VETERANS LAW JOURNAL

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

Message from the Chief Judge

Greetings! I hope you are all well.

I have a few updates. First, although we've received somewhat fewer appeals this year than in FY 2020, we anticipate a record number of appeals in FY22 based on the Board of Veterans' Appeals' goal of deciding 111,500 cases next fiscal year. This means that we will most likely seek additional judicial resources in the near future to deal with an expected record number of appeals over and above our FY 2020 record, which was just shy of 9,000 appeals.

Second, an innovation that the Board of Judges hopes to roll out soon after we return to on-site work--hybrid oral arguments. In a hybrid oral argument, judges and counsel are able to individually choose in-person or virtual participation. This means that some judges and counsel in an oral argument may be on-site and others may appear remotely. The Court recently completed a test-run of a hybrid oral argument and, thanks to the efforts of our talented IT staff, it was a success. As a Court of national jurisdiction, it makes sense for Court proceedings to be easily accessible to practitioners, regardless of their physical location, and having hybrid oral argument capability will help us achieve that goal. Stay tuned for more information.

In other news, the Board of Judges recently held its first joint meeting with the Court's Judicial Advisory Committee (JAC); due to the pandemic, the meeting was held via videoconference. The Board of Judges and the JAC discussed ways to improve Court efficiency and to implement lessons learned from operating during the pandemic. A working group was formed to further explore ideas discussed in that meeting. Thank you to all who made this event possible, especially Glenda Herl, Chief Executive Officer, Carpenter, Chartered, and Merri Flynn, Chief Counsel, CAVC Litigation Group, VA Office of General Counsel.

The Court is in the process of making improvements to our Rules of Practice and Procedure and Internal Operating Procedures (IOPs). Thank you to the Rules Advisory Committee and the JAC, who both had a hand in drafting and proposing revisions to Rule 30(a) regarding citation of nonprecedential authorities, and other Rules that are being developed or undergoing revision. Thanks also to those who sent in suggestions during recent public comment periods concerning several Rules. The

TABLE OF CONTENTS

judges are in the process of reviewing comments and hope to issue updated Rules soon. In addition, the Court just revised IOP XI to authorize single judges to grant petitions for writs of mandamus without the need for a panel. A copy of the revised IOP is available on the Court's website for your reference.

I also wanted to update you on the Court's Rule 33 pilot program, which gives unrepresented appellants the opportunity to obtain limited pro bono representation for the purpose of participating in a Rule 33 mediation conference. Since kicking off in May, unrepresented parties have been provided information about the program and 49 pro se appellants, or about 30%, have opted in. So far, 14 Pilot cases have had a Rule 33 conference, and 5 of these conferences have resulted in joint resolutions. In 3 cases where joint resolution wasn't reached, the volunteer lawyers continued their representation through briefing. We now have 54 experienced attorneys in the program, and as I mentioned in my last message, if you'd like to volunteer to participate please contact the Clerk of the Court, Greg Block, at gblock@uscourts.cavc.gov.

A reminder that the National Veterans Law Moot Court Competition is fast approaching. The NVLMCC—co-sponsored by the Court, the Bar Association, and the George Washington University Law School—brings together law students from across the country to argue veterans law issues before panels of distinguished practitioners and judges. This year, 28 teams will compete. Please think about volunteering to participate in this event, either in grading briefs or serving as judges for virtual and in-person oral arguments. Be on the lookout for further information from NVLMCC coordinators in the near future.

Finally, while the Court had hoped to return to on-site work at 625 Indiana Avenue after Labor Day, the rise in COVID cases from the Delta variant has caused a postponement. The Court continues to monitor the situation to ensure that our return to on-site work is as safe as possible. In the meantime, most Court staff continue to work remotely and to do an amazing job.

Stay safe and be well!

Meg

Message from the President

Hard to believe my term as president draws to a close at the end of the month. It began via a virtual meeting and has been carried out under an all-virtual format. A situation that no president in our 20 -year existence has had to operate under. I am proud to say that instead of maintaining the status quo or sliding backwards as a result, the Bar membership and its supporters have stepped up to advance us forward and should be commended. Special thanks to Chief Judge Bartley and Clerk of the Court Greg Block for your commitment to keeping real-time lines of communication open between us and your ongoing willingness to help the Bar without hesitation. And of course, THANK YOU to my colleagues on the Board of Governors for stepping up to help lead this fine organization. It has been an absolute pleasure serving beside you.

I am certain that all who attended our July program "Point Made" brief-writing seminar with Ross Guberman found it to be as informative and beneficial as I did. Our August follow-up panel on brief-writing with Judges Allen, Meredith and Toth was also outstanding and provided excellent tips for the Court's practitioners. My personal thanks to them for taking the time to provide such valuable

advice. Stay tuned throughout the next few months for info on our monthly programming events as well as updates on the Bar's continued efforts to update our technology platforms for membership communications, website, and social media. Additionally, I ask all members to consider becoming part of the Bar Association's new Law Student Mentorship Program. I promise there is no required intense commitment of time, and you will not be involved in writing Rule 33 memos or briefs for the students. Your role is to provide overall guidance as to what pursuing practice in front of, or working within, the Court entails. Sharing your own insight and experience with these students will no doubt be gratifying and will help build an even larger foundation of attorneys willing to carry out the Court's mission. For any questions or to sign up, please send an email to CAVCBarMentors@gmail.com.

Our nominations for officers and governor-at-large positions on the Board of Governors closed on August 27th. There is once again a fine slate of candidates. I was very pleased to see seven candidates for the four seats being elected for the 2021-2022 fiscal membership year. Our officer candidates are stellar, as are all your BOG members whose term continues. Reminder to please get your email ballots completed and sent to cavcbarassoc@gmail.com.

As I write this message in early September, we are still planning for the annual meeting to be conducted in-person in Washington, D.C. and will also live-stream it via Zoom. It will be held on September 29th, from 4-6 p.m., at the Hyatt Place/White House, 1522 K Street. In addition to conducting business of the association, we will hear from the Bar's founding members and Chief Judge Bartley. Immediately following, we will adjourn to the Ellipse Rooftop Bar upstairs to celebrate the Bar's 20th anniversary and enjoy some long overdue camaraderie.

REMINDER: If you plan to attend in-person, please RSVP to me at jjohns@westdunn.com and include proof of vaccination and signed liability waiver.

At the annual meeting, I will hand off the gavel to incoming President Jenna Zellmer and will do so with absolute confidence that she will be an outstanding leader. I look forward to continuing my service to the Bar via my year as Immediate Past President as I enter my sixth, and final, year as a member of the Board of Governors. The next 20 years is looking good!

Jason E. Johns

Message from the Incoming President

Hello colleagues,

I am honored to be taking the gavel for the upcoming year and look forward to the opportunity to build on the successes of our past presidents. I promise that I will work hard to continue the impressive legacy the Bar Association has built over the past 20 years. Thank you especially to Outgoing President Jason Johns for his leadership over the past year. Although no one envisioned our remote environment lasting quite this long, Jason stepped up to the challenge and continued to provide valuable content to our members. I'm proud of the fact that, under both Immediate Past-President Jenny Tang's and Jason's tenures, our engagement and ability to reach members outside the DC metro area has only improved.

I hope that we can keep moving forward by hosting both in-person and virtual events over the next year. But as Covid-19 continues to present a challenge, please know that your health, safety, and

comfort are my priority. With that said, I'd like to highlight two exciting programs the Bar Association has planned to further our mission to support the Court and provide networking and educational opportunities to our members.

First, the Bar Association's Law School Outreach Committee is launching a new mentorship program to facilitate networking between law students and veterans law practitioners. This is a great opportunity to share our passion for veterans law with the next generation of advocates. I'm very much looking forward to this initiative and would like to thank Stacey-Rae Simcox and Jillian Berner for getting it off the ground.

Second, I'm excited to be working with the Court and its Volunteer Planning Committee to prepare for the fifteenth Judicial Conference. We have some wonderful topics and speakers lined up, so I hope that you join us on April 7th and 8th at the National Press Club in Washington, DC. Immediately following the conclusion of the conference, the Bar Association will host its own half-day event, the topic of which is still to be determined.

Finally, I intend to follow in my predecessors' footsteps by providing high-caliber programming that is accessible to all members throughout the year. I look forward to seeing many of you at the Annual Meeting on September 29th. Please do not hesitate to contact me if you have any topic suggestions or requests for other services that we can provide to the Bar Association membership.

Thank you,
Jenna Zellmer
jzellmer@cck-law.com

Readers: are you interested in contributing to the Veterans Law Journal*? Attorneys, non-attorney practitioners, paralegals, law students, and other interested parties who wish to either write for the* VLJ *or contribute to its publication should contact Editor-in-Chief Jillian Berner at berner.jillian@gmail.com.*

Under the Benefit-of-the-Doubt Rule, "Approximate Balance" Becomes "Nearly Equal"

by Angeline Allen

Reporting on *Lynch v. McDonough*, No. 19-3106 (June 3, 2021).

Lynch v. McDonough is a decision of the Court of Appeals for the Federal Circuit (Federal Circuit) interpreting *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001), and the benefit-of-the-doubt rule under 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102. In the June 3, 2021, decision authored by Judge Prost, the Federal Circuit affirmed a decision of the United States Court of Appeals for Veterans Claims (CAVC) which had affirmed the Board of Veterans' Appeals (Board) denial of an increased rating for posttraumatic stress disorder (PTSD).

Mr. Lynch, the appellant in this case, served on active duty from July 1972 to July 1976. Mr. Lynch filed a service connection claim for PTSD in March 2016. The Regional Office granted service connection and assigned an initial 30 percent rating, which Mr. Lynch appealed. There were conflicting medical opinions as to the severity of the Veteran's PTSD, but the Board concluded that the preponderance of the evidence was against the claim and denied entitlement for a disability rating greater than 30 percent for PTSD.

Thereafter, Mr. Lynch appealed to CAVC arguing that the Board misapplied 38 U.S.C. § 5107(b) and wrongly found that he was not entitled to the benefit of the doubt.

Worth noting are the statute and regulation regarding the benefit-of-the-doubt rule. 38 U.S.C. § 5107(b) provides: "The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." The implementing regulation 38 C.F.R. § 3.102 provides: "When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim."

CAVC found Mr. Lynch was not entitled to the benefit-of-the-doubt and affirmed the Board's decision reasoning that the doctrine did not apply because the preponderance of the evidence was against the claim.

Before the Federal Circuit, Mr. Lynch argued that *Ortiz* was wrongly decided because it set forth an "equipoise of the evidence" standard to trigger the benefit-of-the-doubt rule and that decreased his chance of receiving a higher rating. More specifically, he argued that *Ortiz* read "approximate" out of the term "approximate balance" in 38 U.S.C. § 5107(b) by requiring equal or even balance of the evidence to apply the doctrine.

The Federal Circuit held that, contrary to Mr. Lynch's assertions, *Ortiz* set forth an equipoise-of-the-evidence standard to trigger the benefit-of-the-doubt rule by explicitly giving force to the modifier "approximate" as used in 38 U.S.C. § 5107(b). The Federal Circuit reasoned that *Ortiz* found 38 U.S.C. § 5107(b) to be "clear and unambiguous on its face" as evidenced by the holding in *Ortiz* that under the statute, "evidence is in approximate balance when the evidence in favor of and opposing the veteran's claim is found to be almost exactly or nearly equal." Thus, the Federal Circuit found that *Ortiz* necessarily requires that the benefit-of-the-doubt rule may be triggered in situations other than equipoise of the evidence. More specifically, in situations where the evidence is "nearly equal" or "an approximate balance" of positive and negative evidence.

In sum, the Federal Circuit held under 38 U.S.C. § 5107(b) and *Ortiz*, a claimant is to receive the benefit of the doubt when there is an "approximate balance" of positive and negative evidence, which *Ortiz* interpreted as "nearly equal" evidence. The Federal Circuit found this interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance. In other words, the Federal Circuit stated, "if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt."

Mr. Lynch further argued that *Ortiz* was wrongly decided because "the totality of the…evidence can both preponderate in one direction and be nearly or approximately in balance." He argued that these two standards cannot co-exist; therefore, *Ortiz* eliminates any meaning of the work "approximate" in 38 U.S.C. § 5107(b). The Federal Circuit held that *Ortiz* considered and rejected such reasoning explaining that, "if the Board is persuaded that the preponderant evidence weighs either for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal'… and the benefit of the doubt rule therefore has no application."

Judge Dyk authored a concurrence in part and dissent in part. Judge Dyk agreed that the holding in *Ortiz* did not establish an equipoise-of-the-evidence standard for applicability of the benefit-of-the-doubt rule. He agreed *Ortiz* is best understood as holding that veterans are entitled to the benefit of the doubt when the evidence for or against their claims is approximately equal.

Judge Dyk disagreed, however, that under *Ortiz*, the benefit-of-the-doubt rule does not apply when the preponderance of the evidence is found to be for or against a claimant. Judge Dyk found *Ortiz's* preponderance of the evidence standard is inconsistent with the plain text of 38 U.S.C. § 5107(b). Judge Dyk explained that the phrase "preponderance of the evidence" has been found where evidence only slightly favors one party. Thus, because preponderant evidence may be found when the evidence "tips only slightly against a veteran's claim," the standard is inconsistent with the statute's standard. Judge Dyk also found *Ortiz's* holding to be too restrictive based, in part, on the reasoning that there are situations where the evidence slightly favors the government but the veteran would be unable to recover under the majority's holding even though the veteran *should* recover.

