguments, and the Federal Circuit affirmed CAVC's decision.

The Federal Circuit found that the plain language of 38 U.S.C. § 1151(a) contradicted Ms. Burkhart's first argument in that § 1151(a) expressly provides for compensation "as if" the disability or death in question were service connected only for purposes of chapter 11 and chapter 13 of title 38. VA's home loan guaranty program, the Court noted, falls under chapter 37. The Court found that because § 1151 "expressly enumerated the chapters to which it applies," it was not "redefin[ing] a service-connected death or disability for all benefits."

Regarding Ms. Burkhart's second argument, the Court noted that 38 U.S.C. § 3721 – the incontestability provision – made no reference to loan beneficiaries, but instead referred only to VA and the lender. The Court further determined that the description of the home loan guaranty process in § 3702(c) weighed against Ms. Burkhart's argument. That section provides that an eligible person may request a COE from VA, and that subsequently, once a loan is issued, the lender must notify VA of the loan details and VA in turn provides a loan guaranty certificate or other evidence of the guaranty. The Court noted it was this "loan guaranty" provided to the lender by VA, and not the issuance of a COE to potential beneficiary, which is the subject of the incontestability provision in § 3721. For these reasons, the Court held § 3721 "operates (1) as to the loan guaranty between VA and the lender and (2) only once a lender has actually issued a loan." In Ms. Burkhart's case, no loan had yet been issued.

Finally, the Federal Circuit disagreed with Ms. Burkhart's argument that CAVC should have granted her equitable relief. The Federal Circuit cited its recent decision in *Burris v. Wilkie*, 888 F.3d 1352 (Fed. Cir. 2018) for the proposition that while Congress had granted VA the power to grant equitable relief in 38 U.S.C. § 503(b), it had not provided similar powers to CAVC. Instead, the Federal Circuit noted, CAVC is "statutorily permitted to review [VA] decisions involving legal and factual questions related to statutory benefits" but not "extra-statutory relief . . . ." The Court further noted that § 503(b) is "[t]he only provision in title 38 that addresses equitable relief in this context," thus indicating that Congress did not intend for CAVC's jurisdiction to include equitable relief. For these reasons, the Court agreed with CAVC that it could not grant equitable relief without "inappropriately expand[ing] [its] jurisdiction."

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Court Affirms Requirement of DSM-5 Diagnosis for Psychiatric Disabilities under *Saunders*

by Hilary S. Styer

Reporting on *Martinez-Bodon v. Wilkie*, No. 18-3721 (August 11, 2020).

In *Martinez-Bodon v. Wilkie,* the United States Court of Appeals for Veterans Claims (Court) addressed whether a claimant may establish service connection for a psychiatric disability that is based on symptoms and functional impairment, but does not have a diagnosis that conforms to the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5).

In April 2016, Mr. Martinez-Bodon filed claims seeking entitlement to service connection for diabetes mellitus and a mental condition that he claimed was secondary to diabetes mellitus.

A VA examiner concluded after Mr. Martinez-Bodon's VA examination in September 2016 that "since there are no criteria for a mental condition per DSM-5," she could not answer whether Mr. Martinz-Bodon's mental condition was due to his diabetes mellitus.

In the June 2018 decision on appeal, the Board of Veterans' Appeals (Board) denied entitlement to service connection for an anxiety disorder and found that Mr. Martinez-Bodon did not have a current diagnosed disability. In that decision, the Board relied on the September 2016 VA examiner's finding that Mr. Martinez-Bodon did not meet the DSM-5 criteria for a mental condition. The Board also found there was no additional medical evidence, including in Mr. Martinez-Bodon's VA treatment records, in significant conflict with the September 2016 VA examination finding. In addition, the Board found that although Mr. Martinez-Bodon was competent to report symptoms observable to a layperson, he was not competent to provide a diagnosis of a mental condition.

On appeal to the Court, Mr. Martinez-Bodon argued that the Board erred in requiring a diagnosis of a psychiatric disability in order to establish the current disability element of his service connection claim, as such a requirement is inconsistent with the holding in *Saunders v. Wilkie*. 886 F.3d 1356 (Fed. Circ. 2018). In *Saunders*, the Federal Circuit held that pain alone, without a specific diagnosis or identified disease or injury, may constitute a disability under 38 U.S.C. § 1110 in order to establish service connection. 38 U.S.C. § 1110 is the statutory authority for basic entitlement to VA compensation and provides such compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty," but does not define "disability." Specifically, Mr. Martinez-Bodon contended that the holding in *Saunders* extends to more than just pain and encompasses any undiagnosed disability that results in functional loss. Thus, as his anxiety and sleep impairment caused impairment of earning capacity, they constituted a disability for service connection purposes.

The Court held that *Saunders* is not limited to pain, and the definition of "disability" includes any condition that results in functional impairment of earning capacity. Thus, this definition applies in any case that implicates section 1110, including the psychiatric condition at issue in Mr. Martinez-Bodon's case.

However, the Court noted that implicit (or explicit) in *Saunders* is the principle that the Rating Schedule provides indications about how VA interprets the role of certain types of impairments in assessing disability. Therefore, while 38 C.F.R. § 4.10 indicates that, like pain, psychiatric symptoms can be considered functional impairment as far as the rating schedule is concerned, the Court found it had jurisdiction to discuss an interpretation of the language in the regulations and analyzed how both § 4.125 and § 4.130 speak to the evaluation of psychiatric disabilities.

Within the Rating Schedule, 38 C.F.R. § 4.125(a) is entitled "Diagnosis of mental disorders" and provides that "if the diagnosis of a mental disorder does not conform to the DSM-5 or is not supported by the findings on the examination report, the rating

agency shall return the report to the examiner to substantiate the diagnosis." The rating schedule for mental disorders is contained within 38 C.F.R. § 4.130, which begins by setting forth general principles, specifically that "[t]he nomenclature employed in this portion of the rating schedule is based upon the [DSM-5]" and "rating agencies must be thoroughly familiar with this manual to properly implement the directives . . . and to apply the general rating formula." Furthermore, 38 C.F.R. § 4.130 provides that at a zero percent disability rating a "mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication."

The Court decided that an interpretation of 38 C.F.R. § 4.130 supports the requirement of a DSM-5 diagnosis, as the language in that regulation states that the entire rating regime for mental disorders is predicated on the diagnostic criteria outlined in the DSM-5. In addition, VA expressly requires a mental condition be formally diagnosed at the zero percent disability level. Thus, the upwardly cascading nature of the rating criteria that includes worsening occupational and social impairment for a mental condition, when read in the context of the introductory paragraph of Section 4.130's emphasis on the DSM-5, supports that Section 4.130 requires a DSM-5 diagnosis in order to rate mental conditions at each rating level, not just the noncompensable level.

As to 38 C.F.R. § 4.125(a), when taken in context with Section 4.130, the Court held that it was reasonable to interpret that a DSM-5 diagnosis is required for all mental conditions.

In addition, the Court held that it could not consider whether VA's limitation on diagnosed mental conditions is consistent with 38 U.S.C. § 1110, as the Federal Circuit defined "disability" in *Saunders*. Citing *Wanner v. Principi,* 370 F.3d 1124 (2004), the Court reiterated that it could not review the schedule of ratings for disabilities adopted under 38 U.S.C. § 1155 or any action of the Secretary in adopting or revising the schedule. The Court has strictly applied *Wanner* in finding that it lacked jurisdiction to consider whether the Secretary's decisions in defining what disabilities to compensate are consistent with Section 1110. While the Court was able to provide an interpretation of Sections 4.125 and 4.130, it was without jurisdiction to question what the Secretary decides constitutes a disability in the absence of a constitutional challenge or a claim that the regulations were adopted in a procedurally defective manner.

