VETERANS LAW JOURNAL

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VA Leadership Updates Bar on Agency Happenings

by Claire L. Hillan Sosa

On January 27, 2022, the Court of Appeals for Veterans Claims Bar Association hosted a Veterans Affairs leadership update over Zoom. The event attracted around 120 attendees and focused on VA accomplishments over the past year and its goals for the coming year. One central theme was VA's continued efforts to address the backlog of appeals lingering in the legacy appeal system and to streamline appeals under the Veteran Appeals Improvement and Modernization Act of 2017 (also called the Appeals Modernization Act or AMA).

Jenna Zellmer, president of the CAVC Bar Association, introduced the event and moderated the Zoom chat. James Drysdale, a member of the Board of Governors of the CAVC Bar Association moderated the panel of VA leadership.

Timothy Sirhal, the Acting Executive Director of the Veterans Benefits Administration Office of Administrative Review (OAR), presented on OAR's progress in implementing the AMA. He reported that the office completed 100,000 higher-level reviews and 250,000 supplemental claims last year, and that it continues to beat its 125-day decision goal with an average of 39 days for higher-level reviews and 108 days for supplemental claims. Although Mr. Sirhal acknowledged that much of veterans' customer satisfaction is driven by the outcome of their appeals, OAR continues to seek improvement through its satisfaction surveys because they are an indicator of confusion about the process. OAR asserts a quality review success rate of 96 percent.

Next, Cheryl Mason, Chairman of the Board of Veterans' Appeals (Board), presented on the Board's progress and goals. At the time of the update presentation, the Board had 113,000 legacy appeals remaining on its docket, 20,000 of which were pending hearings. An additional 117,000 AMA appeals were pending. The Board must work through the appeals in docket order in most cases, and is therefore deciding cases at a rate of about 80 percent legacy appeals and 20 percent AMA appeals. Chairman Mason also reported that the Board's attorney attrition rate was down, AMA timeliness goals were being met, and that the Board was close to reaching its goal of 111,500 decisions for Fiscal Year 2022. The Board's FY22 goal for number of hearings is limited by limited bandwidth issues. Mason also reported that the Board is working towards implementing electronic notices of disagreement, artificial intelligence and machine learning to streamline docketing, and an app for hearings.

Chairman Mason also addressed questions about delayed mailing of notice letters. An issue arose

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when the Government Printing Office took over mailing of decision and hearing notices, resulting in significant delays affecting veterans' abilities to respond in a timely fashion. Mason reported the issue was resolved and that GPO had caught up with the backlog of mail. Attendee questions about whether mailing delays would toll appeal deadlines at CAVC were not answered and instead referred to the Office of General Counsel (OGC).

Richard Hipolit, Principal Deputy General Counsel at OGC, explained that his office's hiring was affected by budget issues, but that it was fully staffed at the beginning of FY22 and attrition has been low. OGC oversees accreditation for 92 veteran service organizations and more than 9,000 representatives. During the COVID-19 pandemic, OGC has processed 175 claims-agent applications electronically and updated the agent examination with developments in the law. OGC is also working on fee issues with an updated list of coordinators on its website, and is reviewing public comments on a proposed rule about access to the Veteran Benefits Management System database for managing and reviewing veterans' claims files.

Cheryl Mason, Chairman of the Board of Veterans' Appeals, addressed bar members about the Board's latest updates.

Mary Flynn, Chief Counsel for the OGC Court of Appeals Law Group, discussed the organization's move to a new office, its continued remote and telework posture, and its 22 percent attrition rate, as well as new hires. During the pandemic, the Court of Appeals Law Group developed alternatives for delivery of Records Before the Agency with a pilot program for online file sharing that expanded to 144 firms in January 2022. Ms. Flynn reported there was a reduction in the number of appeals to the Court, but that the complexity of issues on appeal increased with many issues of first impression and multiple class actions percolating.

Next, David Barrans, Chief Counsel of the OGC Benefits Law Group, explained his group's role in providing legal services for VA's non-medical programs within VBA and National Cemeteries. Mr. Barrans highlighted several important cases at the Federal Circuit and at the U.S. Supreme Court. He also explained that VA was working internally on a new model for considering whether presumptive service connection is warranted for particulate matter. (Subsequently, on March 1, VA announced that it will add several rare cancers to the presumptive list.)

Finally, Susan Blauert, Chief Counsel of the OGC Health Care Law Group, described her office's work in a wide range of issues, including eligibility for care, copay obligations, informed consent, and programs for veterans experiencing homelessness, among others. The Veterans Health Administration operates over 1,000 facilities and serves more than 9 million veterans per year. The office of 32 people has seen an increase in the number of decisions related to VHA benefits at the Board and at CAVC. Ms. Blauert explained that initial decisions on healthcare benefits are made not at the regional offices, but instead at medical centers or other centralized locations.