Angeline Allen is Associate Counsel at the Board of Veterans' Appeals.

A Case Study in Statutory Interpretation: *Cameron v. McDonough*

by David R. Seaton

Reporting on *Cameron v. McDonough*, No. 2020-1839 (June 9, 2021).

In *Cameron v. McDonough*, the Court of Appeals for the Federal Circuit (Federal Circuit) provided guidance on the subject of attorneys' fees and, namely, whether or not attorneys could charge fees prior to the promulgation of a final decision by the Board of Veterans' Appeals (Board), and the effective date of any such provision. The Federal Circuit's reasoning was based largely on its interpretation of the Veterans Benefits Health Care, and Information Technology Act of 2006 (2006 Act). Consequently, this case is about, more than anything else, the Federal Circuit's doctrine of statutory interpretation.

John Cameron, a lawyer who provides legal services to claimants seeking benefits from the Department of Veterans Affairs (VA), filed a claim for attorney's fees with a VA agency of original jurisdiction (AOJ) for services rendered prior to the promulgation of a Board decision in a previous case. The AOJ denied Mr. Cameron's claim. Mr. Cameron appealed to the Board, which also denied his claim. Mr. Cameron subsequently appealed to the Court of Appeals for Veterans Claims (Veterans Court), which also denied his claim. Thereafter, the veteran appealed to the Federal Circuit.

Prior to the promulgation of the 2006 Act, attorneys were not allowed to charge attorneys' fees for any services rendered before a Board decision was promulgated. 38 U.S.C. § 5901(c)(1) (1998). On December 22, 2006, however, Congress passed the 2006 Act, which permitted attorneys to begin charging fees for services rendered prior to the promulgation of a Board decision. Critically, the 2006 Act was set to take effect "180 days after the date of enactment" and applied to "services of . . . attorneys . . . with respect to cases in which notices of disagreement are filed on or after that date." Veterans Benefits Health Care, and Information Technology Act of 2006, 120 Stat. at 3403. sec. 101(h) (2006). One hundred and eighty days after the 2006 Act passed was June 20, 2007.

It is here that we must briefly turn to the process of how federal statutes are memorialized after their passage. Once a statute has been passed, the original copy of the document is sent to the Archivist of the United States who is responsible for preserving it. 1 U.S.C. § 106a. Copies of the statute may be published in pamphlet or slip form. 1 U.S.C. 201(a). Thereafter, the Archivist publishes copies of the statutes passed by Congress in the Statutes at Large. The Statutes at Large are simply the statutes passed by Congress in chronological order of the date the statute was enacted without any further organization. 1 U.S.C. § 112. Finally, the Office of Law Revision Counsel codifies the statute in the United States Code; which is an up to date consolidation of all federal statutes that are in effect at the time that particular version of the United States code is published. 2 U.S.C. § 285b.

Thus, after the 2006 Act was passed into law, copies of the law were published in pamphlet or slip form. *See* Veterans Benefits Health Care, and Information Technology Act of 2006 Pub. L. No. 109-461. Additionally, the Archivist of the United States, the custodian of the original copy of the 2006 Act, also published a copy in the Statutes at Large. *See* Veterans Benefits Health Care, and Information Technology Act of 2006, 120 Stat. 3403. Finally, the 2006 Act was subsequently codified. The effective date section of the statute, however, was codified in a note to the United States Code rather than in the text of the code itself. The 2006 Act "take[s] effect . . . 180 days after the date of the enactment . . . and shall apply . . . to services of . . . attorneys . . . [when] notices of disagreement are filed on or after that date." *Id.* § 5904(c)(1) note (2006). Additionally, VA promulgated the following regulation enforcing the statute at the regulatory level. When a notice of disagreement is filed on or before June 19, 2007, "attorneys may charge fees only for services . . . after a final decision was promulgated by the Board[.]" 38 C.F.R. § 14.603.

In the previous case for which Mr. Cameron was seeking attorneys' fees, the notice of disagreement was filed in August 2005. Thus, the AOJ, the Board, and the Veterans Court all concluded that Mr. Cameron was not entitled to attorneys' fees prior to the promulgation of a Board decision, because the notice of disagreement was filed prior to June 20, 2007, and the statute permitting attorneys to charge attorneys' fees prior to the promulgation of a Board decision only applied to notices of disagreement filed on or after June 20, 2007.

Mr. Cameron, however, argued that the effective date section of the 2006 Act was inapplicable and had essentially no force of law. Mr. Cameron's argument was based on the observation that – when the 2006 Act had been codified into the United States Code – the effective date section of the 2006 Act had been characterized as a mere note; rather than in the actual text of the code itself.

The Federal Circuit rejected this argument. Specifically, the Federal Circuit found that where a provision is placed in the United States Code – be it in a note or in the text of the code itself – is not dispositive of whether or not a statute, or any section thereof, has any legal effect. Indeed, the Federal Circuit went so far as to say that the effective date section of the 2006 Act would still be effective even if it had been eliminated from the United States Code entirely. The Federal Circuit found that the Statutes at Large constitute the legal evidence of laws, and that the Statutes at Large trump the United States Code. In this particular case, the provision permitting attorney's fees solely when the notice of disagreement was filed on or after June 20, 2007 was contained within the text of the copy of the 2006 Act published in the Statutes at

Large, and, as such, it is legally binding, regardless of the fact that it was codified in a note to the United States Code, rather than the text to the code itself. Additionally, the Federal Circuit held that 38 C.F.R. § 14.603, the regulation enforcing the 2006 Act, was entirely compatible with the text of the 2006 Act itself.

Beyond the text of the statute itself, Mr. Cameron argued that the 2006 Act ought to be interpreted in light of its legislative intent, which was to expand the availability of attorneys' fees. The Federal Circuit rejected this argument as well and instead found that Congress had explicitly considered and rejected removing all restrictions on attorneys' fees. The Federal Circuit relied on two lines of evidence for this conclusion. First, the Federal Circuit noted that while Congress was considering the 2006 Act it was also considering the Veteran's Choice of Representation and Benefits Enhancement Act of 2006 which explicitly removed all restrictions on attorney's fees. S. 2694, 109th Cong. § 101(c). Ultimately, Congress did not pass this bill, which the Federal Circuit interpreted as proof that Congress did not desire to withdraw all restrictions on attorney's fees. Additionally, the Federal Circuit looked to the legislative history of the 2006 Act itself. Notably, a report issued by the Senate Veterans Affairs Committee (SVAC) while the 2006 Act was under consideration acknowledged the recommendation from external stakeholders that all limitations on attorneys' fees be lifted, but SVAC rejected this approach in order to avoid the possibility of mass disruption to the VA system if the restrictions were lifted all at once. Thus, the Federal Circuit concluded that the SVAC report was representative of Congressional intent. The Federal Circuit also held that 38 C.F.R. § 14.603, the regulation enforcing the 2006 Act, fulfilled Congress's legislative intent.

Finally, Mr. Cameron argued that interpreting the 2006 Act to limit the payment of attorneys' fees for services rendered prior to the promulgation of a final Board decision to cases where a notice of disagreement was filed on or after June 20, 2007, would create a irreconcilable contradiction with 38 U.S.C. § 5904(d). The Federal Circuit, in a rather conclusory manner, rejected Mr. Cameron's arguments by finding that no such contradiction existed. To be sure, this is certainly the weak point of an opinion that otherwise provides an intricate blueprint to the Federal Circuit's framework for interpreting federal statutes.

This case provides a detailed look at how the Federal Circuit resolves cases of statutory interpretation. Namely, the Federal Circuit favors language memorialized in the Statutes at Large over language memorialized within the United States Code. Additionally, the Federal Circuit will be guided not only by reports of Congressional committees prepared prior to the passage of the statute under consideration, but also by comparing and contrasting the bills under consideration during the same Congressional session that died in committee or otherwise were not enacted into law. Finally, the Federal Circuit will consider whether or not its interpretation of a statute is harmonious with other federal statutes, although the Federal Circuit's reasoning in this regard may be somewhat less detailed than the Federal Circuit's textual analysis or survey of any relevant legislative history.

David R. Seaton is Counsel with the Board of Veterans' Appeals.

Limitations of Presumptive Service Connection under 38 C.F.R. §3.318 and the Secretary's Authority

by Gillian Slovick

Reporting on *Snyder v. McDonough*, No. 20-2168 (June 9, 2021).

In *Snyder*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) addressed the 90-day continuous service requirement under 38 C.F.R. § 3.318 which establishes a presumption of service connection for Amyotrophic Lateral Sclerosis (ALS).

Mr. Snyder's appeal followed a Court of Appeals for Veterans Claims (Court) denial of service connection for ALS. The Court found that Mr. Snyder failed to

meet the 90-day continuous service requirement under 38 C.F.R. § 3.318 and that the Secretary had the authority to place limitations on presumptive service connection. Mr. Snyder asserted that the 90-day requirement exceeded the Secretary's authority and was arbitrary and capricious.

In its analysis, the Federal Circuit explained that the presumption was regulatory, and the Secretary established the presumption based on general rulemaking authority. The Federal Circuit noted that the regulation followed a VA-commissioned report from the National Academy of Sciences Institute of Medicine (IOM report) which found "limited and suggestive" evidence of a relationship between service and ALS.

The Federal Circuit discussed the Secretary's finding that 90 days was a reasonable period to demonstrate sufficient contact with hazards which may contribute to ALS. It was noted that the ALS Association supported the regulation, and that studies supporting a relationship between ALS and service discussed service in terms of years.

Regarding Mr. Snyder's assertion that the Secretary exceeded his authority in promulgating the 90-day service requirement, the Federal Circuit found that 38 U.S.C. § 501(a) granted the Secretary the authority to issue the regulation. Quoting that regulation, the Federal Circuit explained that the Secretary had broad authority to establish the service-connection presumption as well as the power to issue "regulations with respect to the nature and extent of proof and evidence…in order to establish the rights to benefits under such laws."

The Federal Circuit found Mr. Snyder's argument that § 3.318 was an unlawful modification of the definition of "veteran" in 38 U.S.C. § 101(2) meritless, explaining that nothing in 38 U.S.C. § 101(2) required that all veterans meet the same evidentiary requirements. Further, it rejected his argument that 38 U.S.C. § 5303, which enumerates bars to benefits, showed that the Secretary exceeded his authority, finding that, like § 101(2), the limitations were not inconsistent with "regulations that make evidentiary requirements dependent on particular circumstances that not all veterans share."

The Federal Circuit then turned to the argument that the 90-day service requirement was arbitrary and capricious. Citing *F.C.C. v. Prometheus Radio Project*, the Federal Circuit explained that an agency's action must be "reasonable and reasonably explained." *F.C.C.*, 1421 S. Ct. 1150, 1158 (2021). Noting that the review was deferential, the Federal Circuit found that the agency was acting "within a zone of reasonableness." *Id.* The Federal Circuit found that the Secretary's action passed reasonableness standards, relying on the IOM report, and supporting studies.

Gillian Slovick is a Counsel at the Board of Veterans' Appeals.

The Thoracic and Lumbar Spine Segments Are One Unit for Rating Purposes

by Mariah N. Sim

Reporting on *Langdon v. McDonough*, No. 2020-1789 (June 9, 2021).

In *Langdon v. McDonough*, a panel of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), comprised of Judges Moore, Prost, and Chen, considered whether VA's interpretation of its General Rating Formula for Diseases and Injuries of the Spine under 38 C.F.R. § 4.71a required the thoracolumbar spine to be rated as a unit, irrespective of whether a service-connected or non-service-connected disability caused the functional loss, and whether the functional loss was in the thoracic or lumbar spine segments.

The veteran, Mr. Robert E. Langdon, had a service-connected thoracic spine injury, and a non-service-connected lumbar spine injury. Upon physical examination, it was determined that Mr. Langdon's service-connected thoracic spine injury did not cause functional impairment, and his reduced flexion was solely as a result of his non-service-connected lumbar spine injury. VA determined that the Veteran's service-connected thoracic spine

injury warranted a noncompensable rating under 38 C.F.R. § 4.71a because the reduced motion was a result of his non-service-connected lumbar spine condition.

Mr. Langdon appealed the noncompensable rating to the Board of Veterans' Appeals (Board) and only challenged the rating based on his thoracic spine disability. He sought a twenty percent disability rating based on limitation of flexion of his thoracolumbar spine. On appeal, the Board assigned a ten percent disability rating due to pain under 38 C.F.R §§ 4.45(f), and 4.59, but disagreed with Mr. Langdon's assertions that he was entitled to a twenty percent disability rating based on limitation of flexion. Mr. Langdon then appealed to the Court of Appeals for Veterans Claims (Court), and the Court affirmed the Board's decision.

The Federal Circuit found that the plain language of the General Rating Formula under 38 C.F.R. § 4.71a did not allow VA to distinguish between the thoracic and lumbar spine segments because the phrase "thoracolumbar spine" was used throughout the rating regulation, as currently adopted. Specifically, the Federal Circuit noted that the General Rating Formula did not separate the segments in the rating criteria, nor in any of the accompanying notes.