In sum, the Court held that the definition of a "disability" as functional impairment in earning capacity as held in *Saunders* applies broadly to include more than just pain. However, this definition is limited by VA's authority to adopt and apply its rating schedule. Specifically, with respect to mental conditions, VA limited compensation to psychiatric disabilities that conform to a DSM-5 diagnosis. Moreover, the Court lacked jurisdiction to determine whether the regulations of 38 C.F.R. § 4.125 and § 4.130 are consistent with 38 U.S.C. § 1110.

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Federal Circuit Dismisses Case After Surviving Spouse Fails to File Formal Claim within One Year of Veteran's Death

by Nick Breitbach

Reporting on *Merritt v. Wilkie*, No. 2019-1095 (July 17, 2020).

In *Merritt v. Wilkie*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that where a surviving spouse seeks survivorship benefits pursuant to 38 U.S.C. § 5121, 38 U.S.C. § 5101(a)(1)(B) does not excuse his or her failure to file a formal claim within one year after the veteran's death.

Mr. Merritt, a U.S. Navy veteran and the original claimant in the case, filed claims for disability benefits for bipolar disorder, anxiety, and personality disorder in March 2010. The Board of

Veterans' Appeals (Board) determined that Mr. Merritt's acquired psychiatric disorders were not service-connected and denied his claims. Following a remand from the Court of Appeals for Veteran Claims (Court), the Board denied Mr. Merritt's claim for entitlement to service connection. Mr. Merritt again appealed the Board's denial to the Court. On July 26, 2018, the Court found that the Board had not complied with the remand order, however, the Court affirmed the Board's denial of Mr. Merritt's claim of entitlement to service connection for acquired psychiatric disorders because the Board's error was harmless. On October 17, 2018, Mr. Merritt filed a notice of appeal with the Federal Circuit.

Mr. Merritt died on November 10, 2018. On December 19, 2018, Mrs. Merritt filed a motion to substitute herself as the surviving spouse. The Federal Circuit granted Mrs. Merritt's motion under Federal Rule of Appellate Procedure 43(a)(1).

On appeal, Mrs. Merritt argued that (1) the Court failed to enforce its own remand order and (2) the Court lacked authority to consider the question of harmless error because 38 U.S.C. § 7261(b)(2), which requires the Court to "take due account of the rule of prejudicial error," "has no applicability in the context of an appeal in which the issue is the enforcement of the appellant's right to compliance with [the Court's] prior remand order." Therefore, as the veteran's surviving spouse, Mrs. Merritt argued that she was entitled to pursue the claim for Mr. Merritt's accrued benefits.

The government argued that Mrs. Merritt had not established that she was the veteran's surviving spouse due to an inconsistency in the death certificate that Mrs. Merritt submitted with her motion for substitution.

The Federal Circuit determined that it did not need to address the parties' arguments because Mrs. Merritt had not preserved her claim for accrued benefits under the statute and regulation by filing a claim for accrued benefits within the statutory time limit. The Federal Circuit noted that "a specific claim in the form preserved by the Secretary [of the VA] . . . must be filed in order for benefits to be paid or furnished under the laws administered by the Secretary." In addition, the Federal Circuit noted that an application for accrued benefits "must be filed within one year after the date of death [of the veteran beneficiary]."

Mrs. Merritt argued that her motion for substitution constituted the filing of a claim for accrued benefits under *Reeves v. Shinseki*, 682 F.3d 988, 993 n.3 (Fed. Cir. 2012). In *Reeves*, the Federal Circuit found that a veteran's right to continuing disability compensation ends at his or her death and that certain individuals (including a surviving spouse) have the right to obtain accrued benefits due and payable to the veteran at the time of death.

However, the Federal Circuit observed that substitution is not the same as entitlement, and that Mrs. Merritt had to show that she was entitled to Mr. Merritt's claim under the applicable statutes and regulations.

Furthermore, the Federal Circuit differentiated Mrs. Merritt's case from *Reeves* because *Reeves* was decided under an earlier version of 38 C.F.R. § 3.155 (2011) that created an "informal claim" framework.

Under the earlier version of 38 C.F.R. § 3.155, "any communication [could] qualify for an informal claim if it: (1) [was] in writing; (2) indicate[d] an intent to apply for veterans' benefits; and (3) identifie[d] the particular benefits sought." The Federal Circuit noted that it was under the informal claim framework that it held that a motion for substitution "qualifie[d] as an informal claim for accrued benefits." The Federal Circuit noted that, even under the 2011 regulation, a survivor might forfeit the right to accrued benefits if a formal claim was not filed within one year of the veteran's death.

In 2015, VA replaced the "informal claim" framework with an "intent to file a claim" framework when VA revised 38 C.F.R. §§ 3.155 and 3.160. Pertaining to survivor's benefits, under the updated regulations, if a survivor has not filed a formal claim, he or she may preserve the claim by submitting an "intent to file a claim" within the one-year period of the veteran's death. The Federal Circuit then determined that under the updated regulations, a survivor cannot

preserve a claim for accrued benefits by filing an informal claim within one year of the veteran's death.

In *Merritt*, the Federal Circuit observed that Mrs. Merritt did not file a formal claim within one year of Mr. Merritt's death. Furthermore, the Federal Circuit noted that even if Mrs. Merritt's motion for substitution constituted an "intent to file a claim" under 38 C.F.R. § 3.155, she did not meet the requirements of filing a formal claim on a "complete application form" within one year of submitting her motion for substitution.

The Federal Circuit noted that Mrs. Merritt did not make an argument under 38 U.S.C. § 5101(a)(1)(B)(i), which permits the Secretary to "pay benefits . . . to a survivor of a veteran who has not filed a formal claim if the Secretary determines that the record contains sufficient evidence to establish the entitlement of the survivor to such benefits." Therefore, as Mrs. Merritt made no argument under 38 U.S.C. § 5101(a)(1)(B)(i), the Federal Circuit concluded that it did not have to decide whether a determination by the Secretary regarding 38 U.S.C. § 5101(a)(1)(B)(i) would be appealable to the Court and Federal Circuit.

In sum, the Federal Circuit found that where a surviving spouse seeks survivorship benefits pursuant to 38 U.S.C. § 5121, 38 U.S.C. § 5101(a)(1)(B) does not excuse his or her failure to file a formal claim within one year after the veteran's death.

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CAVC Limits its Extent of Jurisdiction and Affirms Board's Discretion in Motions for Reconsideration

by Benton Jay Komins

Reporting on *Wolfe v. Wilkie*, No. 17-0519 (August 31, 2020).

In *Wolfe v. Wilkie*, Ms. Wolfe appealed a December 2016 decision in which the Chairman of the Board of Veterans' Appeals (Board) denied a motion for reconsideration of a May 2014 Board decision. In the May 2014 decision, the Board found that Ms. Wolfe did not qualify as a surviving spouse for purposes of receiving VA death benefits. In turn, Ms. Wolfe submitted correspondence, which the Board construed as a motion for reconsideration. Ms. Wolfe argued that the 2010 divorce decree, upon which the Board relied to deny benefits to Ms. Wolfe, was fraudulent. In May 2016, the Chairman denied Ms. Wolfe's motion for reconsideration.

At first blush, this case would appear to involve—or implicate—both a host of state and federal actors and the propriety of multiple legal issues, to include fraud in inducement and common law marriage. This was not the case. The Court emphasized that its subject matter jurisdiction was limited to two issues: 1) To what extent the Court may exercise jurisdiction to review a Board Chairman's denial of a motion for reconsideration; and 2) Whether 38 C.F.R. § 20.1000 (now, as of the implementation of the AMA, 38 C.F.R. § 20.1001) permits the Board Chairman to exercise discretion vis-à-vis factors that *may* warrant reconsideration of a Board decision.