The VA leadership provided the following helpful points of contact:

- Board of Veterans' Appeals issues – martin.caraway@va.gov
- VHA benefits issues – vhabenefitappeals@va.gov
- Higher-level review policy and procedure questions – OARadmin.vbawas@va.gov
- Case-specific questions about attorney fees – OARops.vbawas@va.gov

A recording of the event is available online for three months following the event (until approximately April 27, 2022).

Claire L. Hillan Sosa is a veterans disability attorney at Berry Law Firm.

Message from the President

This latest edition of the Veterans Law Journal marks the first half of my term as President. Time has flown! I'm extremely proud of the work the Board of Governors has done so far this term, from organizing some wonderful Zoom events to working behind the scenes to improve our technology and website design (more details to come on that soon) to making sure our finances and tax-exempt status are in order. Although I've been a member of the Board of Governors for many years, I did not fully realize all the work that goes on beneath the surface to make sure our organization is running smoothly. Now, as President, I've gained a new appreciation for how much effort the Board of Governors exerts in ensuring that members of the bar are well informed and engaged.

And that same appreciation extends to the Court. It has been gratifying to become more involved with the Court this year through my participation on the Judicial Conference Volunteer Planning Committee and the Judicial Advisory Committee. Like the Board of Governors' work, so much of the Court staff's work goes unrecognized because everything runs smoothly. It is only when you peek behind the curtain that you realize how many people are working diligently to make our lives easier.

And speaking of the Court, I hope that many of you plan to join us next month, either virtually or in person, for the Court's 15th Judicial Conference. The Volunteer Planning Committee has recruited a wide range of practitioners from both sides of the bar to discuss many pressing issues in the field of veterans law, including environmental exposures, some of VA's recent regulatory changes, legal trends at the Court, and the future of the Appeals Modernization Act (AMA). The Bar Association's program on negotiating joint motions for remand (JMRs) will follow immediately after the Judicial Conference and should be a great discussion.

Finally, I want to thank all the volunteers who have participated in the programs the Bar Association has put on since our last Journal edition. Judge Grant C. Jaquith and Veterans Law Judge Shereen Marcus generously offered their time around the busy December holiday season for an informal discussion regarding oral arguments in the virtual world. January and February were full of helpful and informative programs. James Drysdale recruited VA leadership to provide a vital update on Agency operations. Ashley Varga organized a great program with Chief Deputy Clerk of Operations Anne Stygles to discuss effective motions practice. And Jillian Berner, Stacey-Rae Simcox, and Freda Carmack set up a panel of veterans law practitioners to speak to law students about potential careers in the field. As I mentioned above, I am lucky to have such an engaged and cooperative Board of Governors to help me provide value to our members. I'm excited for what the second half of my term will bring!

Jenna Zellmer
President, CAVC Bar Association

Message from the Clerk of Court

Greetings on behalf of the Court's entire clerk's office.

It is hard to believe we have kicked off a new year, and 2022 looks like it will be more of the same – busy! While we continue to try to keep up with all the new case filings and conferences, we know that you are trying your best to keep things moving, too. Our collective success is enhanced when the entire bar makes an extra effort to conform pleadings to the rules and make filings timely. Suffice it to say, I am very proud of the fact that you can reach out to the Court and speak with a docket clerk, or with our Public Office Chief, Anne Stygles, or with me, if you have questions or need help. With more than 7,500 cases open at the Court,

it takes all of us to keep veterans cases on track – our thanks to each of you!

Speaking of Anne Stygles, I hope many of you were able to listen in on the CAVC Bar Association program on motions practice that featured Anne. If you didn't, please try to look at a recording (you can view it at https://zoom.us/rec/play/Y-sKbFF24_No-YFZhrNclriJVPnVw-clxLlgzh4MEz7jFG5264wEZpfYWRR6r8MARma_NhZkelBc_i-Q.pUZ4Yq753zOj6TH7?autoplay=true&startTime=1644256074000) and take note of Anne's number one tip – include all information regarding previous extensions when moving for an extension in your case. I hope you are trying to limit the number of extensions you have to file with the Court, but, when you do ask for extensions, providing all information required moves the process along in a big way. Just so you know, we are receiving about 1,000 motions for extension of time every month and, while the bulk of these motions are coming from the appellant's bar, all parties can contribute to making cases move more quickly and efficiently.