Additionally, the Federal Circuit found that diagrams associated with the General Rating Formula depicted thoracolumbar flexion and showed range of motion of the entire thoracolumbar spine. Therefore, the Federal Circuit determined that the plain language of the regulation treated the thoracic and lumbar spine segments as one unit and should be rated as such.
In support of its reversal of the Court and Board interpretations, the Federal Circuit noted that the General Rating Formula was previously amended in 2003 and eliminated the separate criteria for thoracic and lumbar spine segments. During the amendment process, the proposed changes to eliminate separate ratings for thoracic and lumbar spine segments arose from the rationale that the two spinal segments ordinarily move as one unit and it is clinically difficult to separate the range of motion of one from that of the other. The Federal Circuit reasoned that VA's adoption of the current General Rating Formula using the term "thoracolumbar spine," when it had previously considered the two spine segments separately, was powerful evidence that VA did not intend the current regulation to consider the two spine segments separately for evaluation purposes.

Finally, the Federal Circuit addressed VA's contention that allowing an increased rating based on limitation of flexion of the lumbar spine would result in Mr. Langdon improperly receiving compensation for a non-service-connected disability. However, the Federal Circuit agreed with Mr. Langdon and found that his service-connected thoracic spine injury encompassed the limitation of flexion in the lumbar spine because he has a "service-connected thoracolumbar spine" disability as referenced in the General Rating Formula.

Mariah N. Sim is Counsel at the Board of Veterans' Appeals.

Official Clarity on the Meaning of "Employment in a Protected Work Environment" Will Have to Wait

by Kimberly Parke

Reporting on *Arline v. McDonough,* 18-0765 (July 1, 2021).

In *Arline,* the Court of Appeals for Veterans Claims (Court) referred a case to panel with oral argument to address the meaning of "employment in a protected environment" in 38 C.F.R. § 4.16(a). However, the Court did not reach this issue because it found that the Board did not clearly err in finding that Mr. Arline's descriptions of his workplace accommodations were not credible and finding that he was not unemployable. The Court took the opportunity to lament that, although it specifically invited the Secretary to define the phrase "employment in a protected environment" in *Cantrell v. Shulkin,* 38 Vet. App. 382 (2017), the Secretary still has not defined this term.

Mr. Arline sought a total disability rating due to individual unemployability (TDIU) and an increased disability rating for his service-connected schizophrenia. Regarding his schizophrenia claim, Mr. Arline sometimes reported auditory and visual hallucinations to his VA treating clinicians and denied hallucinations on other occasions. When asked about these discrepancies by his VA treating clinician, Mr. Arline reported that he denied hallucinations because he "didn't want to seem crazy."

Mr. Arline worked for the Defense Logistics Agency (DLA) for thirty-eight years – first as a janitor, then as a machine specialist, and finally as a parts expediter. Mr. Arline retired from his work at DLA when he reported that he was told to retire or be fired. After retirement, he volunteered at a local VA facility. Mr. Arline asserted that the only way he was able to keep his job at DLA was because of "profound accommodations" made by his employer. In connection with his claim, Mr. Arline was provided a VA vocational opinion where the vocational expert opined that Mr. Arline would not have been able to maintain his job without the accommodations provided by his employer, which rendered it a protected work environment. The vocational expert also found that Mr. Arline was unemployable in any occupational requiring sedentary or greater physical demands.

Mr. Arline asked the Court to reverse the Board's denial of TDIU because the positive vocational opinion was the only competent evidence on that question and because the Board provided legally invalid reasons for discounting the opinion. Initially, Mr. Arline urged the Court to define "employment in a protected environment" as "a job in which extraordinary accommodations compensate for a veteran's inability to perform the essential functions of his [or her] job."

The Secretary responded that the Board's negative credibility finding regarding Mr. Arline's reports of his workplace accommodations had a plausible basis in the record and was adequately explained. The Secretary then argued that there was no reason for the Court to reach the definition of "employment in a protected environment;" however, if it should reach that question, the Secretary asked the Court to find that the phrase is unambiguous and means in "a non-competitive workplace separated from workplaces in the open labor market and in which hiring and compensation decisions are motivated by a benevolent attitude toward the employee." Alternatively, the Secretary asked the Court to find the phrase ambiguous and defer to the Secretary's proposed definition.

In response to the Secretary, Mr. Arline agreed that the phrase is unambiguous but argued that it means employment in "an environment in which a veteran is protected from the economic consequences of his or her inability to perform the physical or mental tasks required by substantially gainful employment."

The Court found that there was a plausible basis for the Board's credibility and employability determinations, because the Board determined that Mr. Arline's workplace accommodation descriptions were not credible based on the lack of facial plausibility and inconsistencies with other independent evidence. The Court also found that the Board provided adequate reasons or bases for its decision by explaining that the length, nature, and reason for termination of Mr. Arline's employment weighed against finding his reports of workplace accommodations credible and that he was unemployable.

After finding that the Board had a plausible basis for finding Mr. Arline's statements regarding his employment accommodations were not credible, the Court held that the Board's conclusion that the vocational opinion was based on inaccurate facts was a sufficient basis for determining that the opinion lacked probative value. Mr. Arline argued that the positive vocational opinion was the only competent evidence for finding whether he was employed in a protected environment. However, the Court held that the Board properly considered the other evidence of Mr. Arline's work history in determining that he was not employed in a protected environment and was employable.

Next, Mr. Arline argued that the reasoning in *Miller v. Wilkie,* 32 Vet. App. 249 (2020), and *Kahana v. Shinseki,* 24 Vet. App. 428 (2011), concerning medical

opinions should apply to vocational opinions. He argued that "expert evidence can be necessary to deciding whether a lay-reported incident plausibly occurred." The Court held that vocational matters do not involve the same complex issues as medical matters, that the Board members have experience in work environments, and that statutes and regulations outline how federal employment operates. Therefore, the Court held that Mr. Arline's arguments were not persuasive.

The Court then rejected Mr. Arline's remaining arguments that the Board improperly analyzed his retirement, a VA examination, his volunteering and church activities, and his memory impairment. The Court held that the Board did not clearly err in its credibility and employability determinations and that the Board provided adequate reasons or bases for its decision regarding TDIU.

Turning to Mr. Arline's claim for an increased rating for schizophrenia, Mr. Arline asserted that the Board provided inadequate reasons or bases for its denial when it failed to discuss evidence showing why he sometimes underreported his psychiatric symptoms to VA medical professionals. Before the panel, the Secretary conceded that the Board provided inadequate reasons or bases for its decision that Mr. Arline's reports of hallucinations were not credible. The Court did not grant Mr. Arline's request for reversal on this issue but instead remanded the claim to the Board for it to properly weigh Mr. Arline's evidence showing why he underreported his hallucinations at times.

Chief Judge Bartley dissented to express her disagreement with the majority's determinations regarding Mr. Arline's TDIU claim. Chief Judge Bartley explained that the Board went out of its way to impeach Mr. Arline's lay testimony rather than accept his plausible description of his declining psychiatric state, the corresponding problems it caused with his employment, and the significant accommodations he received from his employer. Chief Judge Bartley asserted that to be facially implausible, testimony must be so unbelievable that no factfinder would credit it. She would find that Mr. Arline's testimony fell far below that threshold. She disagreed with the majority that Board members should be able to discount TDIU evidence based on their abstract conceptions without a foundation in the record. Chief Judge Bartley would find that there was no *Auer* deference due to the Secretary because the Secretary's proposed definition is no more than a convenient litigating position.

Finally, Chief Judge Bartley offered a non-exhaustive grouping of factors from the parties' briefing to help veterans and VA adjudicators in assessing whether a protected environment exists. The first group of factors focus on the employee in the job itself. Evidence that a veteran requires substantial accommodations to effectively perform duties suggests a protected environment, and evidence of a few or less extensive accommodations may weigh against such a finding. Also, the magnitude of job responsibilities may bear on that analysis. The second group of factors relates to the employer. Employer behavior may indicate that the veteran is shielded from consequences of poor performance of job duties. An employer's benevolent intent in hiring and promoting a veteran may be relevant, but is not dispositive. Evidence that the veteran works for an institutional employer who traditionally provides sheltered employment may indicate a protected environment. The third factor is economic. While income above the poverty line is not determinative, high income may counter against a protected environment while income that only marginally exceeds the poverty threshold may indicate a protected environment.

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Court Imposes Limits on VA Payment or Reimbursement for Foreign Medical Care

by Dan Brook

Reporting on *Van Dermark v. McDonough*, No. 19-2795 (June 1, 2021).

Mr. Van Dermark, a veteran, appealed an April 2019 Board of Veterans' Appeals (Board) decision, which

denied VA reimbursement for cardiac treatment received at Bangkok Hospital, in Bangkok, Thailand, in May 2016 and May 2018. The Board found that 38 U.S.C. § 1725 and/or 38 U.S.C. § 1728, governing VA reimbursement for emergency medical treatment, did not apply to medical care received outside the U.S. and that the reimbursement of such care is governed by the VA Foreign Medical Program (FMP) under 38 U.S.C. § 1724 and its implementing regulation, 38 C.F.R. § 17.35. Section 1724 generally prohibits the furnishing of hospital or domiciliary care or medical services outside the U.S., except where the care is for a service-connected disability or where the care is necessary as part of a rehabilitation program under 38 U.S.C. Chapter 31. Because the care in question did not meet either of these conditions, the Board denied reimbursement.

On appeal, Mr. Van Dermark argued that the 38 U.S.C. § 1724 prohibition on furnishing hospital or domiciliary care or medical services outside the U.S. did not apply to his claim for reimbursement. He contended that the word "furnish" refers to the direct provision of healthcare, whereas the word "reimburse" refers to payment for healthcare provided by another party. Thus, because the Section 1724 prohibition only refers to furnishing care, it was inapplicable to his claim for reimbursement. He further argued that he was entitled to reimbursement under 38 U.S.C. § 1728(a)(3) based on his receipt of VA compensation for total disability due to individual unemployability (TDIU) or under 38 U.S.C. § 1725 based on his active participation in the VA healthcare system and personal liability for the cost of the Bangkok Hospital treatment received. He argued that both these statutory sections specifically apply to reimbursement of emergency medical treatment and that the treatment for which he was seeking reimbursement was emergent. In response, the Secretary asserted that the entirety of 38 U.S.C. Chapter 17 evidenced Congressional intent "only to provide or pay for medical care outside of the United States through the FMP established by section 1724."

The opinion, written by Judge Toth and joined by Judge Pietsch, analyzed the meaning of the terms "reimburse" and "furnish" within the VA statutory scheme, noting that because neither term was specifically defined by Congress, the Court looked to "their ordinary meaning at the time of enactment." After a detailed analysis, the Court determined that the use of the word "furnish" in Section 1724 to generally prohibit furnishing hospital or domiciliary care or medical services outside the U.S. encompassed a prohibition of reimbursement of the cost of such care received outside the U.S. Thus, Section 1724 was directly applicable to the veteran's claim. The Court also considered whether Sections 1725 or 1728, enacted after Section 1724, changed VA's obligations to reimburse veterans for healthcare received outside the U.S. However, the opinion ultimately concluded that these statutes apply only inside the U.S., noting that they make no reference to reimbursement for treatment received abroad, whereas Section 1724 specifically addresses this situation. Accordingly, the Court affirmed the April 2019 Board decision, finding that 38 U.S.C. § 1724 precluded reimbursement of the veteran's treatment at Bangkok Hospital on May 2016 and May 2018 because it was not for a service-connected disability and was not received in conjunction with a rehabilitation program under Chapter 31.

In a dissenting opinion, Judge Greenberg indicated that the pro-veteran canon required the Court to interpret statutes in a manner that helps veterans and that in blurring the line between plain language analysis and interpreting ambiguity in a statute, the majority opinion had not upheld this requirement, setting a dangerous precedent.

Dan Brook is Counsel with the Board of Veterans' Appeals.

Federal Circuit is Split on Whether the Effective Date Provisions of 38 U.S.C. § 5110 are Statutes of Limitations

by Kimberly Parke

Reporting on *Arellano v. McDonough*, 1 F.4th 1059 (June 17, 2021).

In this case, Mr. Arellano appealed the effective date for service connection assigned by VA, arguing that he was entitled to the retroactive effective date provided by 38 U.S.C. § 5110(b)(1) under an equitable tolling theory. Section 5110(b)(1) provides for an effective date of the day after discharge from service when a veteran files a claim within a year of discharge. The Court of Appeals for the Federal Circuit (Federal Circuit) considered en banc whether the rebuttable presumption of equitable tolling for statutes of limitations established in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990), applies to the one-year period in 38 U.S.C. § 5110(b)(1).

Mr. Arellano filed his claim for service connection for psychiatric disabilities more than thirty years after his discharge from service and was granted a one hundred percent disability rating for "schizoaffective disorder bipolar type with PTSD," effective the date VA received his claim. Mr. Arellano appealed to the Board of Veterans' Appeals (Board), arguing that 38 U.S.C. § 5110(b)(1)'s one-year period should be equitably tolled in his case to afford him an earlier effective date back to the day after his discharge from service based upon his psychiatric disability. In support of his argument, he submitted a medical opinion by his psychiatrist that he had been one hundred percent disabled since 1980 when he was almost crushed and swept overboard while working on the flight deck of an aircraft carrier. The Board denied Mr. Arellano's claim based upon the Federal Circuit's holding in *Andrews v. Principi,* 351 F.3d 1334 (Fed. Cir. 2003). The Court of Appeals for Veterans Claims (Court) affirmed the Board's denial.