In its May 2014 decision, the Board found that the veteran and Ms. Wolfe had continuously lived together from 2002 until the veteran's death in August 2010. However, the Board found that the veteran's prior marriage had not been dissolved until May 2010. Thus, the "resulting" common law marriage between Ms. Wolfe and the veteran had existed for less than one year; as such, Ms. Wolfe did not qualify as a surviving spouse for VA purposes. This lack of spousal qualification also rendered Ms. Wolfe's claim for service connection for cause of death moot. In May 2014, Ms. Wolfe submitted her motion for reconsideration to the Board Chairman.

Thus far, this case would appear straightforward, but it was not. In December 2014, a state court order vacated the May 2010 divorce decree between the veteran and his other spouse. In pertinent part, the state court found that the veteran and this other spouse had not been married; more specifically, the state court opined that the other spouse had

induced the veteran into believing that a marriage had been confected. Here, the state court noted that not only was the veteran incarcerated at the time of this purported marriage, but also that neither the veteran nor the other spouse had fully executed a valid marriage license. In short, the marriage between the veteran and the other spouse was a nullity.

In December 2016, the Board Chairman denied Ms. Wolfe's motion for reconsideration; in turn Ms. Wolfe filed a timely notice of appeal with the Court as to the Chairman's denial of the motion for reconsideration.

The Court cited *Mayer v. Brown*, 37 F. 3d 618, 620 (Fed. Cir. 1994), in which the Federal Circuit held that the Court may review a denial for reconsideration only when it has the authority to review the underlying Board decision. Therefore, according to the Court, it had jurisdiction to determine whether Ms. Wolfe satisfied one of the three changed circumstances delineated in 38 C.F.R. § 20.1001 —(a) obvious error of fact or law; (b) new and material relevant records or service department records; and (c) false or fraudulent evidence submitted by, or on behalf of, an appellant.

Ms. Wolfe argued that the 2014 state court order, which vacated the veteran's divorce to the other spouse, was not merely additional evidence, but evidence "of the variety" recognized in 38 C.F.R. § 20.1001(c) and constituted changed circumstances. Ms. Wolfe emphasized that the other spouse's inducement of the veteran into believing he was married constituted fraud and that the Chairman should have granted Ms. Wolfe's motion for reconsideration. Moreover, Ms. Wolfe argued that VA's interpretation of 38 U.S.C. §§ 7103 ("Reconsideration; correction of obvious error") and 7104 ("Jurisdiction of the Board") does not comport with the law because it permits reconsideration of a grant of benefits based upon fraud but proscribes reconsideration of a denial based upon fraud.

After oral argument, the Court requested that the Secretary evaluate whether there were cases in which the Chairman (or her delegate) ordered reconsideration for grounds other than those enumerated in 38 C.F.R. § 20.1001. The Court noted that the Board Vice-Chairman reviewed 648 grants for reconsideration. Only three of the 648 grants for reconsideration included notations of alleged VA and/or Board employee fraud; however, even in these three cases, grants for reconsideration were not based upon the alleged fraud. Otherwise, 645 grants for reconsideration were decided upon bases laid out in 38 C.F.R. § 20.1001.
Based upon the Board's data and the language of 38 C.F.R. § 20.1001(c), the Court found that Ms. Wolfe's argument concerning the fraudulent acts/evidence attributable to an ultimately adversarial third party were unconvincing. If anything, the fraudulent nature of the evidence at issue was not contrived to advance Ms. Wolfe's interests; clearly 38 C.F.R. § 20.1001(c) does not contemplate this "variety" of fraudulent evidence.

Turning to the issue of the Chairman's discretion, the Court underscored that the Chairman's authority to afford reconsideration is discretionary. 38 U.S.C. § 7103(b) describes the procedures that must be followed upon the Chairman's order for reconsideration. In this regard, the Court found that even though Congress has provided a statutory provision which permits the Chairman to afford reconsideration of Board decisions, Congress has not spoken to the issue of fraud. Furthermore, as noted in a long strand of federal court jurisprudence (*Chevron* and its progeny), when Congress has not spoken to a precise issue directly, there is a "gap" for an administrative agency (VA) to fill. And, as is the case here, courts may not disturb a regulation, like 38 C.F.R. § 20.1001, unless it is arbitrary or capricious in substance, or manifestly contrary to the statute.

Thus, despite the fact that 38 C.F.R. § 20.1001 is not favorable to Ms. Wolfe, the empirical data—648 cases—do reveal that this regulation is neither unfavorable to veterans nor conflicts with the beneficent scheme upon which VA benefits are based.

The Court concluded by holding that the Chairman has discretion under 38 C.F.R. § 20.1001—given that the regulation itself is discretionary. Additionally, the Court surmised that it may conduct "limited reviews" of the Chairman's denials of motions for

reconsideration only when the Court has jurisdiction over an underlying Board decision (when appellants file timely NOAs).

In a partial dissent, Chief Judge Bartley wrote that the Board should have vacated the May 2014 denial of Ms. Wolfe's claim because the Board had knowledge that its denial was based upon fraudulent evidence. As such, the Board's May 2014 decision deprived Ms. Wolfe of her due process rights.

In a concurrence, Judge Falvey responded to Chief Judge Bartley's partial dissent by writing that Ms. Wolfe never argued that the Board's May 2014 denial should be vacated. Likewise, Ms. Wolfe never argued, articulated, or even implied that the Chairman's December 2016 *discretionary* denial of her motion for reconsideration vitiated her rights of due process.

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Federal Circuit Upholds VA's Interpretation of a Military Discharge Due to "Willful and Persistent Misconduct" As a Bar to Entitlement for VA Benefits

By Vanessa-Nola Pratt

Reporting on *Garvey v. Wilkie*, No. 2020-1128 (August 27, 2020).

In *Garvey v. Wilkie*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) upheld the Department of Veterans Affairs' (VA's) interpretation that the discharge of a service member, from the military, for "willful and persistent misconduct," under 38 C.F.R. § 3.12(d)(4), is consistent with, and authorized by 38 U.S.C. § 5303(a), which establishes the circumstances where a service member is barred from receiving VA benefits.

John Garvey (Mr. Garvey) served in the United States Army from February 1966 to May 1970. Due to a series of events of misconduct, he was discharged as unfit for service in May 1970, with an "Undesirable Discharge" classification. In June 1977, under the Special Discharge Review Program, which allows Vietnam-era service members to upgrade their discharge status if they met certain criteria, Mr. Garvey's discharge status was upgraded to a discharge "Under Honorable Conditions (General)." However, in August 1978, a Discharge Review Board found that Mr. Garvey would not have been entitled to an upgrade, under generally applicable standards.

Mr. Garvey died in August 2010. In September 2012, his surviving spouse applied for dependency and indemnity compensation and death pension benefits. In August 2018, the Board of Veterans' Appeals (Board) denied the claim on the basis that Mr. Garvey was ineligible for benefits because he was discharged for "willful and peristent misconduct", under 38 C.F.R. § 3.12(d)(4), which is a bar to receiving VA benefits. In September 2019, the United States Court of Appeals for Veterans Claims (CAVC) affirmed the Board's decision. Mrs. Garvey appealed to the Federal Circuit.

In her appeal, Mrs. Garvey argued that the bar against VA benefits for a discharge from service due to "willful and persistent misconduct" is contrary to the statute, 38 U.S.C. § 5303.

In addressing this question, the Federal Circuit noted that section 5303 identifies six situations where a former service member is barred from receiving veterans' benefits. Although section 5303(a) does not list "willful and persistent misconduct" as one of its statutory bars, 38 U.S.C. § 101(2), which defines a "veteran", and section 5303, are both implemented in 38 C.F.R. § 3.12. The Federal Circuit rejected Mrs. Garvey's argument that because section 5303(a) specifies six conditions under which a former service member is ineligible for benefits, it was improper for VA to add a seventh, unlisted, "willful and persistent misconduct" bar. The Federal Circuit reasoned that neither section 5303 nor any other statute provides that section 5303 contains an exclusive list of conditions for benefits for eligibility. Moreover, the

definition of "veteran" in section 101(2) expressly limits benefits to those discharged "under conditions other than dishonorable."