Another expert at the Court you should know about is Karolyn Marshall, our admissions clerk. Karolyn is the master of our database of bar members, and she takes care of not only general and *pro hac vice* applications, but requests for wall certificates and certificates of good standing. Did you know that you can use pay.gov for all of these matters? And that the forms links on the Court's website will take you directly to pay.gov (http://www.uscourts.cavc.gov/forms_fees.php)? Many of you do, but we still see some attorneys mailing in paper applications with checks. Also worth knowing is that Karolyn is the person who updates changes in contact information - please send your updates to efiling@uscourts.cavc.gov. When was last time you checked our website to make sure we have your contact information listed accurately?

Almost all of you are intimately involved in the Rule 33 process, and you will see more than a little focus on this subject at the upcoming CAVC Judicial Conference and the follow-on CAVC Bar Association Conference. Hopefully, all of you will attend and share your own experiences and expertise. We know that counsel for both sides put lots of work into conferences, and I hope that you also appreciate the hard work put into conferencing by the staff attorneys of the Central Legal Staff (CLS). Have you ever wondered what it would be like to come to work at CLS? I asked three CLS attorneys about the challenges they experienced coming to CLS – Amy Gordon came from the VA OGC CAVC Litigation Group, Scott Walker from the Board of Veterans' Appeals, and Jeremy Bedford previously held several positions in the appellant's bar.

Jeremy, who has since moved to take a position in DoD, said that his biggest adjustment was having access to only those parts of the record provided by counsel, rather than the entire record. Also, when representing veterans at Vietnam Veterans of America, he worked the same case to completion, while CLS attorneys work on various cases and arguments every day. Jeremy did say his experience screening cases for the Veterans Pro Bono Consortium was similar to his work reviewing Statements of Issues to prepare for conferences. Amy agreed that having access to only parts of the record was a big adjustment. She further said that she needed to learn, or in some cases relearn, certain rules and policies from the perspective of the Court, rather than a practitioner. Finally, Scott said his transition from the Board to the Court was not difficult, at least in part because he was able to bring the same neutral approach he brought to his role as a writer and instructor at the Board to his role as a mediator at CLS. With a focus on staying neutral, Scott tries to keep conferences friendly and relaxed, and usually phrases any substantive comments he might have with a question, like, "Have you considered this?" or "Would you be willing to circle back with your

supervisor based on the clarification received today?"

Obviously, there are many ways of approaching the conferencing process, but high resolution rates suggest that all concerned – appellants' counsel, government counsel, and CLS staff attorneys – are making the process work to the benefit of veterans and the Court. Please take the opportunity to talk with Amy and Scott and other CLS attorneys at the Judicial Conference, and don't be shy about sharing your own constructive thoughts about ways we can further enhance the process.

On a note related to conferencing, the Court's Rule 33 Pilot, focused on providing limited representation at Rule 33 conferences for unrepresented litigants, continues to go well. Since kicking off last May, we have had about a third of the unrepresented litigants opt into the program and, of those who do, about half have achieved favorable outcomes. If you are interested in participating in the pilot and have a minimum of two years of experience representing veterans and have completed at least 50 cases, please send me a note at gblock@uscourts.cavc.gov.

I'll look forward to seeing many of you at the upcoming Judicial Conference. In the interim, or if you can't come and have comments or suggestions to offer, please don't hesitate to send me an email or give me a call.

Regards,
Greg Block

Attorneys and Judges Discuss Career Opportunities in Veterans Law

by Jillian Berner

On February 23, 2022, various members of the veterans law community provided insight into their careers and gave advice to future practitioners. Approximately 75 audience members viewed the panel live via Zoom. Panelists Chief Judge Margaret Bartley of the U.S. Court of Appeals for Veterans Claims (Court), Veterans Law Judge Evan Deichert, VA Office of General Counsel senior appellate counsel Nicholas Esterman, and Javier Centonzio of Centonzio Law, PLLC, all appeared virtually. Freda Carmack of the Board of Veterans' Appeals (Board) moderated.

Chief Judge Bartley began the panel by discussing her background, including attending law school and participating in the only veterans law clinic at the time, then serving as a judicial law clerk at the Court. She then discussed her career as an advocate, beginning at the National Veterans Legal Services Program (NVLSP), which allowed her to develop her writing skills.

Veterans Law Judge Deichert began his career as an associate representing home builders at a medium-sized law firm, then clerked for a judge in Maryland. He then began working at the Board, eventually becoming a Veterans Law Judge, and said that, although he did not foresee his career heading in this direction, "at this point, I cannot imagine doing anything else."

Veterans Law Judge Evan Deichert shared his experiences with the panel audience.