Mr. Arellano urged the Federal Circuit to overrule its holding in *Andrews* that 38 U.S.C. § 5110(b)(1) is not a statute of limitations amenable to equitable tolling but merely establishes an effective date for the payment of benefits. In *Andrews*, the Federal Circuit reasoned that the principles of equitable tolling are not applicable to the time period in 38 U.S.C. § 5100(b)(1) because it does not contain a statute of limitations but instead establishes when benefits may begin and provides for an earlier effective date under certain limited circumstances.

The Federal Circuit was split regarding the reasons for its decision to affirm the Court's decision. The judges disagreed regarding whether 38 U.S.C. § 5110(b)(1) is a statute of limitations and whether equitable tolling is available. However, all of the judges agreed that Mr. Arellano's claim was untimely and that he is not entitled to an earlier effective date.

The concurring opinion, authored by Judge Chen and joined by Chief Judge Moore and Judges Lourie, Prost, Taranto, and Hughes, stated that 38 U.S.C. § 5110(b)(1) is not a statute of limitations and does not function similarly to a statute of limitations. Therefore, this opinion found that equitable tolling should not apply to 38 U.S.C. § 5110(b)(1). Judge Chen wrote that the equitable tolling doctrine permits a court to pause a statutory time limit when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action. Judge Chen wrote that before deciding whether the factual circumstances justify equitable tolling, the court must decide whether the statutory time limit at issue is one amenable to equitable tolling. Judge Chen discussed the Federal Circuit's holding in *Andrews* that principles of equitable tolling are not applicable to the time period in 38 US.C. § 5110(b)(1) because it does not contain a statute of limitations.

Judge Chen wrote that *Irwin* established a two-step framework consisting of determining whether the rebuttable presumption of equitable tolling applies to the statutory provision at issue and then whether that presumption was rebutted. Judge Chen explained that the presumption has been rebutted when there is good reason to believe that Congress

did not want equitable tolling to apply to the statute. Judge Chen further explained that the Supreme Court has only applied the presumption of equitable tolling to statutory provisions that Congress clearly would have viewed as statutes of limitations. Conversely, the Supreme Court has declined to presume that equitable tolling applies where the time limit at issue functions unlike a statute of limitations.

Judge Chen wrote that to determine whether 38 U.S.C. § 5110(b)(1) is a statute of limitations, the court should consider whether the provision satisfies the functional characteristics of such statutes. He saw two reasons why Congress would not have thought that this provision is a statute of limitations. First, § 5110(b)(1) does not operate to bar a veteran's claim for benefits for a particular service-connected disability after one year has passed. Second, § 5110(b)(1) lacks features standard to the laws recognized as statutes of limitations with presumptive equitable tolling, including that its one-year period is not triggered by harm from the breach of a legal duty owed by the opposing party, and it does not start the clock on seeking a remedy for that breach from a separate remedial entity. Judge Chen cited Black's Law Dictionary for the proposition that a statute of limitations bars claims after a specified period. Judge Chen reasoned that § 5110(b)(1) does not have the key "functional characteristics" that define a statute of limitations because a veteran seeking disability compensation faces no time limit for filing a claim. Judge Chen further reasoned that the timing provision of § 5110(b)(1) does not function to bar stale claims or encourage the diligent prosecution of known claims. Judge Chen determined that § 5110(b)(1) establishes the effective date of a single benefits claim for an ongoing disability, whereas the statutory-lookback periods for patent and copyright infringement relied upon by the other concurring opinion are for a series of discrete infringing acts. Judge Chen wrote that in contrast to these provisions, § 5110(b)(1) never bars a veteran's benefits claim regardless of when it was filed but instead establishes an element of the claim itself (i.e., the effective date of the award).

Judge Chen further held that § 5110(b)(1) differs from statutes of limitations because of the onset of its one-year period and the remedial authority involved. The standard rule is that a statute of limitations begins to run when the cause of action accrues, i.e., when the plaintiff has a complete and present cause of action. In the veterans' benefits context, the earliest point at which a veteran's cause of action accrues is when VA has failed to satisfy a legal duty owed to the veteran, such as when his claim for benefits has been wrongfully adjudicated or denied. The one-year period in § 5110(b)(1) in contrast begins on the day after discharge from service and does not measure the time from harm caused by a breach of duty or from the breach of duty. Judge Chen asserted that if the court were to adopt Mr. Arellano's and Judge Dyk's arguments, a claimant would have a cause of action on the date after discharge from service – before any claim has been filed with VA. Judge Chen further asserted that the functional distinction between § 5110(b)(1)'s effective date provision and a statute of limitations is confirmed by observing that the creation of a right is distinct from the provision of remedies for violations of that right. Judge Chen wrote that he is unaware of any cases that apply *Irwin's* presumption to a statutory provision similar to § 5110(b)(1) – one that does not encourage the diligent prosecution of a claim by barring a claimant from seeking relied after the statutory period elapses and, instead, establishes an element of the claim itself.

Judge Chen held that even if *Irwin's* presumption were to apply to § 5110(b)(1), equitable tolling would not be available because it is inconsistent with the text of the relevant statute. There are several ways to rebut the presumption of equitable tolling, all of which seek to answer *Irwin's* question – is there good reason to believe that Congress did not want the equitable tolling doctrine to apply? Section 5110 begins with the default rule that unless specifically provided otherwise in this chapter, the effective date of an award shall not be earlier than the date of receipt of application thereof. Judge Chen reasoned that by mandating that any exception to the default rule must be provided for specifically in the chapter, the most natural reading of § 5110 is that Congress implicitly intended to preclude the general availability of equitable tolling by explicitly

including a more limited, specific selection of equitable circumstances under which a veteran is entitled to an earlier effective date and specifying the temporal extent of the exceptions for those circumstances. Judge Chen also wrote that the statutory history of § 5110 reinforces the conclusion that Congress did not intend for equitable tolling to apply to § 5110(b)(1).

Judge Chen acknowledged that Congress is more likely to intend equitable tolling for statutes designed to be unusually protective of claimants where laymen initiate the process. But these general background principles cannot override the unambiguous meaning of the statutory text. Judge Chen recognized that there are circumstances under which it may seem unjust to preclude equitable tolling. However, he stated that where the statutory text demonstrates a clear intent to preclude tolling, courts are without authority to make exceptions merely because a litigant appears to have been diligent, reasonably mistaken, or otherwise deserving.

Judge Chen then wrote that because both the Board and the Court found equitable tolling categorically unavailable for § 5110(b)(1) as a matter of law, neither had reason to consider whether the specific facts of this case justified equitable tolling. Judge Chen disagreed with Judge Dyk's conclusion in the concurrence that the Federal Circuit may determine the application of equitable tolling in the first instance where the facts are undisputed. Conversely, if *Irwin's* presumption of equitable tolling were to apply to § 5110(b)(1), Judge Chen would remand the case for further factual development.

The second concurring opinion, authored by Judge Dyk and joined by Judges Newman, O'Malley, Reyna, Wallach, and Stoll, would hold that 38 U.S.C. § 5110(b)(1) is a statute of limitations but that it cannot be equitably tolled for a mental disability in the circumstances of this case. Judge Dyk wrote that the Supreme Court has never suggested that the presumption in favor of equitable tolling is generally inapplicable to administrative deadlines.

Judge Dyk disagreed with Judge Chen's analysis that § 5110(b)(1) is not triggered by harm from the breach of a legal duty and does not start the clock on seeking a remedy for the breach from a separate remedial entity. Judge Dyk wrote that these rules do not come from case law and come only from treatises with general language describing statutes of limitations. Judge Dyk then analogized 38 U.S.C. § 5110(b)(1) to the Vaccine Act's no-fault statute of limitations.

Judge Dyk wrote that a claim for benefits have two components: (1) a retrospective claim for benefits for past disability and (2) a prospective claim for future benefits. The statute imposes no statute of limitations for prospective benefits, and a veteran may be entitled to forward-looking benefits after the one-year period prescribed by § 5110(b)(1) runs. However, it does impose what is clearly a one-year statute of limitations for retrospective claims – making retrospective benefits unavailable unless the claim is filed within one year after discharge. Judge Dyk then analogized § 5110(b)(1) to the statutes providing for Social Security disability benefits, in copyright and patent infringement, and the three-year lookback provision in the Bankruptcy Code.

Judge Dyk then reasoned that the *Irwin* presumption has not been rebutted because Congress has not clearly indicated a general prohibition against equitable tolling as to § 5110(b)(1). Judge Dyk went through five factors identified by the Supreme Court to determine whether the equitable tolling presumption has been rebutted. First is the language of the statute, which Judge Dyk held does not clearly foreclose equitable tolling of § 5110(b)(1). Second is that the detailed nature of the statute may suggest that Congress did not intend for a statute of limitations to be equitably tolled. Judge Dyk wrote that while §5110 is a detailed statute, it uses fairly simply language. Third is whether a statute of limitations has explicit exceptions to its basic time limits, which may preclude equitable tolling. Judge Dyk found that although § 5110(b)(1) is itself an exception to the general effective date rule of § 5110(a)(1), there are no explicit exceptions to the one-year period in § 5110(b)(1). Additionally, Judge Dyk wrote that the other provisions on § 5110 do not speak to equitable tolling. Fourth is whether

Congress is more likely to have intended a statute of limitations that govern a statutory scheme in which "laymen, unassisted by trained lawyers, initiate the process" to be subject to equitable tolling. Judge Dyk reasoned that this scenario clearly fits the veterans benefits context. Fifth is the subject matter of the statute; if the provision is contained in a statute that Congress designed to be unusually protective of claimants, that will suggest that Congress intended for equitable tolling to apply. Judge Dyk found that the pro-claimant nature of veterans benefits law clearly weighs in favor of this factor supporting equitable tolling.

Turning to whether equitable tolling should apply in this case, Judge Dyk found that the statutory scheme helps inform the scope of equitable tolling based on a mental disability. First, Judge Dyk noted that an individual who lacks mental capacity may have a caregiver sign a form for benefits on his or her behalf. Additionally, 38 C.F.R. § 3.155 provides that a next friend may submit an intent to file a claim for a claimant without full capacity. Then Judge Dyk noted that for pension benefits, there is a one-year period for a retroactive effective date if a permanently and totally disabled veteran files within one year of the date on which they became totally disabled. Judge Dyk found this instructive because it indicates Congressional willingness to delay veterans' filing obligations where a disability makes meeting them difficult or impossible, but not to do so indefinitely or for a substantial period of time. Applying that framework to the facts of this case, Judge Dyk found that because Mr. Arellano had a caregiver who could have filed an application on his behalf and no special circumstances are alleged, equitable tolling on the grounds of Mr. Arellano's mental disability is not available, especially for such an untimely filing.

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Federal Circuit Holds that a Party's Own Self-Serving Testimony Can Invoke the Common Law Mailbox Rule

by Max C. Davis

Reporting on *Anania v. McDonough*, 1 F.4th 1019 (Fed. Cir. 2021).

In *Anania v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) reversed a decision of the United States Court of Appeals for Veterans Claims (Veterans Court) that held that, as a matter of law, a party's self-serving statement could not be accepted as evidence for purposes of invoking the common law mailbox rule.

By way of background, following issuance of a statement of the case (SOC) by the Department of Veterans Affairs (VA) denying Mr. Anania's claim for benefits, Mr. Anania had one year from the date of the mailing of the notification of the SOC to file a substantive appeal. Approximately two years later, Mr. Anania's counsel requested confirmation that VA had received the appellant's substantive appeal, attaching with the request a copy of the purportedly-mailed substantive appeal. In response, VA issued a decision that it had not received a timely substantive appeal because, up until the attachment received with the confirmation request, no substantive appeal had been received by VA.

When the matter was appealed to the Board of Veterans' Appeals (Board), Mr. Anania's counsel submitted a signed affidavit that he had personally mailed the substantive appeal on a date within the allotted one-year timeframe. The affidavit indicated that the appeal was sent to the correct location, and it was not disputed that the mailing would have allowed sufficient time for the appeal to be received by the due date. Mr. Anania contended that this evidence was sufficient to invoke the presumption of receipt, a presumption available under the common law mailbox rule that "if a letter properly directed is proved to have been either put into the post office

or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time and was received by the person to whom it was addressed." *Rios v. Nicholson*, 490 F.3d 928, 930-31 (Fed. Cir. 2007) (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S. Ct. 382, 28 L. Ed. 395 (1884)). The Board, without discussing the credibility or probative value of the affidavit, concluded that the affidavit "amount[ed] to no more than self-serving testimony" which could not be accepted as evidence for invoking the presumption of receipt.

The Veterans Court affirmed the Board's decision and held that, as a matter of law, a party's own self-serving testimony, or that of his counsel, cannot be used to invoke the common law mailbox rule. The Veterans Court interpreted holdings of the Federal Circuit to require proof of mailing such as an independent proof of postmark or a dated receipt, or any other evidence apart from the party's own statements.

On appeal, the Federal Circuit rejected the Veterans Court's per se rule. It found persuasive holdings of the United States Courts of Appeals for the Second, Third, Fifth, and Ninth Circuits, as well as guidance in a decision of the United States Court of Appeals for the Sixth Circuit, that accepted as evidence a party's own statements for purposes of invoking the presumption of receipt under the mailbox rule. The Federal Circuit also distinguished Mr. Anania's case from a line of tax cases in which the court held that self-serving testimony alone was not sufficient to invoke the presumption of receipt, explaining that in the context of tax law the mailbox rule has been affirmatively limited by the Internal Revenue Code.