The Federal Circuit undertook a comprehensive analysis of the legislative history of the bars to benefits in 38 U.S.C. § 5303 and the "discharge under conditions other than dishonorable." Section 5303 and the "conditions other than dishonorable" requirement section 101(2), originated in the Servicemen's Readjustment Act of 1944 ("the G.I. Bill"). The Senate Committee amended the G.I. Bill to add a new section, section 1603, for the dual purpose of providing benefits to deserving service members with "honest and faithful or otherwise meritorious" service, even if they did not receive Honorable discharges, but to deny benefits to "unworthy" former service members, even if they were not given a Dishonorable discharge. The Federal Circuit noted that the sponsor of the G.I. Bill explained that the purpose of the "conditions other than dishonorable" standard was that a person with poor conduct in the service may nevertheless be discharged without a court-martial because the military "did not want to take the trouble to court martial the service member, and give them what they deserved – a dishonorable discharge," and that under these circumstances, a servicemember should not receive benefits.

The Federal Circuit also reasoned that Congress concluded that the upgrade aspect of the Special Discharge Review Program was unfair because it upgraded Vietnam-era service members, but not other service members, and because it unfairly allowed those with problematic service records to obtain veterans benefits. On this basis, in 1977, Congress passed legislation to deny entitlement to veterans' benefits to certain persons who would otherwise become so entitled solely by virtue of the administrative upgrading under the Program.

Given that Congress was aware that a discharge for willful and persistent misconduct would render a service member ineligible for veterans' benefits and that Congress required an upgraded servicemember to remain subject to VA's rules under his or her original discharge status, the Federal Circuit concluded that the language used by Congress in 38 U.S.C. § 5303 and 38 U.S.C. § 101(2) reflects approval of those rules, including the "willful and persistent misconduct" bar of 38 C.F.R. § 3.12(d).

On these bases, the Federal Circuit upheld 38 C.F.R. § 3.12(d), as authorized by 38 U.S.C. § 5303(a) and 38 U.S.C. § 101(2), because VA's inclusion of "willful and persistent misconduct" as a basis for finding a discharge to be "issued under dishonorable conditions" was consistent with the language and history of those laws. It therefore affirmed the Board and CAVC decisions finding that Mrs. Garvey was not entitled to veterans' benefits because Mr. Garvey's discharge was for willful and persistent misconduct.

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

Actual Knowledge of VA Medical Records is Not Required to Establish Constructive Receipt

by Freda Carmack

Reporting on *Lang v. Wilkie*, No. 2019-1992 (August 19, 2020).

The constructive receipt rule in *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992), states that documents generated by VA facilities that may have an impact on the adjudication of a claim are generally considered to be part of the record during the consideration of a claim, regardless of whether they are physically on file. In *Turner v. Shulkin*, 29 Vet. App. 207 (2018), the Court of Appeals for Veterans Claims (the "Court"), applying *Bell*, held that certain documents may be constructively received by the VA during the one-year period for appeal, pursuant to 38 C.F.R. § 3.156(b), if they were generated by a VA medical facility and VA adjudicators had sufficient knowledge that such records exist.
In *Lang v. Wilkie*, the Court of Appeals for the Federal Circuit (the "Federal Circuit") took issue with the Court's decision in *Turner*, holding that the

rule in *Bell* does not require that a VA adjudicator have actual knowledge of VA medical records to establish constructive receipt. This rule applies to 38 C.F.R. § 3.156(b) without any such limitation.

James R. Lang served in the United States Marine Corps from February 1966 to July 1968. In March 1995, he was diagnosed with post-traumatic stress disorder ("PTSD") and, in a June 1996 rating decision, he was granted service connection for this condition and assigned a 10 percent disability rating.

In February 2014, Mr. Lang filed a motion to revise the 1996 rating decision based on clear and unmistakable error ("CUE"). The motion for CUE was denied in September 2014. Mr. Lang appealed to the Board of Veterans' Appeals (the "Board") and, in September 2015, the Board remanded the appeal for further development that included obtaining VA medical records dated from January 1995 to June 1997. The records were obtained, and the appeal was returned to the Board; but in September 2017, the Board declined to revise the rating decision.

Mr. Lang appealed to the Court, arguing that the Board's CUE determination was improper because the 1996 rating decision was not final. He asserted that the VA-generated medical records that were created in the year following his 1996 rating decision were constructively received by the VA and, because they had never been reviewed for "new and material evidence" under 38 C.F.R. § 3.156(b), the rating decision never became final. The Board did not, therefore, have jurisdiction to consider CUE, and the appeal should be remanded back to the Board for consideration of whether those VA medical records constituted "new and material" evidence. The Court agreed that a non-final decision could not have been subject to CUE review by the Board, but held that the records in question were not constructively received by the VA because, consistent with *Turner*, Mr. Lang did not show that the "VA had sufficient knowledge of the VA treatment records . . . to trigger the Board's duty to make the requested findings."

In its August 2020 precedential decision, the Federal Circuit held that the "triggering principle" in *Turner* – that VA adjudicators must have sufficient knowledge that VA medical records exist in order for them to be considered a part of the record – is erroneous. The Federal Circuit reviewed the history of the constructive receipt rule in *Bell* and noted that it was officially adopted for all records in the VA's possession in Office of General Counsel Opinion 12-95. It also noted that, prior to *Turner*, the Court did not require an appellant to take any action in order for the veteran's own VA-generated medical documentation to be considered a part of the record. To the contrary, the Court consistently held that, in the context of records created prior to a decision, all relevant and reasonably connected VA-generated documents are a part of the record and, as such, constructively known by the VA adjudicator. There is no reason, the Federal Circuit explained, to support a different test in the case of records received *after* a rating decision is rendered. Rather, records received in the post-decision context must be evaluated under the same framework applied to records generated prior to a decision. Furthermore, a veteran's own medical records, generated by VA, are always reasonably related to that veteran's claim.

Thus, the Federal Circuit clarified that evidence is constructively received by the VA post-decision if it (1) was generated by the VA or was submitted to the VA and (2) can reasonably be expected to be connected to the veteran's claim. There is no requirement that the VA adjudicator have any actual knowledge of the evidence for this principle to apply.

Based on this, the Federal Circuit found that Mr. Lang's post-decision medical records were constructively received by the VA adjudicator prior to the expiration of his one-year appeal period. The claim, therefore, remained opened until the VA determined whether the records received within that time were "new and material." Since this determination was never made, the 1996 rating decision was not final, and a CUE analysis was not required. The Court, therefore, erred when it declined to remand Mr. Lang's claim to the Board to review those records for new and material evidence.

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Court Rules that Regulation, Not *DeLisio* Factors, Controls Criteria for Written Withdrawal of Appeals

By Janet Alexander

Reporting on *Hembree v. Wilkie*, No. 18-3856 (August 31, 2020).

In *Hembree v. Wilkie,* the Court of Appeals for Veterans Claims (Court) reviewed a decision by the Board of Veterans' Appeals (Board) that denied earlier effective dates for the grant of service connection for diabetes mellitus and coronary artery disease. The Board found that the veteran's prior written withdrawal of those claims was valid, precluding any additional entitlement. The specific issue before the Court was whether the standard relevant to determining the effectiveness of an oral withdrawal of an appeal as laid out in *DeLisio v. Shinseki*, 25 Vet. App 45 (2011), also applied to written appeal withdrawal requests. The Court held that because the criteria for written appeal withdrawals are specifically identified by regulation at 38 C.F.R. § 20.204(b), the *DeLisio* factors do not apply.