Esterman described his family connection, as his brother is a veteran, and his law school experience in a veterans clinic. He described participating in the National Veterans Law Moot Court Competition during law school and meeting a future employer during a networking reception at the competition. After graduation, he worked for the American Bar Association, then moved to Washington, D.C., to begin working for VA.

Centonzio discussed his prior military service, including a deployment to Iraq and the loss of a friend, which inspired him to attend college and law

school. His experiences and his friends' difficult experiences in obtaining VA disability benefits inspired him to choose to attend law school at Stetson, which had a veterans clinic. During law school, he participated in a paid internship at the Veterans Consortium Pro Bono Program and NVLSP. Following graduation, he clerked at the Court.

Moderator Freda Carmack asked the panelists to recommend law school courses and experiences helpful to a career in veterans law. Centonzio recommended courses in disability law and appellate law and participation in moot court. Esterman recommended veterans clinic participation and taking "every legal writing course you can find." Deichert echoed these recommendations, stressing the importance of legal writing and research. Chief Judge Bartley suggested obtaining experience in veterans law as early as possible, including internships.

Carmack asked the panelists if they would have done anything differently in law school given what they now know. Deichert said he wished he had been involved in a clinic to develop skills necessary to be successful in a legal career. Centonzio said he wished he had more law school experience in legal writing, while Esterman said that he would have taken administrative law or appellate advocacy courses.

Carmack asked the panelists about the most satisfying aspects of their positions. Esterman described the ability to participate in unique and unanswered questions of law as especially rewarding. Centonzio discussed a recent oral argument before the Court but emphasized that the most satisfying experience is calling a veteran or their family to communicate good news about their claim. Chief Judge Bartley described writing a decision, even if it is not in the veteran's favor, that provides closure to the claimant. Deichert talked about how rewarding it is to speak directly to veterans during hearings.

Carmack asked the panelists for any advice they would give to prospective veterans law attorneys. Chief Judge Bartley recommended that audience members "get [their] hands dirty" and gain experience, both to determine their interests and to network for job opportunities. She especially encouraged students to take advantage of remote work opportunities. Centonzio advised students to keep an open mind and to avoid preconceived notions about counsel on either side of the bench. He also recommended prospective attorneys keep their patience in difficult situations involving counsel and clients. Deichert counseled audience members to get their names out in the veterans law community and to "immerse yourself in some of the free resources that are available." Esterman recommended, similarly, that students seek out any opportunity to be involved in the community.

Attorney Javier Centonzio provided his advice to future veterans law practitioners.

An audience member asked the panelists which factors they considered when interviewing prospective applicants. Centonzio said that he considers commitment to public service and a writing sample when hiring. Deichert stated that the Board typically considers grades (though that may not be the determinative factor), interviewing skills, and writing ability. Chief Judge Bartley said that the Court's consideration of law clerks varies by judge, but that most judges allow for experience in veterans law to sometimes substitute for top grades.

An audience member sought out information about where to find job opportunities. Deichert shared that most Board openings are posted on USA Jobs, but that reaching out to the Board at any time is also helpful. Esterman said that submitting information to the Office of General Counsel's hiring committee, regardless of current openings, can be a good way to get on the committee's radar for future opportunities. Centonzio recommended that applicants to smaller and mid-size firms reach out

directly to firms and introduce themselves to practicing attorneys. Chief Judge Bartley advised the audience that Court opportunities are posted on the Court website, but that some judges also use USA Jobs or OSCAR to publicize openings, which can be available year-round.

Jillian Berner is Senior Staff Attorney at the University of Illinois Chicago Law School Veterans Legal Clinic.

Bar Association Hosts Presentation on Effective Motions Practice

by Victoria Tamayo

On February 7, 2022, the CAVC Bar Association hosted a Zoom presentation on effective motions practice at the Court. The presentation featured Anne P. Stygles, Chief Deputy Clerk of Operations at the CAVC.

Ms. Stygles began the presentation by showing attendees a useful chart found on the Court's website at https://www.uscourts.cavc.gov/court_process.php. The chart summarizes the entire Court process. At each "step" in the process, the viewer can click on the correlating link on the righthand side of the page, which will show the applicable Court rules. Ms. Stygles recommended new attorneys use this as tool when learning the Court's rules of practice and procedure.

Next, Ms. Stygles discussed the top ten reasons why Court submissions are rejected.

(1) Motions for extension of time are often rejected because they are missing pertinent information required by Rule 26(b)(1). For example, motions will be missing the total number of extension days each party has received thus far.

(2) Motions are rejected when they do not contain a statement of consent pursuant to Rule 27(a)(5). In other words, the motion fails to specify whether the opposing party is opposed to the motion.