The Federal Circuit thus held that "all that is required for the presumption to attach is evidence demonstrating that the mail was 'properly addressed, stamped, and mailed in adequate time to reach the [destination] in the normal course of post office business,' or, '[i]n lieu of direct proof of mailing, . . . evidence of mailing custom or routine practice.'" (Citing *Rios*, 490 F.3d at 933.). As the Government neither challenged the credibility of the affidavit submitted by Mr. Anania's counsel nor challenged its substantive assertion that the substantive appeal was properly addressed, stamped, and mailed in adequate time, the Federal Circuit concluded that reversal of the Veterans Court's decision was the proper disposition.

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CAVC Issues Rare Reversal and Grant of Service Connection in *Andrews*

by Kenneth L. Meador

Reporting on *Andrews v. McDonough*, 19-0352, 2021 U.S. App. Vet. Claims LEXIS 972.

In *Andrews*, the Court of Appeals for Veterans Claims (Court) issued a rare reversal of an October 1, 2020, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for hepatitis C and remanded the matter for VA to assign the appropriate effective date for the grant of service connection.

In the pendency of his claim, Mr. Andrews submitted lay testimony attributing his Hepatitis C to in-service shots with inoculation air guns (with photographic evidence), dental care, and reusable syringes. He also stated that he'd never gotten a tattoo, used drugs, or received a blood transfusion. His service treatment records also indicated an in-service STD. Mr. Andrews also submitted Board decisions granting service connection for Hepatitis C related to air gun immunizations and internet materials regarding VA's treatment of Hepatitis C claims. Specifically, he submitted text of M21-1 Adjudication Manual provisions explaining that when "the evidence favoring risk factor(s) in-service is equal to the evidence favoring risk factor(s) before or after service," VA should resolve reasonable doubt in favor of the veteran. M21-1, Pt. III, sbpt. iv, ch. 4, sec. H.2.e.

Mr. Andrews underwent compensation and pension examinations in 2010 and 2017. In 2010, the examiner opined that Mr. Andrews's condition was

not related to his service because "air gun injections are not a risk factor" for Hepatitis C. The Board remanded the matter for a new opinion in 2017, finding that the 2010 examiner failed to consider Mr. Andrews's in-service STD and, when remanding, the Board specifically noted the M21-Adjudication Procedures Manual's instructions regarding hepatitis C claims.

In September 2017, the same examiner provided a second negative nexus opinion. He again stated that there was "no direct correlation" between air gun use and hepatitis C and that the STD Mr. Andrews had in service was not "a known etiology for liver disease." The examiner also addressed Mr. Andrews's theory that his in-service dental care may have caused his condition, opining that there was no evidence of a blood transfusion or contact with blood from medical personnel.

In October 2018, the Board denied entitlement to service connection for the condition. In reaching its negative conclusion the Board placed greater probative weight on the 2017 VA Examination than the evidence submitted by Mr. Andrews and the Board only addressed Mr. Andrews in-service STD in reviewing the 2017 VA Examiner's opinion. Mr. Andrews appealed the Board's decision to the Court. In briefing, the parties agreed that the Board relied on an inadequate medical examination to reach its decision. However, Mr. Andrews argued that reversal was the appropriate remedy in the matter because the evidence of record met the benefit of the doubt standard in the M21-1. The Secretary disagreed, arguing that reversal would force the Court to act in the first instance in violation of 38 U.S.C. § 7261(c).

In its decision, the Court explained that its "propensity for remands over reversals derives not from a perceived lack of authority or confusion about the proper legal standard, but follows unavoidably from our limitations as an appellate court and the factual complexities inherent in the evidentiary decisions VA must make in benefits cases." Accordingly, the Court narrowly granted Mr. Andrew's request for reversal based on (1) the applicable legal standard the Board adopted in the matter at hand, (2) the uncontested facts established in the matter, and (3) the de minimis role that additional development would have on the claim.

First, the Court cited *Adams v. Principi*, 256 F.3d 1318 (Fed. Cir. 2001), noting that the principle from *Adams* was that it is *not* appropriate to remand a case to allow the agency to develop for negative evidence.

The Court then drew upon the holding in *Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012), for the proposition that, in rare circumstances, namely where the government has conceded relevant facts, or where the Court is required by statute to consider harmless error, the Court may engage in limited initial fact finding, but still, generally, "when there are facts that remain to be found in the first instance, a remand is the proper course." *Byron*, 670 F.3d at 1205.

Finally, the Court found that *Deloach v. Shinseki*, 704 F.3d 1370 (Fed. Cir. 2013), was closely analogous to the matter at hand. In *Deloach*, multiple consolidated appellants argued that reversal was necessary after the record had been reviewed in its entirety and the appellants had been given the benefit of the doubt under 38 U.S.C. § 5107. The Court noted that, in *Deloach*, the Federal Circuit had stated that the phrase "or reverse" from 38 U.S.C. § 7261(a)(4) unequivocally showed that Congress intended to give the Court power reversal power in appropriate cases. *Deloach*, 704 F.3d at 1379-80. The Federal Circuit also held in *Deloach* that "where the Board has performed the necessary fact-finding and explicitly weighed the evidence, the Court of Appeals for Veterans Claims should reverse when, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed."

In the case at hand, the Court affirmed that it could not independently turn to the M21-1 to inform its decision, but because the Board had invoked the M21-1 adjudication manual in its 2017 remand, and the manual instructs to "resolve reasonable doubt . . . in favor of the Veteran when the evidence favoring risk factor(s) in service is equal to the evidence favoring risk factor(s) before or after service," the Court was reviewing the matter based on the legal

standard the Board used. Citing *Hudick v. Wilkie*, 755 F. App'x 998, 1006-07 (Fed. Cir. 2018), the Court noted that, "The Board's citation to a manual provision amounts to a tacit recognition that the provision constitutes authority in the case."

Given that the Board did not dispute the presence of Mr. Andrew's in-service risk factors or the lack of pre- or post-service risk factors, "no matter how diminished the Board thought the likelihood that Mr. Andrews' in-service risk factors caused his hepatitis C, this must be weighed against the absence of extra-service risk factors," the Court held. The Court then held that there was an approximate balance of evidence favoring risk factors in service and a lack of risk factors post-service and that, to the extent that the Board found that such evidence did not meet the reasonable doubt standard discussed in 38 C.F.R. § 3.102 (2020), the finding was clearly erroneous.

According to the Court, any further development could not dismiss the fact that no post-service risk factors exist. That is, even if an examiner on remand opined that the in-service risk factors were less likely than not to have caused Mr. Andrews's hepatitis C, the M21-1 provision regarding in-service risk factors and the benefit of the doubt necessitates that the likelihood of in-service risk factors remains on par with the likelihood of a post-service etiology. Accordingly, the Court reversed the Board's October 2020 decision and ordered VA to award service connection to Mr. Andrews for hepatitis C.

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Federal Circuit Permits Combining Montgomery GI and 9/11 GI Bill Education Benefits Based on Multiple Periods of Service

by Marissa Caylor

Reporting on *Rudisill v. McDonough*, No. 20-1637 (Fed. Cir. July 8, 2021).

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in *Rudisill* affirmed the U.S. Court of Appeals for Veterans Claims ("Court") decision in *BO v. Wilkie*, 31 Vet. App. 321 (2019), which held that a veteran who qualifies for education benefits under both the Montgomery GI Bill, 38 U.S.C. § 3011(a), and the Post-9/11 GI Bill, 38 U.S.C. § 3311, based on separate periods of service is entitled to educational benefits under both GI Bills, subject to a statutory cap of a combined total of 48 months of education benefits under 38 U.S.C. § 3695.

The appellant, James Rudisill, had three periods of active duty service: (1) January 2000 to June 2002 (Army); June 2004 to December 2005 (Army National Guard); and (3) November 2007 to August 2011 (Army, commissioned officer). He received education benefits under the Montgomery GI Bill ("Chapter 30 benefits"), 25 months and 14 days, to complete a college degree. Later, after his third period of service, he applied for education benefits under the Post-9/11 GI Bill ("Chapter 33 benefits"). VA granted entitlement to Chapter 33 benefits but found that, because he had previously received Chapter 30 benefits, he was only entitled to Chapter 33 benefits for the 10 months and 16 days of benefits remaining under his entitlement to 36 months of Chapter 30 benefits.

Rudisill appealed, requesting additional Chapter 33 benefits up to a statutory cap of 48 months of education benefits under 38 U.S.C. § 3695. The Board of Veterans' Appeals denied the appeal, holding that entitlement under Chapter 33 was limited by 38 U.S.C. § 3327 and 38 C.F.R. § 21.9550(b)(1), which address entitlement in situations where an individual uses some of a

Chapter 30 entitlement and then elects to receive benefits under Chapter 33 instead. The Court reversed the Board's decision and determined that 38 U.S.C. § 3327, which addresses eligibility to elect Chapter 33 benefits when Chapter 30 benefits have already been used, does not apply to veterans with multiple qualifying periods of service. The Court held that Rudisill was entitled to 36 months of Chapter 30 benefits and 36 months of Chapter 33 benefits based on his separate periods of qualifying service and, because he had multiple qualifying periods of service, was entitled to receive up to the aggregate limit under 38 U.S.C. § 3695 of 48 months of education benefits.

Before the Federal Circuit, Rudisill's initial argument was jurisdictional. Rudisill argued that a delay in the Solicitor General's approval, required under 28 C.F.R. § 0.20(b), of the Attorney General's filing of a notice of appeal on behalf of the VA Secretary rendered the notice of appeal itself untimely because it was filed at a time when it was not yet authorized by the Solicitor General. The Secretary argued that the practice of filing "protective" notices of appeal is routine and cited to several Federal Circuit decisions wherein the Attorney General's filing of a notice of appeal prior to the Solicitor General's authorization was considered timely. The Federal Circuit ultimately held that the jurisdictional requirement of a timely filed notice of appeal was met, as the Attorney General had the authority to file a protective notice of appeal, it was filed within 60 days, and it was later approved by the Solicitor General.

Regarding the underlying substantive issue, the Secretary argued that 38 U.S.C. § 3327(d)(2)(A) applied where a veteran used some Chapter 30 education benefits and then later elected to use Chapter 33 benefits. Under that section, Rudisill's entitlement to Chapter 33 benefits would be limited to the number of months remaining in his Chapter 30 benefits entitlement, subject to its cap of 36 months of education benefits entitlement.

The Federal Circuit disagreed with the Secretary and held that 38 U.S.C. § 3327(d)(2)(A) and its cap of 36 months of entitlement did not apply. The Federal Circuit noted that Congress had specifically provided additional benefits in 38 U.S.C. § 3695(a) to veterans who have multiple qualifying periods of service, each of which would separately qualify the veteran for education benefits. These veterans were entitled to an aggregate of 48 months of education benefits rather than 36 months. The Federal Circuit noted that the aggregate entitlement of 48 months for these veterans had been included in each GI Bill since the late 1960s and concluded that the legislative history and statutory pattern involved did not support the Secretary's interpretation. The Federal Circuit affirmed the Court's statutory interpretation and holding and held that Rudisill was entitled to Chapter 33 benefits subject to a total cap of 48 months of benefits, including the number of months of Chapter 30 benefits he had already received.

Judge Dyk concurred in part and dissented in part. He concurred with the majority's holding on the timeliness of the notice of appeal, but dissented from the majority's holding that only 38 U.S.C. § 3695(a) applied to Rudisill's case. Judge Dyk wrote that 38 U.S.C. § 3327(d)(2)(A) was not limited in application to only veterans who qualify for two education benefits programs based on a single period of service. Judge Dyk determined that Rudisill had made the election referenced in 38 U.S.C. § 3327(a)(1)(A) and that consequently VA's determination that Rudisill's entitlement was limited to the cap of 36 months of aggregate entitlement was correct. Judge Dyk wrote that nothing in the text or legislative history of the statutes involved supported the majority's interpretation and stated that it was not the Federal Circuit's job to "rewrite the statute to achieve a supposedly fair result."

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Equitable Estoppel May Prevent VA from Denying an Effective Date before the Date of a Veteran's Claim if the Government Prevented the Veteran from Filing Earlier

by Philip Timmerman

Reporting on *Taylor v. McDonough*, 2019-2211 (June 30, 2021).

During his active duty service, the appellant, Mr. Taylor, voluntarily participated in a government study during which he was exposed to various chemicals. He signed an oath of secrecy regarding the study and refrained from filing a claim for service connection for posttraumatic stress disorder (PTSD) based on the experience until VA notified him in 2006 that the government had declassified the names of study participants and that he could seek healthcare and compensation benefits based on his participation in the study.

In *Taylor*, the Court of Appeals for the Federal Circuit (Federal Circuit) reversed a decision of the Court of Appeals for Veterans Claims (CAVC) affirming a Board of Veterans' Appeals (Board) decision which denied Mr. Taylor an effective date for service connection for PTSD before the date of his claim. Instead, the Federal Circuit held that the government was equitably estopped from asserting against Mr. Taylor the claim filing requirement of 38 U.S.C. § 5110(a)(1).

The CAVC's decision rested on the holdings that 1) Mr. Taylor had no protected property interest in his VA disability benefits for due process purposes before he filed his claim, 2) the CAVC's equitable powers were not so broad that it could "order VA to establish a process by which [Mr. Taylor] and other veterans like him may establish an earlier effective date for the award of benefits as of the date of the injury, in the absence of a prior claim," and 3) that there was no statutory authority for the monetary relief Mr. Taylor sought.