Historically, Mr. Hembree filed original service connection claims for diabetes mellitus and coronary artery disease in 2001, which were denied in a final 2005 rating decision. In May 2007, he submitted a request to reopen those claims, which was denied by the Regional Office (RO) in June 2008 rating decision for lack of new and material evidence. Mr. Hembree submitted an informal notice of disagreement (NOD) in July 2008. The RO notified Mr. Hembree in August 2008 that the informal NOD was inadequate and directed him to file a formal NOD. However in September 2008, three separate documents were submitted in Mr. Hembree's case: a written statement bearing his name, file number and signature that requested to withdraw all pending claims; a letter from his representative identifying Mr. Hembree by name, file number, and reiterating that he wished to withdraw all claims and file for total disability due to individual unemployability (TDIU); and an employment questionnaire in support of his claim for TDIU. No further action was taken regarding the service connection claims.

In March 2011, Mr. Hembree once again filed to reopen his service connection claims for diabetes mellitus and coronary artery disease. VA processed this claim as a new claim for benefits. In a February 2012 rating decision, the RO granted benefits for both disabilities effective February 24, 2011, a date which reflected a law entitling him to presumptive service connection based upon his service in the demilitarized zone (DMZ) in Korea.

Thereafter, Mr. Hembree contested the effective date of the grant of service connection, but his appeal for an earlier effective date was denied. The Board found that while he had disagreed with the June 2008 rating decision, those claims were subsequently withdrawn in writing. Since new and material evidence was not submitted within one year, the June 2008 decision became final. Mr. Hembree contended that the Board erred because it did not consider whether the written withdrawal of his appeals complied with the requirements as set forth in *DeLisio v. Shinseki.*

The Court affirmed the Board's decision. Although the standard to assess the validity of withdrawing an appeal orally was well settled, the Court acknowledged that the criteria required to assess the validity of written withdrawals was an issue of first impression. In *DeLisio* the Court found that an oral withdrawal of an appeal is only valid where a three - factor test is met showing "explicit, unambiguous, and done with full understanding of the consequences of such action on the part of the claimant." 25 Vet. App. at 57. In *DeLisio,* Mr. DeLisio's oral withdrawal was not valid, because the factors had not been met. For example, the hearing transcript disclosed neither an explicit discussion of the withdrawal nor an indication that he understood which disabilities his withdrawal affected. That standard was later adopted in *Acree v. O'Rourke*, 891 F.3d 1009 (Fed. Cir. 2018), which also held that when the *DeLisio* standard applies the Board must make express findings of regarding each of the three factors. In *Acree,* the Federal Circuit Court limited

its review to the requirements necessary for the effective oral withdrawal of a veteran's appeal at a hearing. While it expressed no position on specific requirements, the Federal Circuit Court noted that 38 C.F.R. § 20.204(b) controlled a Veteran's written withdrawal of an appeal.

Here, because there had been an effort to withdraw an appeal in writing, the Court turned directly to the same regulation 38 C.F.R. § 20.204 that the Federal Circuit in *Acree* had opined would control such a factual situation. Preliminarily, the Court noted that "[a] valid regulation has the full force and effect of law." The Court then found that the regulation controlling the written withdrawal of appeals was valid because it unambiguously laid out the necessary requirements. Specifically, 38 C.F.R. § 20.204 (a) and (b)(1) provided that the claimant or their representative may withdraw an appeal as to any or all of the issues provided that the written request contains the name, file number and a statement that the appeal is withdrawn. If the appeal involved multiple issues, the regulation required that the withdrawal identify with specificity that it applies to the entire appeal or a particular issue (s) being withdrawn.

The Court noted that the requirements of the federal regulation mirrored the first and second *DeLisio* factors, because the criteria resulted in a written withdrawal that was both explicit and unambiguous. However, the Court found there was no justification to impose the third *DeLisio* factor and require an inquiry as to whether the claimant had a full understanding of implications of withdrawing their appeal. The Court reasoned that because the written withdrawal is effective upon receipt, an adjudicator cannot reasonably wait to give it effect depending upon what happens after it is submitted. Further, since the appellant can renew an appeal after it is withdrawn the regulation contemplates a change of mind or circumstances. Imposing an inquiry into the appellant's subjective understanding would negate these provisions.

Accordingly, the Court held that *DeLisio* does not apply to written withdrawals of appeals. Rather, the proper inquiry is whether the written withdrawal falls under 38 C.F.R. § 20.204. In that regard, the Court noted that effective February 19, 2019, VA amended and renumbered 38 C.F.R. § 20.204 to comply with the appeals processing changes mandated by the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No.115-55, 131 Stat. 1105 (Aug. 23, 2017). The Court therefore limited their analysis to the law in effect at the time of the Board's May 2018 denial. If the written withdrawal request is within the purview of 38 C.F.R. § 20.204 it will be effective if it is in compliance with the regulation's requirements and contains the claimant's name, file number, and a statement that the appeal is withdrawn either in its entirety or as to specific claims.

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On Remand from SCOTUS, Federal Circuit Holds that VA is Not Entitled to Deference in its Interpretation of "Relevant" in Applying 38 C.F.R. § 3.156(c)(1)

by Sarah Blackadar

Reporting on *Kisor v. Wilkie*, 16-1929 (Fed. Cir. August 12, 2020).

This August, after four years of litigation, the Federal Circuit finally answered the question of whether the Department of Veterans Affairs (VA) should receive deference for its interpretations of the term "relevant" in 38 C.F.R. § 3.156(c)(1). The answer: No.

But VA's interpretation of term "relevant," as discussed in the Board of Veterans' Appeals (Board) decision, will still control because the term "is not genuinely ambiguous," and the meaning attributed by the Board is the only "reasonable meaning."

The seeds of this case were planted in 1983 when Mr. Kisor originally filed his claim for service connection for Posttraumatic Stress Disorder (PTSD). The

claim was denied because Mr. Kisor did not have a diagnosis of PTSD at that time. The denial became final when he did not perfect an appeal. In 2006, Mr. Kisor filed to reopen his claim for service connection for PTSD. Mr. Kisor also submitted additional service department records documenting his Combat Action Ribbon that were not considered as part of his 1983 claim. In addition, VA afforded Mr. Kisor a medical examination in 2007 and the examiner diagnosed him with PTSD.

As a result, the Regional Office (RO) reopened Mr. Kisor's claim for service connection, granted service connection, and assigned a 50% disability rating. Mr. Kisor filed a Notice of Disagreement with both the assigned rating and effective date (which the RO established as the date on which his claim to reopen was filed). While the RO granted Mr. Kisor the increased rating he sought, it denied an earlier effective date. Mr. Kisor appealed to the Board.

There, for the first time, the Board considered whether 38 C.F.R. § 3.156(c) might apply to Mr. Kisor's claim, and potentially allow for an effective date as early as the date of his "previously denied claim." The Board denied an earlier effective date because it found that the new service records were not outcome-determinative and not relevant to the May 1983 decision because the claim was denied at that time because a diagnosis of PTSD was not warranted.

Mr. Kisor then appealed to the Court of Appeal for Veterans Claims (CAVC), which affirmed the Board's decision granting *Auer* deference to VA for its interpretation of its own ambiguous regulation. On appeal to the Federal Circuit, *Auer* deference was again granted. But, in an unusual turn of events for veterans law cases, the Supreme Court of the United States (Supreme Court) took up Mr. Kisor's petition last year, not to determine the meaning of the term "relevant" in § 3.156(c), but to address whether *Auer* deference remained viable at all.