(3) Briefs are rejected when they are missing record citations pursuant to Rule 28(a)(2). Ms. Stygles explained how the table of contents will sometimes fail to include the descriptions for each record citation.

(4) Submissions are rejected when the party failed to redact personal identifiers. For example, the Appellant's claim number might be found in the submission.

(5) Record disputes and record of proceeding disputes are rejected when they are missing a statement describing the "good faith effort" used to resolve the dispute. This is required by Rules 10(b) and 28.1(b).

(6) Submissions are often rejected because the party improperly filed a motion to stay proceedings instead of a motion for extension. The proper grounds for filing a motion to stay can be found at Rule 5(a).

(7) Motions to withdrawal from representation are rejected when they are missing the Appellant's phone number pursuant to Rule 46(c)(1)(B). Ms. Stygles explained how it is important for the clerks to have access to the Appellant's contact information once they become a *pro se* Appellant.

(8) Motions or certificates of service are rejected when they are not electronically signed pursuant Electronic Rule 10(a). The electronic signature should include "/s/" before the signer's name.

(9) Motions to expedite proceedings due to a serious health condition are rejected when they fail to include the physician's licensing authority and/or licensing number pursuant to Rule 47(a)(1).

(10) Motions to supplement or amend a previous pleading are often rejected because the party failed to explain why the supplement or amendment is necessary. Ms. Stygles explained how this should be done in the motion itself or in a separate motion for leave.

After discussing common reasons why Court submissions are rejected, Ms. Stygles briefly described the "Response Matrix," which is the Court's system for tracking the number of noncompliant submissions. This system was created

about ten years ago when the Court decided to objectively track a practitioner's noncompliant submissions and promote conformity with all Court rules. If a practitioner meets a certain number of violations, he or she will receive a warning from the Court. The practitioner would receive at least three warnings before any disciplinary case is opened against them. For more information regarding the Court's efforts to ensure compliance with its rules of practice and procedure, please visit https://www.uscourts.cavc.gov/compliance.php.

Ms. Stygles concluded the presentation by providing the various ways to contact Court staff. Below is a list of the email addresses and phone numbers that Anne mentioned during the program.

Docket Clerks:
(202) 501-5790 ext 100 + last digit of case number

Anne Stygles, Chief Deputy Clerk of Operations
astygles@uscourts.cavc.gov
(202) 501-5979

Tyrone Deshazier, Deputy Clerk of Operations
pdeshazier@uscourts.cavc.gov

Sherry Lanuza, CM-ECF coordinator, and point of contact for attorney name, telephone, or address change: slanuza@uscourts.cavc.gov
(202) 501-5970 ext 1031

Cybersecurity:
Kendyll Benson, Director, Office of Information Technology, kbenson@uscourts.cavc.gov or his deputy, Ken Rowland, krowland@uscourts.cavc.gov.

E-Filing Helpline: (202) 418-3453

Information Helpline: (202) 501-5970 ext. 1010

Victoria Tamayo is an associate attorney at Centonzio Law, PLLC.

CAVC Clarifies VA's Duty to Consider "Logically Related" Claims for Secondary Service Connection.

by Payton Fletcher

Reporting on *Wilson v. McDonough,* Vet. App. No. 19-3791 (Jan. 26, 2022).

In *Wilson*, the Court of Appeals for Veterans Claims (Court) determined that the VA has a duty to consider secondary service connection issues that "logically relate" to a pending claim, regardless of whether the issue was expressly raised.

In 2016, after a VA audiological examination, Air Force veteran Randolph Wilson was rated at zero percent for bilateral hearing loss and ten percent for tinnitus. In February 2017, Mr. Wilson appealed the rating decision to the Board of Veterans' Appeals (Board), stating the audiological exam failed to include testing for peripheral vestibular disorder (PVD), a result of his ear conditions. PVD causes Mr. Wilson dizziness and occasional staggering.

In an April 2017 letter, VA acknowledged Mr. Wilson's PVD concern. It also stated that regulations require claims be submitted on standardized forms. Mr. Wilson asserted the April 2017 letter sent to him was only a form letter and it did not include any information about needing to file a separate claim for PVD. As a result, Mr. Wilson proceeded with the appeals process and did not file any additional claims. The Board denied Mr. Wilson's disability claim for bilateral hearing loss on November 27, 2018, without any mention of PVD.

On appeal to the Court, Mr. Wilson argued a new audiological exam would have assisted the Board in determining the association between his PVD and service-connected ear conditions. Mr. Wilson also argued that a new exam would have assisted the Board in determining whether his hearing loss impairment increased since his prior exam in 2016. Further, he argued the possibility of receiving an

extraschedular rating was intercepted due to the lack of another exam.