However, in a footnote responding to the dissenting opinion, the CAVC also held that equitable estoppel was not available to grant Mr. Taylor monetary relief 1) in the absence of an explicit statutory grant of authority for the CAVC to use equitable estoppel and 2) contrary to the requirements of 38 U.S.C. § 5110. In support of these holdings, the CAVC cited *Office of Pers. Management v. Richmond*, 496 U.S. 414 (1990), and *McCay v. Brown*, 106 F.3d 1577 (Fed. Cir. 1997).

In holding that equitable estoppel was available, the decision of the Federal Circuit dealt almost exclusively with this footnote. Addressing and refuting each of the footnote's arguments in turn, the court held that: 1) the CAVC has inherent authority to grant equitable relief such as estoppel; 2) the rule limiting effective dates to no earlier than the date of claim (38 U.S.C. § 5110(a)(1)) is not jurisdictional, and thus is subject to equitable considerations such as estoppel; and 3) neither *Richmond* nor *McCay* preclude the granting of monetary relief to a claimant against the government on a theory of equitable estoppel where such monetary relief is otherwise authorized by Congress or the relevant government agency.

First, the Federal Circuit held that the CAVC has inherent authority to grant equitable relief such as estoppel. Against the CAVC's assertion that it could not apply equitable estoppel without an "explicit statutory grant" of authority to do so, the court reasoned that in establishing the CAVC "Congress legislate[d] against a common law background" and that "[w]here [a] common-law principle" such as equitable estoppel "is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."

The Federal Circuit further found that the statutory purpose did not weigh against the use of equitable estoppel, but for it, since "Congress created the Veterans Court . . . 'for the [express] purpose of ensuring that veterans were treated fairly by the [G]overnment and to see that all veterans entitled to benefits received them."

Second, the Federal Circuit held that 38 U.S.C. § 5110(a)(1), which limits effective dates for VA benefits to no earlier than the date of the underlying claim, is not jurisdictional, and thus is subject to equitable considerations such as estoppel.

Whereas the CAVC held that it could not "use equitable estoppel to authorize payments outside of the requirements set out in [38 U.S.C. § 5110]," the Federal Circuit stated that it could in fact do so, because the claim filing requirement of that statute is not jurisdictional.

The Federal Circuit explained that any non-jurisdictional claim processing rule may be subject to equitable considerations, even if mandatory, and that all such rules are to be treated as non-jurisdictional unless "Congress has clearly state[d] that the rule is jurisdictional." 38 U.S.C. § 5110 contains no such clear statement and thus must be presumed to be non-jurisdictional and subject to equitable estoppel.

Third, the Federal Circuit held that neither *Richmond* nor *McCay* preclude the granting of monetary relief to a claimant against the government on a theory of equitable estoppel where such monetary relief is otherwise authorized by Congress or the relevant government agency.

Regarding the Supreme Court's *Richmond* decision, the Federal Circuit stated that the CAVC interpreted it to mean that the Supreme Court has "shut the door on all estoppel claims against the [G]overnment . . . when the claimant seeks monetary relief." The Federal Circuit stated that, to the contrary, *Richmond* in fact stands for the narrower proposition that estoppel will not lie against the government only when the claimant seeks monetary relief *contrary to statutory appropriation*.

Similarly, the Federal Circuit disagreed with the CAVC's citation to the Federal Circuit's *McCay* decision for the proposition that equitable estoppel could never be used to grant payment contrary to the requirements of 38 U.S.C. § 5110. The Federal Circuit stated that *McCay* stands only for the proposition that equitable estoppel "is not available to grant a money payment where Congress has not authorized such a payment or the recipient [is not] qualif[ied] for such a payment under applicable statutes."

Although the Federal Circuit cast the discussion of *Richmond* and *McCay* as a question of whether equitable estoppel is unavailable whenever a claimant seeks monetary relief or only where a claimant seeks monetary relief contrary to statutory appropriation, it is not clear that this accurately reflects the CAVC's holdings. Rather, the CAVC's decision itself states that *Richmond* and *McCay* stand for the proposition that "equitable estoppel [can] not be used to pay money not authorized by statute." The CAVC also explicitly found that Mr. Taylor could not be granted monetary relief because such relief was not statutorily authorized, namely under 38 U.S.C. § 5110(a)(1).

In light of this, there may be no real conflict between the CAVC's position and that of the Federal Circuit regarding the interpretation of *Richmond* and *McCay*. Rather, the issue may be whether monetary relief contrary to the requirements of 38 U.S.C. § 5110 constitutes relief "contrary to statutory authorization" such that equitable estoppel is not available, as the CAVC held.

In addition, if monetary relief contrary to the requirements of 38 U.S.C. § 5110 constitutes relief contrary to statutory authorization, there may be some tension between the rule that equitable estoppel is not available to grant monetary benefits contrary to statutory authorization and the Federal Circuit's holding that equitable estoppel *is* available against 38 U.S.C. § 5110 because it is not jurisdictional.

Finally, in holding that Mr. Taylor was entitled to estoppel, the Federal Circuit held that the facts of the case were unambiguous and thus that the issue in dispute was a pure question of law. However, in a footnote, the court noted that the Board (affirmed by the CAVC) had found that Mr. Taylor's PTSD diagnosis was based on multiple in-service stressors besides his participation in the chemical study. The Federal Circuit suggested this finding comprised an "unsubstantiated medical opinion" and "uninformed

speculation," but did not rebut it or point to any contradictory evidence.

If true, it could mean that Mr. Taylor was not prevented from filing his service connection claim before the government released him from his secrecy oath in 2006, since he could have filed a claim based on his other stressors. Thus, the ordinary requirement of estoppel that the party "has reasonably relied on its adversary's conduct in such a manner as to change his position for the worse" would not be met.

Note: On July 22, 2021, the Federal Circuit vacated the June 30, 2021, panel decision—the subject of this summary—and ordered that the case be reheard en banc. The court ordered briefing on various questions related to equitable estoppel as well as the question of whether Mr. Taylor has a claim for denial of a constitutional right of access to VA processes for securing disability benefits.

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Cost of Living Increase to the Statutory EAJA Attorney Rate Awarded for Work Performed Outside of the United States

by Christine Cote Hill

Reporting on *Swanagan v. McDonough*, No. 19-1350(E) (June 23, 2021).

In *Swanagan v. McDonough*, the Court of Appeals for Veterans Claims (Court) held that the Court may award a cost of living increase to the $125 Equal Access to Justice Act (EAJA) statutory maximum hourly attorney fee rate for work performed outside of the U.S. in a location for which the U.S. Bureau of Labor Statistics does not issue a Consumer Price Index for all Urban Consumers (CPI-U). However, the Court held that the Appellants failed to support their proposed method for calculating the cost of living increase for work performed in Quito, Ecuador, and the Court reduced the requested rate for fees in the EAJA application to the $125 statutory maximum.

Under the EAJA statute, an attorney's hourly rate is generally the lower of the prevailing market rate or the rate of $125 plus a calculated adjustment for cost of living increase. As the Court noted, under *Speigner v. Wilkie*, 31 Vet. App. 41, 50 (2019), cost of living increases are to be calculated based on data for the location in which the work was performed. An appellant bears the burden of providing proof of an increase in the cost of living and demonstrating that the proposed method of calculating an increase is reasonable. The Court in *Elcyzyn v. Brown*, 7 Vet. App. 170, 181 (1994), addressed the method of calculating cost of living adjustments and held that it was appropriate to utilize CPI-U data to make the calculation for the relevant area.

Appellants offered benefits of allowing cost of living adjustments for attorney work performed outside of the U.S. and explained that there is nothing in the EAJA statute, 28 U.S.C. § 2412(d), prohibiting use of alternative indices to the CPI-U to support cost of living increase calculations. However, Appellants acknowledged that they cannot support a cost of living adjustment using the calculation method outlined in *Elcyzyn* using Quito's CPI (because a period of extraordinary inflation since March of 1996 yields an unsurprisingly unreasonable attorney fee rate).

Instead, Appellants proposed averaging the hourly rates calculated using the Department of Defense (DoD) and United Nations (UN) cost of living allowance indices related to Quito to calculate the hourly rates for work performed there. In their reply to the Secretary's EAJA response, Appellants proposed, in the alternative, that the Court abandon its method for calculating hourly rates for all EAJA cases (as well as its method for calculating the midpoint of litigation) and allow for use of the annual national CPI-U and the year the work was performed to support cost of living increases.

Among other arguments to deny a cost of living increase, the Secretary asserted that: because

Elcyzyn addressed the use of CPI-U data in calculating cost of living increases and there is no CPI-U data maintained for areas outside of the U.S., an increase is unavailable when an attorney lives and works in another country; the intent of the EAJA statute is to allow for appellants to obtain competent representation while avoiding locality-based windfall to attorneys; because there is no CPI-U data for locations outside of the U.S., the Court would be burdened with independently assessing these factors; even if data equivalent to the CPI-U were available for locations outside of the U.S., the Court would need to engage in complex calculations (including evaluating historical exchange rates); and Appellants' proposed method of averaging rated from DoD and UN indices has no basis in law. The Court acknowledged that *Elcyzyn* requires the CPI-U for locations within the U.S. for which CPI-U data is available, but agreed with Appellants that other methods of calculating cost of living increases for work performed outside of the U.S. are not foreclosed by the EAJA statute.

The Court noted that the *Elcyzyn* Court was not asked to consider methods for calculating cost of living increases for work performed outside of the U.S. nor did it contemplate such work. The Court also could discern no reason that an attorney working in Quito would be unable to competently represent clients.

The Court made clear that an appellant is not precluded from calculating a cost of living increase for work performed outside of the U.S., but that Appellants failed to provide proof supporting their cost of living increase or demonstrate the reasonableness of their proposed method for calculating the appropriate hourly rate for work performed in Quito. Appellants did not identify what other potential indices were available to calculate the cost of living increase for Quito and did not explain why they selected DoD and UN cost of living allowance indices over others, why those indices (used to generate cost of living allowances for employees) track the CPI-U, or why they used an average of the results of the two indices in their calculations.

The Court declined to review the alternative argument raised in the EAJA reply regarding use of the annual national CPI-U data to calculate cost of living increases.

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CAVC Declines Access to VBMS for Non-Accredited Paralegals and Staff

by Anthony B. Sparks

Reporting on *Carpenter v. McDonough*, Nos. 19-1136, 19-1137 (July 9, 2021).

In *Carpenter*, the Court of Appeals for Veterans Claims (Court) decided that categorically barring non-VA-accredited paralegals and staff from remote, read-only access to the Veterans Benefits Management System (VBMS) does not violate the note to 38 C.F.R. § 14.629. Further, the Court held that VA's bar against remote access to VBMS for these individuals did not deprive veterans of the right to competent and diligent representation.

Prior to the Court's decision, attorneys Kenneth Carpenter and Robert Chisholm, individually, requested remote, read-only access to automated VA claims records for their non-VA-accredited paralegals and staff. The Board of Veterans' Appeals (Board) denied both requests. The Board found that denying access to the attorneys' staff did not violate 38 C.F.R § 5904 (the competency requirement) because Carpenter and Chisholm had not alleged a specific instance in which they could not render effective counsel but rather relied on "hypothetical" harm. Furthermore, the Board believed the relationship between access to VBMS for unaccredited staff and the statutory and ethical obligations was too attenuated.

Carpenter and Chisholm appealed the Board's findings, and the Court issued a panel decision on February 24, 2020, affirming the Board's decision. The attorneys filed to deconsolidate the cases and Mr. Carpenter then moved for panel

reconsideration. The Court granted Mr. Carpenter's motion for panel reconsideration and sua sponte granted panel reconsideration in Mr. Chisholm's case to avoid having two different precedential decisions on the same matter.

On appeal, Carpenter and Chisholm asserted that the categorical bar against remote access to VBMS for accredited attorneys' unaccredited employees violates § 5904(a) and due process. Finally, they argued that *Green v. McDonald*, also litigated by Mr. Chisholm, was *void ab initio* or *dicta*. They argued that in *Green*, the Court did not need to analyze 38 C.F.R. §§ 1.600-603 to answer the question presented there. Additionally, these statutes had self-abrogated due to the changes in VA's technological landscape since the *Green* decision.

In opposition to opening VBMS access to non-accredited paralegals and staff, the Secretary argued that there was no statutory or regulatory right to remote, read-only access to VBMS, that *Green* controlled, and that Carpenter and Chisholm did not carry their burden of proving prejudicial error. Finally, the Secretary reasserted that VA had afforded the attorneys due process.

Applying principles of regulatory interpretation, the Court held that 38 U.S.C. § 5904(a) requires attorneys access to their clients' claims records and that this access is governed by 38 C.F.R. §§ 1.600-603, which proscribes procedures for when and how VA grants read-only access to claims records. The Court further explained that the automated claims records referenced in §§ 1.600-603 do not include VBMS and thus, any error in categorically barring access to VBMS would not be related to the regulations. Because the note to § 14.629 refers only to access granted under these statutes, it did not need to address the language of the note.

Next, the Court found the attorneys' case was indistinguishable from *Green*. In reviewing the applicability of *Green,* the Court noted substantial similarities between the two cases – specifically that both cases addressed the denial of remote VBMS access to unaccredited individuals and whether the same regulations applied to remote only access to VBMS. The *Green* court, ultimately, concluded that non-accredited attorneys and staff representing veterans before the Court do not have a regulatory right to remote read-only access to VBMS. In refuting the attorneys' present argument, the Court ruled that *Green*'s analysis of those regulations controlled.