The Supreme Court found that at least some form of *Auer* deference could be afforded to agency interpretations of their own ambiguous regulations, but that courts must be stricter in their review to ensure that a term in an agency's regulations is "genuinely ambiguous" before affording *Auer* deference. As a result, the Supreme Court remanded Mr. Kisor's case to the Federal Circuit for the circuit court to revisit whether "relevant" in Section 3.156(c) is a "genuinely ambiguous" term.

On remand to the Federal Circuit, both Mr. Kisor and the government argued that "relevant" was not a genuinely ambiguous term, though both sides posited different views of the only reasonable reading.

In the end, the Federal Circuit was persuaded by the government's position that relevant records "must address a dispositive issue and therefore affect the outcome of the proceedings." The Federal Circuit noted that while Section 3.156(c) does not provide a definition of the term relevant "the context of Section 3.156(c) makes clear that, in order to be 'relevant' for purposes of reconsideration, additional records must speak to the basis of the VA's prior decision." Based on this understanding of Section 3.156(c), the Federal Circuit concluded that the Board did not err in holding that the new service department records supplied by Mr. Kisor in 2007 were not relevant "because they did not pertain to the basis of the 1983 denial."

The Federal Circuit rejected the interpretation urged by Mr. Kisor that, regardless of the remedial nature of Section 3.156(c), the duty to assist requires VA to assist claimants under 38 U.S.C. § 5103A(a)(2) unless "no reasonable possibility exists that such assistance would aid in substantiating the claim." The Federal Circuit held that these records, if they were in the record in 1983, would not have affected the outcome of the claim. The Federal Circuit also held that the pro-veteran canon of construction was inapplicable here because the regulation at issue was not ambiguous.

Having found the reasoning of the original Board decisions adequate, the Federal Circuit again affirmed the CAVC's decision affirming the Board's denial of Mr. Kisor's claim for entitlement to an earlier effective date.

The Federal Circuit's decision was not unanimous. Judge Reyna filed a blistering dissent, finding that

"[n]othing in the plain meaning or context of the provision requires 'relevant' records to 'speak to the basis of the VA's prior decision,' to address facts expressly 'in dispute,' or to 'affect the outcome.'" Because Judge Reyna found that the regulation was ambiguous—a finding he noted that was consistent with the Federal Circuit's original decision in this case—he noted that the pro-veteran canon of construction should have been applied in this case. Under such a construction, Judge Reyna found that Mr. Kisor should be granted reconsideration of his 1983 claim under Section 3.156(c).

Sarah Blackadar is a General Attorney with the Federal Labor Relations Authority and a former Appellate Attorney in the Office of General Counsel, Department of Veterans Affairs.

Federal Circuit Extends Requirement to Consider Harmless Error to Presumption of Soundness and Line-of-Duty Presumption

by David R. Seaton

Reporting on *Simmons v. Wilkie*, No. 2019-1519 (Fed. Cir. July 17, 2020).

In *Simmons v. Wilkie*, the United States Circuit Court of Appeals for the Federal Circuit (Federal Circuit) considered whether or not an error made by the Department of Veterans Affairs (VA), specifically related to the presumption of soundness and line-of-duty presumption, during the course of a claim for VA benefits, was automatically prejudicial. Relying on the reasoning of the Supreme Court of the United States (Supreme Court) in *Shinseki v. Sanders* that errors, specifically related to VA's failure to provide statutorily required notices pursuant to 38 U.S.C. § 5103(a), must be reviewed on a case-by-case basis as to their harmfulness, the Federal Circuit found that presumption of soundness errors and line-of-duty errors, during the course of a claim for VA benefits, were not automatically prejudicial and instead extended case-by-case review to both presumption of soundness errors and line-of-duty errors. *Simmons* represents a movement in veterans law toward rejecting all types of errors as automatically prejudicial in favor of reviewing all errors alleged to having occurred during the course of a claim for VA benefits for harmfulness on a case-by-case basis.

In June 1974, Mr. Richard D. Simmons, a veteran of the United States Navy, filed for VA compensation benefits for a psychiatric disorder; which he alleged was proximately due to rheumatoid arthritis which he alleged originally began during his period of service between November 1968 and January 1970. In September 1974, a VA regional office (RO) denied the Veteran's claim. In December 2005, Mr. Simmons, by and through counsel, filed a new claim for VA compensation for a psychiatric disorder, alleging that the September 1974 rating decision was based on clear and unmistakable error (CUE), and, that as a result, the Veteran should be granted VA compensation benefits for an acquired psychiatric disorder. The RO denied Mr. Simmons's CUE claim in September 2009, and Mr. Simmons appealed to the Board of Veterans' Appeals (Board). The Board initially affirmed the RO's determination in March 2015, but Mr. Simmons appealed to the Court of Appeals for Veterans Claims (Court). Pursuant to a joint motion for remand, the matter was remanded back to the Board. In May 2016, the Board reaffirmed that there was no CUE in the September 1974 decision. Mr. Simmons appealed to the Court again, which affirmed the Board decision. Mr. Simmons appealed to the Federal Circuit.

Mr. Simmons's CUE claim is specifically based on the allegation that that the RO failed to comply with the presumption of soundness and the line-of-duty presumption during the course of his claim, and that these failures automatically constituted CUE, regardless of whether or not it can be established that the error was actually harmful. Under the presumption of soundness, a veteran is presumed to be sound (free of a disability or injury) except for disabilities or injuries that are noted on a military entrance examination. The presumption of soundness may be rebutted when clear and unmistakable evidence demonstrates that a disability preexisted service and was *not* aggravated

by a period of service. Under the line-of-duty presumption, diseases and injuries that occur during active duty are presumed to be in the line of duty and not due to misconduct. This presumption may be rebutted by demonstrating willful misconduct or abuse of alcohol or drugs.

The Federal Circuit affirmed the Court's denial of Mr. Simmons's appeal and declined to adopt an automatic rule that any violation of the presumption of soundness or line-of-duty presumption was automatically prejudicial. The Federal Circuit relied heavily on the Supreme Court's reasoning in *Shinseki v. Sanders* in order to justify its decision.

In *Shinseki v. Sanders*, the Supreme Court, in a six to three decision, considered whether VA's failure to provide statutorily required notices pursuant to 38 U.S.C. § 5103(a) was automatically prejudicial. The majority found that both the statutory language and legislative history of 38 U.S.C. § 7261(b)(2), a statute requiring the Veterans Court to consider prejudicial error when reviewing appeals, required courts to determine on a case-by-case basis whether the error was harmful or not rather than a rule that all error was per se or automatically prejudicial.

In *Sanders*, the Supreme Court bolstered its arguments by offering three policy reasons in support of its interpretation: (1) case-by-case review would require courts to remand cases even when the court knows that the error was harmless; (2) an automatic finding of harmful error placed too high an evidentiary burden on the VA; and (3) the burden of showing that error was harmful normally falls on the party attempting to set aside an administrative decision.

Notably, the *Sanders* Supreme Court – while explicitly ruling that the Federal Circuit did not have the authority to create rigid rules regarding whether error was automatically prejudicial – acknowledged and declined to rule on the Court's practice of declaring certain kinds of errors to be "naturally" prejudicial. Frustratingly, the *Sanders* Supreme Court did not outline a specific test, in its *dicta*, to distinguish between a determination that certain errors are "naturally" prejudicial and a rule that certain errors are per se or automatically prejudicial. Moreover, *dicta* from the *Sanders* Supreme Court seems to suggest that the Court's unique concentration in reviewing VA administrative decisions creates a unique expertise in determining which errors are "naturally" prejudicial.

Turning back to the Federal Circuit's reasoning in *Simmons*, the Federal Circuit declared that the *Sanders* Supreme Court's reasoning guided the outcome of the case. The Federal Circuit reiterated the *Sanders* Supreme Court's reasoning that a rule holding that errors were per se prejudicial would deviate from typical appellate litigation by: (1) unnecessarily forcing courts to remand cases; (2) placing too high an evidentiary burden on the VA; and (3) improperly shifting the burden of proof.