In response, the Secretary relied on the 2015 amendments to 38 C.F.R. § 3.155 that describe how to file benefits claims and asserted the Board was not required to acknowledge any issues relating to PVD. The Secretary argued Mr. Wilson failed to respond to VA's efforts to further develop his claim, did not establish a connection between hearing loss and PVD, and never filed a formal claim for PVD.

The Court disagreed. First, it found the April 2017 letter did not clearly indicate to Mr. Wilson that he needed to file a new claim for PVD. The Court then discussed *Bailey v. Wilkie*, 33 Vet. App. 188, 199 (2021), which held the VA is required to develop and consider secondary service connection claims that arise during the initial claims filing process and are logically related to the pending claim. *Bailey* cites § 3.155(d)(2), which states the VA must evaluate all evidence to determine benefits for the claimed condition and any additional benefits for "complications of the claimed condition." The *Bailey* court noted the term "complications" in § 3.155(d)(2) includes additional conditions caused or aggravated by treatment for a service-connected condition, and as such, the VA has a duty to consider logically related conditions for secondary service connection if mentioned during the course of filing an initial claim.

Additionally, the Court emphasized the Board has a duty to construe sympathetically and in a liberal manner all issues raised by the veteran. That is, the scope of a raised claim is not limited to just that claim, but includes any other disability depicted in the veteran's description of the claim.

Here, the Board failed to determine whether Mr. Wilson's claims of dizziness and PVD were logically related to his hearing loss claim. As a result, the Court found the Board's silence was not harmless error, as Mr. Wilson referenced his PVD symptoms prior in his appeal. Notwithstanding Mr. Wilson's assertions, the Court noted there are regulations and caselaw that logically relate PVD symptoms to hearing loss, including Diagnostic Codes (DC) 6200 and 6204 in 38 C.F.R. § 4.87.

Ultimately, the Court determined the Board committed an error in making its decision for Mr. Wilson's bilateral hearing loss because it failed to acknowledge his claims without any reasons or bases. Therefore, the Court vacated and remanded the case for further consideration.

Payton Fletcher is a third-year student at Stetson University College of Law, where she is a Teaching Assistant for Stetson's Veterans Advocacy Clinic.

Limitations of Apportionment Standing and the Presumption of Regularity

by Amanda J. Baker

Reporting on *Fuller v. McDonough*, Vet. App. No. 18-7000 (Feb. 23, 2022).

The Court of Appeals for Veterans Claims (Court) in *Fuller* considered whether California community property law afforded a veteran standing for an appeal on apportionment benefits awarded to a spouse, and application of the presumption of regularity. The Court determined that, under limited circumstances, a veteran may have standing to pursue an appeal on apportionment benefits awarded to a spouse and the presumption of regularity should not be assumed.

The veteran, Thurman Fuller, Jr., filed an appeal following a Board of Veterans' Appeals (Board) denial of entitlement to an earlier effective date for apportionment of benefits to his spouse, Beverly Fuller. The Board found that Mr. Fuller had standing to pursue the apportionment benefits claim but denied entitlement to an earlier effective date. In reaching the latter conclusion, the Board found that the presumption of regularity applied to a notice letter sent to Ms. Fuller.

While incarcerated, Mr. Fuller was awarded service-connected disability benefits with a 2002 effective date. VA sent him a notice letter informing him that due to his incarceration, he would receive reduced

compensation in accordance with 38 C.F.R. § 3.665 but that his dependents may be entitled to an apportionment of the withheld portion. In response to the letter, Mr. Fuller completed a VA Form 21-686c, Declaration of Status of Dependents, identifying Ms. Fuller as his dependent and providing a California address. In 2004, VA sent a notice letter to Ms. Fuller at the provided address, stating that Mr. Fuller had submitted a request on her behalf and informing her of the right to file an apportionment claim. VA did not receive a response to the letter.

In 2009, Mr. Fuller sent VA an updated California address for Ms. Fuller, expressing belief that his spouse was in receipt of apportionment benefits. Ms. Fuller subsequently informed VA of her intent to file an apportionment claim. VA granted apportionment benefits to Ms. Fuller with a 2009 effective date, based on the receipt date of her application. Mr. Fuller and Ms. Fuller appealed the claim, requesting a 2002 effective date, when the initial service-connected benefit was granted.

The Board issued a decision, finding that Mr. Fuller had standing under California community property law but denied entitlement to an earlier effective date for apportionment benefits. In denying the claim, the Board found that the presumption of regularity applied to the mailing of a 2004 notice letter to Ms. Fuller that went unanswered.