The Court then analyzed the attorneys' self-abrogation argument based on technological changes. The Court was unpersuaded by the argument that post-*Green* technological developments had significantly altered the landscape and eliminated VA's security concerns. In dismissing this argument, the Court found the attorneys failed to acknowledge the Board's reliance on current VA regulation, did not address that the regulations do not create an enforceable right, and failed to explain how the Board could reach a conclusion contrary to regulation and precedential decisions.

Furthermore, the Court considered Carpenter and Chisholm's arguments regarding competent representation and due process. With respect to competent representation, the Court held that applying *Green*'s rationale was even more compelling under a regulatory challenge. Moreover, the Court recognized that there were perhaps more efficient and convenient ways to balance a law firm's needs with the VA's privacy concerns, such as accrediting paralegals and staff. However, it was ultimately not the Court's place to write laws or make VA policy.

Finally, the Court dismissed the attorneys' due process argument, stating the arguments in front of the Board were not developed, and they did not establish error in the Board's determination. As the challenge related to the inclusion or omission of documents in the record, the Court stated the attorneys had not persuasively demonstrated how the error affected the essential fairness of the adjudication or deprived them of a meaningful opportunity to participate in the fair processing of claims.

Accordingly, the Court fully affirmed the Board's decision because §§ 1.600-603 had not changed since *Green*. Therefore, the Court was bound to

follow the regulations' plain language and prior analysis of that language. Overall, the Court held Carpenter and Chisholm did not adequately prove that they were prejudiced by the denial of VBMS access to their unaccredited employees.

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Federal Circuit Invalidates Three Regulations Implementing the Veterans Appeals Improvement and Modernization Act of 2017

by April Donahower

Reporting on *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, No. 2019-1600 (Fed. Cir. July 30, 2021).

Six petitioners—four organizations, a law firm, and an individual—challenged thirteen VA regulations implementing the Veterans Appeals Improvement and Modernization Act of 2017 (AMA). After disposing of the petitioners' standing, the court invalidated all three of the challenged regulations for which standing existed:

- 38 C.F.R. § 14.636(c)(1)(i), which limits when a veteran's representative can charge fees for work on a supplemental claim;
- 38 C.F.R. § 3.2500(b), which bars the filing of a supplemental claim when the same claim is pending before a federal court; and
- 38 C.F.R. § 3.155, which excludes supplemental claims from VA's intent-to-file framework.

Standing

Of the six petitioners, the court held that Paralyzed Veterans of America (PVA) and Military-Veterans Advocacy (MVA) had associational standing to bring three of their collective seven rule challenges and that the remaining petitioners lacked standing altogether. The associational standing inquiries turned on the first prong of the three-part test for associational standing: whether an organization's member would otherwise have standing to sue in his or her own right.

PVA had associational standing to challenge Sections 3.2500(b) and 3.155 on behalf of its veteran members. Applying its recent decision in *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020), the court held that PVA had sufficiently alleged that two of its veteran members had an actual or potential claim that could be affected by section 3.2500(b)'s bar on a concurrent supplemental claim and judicial appeal and section 3.155's exclusion of supplemental claims from the intent-to-file framework.

MVA had associational standing to challenge section 14.636(c)(1)(i) on behalf of an attorney member because the regulation "directly affects attorneys' fees" and MVA had sufficiently alleged that an attorney member was denied fees because of the rule.

On various grounds, the organizations' remaining theories of associational standing and all the petitioners' theories of organizational, third-party, and personal standing failed. As for associational standing, the court rejected the organizations' argument that their attorney members were harmed by rules making it more difficult for the attorneys' veteran clients to obtain benefits. The law firm's theory of personal standing failed on similar grounds. Addressing organizational standing, the court found no concrete injury to the organizations' activities, as rules seeking to streamline the VA claims adjudication process neither directly precluded claimants from obtaining benefits nor hampered the organizations' missions. Several other theories failed because the assertion of injury was too speculative or generic.

Because of recent legal developments, no petitioner had standing to challenge 38 C.F.R. § 3.105(a)(1)(iv), which precludes a change in the interpretation of a statute or regulation from serving as the basis of a claim of clear and unmistakable error. The organizations' veteran members and the individual veteran petitioner were not harmed by the rule because the Blue Water Navy Vietnam Veterans Act

had provided the relief a veteran would have obtained from a claim of CUE based on *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc). As to an MVA attorney member challenging the unavailability of a changed-interpretation CUE claim, the court reasoned, it had recently addressed and rejected a similar challenge to the validity of the regulation in *George v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021). Having already disposed of the merits of the challenge, the court declined to find standing based on a potential derivative loss of attorneys' fees.

Finally, the law firm lacked third-party standing to petition on behalf of clients who could have pursued actions in their own right.

Validity of the regulations

The court invalidated Sections 14.636(c)(1)(i) and 3.2500(b) as contrary to the plain meaning of the governing statutes and Section 3.155 as arbitrary and capricious.

All three challenged regulations relate to a supplemental claim, which is one of the means of obtaining administrative review of a claim under the AMA. The court therefore began by reviewing 38 U.S.C. §§ 5104C, 5108, and 5110, which establish the supplemental claim framework. A claimant can "continuously pursue" an initial claim that has been denied by filing a supplemental claim with new and relevant evidence within one year of a prior decision on the claim. Continuous pursuit entitles the claimant to an effective date reaching back to the date of the initial claim's filing. A claimant also can obtain readjudication of a previously denied claim by filing a supplemental claim with new and relevant evidence more than one year after the prior decision but without the same effective date protection.

As for Section 14.636(c)(1)(i), the court held that the regulation was inconsistent with "a straightforward reading" of 38 U.S.C. § 5904(c)(1), which "indicates that work on all forms of review under the AMA"—including on non-continuously pursued supplemental claims—should be compensable. The statute states that attorneys' fees may not be charged for services provided before the date a claimant receives notice of the AOJ's "initial decision . . . with respect to the case." The regulation allowed an attorney to charge for any work performed on a continuously pursued supplemental claim but only for work performed after an initial decision on a supplemental claim filed more than one year after the prior decision. But work on *any* supplemental claim, the court reasoned, is done after the "initial decision . . . with respect to the case." Accordingly, the statute provided no basis for treating work done on continuously pursued and non-continuously pursed supplemental claims differently.

The court rejected the government's argument that non-continuously pursued supplemental claims are not part of the same "case" as the prior decision. The government contended that Congress and the court had ratified VA's treatment of a legacy reopening proceeding—the supplemental claim's predecessor—as a "case" separate from the original claim. The court disagreed. A theory of implicit congressional ratification "holds no water where, as here, the regulation at issue clearly contradicts the requirements of the statutory provision." And the court's own decisions reinforced its reading of § 5904 to plainly permit paid representation for all forms of administrative review after an initial decision on the original claim for benefits.

Section 3.2500(b) likewise was found invalid as contrary to the plain meaning of the related statute, § 5104C. The statute expressly bars concurrent lanes of administrative review but does not expressly prohibit concurrent administrative and judicial review. The court rejected the government's argument that this statutory silence left a gap to be filled. The statute "broadly authorizes a claimant to file a supplemental claim '[i]n *any* case in which the Secretary renders a decision on a claim,'" the court reasoned. And Congress demonstrably "knew how to bar two simultaneous forms of review but chose to only bar concurrent lanes of administrative review." The statute "leaves no gap to be filled because it unambiguously permits claimants to file supplemental claims while judicial review of the same underlying claim or issue is pending in federal court."

Finally, the court agreed that the exclusion of supplemental claims from the intent-to-file framework in Section 3.155 was arbitrary and capricious. In the final rule, VA had explained that applying the intent-to-file framework to a supplemental claim would contravene § 5110(a)(3)'s requirement that the effective date of a non-continuously pursued supplemental claim "shall not be earlier than the date of receipt." But there is substantively identical language about the effective date of an initial claim in § 5110(a)(1), the court reasoned, and yet VA provides an effective date for an initial claim that is earlier than the claim's receipt based on the intent to file. Because VA had failed to explain why it interpreted the same language inconsistently, Section 3.155 was invalid.

Aside from the merits, the court observed that VA's promise during the litigation to amend sections 3.2500(b) and 3.155 was as-yet unfulfilled, with no indication of if or when amendment would occur. It therefore denied the government's request for a voluntary remand to amend section 3.155 to bring supplemental claims within the intent-to-file framework.

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The Veterans Court Cannot Make De Novo Findings of Fact

by Freda Carmack

Reporting on *Tadlock v. McDonough*, No. 2020-1762 (July 15, 2021).

In *Tadlock v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) considered the extent to which the United States Court of Appeals for Veterans Claims (Court) may make findings of fact in considering whether an error by the Board of Veterans' Appeals (Board) is prejudicial. It held that 38 U.S.C. § 7162, which requires that the Court "take due account of the rule of prejudicial error," does not give the Court the right to make de novo findings of fact or otherwise resolve matters that are open for debate.

Howard Tadlock served in the Army from 1982 to 2003, to include service in the Persian Gulf. After suffering a heart attack due to a pulmonary embolism in 2010, he filed for service connection under 38 U.S.C. § 1117, which provides presumptive service connection for a "qualifying chronic disability" for Persian Gulf War veterans. "Qualifying chronic disabilities" include undiagnosed illnesses and "medically unexplained chronic multi-symptom illnesses (MUCMI)." Pursuant to regulation, a "qualifying chronic disability" is limited to one that "[b]y history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis." 38 C.F.R. § 3.317 (a)(ii).

After a series of examinations, appeals and remands, Mr. Tadlock underwent a final VA examination in July 2017, which concluded that pulmonary embolism is not an undiagnosed illness because it is not medically unexplained, and that his specific condition was less likely than not related to service. Relying on this opinion, the Board denied service connection for pulmonary embolism, noting that it is not an undiagnosed illness. The Board did not, however, decide whether Mr. Tadlock's medical condition was a MUCMI.

Mr. Tadlock appealed to the Court, arguing that "qualifying chronic disability" under 38 C.F.R. § 3.317 conflicts with 38 U.S.C. § 1117 because the latter expressly includes MUCMIs as well and undiagnosed illnesses. The Court agreed, but it also found that the Board's error in this regard was not prejudicial because Mr. Tadlock's condition is not a MUCMI.

The Court granted Mr. Tadlock's subsequent motion for a panel decision, and a split panel adopted the previous memorandum decision as the decision of the Court. Mr. Tadlock appealed.

In the present case, the Federal Circuit reversed the Court's decision. As a preliminary matter, it rejected the government's argument that the Federal Circuit lacks jurisdiction because Mr. Tadlock's arguments on appeal require consideration of whether the

Board's error was prejudicial, which is a factual determination outside its jurisdiction. The Federal Circuit rejected this on the basis that it may review legal questions, and whether the Court exceeded its jurisdiction in considering the Board's prejudicial error is a question of law.

On the merits, Mr. Tadlock argued that the Court engaged in inappropriate de novo fact finding in making its determination of no prejudicial error. The government argued that the Court was required to review the Board's decision for prejudicial error and this exercise required it go outside the facts found by the Board. The Federal Circuit disagreed, noting that Congress expressly limited the Court's jurisdiction to exclude de novo fact-finding. Specifically, it noted that the Court's duty is to review *how* the Board weighed evidence; it cannot weigh the evidence itself.

The Federal Circuit explained that the Court may affirm on a ground not considered by the Board or VA if it is clear that the factual basis for that conclusion is not open to debate and if the Board, on remand, could not have reached any other determination on that issue. However, when questions of fact are open to debate, veterans are entitled to present evidence and argument to the agency charged with administering veterans benefits and with the expertise to render informed judgements in the first instance. The "harmless error" rule cannot be invoked to allow the Court to decide a matter assigned by statute to the VA for initial determination.

Accordingly, the Federal Circuit held that 38 U.S.C. § 7162's command that the Court "give due account of the rule of prejudicial error" does not permit the Court to make do novo findings of fact or otherwise resolve matters open for debate. Rather, where additional findings of fact are necessary, the proper action is for the Court to remand to the Board for consideration of those facts in the first instance.

As for Mr. Tadlock, the Federal Circuit held that the determination of whether an illness is a MUCMI, "defined by a cluster of signs and symptoms" under the Persian Gulf presumption in section 1117, is a question of fact for consideration by VA in the first instance. Since neither the Board nor the VA considered whether the condition at hand was such, they failed to consider whether the alternative prong of presumptive service connection was met. Since the determination that Mr. Tadlock's symptoms did not constitute a MUCMI was made only by the Court, the Court exceeded its authority and the Court's decision must be vacated and remanded.

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Federal Circuit Upholds VA Regulation That Determines Effective Date for Recommencement of Disability Benefits After Active-Duty Service

by Rakhee Vemulapalli

Reporting on *Buffington v. McDonough,* No 2020-1479 (Fed. Cir. August 6, 2021).

In *Buffington v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) affirmed the United States Court of Appeals for Veterans Claims (CAVC) denial of Mr. Buffington's appeal for an earlier effective date for recommencement of his disability benefits after periods in which he received active service pay.