The Federal Circuit also rejected an argument from Mr. Sanders that the *Sanders* Supreme Court's reasoning should be cabined to only notice errors rather than be applied to errors related to the presumption of soundness and the line-of-duty presumption by noting that 38 U.S.C. § 7261(b)(2) (the previously mentioned statute requiring the Veterans Court to consider whether error was prejudicial) as well as the three arguments offered by the *Sanders* Court are just as applicable to errors generally (including presumption of soundness and line-of duty presumption errors) as they are to notice errors.

Finally, the Federal Circuit bolstered its argument by noting that neither the presumption of soundness nor the line-of-duty presumption address or alter the requirement to demonstrate a causal nexus between the disability for which compensation is being sought from VA and an in-service injury or incurrence in order to sustain a claim for service connection, and any rule finding that presumption of soundness errors and line-of-duty errors were per se prejudicial would improperly reverse a factual finding by VA that a causal nexus had not been properly established.

Notably absent from the Federal Circuit's discussion is what effect, if any, the Court's practice of identifying errors as "naturally" prejudicial would have had on the outcome of the case. Despite the fact that *Sanders* represents a clear trend toward the

Federal Circuit refusing to find any type of error to be automatically prejudicial in the first instance, it is unclear whether or not the Federal Circuit would ratify a determination by the Court that certain types of errors were "naturally" prejudicial or even recognize a distinction between errors that were "naturally" prejudicial versus automatically or per se prejudicial. The Federal Circuit's lack of clear guidance in this regard must be held in sharp relief against the Court's continued practice of identifying certain kinds of errors as "naturally" prejudicial.

In conclusion, the Federal Circuit has clearly signaled both to veterans and VA a trend towards analyzing all errors for harmlessness on a case-by-case basis. There is a certain lack of clarity at this time how, if at all, this trend will interact with the Court's authority to utilize its special competence over veterans law to declare certain errors "naturally" prejudicial, but this caveat does not disrupt the movement towards rejecting any and all errors as automatically prejudicial in veterans law.

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In Case of First Impression Before the Court, Secretary Fails to Demonstrate Administrative Position Was Substantially Justified for EAJA

by Ann Kenna

Reporting on *Lacey v. v. Wilkie*, No. 17-3296 (Aug. 18, 2020).

In *Lacey v. Wilkie*, the Court of Appeals for Veterans Claims (Court) addressed whether the appellant was entitled to attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C § 2412(d), where the Secretary asserted that the position of the Government was substantially justified. Under the EAJA, fees are awarded to a prevailing party, *unless* the Secretary's position was substantially justified at both the Board and the Court, or if other statutory requirements are unsatisfied.

When an appellant alleges that the Secretary's position was not substantially justified, the Secretary carries the burden of proving otherwise, meaning that he must prove his position has "'a reasonable basis in law and fact'"—or stated another way, that a reasonable person could think the Secretary's position correct. This does not mean the Secretary's position must actually be correct.

To determine whether the Government's position is substantially justified, the Court must "focus on the 'totality of the circumstances' pertinent to the Government's position on the issues on which the claimant prevailed, including the 'state of the law at the time the position was taken.'" Factors to be considered include the "'merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act,' along with any other applicable circumstances."

Here, the Secretary argued that the appellant's application for fees should not be granted because the Secretary's position was substantially justified. Applying the totality of the circumstances test, the majority of the Court panel disagreed, deciding the Secretary did not carry his burden to show his administrative position was substantially justified.

In the underlying case, the Board addressed an issue of first impression: whether studies at a four-year college met the requirements of a "program of education" under the Veterans Retraining Assistance Program (VRAP). The Board applied the negative implication canon (interpreting a statute to not apply to terms left out of a list of explicitly included terms), and relied on what it deemed analogous federal regulations, to interpret the meaning as excluding studies at four-year college from the types of "educational institution[s]" contemplated by the statute.

In its merits decision, the Court found that the statute was "at least ambiguous" as to whether VRAP benefits may be used at a four-year college. The Court noted that Congress defined "program of

education" to include an expansive list of courses and defined "education institution" to include four-year colleges. Because the agency never issued regulations or guidance interpreting the statute, and a favorable reading of the statute suggested that such benefits are contemplated by the statute, the matter was resolved in favor of the appellant.
In challenging the appellant's application for fees, the Secretary argued that a factor in support of finding the government's position was substantially justified is that the matter involved a case of first impression. The Secretary further argued that the Board's interpretation was reasonable because it "appropriately employed the canons of statutory construction" and relied on "analogous regulations and Congressional intent."

Citing *Felton,* the Court noted that there is no per se rule that a case of first impression will render the Secretary's position substantially justified. The Government still has a responsibility to prove its position reasonable, even if incorrect. Referencing *Felton*, the Court noted that "[i]n cases of first impression, the Court must determine whether the issue presented 'close' questions, and whether the Secretary sought an unreasonable interpretation or resolution of the matter." Where the Government position is not supported either by the plain language of the statute or legislative history, such interpretation "while not dispositive, weighs heavily against a finding of substantial justification."

The Court held that although there was no precedent at the time of the decision, in applying the totality of the circumstances, the Secretary failed to demonstrate that his administrative position was reasonable. In considering relevant factors, the Court addressed that the merits decision resolved interpretive doubt in favor of the appellant highlighting that the Secretary "took no action 'to issue official guidance as to the agency's position on the issues raised" and that, if the Secretary had taken such action, that case may have concluded differently.

The Court held that, more significantly, the merits decision struck down the Board's use of the negative implication canon, because Appellant's "'program of education' appears to fall within the definition[s] provided by Congress." The Court also considered that the Board's reliance on regulations from federal agencies for guidance was unreasonable, where Congress itself provided necessary definitions.

Considering the Government's lack of action and that its interpretation did not appear to be supported by the statute, the Court concluded no reasonable person would find the Secretary's interpretation of the statute correct. Therefore, the Secretary failed to meet his burden of showing his position was substantially justified at the Board. With the Secretary not meeting this burden at the administrative level, the Court did not need to address whether his litigation position was substantially justified.

As the Secretary's administrative position was not substantially justified, the Court granted Appellant entitlement to attorney fees, costs, and expenses and ordered a staff conference be scheduled to address the reasonableness of fees, under Rule 33 of the Court's Rules of Practice and Procedure.

In his concurrence, Judge Allen wrote that the clarity of the statutory language rendered the Government's position (including litigation position) unreasonable and, therefore, the plain language of the statute, independent of other factors, provided the basis to grant the EAJA application.

In his dissent, Judge Toth opined that EAJA fees should be foreclosed because the Secretary adopted a reasonable, albeit incorrect, interpretation of the statute. He questioned the majority opinion that the Secretary acted unreasonably at the agency level finding it at odds with that part of the merits decision that the Secretary's reading of the statute was "reasonable" and "stood on solid footing." He wrote that applying the totality of the circumstances test reinforces the conclusion that the government's administrative position was substantially justified.

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Federal Circuit Holds that Veteran's Claim Must Identify Condition for Which Compensation is Sought

by Jenny J. Tang

Reporting on *Sellers v. Wilkie*. __ F.3d. App. __, No. 2019-1769 (July 15, 2020).

This summer, the Federal Circuit reversed the Court of Appeals for Veterans Claims (Court)'s holding in *Sellers v. Wilkie*, 30 Vet.App. 157 (2018), in which the Court created a new legal test for the determination of whether a general statement of intent to seek benefits for unspecified disabilities can constitute a formal claim.