The Court agreed with the Board that Mr. Fuller had standing to appeal the apportionment benefits awarded to his spouse. The Court found that economic injury arising from indirect deprivation of the apportioned benefits would be considered part of the community property of Mr. Fuller and his spouse, Ms. Fuller, under California law and was an "injury-in-fact." The Court relied on the fact that the parties were married at all relevant times and had mutuality of interest throughout the claims process.

Turning to the presumption of regularity in the mailing of the 2004 notice letter to Ms. Fuller that went unanswered, the Court disagreed with the Board's application of the presumption. Citing *Wise v. Shinseki*, 26 Vet. App. 517, 525 (2014), the Court found that the unique circumstances of Mr. Fuller's incarceration may be viewed as irregular on its face and prevented the presumption of regularity from attaching. The Court concluded that the Board inaccurately applied the presumption of regularity.

On the merits, the Court vacated the Board's denial of entitlement to an earlier effective date for the apportionment benefits claim.

In a dissenting opinion, Judge Allen argued that Mr. Fuller did not have standing to contest the claim because he lacked a statutory right or adequate legal interest in his spouse's apportioned benefits.

Amanda J. Baker is Counsel at the Board of Veterans' Appeals.

Court Dismisses Petition for Writ of Mandamus Relating to VA Attorney Database as Moot

by Ben Small

Reporting on *Veterans Legal Advocacy Group (VLAG) v. McDonough*, Vet. App. No. 20-8291 (Feb. 14, 2022).

In *VLAG v. McDonough*, the United States Court of Appeals for Veterans Claims (Court) issued a panel order (by Judges Greenberg, Meredith, and Laurer) dismissing the petitioner's request for extraordinary relief as moot and determined that the petitioner's request for sanctions against the Secretary was inappropriate.

At issue in the case was the process by which VA maintains and updates addresses for attorneys of claimants. The petitioner, a law firm representing veterans, argued that VA continues to send correspondence to addresses no longer associated with its firm. In describing VA's procedures for maintaining and updating addresses for attorneys, the Secretary explained that VA uses the address information submitted in a VA Form 21-22, Appointment of Veterans Service Organization as

Claimant's Representative, and that addresses are attorney-, not firm-specific. In addition, the Secretary provided the Court with proof that VA updated its databases to reflect the petitioner's correct address.

The Court, noting the lack of a case or controversy, a jurisdictional requirement required by Article III of the U.S. Constitution, held that the issue presented by the petitioner was no longer valid and dismissed the claim. In addition, the Court found that the Secretary had not violated a Court order and ruled that no further action was warranted to resolve the petitioner's concerns.

Ben Small is an Attorney-Advisor at the Board of Veterans' Appeals.

Court Holds That Records Constructively Before the Board Belong in the RBA

by Solveig Frasch

Reporting on *Page v. McDonough*, Vet. App. No. 19-0865 (Jan. 1, 2022) (per curiam order).

In *Page*, a panel of the Court of Appeals for Veterans Claims (Court), which comprised Judges Pietsch, Meredith, and Falvey, considered whether the record before the agency (RBA) could be amended with records that were constructively before the Board of Veterans' Appeals (Board) at the time of its decision and whether the Court could consider those records.

By way of background, Lewis R. Page appealed an October 22, 2018, Board decision, which denied a disability rating greater than 70% for post-traumatic stress disorder. In the course of the appeal, the Secretary of Veterans Affairs (Secretary) discovered that the RBA did not include certain records from the Veterans Health Information Systems and Technology Architecture (VistA) Imaging system even though the records had been constructively before the Board at the time of its decision.

While both parties agreed on the Board's constructive possession of these records, they disagreed as to whether they could be included in the RBA. The Secretary filed an opposed motion on November 27, 2019, requesting to amend the RBA with the VistA Imaging documents. On July 20, 2021, the Secretary filed another opposed motion for leave to amend the November 27, 2019, motion, to include additional VistA Imaging documents. Mr. Page disagreed that these documents should be added to the RBA, and he filed an opposed motion on February 6, 2020, to strike the portions of the Secretary's brief that discussed the disputed records. The veteran believed that the Court should remand the case to the Board and that the Board must obtain the records under its duty to assist.

While the matter was initially referred to the panel on April 2, 2020, the Secretary filed an unopposed motion to stay proceedings while awaiting the Federal Circuit's decision in *Euzebio v. McDonough* (*Euzebio II*), 989 F.3d 1305 (Fed. Cir. 2021), *vacating*, *remanding Euzebio v. Wilkie* (*Euzebio I*), 31 Vet.App. 39 (2019). The Court granted the motion and stayed the case until the decision in *Euzebio II* issued. Then the Court held oral argument on July 27, 2021.