Mr. Buffington was granted service connection for tinnitus after serving in the Air Force. In 2003, he was recalled to active duty in the Air National Guard. He informed the VA of his return to active duty and the VA discontinued his disability compensation. In 2004, he completed his term of active service, but later that year was recalled again to active duty, serving until July 2005. In January 2009, Mr. Buffington sought to recommence his disability benefits. VA determined he was entitled to compensation effective February 1, 2008, one year before he sought recommencement. Mr. Buffington appealed the decision, challenging the VA's effective date determination.

38 C.F.R. § 3.654(b)(2) sets forth the effective date for recommencement of compensation, at the earliest, one year before filing. CAVC held that this regulation was not inconsistent with 38 U.S.C. § 5304, which specifies that "compensation…shall not be paid…for any period for which such person receives active service pay."

The Federal Circuit, applying the first step of the two-step framework of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), held that Congress "left a gap in the statutory scheme." While 38 U.S.C. § 5304(c) bars duplicative compensation when a veteran receives active service pay and 38 U.S.C. § 5112(b)(3) sets the effective date for discontinuing disability benefits based on active service, Congress did not establish when or under what conditions compensation recommences once a disabled veteran leaves active service.

Mr. Buffington argued that Title 38 obligates the VA to pay compensation for service-connected disabilities, set the effective date for those awards, and provides a limited exception for when payment is barred based on active service pay. Compensation stops on re-entry to active military service and restarts at discharge from active military service.

The Federal Circuit found this interpretation reads into 38 U.S.C. § 5304(c) words that Congress did not enact, such as reading "any period" as "only any period." Furthermore, it found Mr. Buffington conceded the following: that the VA can require that a veteran notify it that the veteran is no longer receiving active duty pay before benefits can be paid; that the VA can require reapplication; that the VA can require a veteran to appear for an additional medical examination; and the VA can reconsider the amount of disability compensation. These concessions were inconsistent with the view that 38 U.S.C. § 5304(c) creates a limited exception to a general entitlement to benefits. Rather, they support the interpretation that when a disabled veteran returns to active service, his disability benefits are discontinued.

The Federal Circuit further found that Mr. Buffington's interpretation would lead to "impermissible surplusage." Specifically, Mr. Buffington's interpretation of the word "period" in 38 U.S.C. § 5304(c) would set both the date for discontinuing benefits and the date for recommencing benefits based on active service. However, Congress already enacted a statute that sets the date for discontinuing benefits based on active service.

The Federal Circuit held the statutory scheme is silent regarding the effective date for recommencing benefits when a disabled veteran leaves active service. In a footnote, the Federal Circuit explained that because it held the statutory scheme is silent, it need not resolve the parties' dispute regarding the pro-veteran canon.

The Federal Circuit then moved on to step two of the *Chevron* analysis and asked whether the agency's answer to the question at issue is based on a permissible construction of the statute. It found 38 C.F.R. § 3.654(b)(2) to be a reasonable regulation. The regulation encourages veterans to seek recommencement of disability benefits in a timely fashion, but always provides the veteran with some compensation and the regulation incentivizes early filing, which promotes the efficient administration of benefits, but does not promote efficiency at all costs. Furthermore, the Federal Circuit noted it is reasonable for VA to require timely reapplication, since a disability may improve or worsen over time.

The Federal Circuit concluded that because VA reasonably filled a statutory gap when promulgating 38 C.F.R. § 3.654(b)(2), it must defer to that regulation.

In her dissent, Circuit Judge O'Malley critiqued all of the majority's arguments. She questioned the majority's *Chevron* analysis and statutory construction, writing that there is in fact no statutory gap to fill. She further explained that the concessions made by Mr. Buffington's counsel do not justify the majority's statutory interpretation and noted the majority's concern with surplusage rests on misinterpretation of the statutory text. Circuit Judge O'Malley also found that any doubt regarding any recommencement date must be resolved in Mr. Buffington's favor. She pointed out that part of a correct step one *Chevron* analysis must

consider all other traditional canons of construction along the way, including the pro-veteran canon of construction.

Circuit Judge O'Malley concluded that disability payments should recommence effective the day after active duty pay ceases. She noted that this conclusion is supported by the broader context surrounding the enactment of the relevant provisions-specifically Congress's solicitude towards veterans, which is reflected by laws that place a thumb on the scale in the veteran's favor. She found it "implausible that Congress wanted disabled veterans who reenter service of their country to be required to 'reapply' for the same benefits for which they previously were entitled, and also risk having their previous effective dates superseded by a new, later date, if they do not reapply within the narrow timeframe set forth in 38 C.F.R. § 3.654(b)(2)." Referring to the regulation as "offensive," Judge O'Malley opined that 38 C.F.R. § 3.654(b)(2) serves no purpose other than to deny disability benefits to veterans entitled to them solely because they answered the call to return to active duty.

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The Relaxed Evidentiary Standard for Proving a PTSD Stressor as it Relates to Fear of Hostile Military or Terrorist Activity is a Liberalizing Law for the Purposes of Establishing an Earlier Effective Date

by Freda J.F. Carmack

Reporting on *Ortiz v. McDonough*, No. 2020-1911 (July 28, 2021).

In *Ortiz v. McDonough*, the Federal Circuit held that 38 C.F.R. § 3.304(f)(3), which relaxes the evidentiary standard for proving the stressor for post-traumatic stress disorder (PTSD) as it relates to fear of hostile military or terrorist activity, is a liberalizing law under 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) for purposes of establishing entitlement to an earlier effective date for the grant of service connection.

Geraldo Ortiz is a veteran of the Vietnam War. In 1997, he filed a claim for service connection for PTSD that was denied because he did not provide corroborating evidence that the events leading to his PTSD occurred during military service, as required by 38 C.F.R. § 3.304(f). Although a VA medical examiner opined that Mr. Ortiz's PTSD was related to Vietnam combat, the fact that he failed to present corroborating evidence of the in-service stressor was fatal to his claim. In 2010, long after the decision became final, an exception to the "corroborating evidence" requirement was added to the PTSD regulation. Subsection 3.304(f)(3) was added to ease the evidentiary burden for veterans claiming service connection for PTSD related to fear of hostile military or terrorist activity by providing an alternate basis to meet the requirement of a corroborated stressor. Specifically, it provides that if a VA (or VA contracted) psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD, and the veteran's symptoms are related to that stressor and consistent with the nature of the veteran's service, the veteran's lay testimony alone is sufficient to establish the incurrence of the in service stressor.

Accordingly, in 2012, Mr. Ortiz moved to reopen his claim. The claim was reopened and granted, and Mr. Ortiz was rated 100 percent disabled effective May 22, 2012, the date VA received the request to reopen the claim. Mr. Ortiz then appealed this decision, arguing that his effective date should have been one year earlier based on 38 C.F.R. § 3.114(a) (implementing 38 U.S.C. § 5110(g)). This regulation provides that when compensation is awarded or increased pursuant to a liberalizing law or a liberalizing VA issue approved by the Secretary, and the claim is reviewed more than one year after the effective date of the law or VA issue, the effective date is one year prior to the date of receipt of such request.
The Regional Office, the Board of Veterans' Appeals (the Board), and the Court of Appeals for Veterans Claims (Veterans Court) each rejected this argument on the basis that the 2010 addition to the PTSD regulation was not a "liberalizing measure."

In the case at hand, however, the Federal Circuit disagreed, finding that subsection 3.304(f)(3) was, in fact, "liberalizing" under section 3.114(a) because it reduced a veteran's affirmative burden of production to establish an element of entitlement to compensation. Considering the plain meaning of "to liberalize," it observed that subsection 3.304(f)(3) was plainly "liberalizing" because it eliminated the requirement of corroborating evidence on an in-service stressor beyond the veteran's own testimony and, thus, the legal standard for entitlement to service-connection for PTSD became less strict. This was obvious based on the fact that Mr. Ortiz's reopened claim was granted on the same facts specifically because of the elimination of a concrete component of what was previously required. Notably, the Secretary did not dispute that the evidentiary burden was lessened. What is more, even the Congressional record described this provision as "liberalizing."

The Federal Circuit found that the law was clear as it pertains to effective dates when there is a change in law: If a claim is reviewed within one year from the effective date of the change, benefits may be authorized from the effective date of the change. If it is reviewed more than more year after the change, benefits may be authorized for a period of one year prior to the date that entitlement was granted (if the decision was reviewed on VA's initiative) or the date a request for review was received. Mr. Ortiz's reopened claim, the Federal Circuit held, is a prototypical example of a liberalizing change resulting in an award.

To the extent that the Secretary argued that the ordinary meaning of "liberalizing" does not apply here based on previous caselaw (specifically, *Spencer v. Brown*, 17 F.3d 368 (Fed. Cir. 1994), and *Routen v. West*, 142 F.3d 1434 (Fed. Cir. 1998)), the Federal Circuit noted that these cases discussed the availability of new original claims as opposed to previously denied claims that are reopened based on new and material evidence. The fact that those cases found that changes to the law did not create a new original claim was not controlling in this case, which involved the effective date of a reopened claim. The only question in the present case was the proper application of subsection 3.114(a) in a matter that undisputedly fell within an express avenue for reconsideration.

Accordingly, the Federal Circuit reversed, holding that subsection 3.304(f)(3) is "liberalizing" for effective date purposes and concluding that the correct effective date for Mr. Ortiz's benefits is May 22, 2011, one year prior to the date that his request to reopen his claim was received.

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CAVC Addresses the Effective Date Rules for DIC Benefits Based on the Need for Aid and Attendance under 38 C.F.R. § 3.402(c)(1)

by Caitlin M. Milo

Reporting on *Nailos v. McDonough*, No. 19-0517, 2021 U.S. App. Vet. Claims LEXIS 1434 (2021).

In *Nailos v. McDonough*, the United States Court of Appeals for Veterans Claims (Court) was tasked with determining under what circumstances 38 C.F.R. § 3.402(c)(1) permits an effective date for the award of increased dependency and indemnity compensation (DIC) benefits based on the need for aid and attendance, earlier than the date of receipt of the claim for aid and attendance benefits. The Court concluded that § 3.402(c)(1) does not permit an effective date earlier than the date of the aid and attendance claim *unless* DIC is in effect for a period prior to the date of the DIC claim—in other words, if there is a retroactive DIC award. Because this exception did not apply to Appellant Joan Nailos's case, the Court affirmed the Board of Veterans Appeals (Board) decision.

As background, in May 2002, veteran William Nailos passed away, leaving his surviving spouse, Mrs. Nailos. The next month, in April 2002, Mrs. Nailos applied for DIC, death pension, and accrued benefits by a surviving spouse. The claim made its way through the appeal process and was ultimately denied. In November 2009, Mrs. Nailos reopened

her claim and in March 2015, the Regional Office granted DIC, effective November 2009. Mrs. Nailos disagreed with the effective date and appealed to the Board; ultimately, the Court continued the 2009 effective date for DIC.

While the DIC effective date litigation was pending, in May 2017, Mrs. Nailos submitted an intent to file a claim and an examination report that detailed her need for aid and attendance. In August 2017, the RO granted aid and attendance benefits, effective May 2017. Mrs. Nailos disagreed with the aid and attendance effective date and argued that it should date back to June 2015 when she became totally disabled. She perfected an appeal to the Board and the Board denied entitlement to an effective date prior to May 2017 for aid and attendance benefits.

The regulation at issue in this case was 38 C.F.R. § 3.402(c)(1) (2017). Section 3.402(c)(1) provides that the effective date for survivor aid and attendance and housebound benefits is the "[d]ate of receipt of claim or date entitlement arose whichever is later. However, when an award of dependency and indemnity compensation (DIC) or pension based on an original or supplemental claim is effective for a period prior to date of receipt of the claim, any additional DIC or pension payable to the surviving spouse by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established."

Clearly, the first sentence of the regulation sets forth the general rule. Thus, the question before the Court was "whether the exception created by the second sentence allows for benefits to be paid for periods prior to the date of the aid and attendance claim where, as here, the appellant was already in receipt of DIC when she sought aid and attendance benefits."

Judge Meredith, joined by Judge Toth, authored this opinion, and Judge Greenberg filed a dissenting opinion.

In the majority opinion, the Court held that the first part of the second sentence—"when an award of [DIC] . . . based on an original or reopened claim is effective for a period prior to date of receipt of the claim"—explains the circumstances under which the exception is triggered. Meanwhile, the second part of the second sentence—"any additional DIC . . . payable . . . by reason of need for aid and attendance . . . shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established"—explains the scope of the exception. 38 C.F.R. § 3.402(c)(1). The Court then addressed the meaning of the words "claim" and "award" in this regulation and the regulatory history. Ultimately, the Court determined that "the text, structure, history, and purpose of § 3.402(c)(1) make clear that the exception outlined in the '[h]owever' sentence does not apply unless the claimant has received DIC for a period prior to the date of the DIC claim, i.e., a retroactive award of DIC."

Here, the effective date for Mrs. Nailos's DIC benefits was November 2009, the date she reopened her DIC claim. She was not entitled to a retroactive DIC award prior to the date of her claim; therefore, the Court found that "she has not shown error in the Board's conclusion that the (c)(1) exception was not applicable." Thus, the Court affirmed the Board's decision denying an effective date prior to May 30, 2017, for the award of aid and attendance benefits.

In the dissenting opinion, Judge Greenberg noted that the complicated VA benefits system, and the Court's majority decision, unfairly burdened Mrs. Nailos, the disabled, elderly widow of a Pearl Harbor veteran.

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