Mr. Sellers had been granted service connection for major depressive disorder (MDD) and assigned an effective date of September 18, 2009, the date on which he had filed an informal claim for service connection for post-traumatic stress disorder (PTSD). He sought an earlier effective date of March 11, 1996, the date on which he filed a formal claim for specific injuries to his leg, knee, back, finger, and ears. In this March 1996 formal claim, Mr. Sellers had also written, "Request for [service connection] for disabilities occurring during active duty service."

The Board denied an effective date earlier than September 18, 2009, based on a finding "that [the] VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 19, 2009." The Board noted that the March 11, 1996, claim "did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability."

Mr. Sellers appealed to the Court, arguing that because his medical records revealed in-service treatment for mental disorders, his March 1996 statement was sufficient to state a claim for service connection for a psychiatric disability. The Secretary argued that the March 1996 filing made no reference to a claim for benefits related to a psychiatric condition and therefore could not constitute a claim under *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009). The Court held "that a general statement of intent to seek benefits, coupled with reasonably identifiable in service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits." The Court then remanded the matter to the Board to determine whether a claim for MDD was reasonably identifiable in March 1996.

The Secretary appealed to the Federal Circuit. The Federal Circuit agreed with the Secretary's argument that the relevant statutes, regulations, and judicial precedent require that a veteran's legally sufficient claim provide information, even at a high level of generality, to identify the sickness, disease, or injury for which benefits are sought. The Federal Circuit rejected Mr. Sellers's argument that the Secretary's requirement that a formal claim must identify the condition for which benefits are sought is fatally inconsistent with VA's duty to assist. The Federal Circuit noted that until the Secretary comprehends the current condition on which the claim is based, the Secretary does not know where to begin to develop the claim to its optimum.

The Federal Circuit concluded that the Court formulated an incorrect legal test and that "[u]nder the correct test, a veteran's formal claim is required to identify the sickness, disease, or injuries for which compensation is sought, at least at a high level of generality. This is the same test as we have applied in evaluating the sufficiency of informal claims." The Federal Circuit noted that it is undisputed that Mr. Sellers's March 1996 statement fails this test, and thus the Federal Circuit held that Mr. Sellers was not entitled to an earlier effective date based on his March 1996 formal claim.

Notably, the Federal Circuit asserted that its decision in *Sellers* was fully consistent with *Shea v. Wilkie*, 926 F.3d 1362, 1362 (Fed. Cir.2019). The Secretary had noted that *Shea* is an instance in which a claim lacking specific reference to PTSD was held sufficient. The Secretary distinguished *Shea* with Mr. Sellers's case, emphasizing that in *Shea,* the claim pointed to specific medical records in which

the veteran's psychiatric condition was noted. It will be interesting to see how *Sellers* may be reconciled with *Shea* in the future.

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Federal Circuit Denies Veteran's Arguments that State-Court-Sanctioned Marital Separation Agreement Supersedes Statutory Apportionment of VA Disability Benefits

by Jillian Berner

Reporting on *Batcher v. Wilkie*, No. 19-2116 (Sept. 11, 2020).

In *Batcher*, the Federal Circuit affirmed the decision of the Court of Appeals for Veterans Claims (Court) that allowed the apportionment of spousal benefits despite the presence of a marital separation agreement barring further support by the veteran to his now-former spouse.

Benefits awarded by the Secretary may be "apportioned" for certain dependents of veterans so that they may receive a portion of the veteran's compensation—for example, where the veteran is not living with his or her spouse and not "reasonably" supporting the spouse (general apportionment). Where a dependent shows hardship, regardless of support by the veteran, apportionment may also occur if it does not create a hardship for other interested parties (special apportionment).

The veteran served in the U.S. Army in the 1960s, married in 1972, and separated from his wife in 2001. In 2002, the veteran filed for divorce in state court in New York, which he later converted to a suit for separation. In 2005, the state court ordered the parties' legal separation and ordered the veteran to pay his wife $300 per month for maintenance. In September 2006, the veteran began receiving monthly disability compensation from the VA. In October 2006, the veteran and his wife appeared at a state court hearing, during which the 2006 Stipulation was ratified by the court. The 2006 Stipulation required the veteran to pay his wife $7,000 by December 6, 2006, and she would no longer receive monthly maintenance payments. The veteran paid the $7,000 soon thereafter.

In April 2008, Mrs. Batcher filed a VA claim for apportionment of her estranged husband's VA disability compensation benefits. VA notified the veteran and he responded, arguing that the apportionment was precluded by the parties' 2006 Stipulation. He did not submit any financial information. In August 2009, the Regional Office (RO) denied Mrs. Batcher's claim for apportionment, finding that she had demonstrated financial need, but that the 2006 Stipulation barred apportionment by barring her from any maintenance or support from her husband. She filed a Notice of Disagreement. In June 2010, the RO again denied the claim, finding that the 2006 Stipulation and the veteran's $7,000 payment resolved any obligation for support. In December 2010, a Pennsylvania state court issued a decree of divorce to the parties. Mrs. Batcher appealed to the Board of Veterans' Appeals (Board).

The Board eventually remanded the claim to the RO for certain procedural deficiencies and finally granted Mrs. Batcher's claim for special apportionment from the date of her claim (April 2008) to the date of divorce (December 2010). The Board found that there was "inadequate objective evidence" for general apportionment to show that the veteran was reasonably discharging his support, but that the evidence did support an award of special apportionment because Mrs. Batcher showed a hardship and the veteran showed no hardship. The veteran appealed to the Veterans Court.

In 2019, a panel considered the case. The veteran argued that his now-ex-wife had waived her right to seek apportionment by entering into the 2006 Stipulation and accepting the $7,000 payment. The panel majority, Chief Judge Bartley and Judge Toth,

held that the separation agreement ratified by a state court was immaterial to the VA's consideration of entitlement to special apportionment and the veteran's remedy was in state court, not with VA. Judge Greenberg dissented, writing that the spouse should not be entitled to apportionment because the divorce was finalized prior to the Board decision and the statute applies only to current spouses, not former spouses, and that Mrs. Batcher should not be entitled to obtain a "modification" of a valid state-sanctioned agreement by misusing a VA order. The veteran appealed.

The veteran argued that the Court erred by refusing to consider the 2006 Stipulation's bar against apportionment was prevented by *res judicata* and that the Court "ignored the preclusive effect" of the 2006 Stipulation. The Federal Circuit disagreed, finding that the Court *did* consider the 2006 Stipulation and clearly held that the state court-ordered agreement did not bar Mrs. Batcher's right to claim apportionment of the veteran's VA disability benefits. The 2006 Stipulation governed only the obligations owed by the *veteran* to his now-former wife, but apportioned VA disability benefits are from VA to an eligible dependent of a veteran and were not governed by the 2006 Stipulation.

The Federal Circuit agreed with the Court that Mrs. Batcher satisfied the criteria for special apportionment, because she experienced hardship, she lived apart from the veteran, and there was no evidence that apportionment would cause undue harm to anyone else. The Federal Circuit reiterated the Court's finding that the veteran's remedy for any purported breach of the 2006 Stipulation was in state court, not the VA.

The veteran also argued that the Court's decision preempted the state domestic relations law. The Federal Circuit disagreed, because there is a presumption against preemption of state domestic relations law and such preemption can only occur with "major damage to clear and substantial federal interests" and actual conflict between the state and federal statutes. An actual conflict, the Federal Circuit held, would be a state law or court order requiring a specific disposition of a veteran's federal benefits. The Federal Circuit found no such conflict. The 2006 Stipulation did not order any payment or division of the veteran's VA benefits.

The veteran also argued that the Court erred by apportioning benefits to his now-former spouse, because the two were legally separated at the time of the filing of the apportionment claim. The Federal Circuit held that Mrs. Batcher was still legally married to the veteran, despite the legal recognition of their separation, as they had not yet been legally divorced.

Accordingly, the Federal Circuit affirmed the Court's decision.

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