The Secretary relied, among other sources, on Court precedent in *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (per curiam order), and Federal Circuit precedent in *Euzebio II*. The Secretary argued in his brief that the records should be added to the RBA and that they contained "no pertinent information" to the claim at issue. He argued that if the Court considered the records, there would "be no doubt that remand … would be futile."

Mr. Page relied, among other sources, on Federal Circuit precedent in *Kyhn v. Shinseki*, 716 F.3d 572, 575 (Fed. Cir. 2013), and *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir. 2021), as well as Court precedent in *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992). He argued that not only should the Court deny the motion to amend the RBA, but also that Federal Circuit precedent prohibited the Court from making factual findings on the disputed records.

First, the Court addressed its own caselaw on constructive possession. It noted that *Murincsak*

did not involve a records dispute, and it found that *Bell* did support inclusion of constructively possessed records into the RBA regardless of whether they would be determinative. The Court held that "if disputed documents proffered in the context of a record dispute were constructively before the Secretary and the Board, they should be included in the record for purposes of proceedings before this Court regardless of whether the records may warrant a remand."

Second, the Court addressed whether the Federal Circuit caselaw prevented it from considering the disputed records. It found that *Khyn*, *Euzebio II*, and *Tadlock* did not prevent it from considering evidence that was constructively before the Board at the time of its decision.

Accordingly, the Court granted the Secretary's July 20, 2021, motion for leave to amend the November 27, 2019 motion; granted the Secretary's amended November 27, 2019, motion to amend the RBA; and denied Mr. Page's February 6, 2020, motion to strike portions of the Secretary's brief. The Court ordered the Secretary to serve the veteran with an amended RBA and to file an amended record of proceedings.

Solveig Frasch is a Staff Attorney at the National Veterans Legal Services Program.

Defining "Child" in 38 U.S.C. § 101(4)(A) and Applying to CHAMPVA Benefits: Course of Instruction Does Not Need to be Full-Time

by Devin deBruyn

Reporting on *Petite v. McDonough*, Vet. App. No. 19-5815 (Dec. 16, 2021).

In *Petite v. McDonough*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (Court) addressed in a precedential decision who qualifies as a "child" for CHAMPVA benefits. The Court held that to qualify as a "child" for CHAMPVA benefits, a course of instruction attended by the beneficiary does not need to be full-time. Because the Court's holding rests on an interpretation of "child" in 38 U.S.C. § 101(4)(A), which broadly applies to title 38 programs, the *Petite* holding concerning this definition may also be relevant in other contexts that involve application of section 101(4)(A) if there is not a more specific statute on point.

The Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) "is a federal health insurance program for spouses, surviving spouses, children, and certain caregivers of qualifying veterans," through which the VA pays a portion of the cost for covered medical expenses. The program does not have its own network of providers. Instead, the program allows beneficiaries to seek care at private or government medical facilities, to include VA medical centers, that accept CHAMPVA benefits.

Ms. Petite, the appellant and daughter of a veteran, was granted CHAMPVA benefits in July 2008 when she was 8 years old. In 2017, the VA notified Ms. Petite that to continue receiving CHAMPVA benefits after she turned 18 years of age, she would need to provide proof that she was pursuing a full-time course of instruction at a VA-approved educational institution. Ms. Petite did not respond to these notifications. As a result, the VA notified Ms. Petite after her 18th birthday that she no longer qualified for CHAMPVA benefits. Shortly thereafter, Ms. Petite filed a Notice of Disagreement. She later perfected an appeal to the Board and submitted a statement that she was a part-time student.

In August 2019, the Board denied Ms. Petite entitlement to continued benefits under CHAMPVA. The Board found that Ms. Petite was ineligible for continued CHAMPVA benefits because she was 18 years of age and she had failed to demonstrate (a) that she was permanently incapable of self-support, or (b) that she was pursuing a full-time course of instruction.

The CHAMPVA statute authorizes the Secretary to "provide medical care, in accordance with provisions of subsection (b) of this section," to certain individuals "who are not otherwise eligible for medical care under [TRICARE]." 38 U.S.C. § 1781(a). Eligible individuals include "the spouse or child of a veteran who has a total disability, permanent in nature, resulting from a service-connected disability." 38 U.S.C. § 1781(a)(1).

Section 1781 does not define who qualifies as a "child" for CHAMPVA benefits. Ms. Petite asserted that the definition of "child" provided in 38 U.S.C. § 101(4)(A) should apply. In relevant part, this section defines "child" as an unmarried person who has a qualifying parent-child relationship with the veteran and (i) who is under age 18; (ii) who became permanently incapable of self-support before reaching the age of 18; or (iii) who "is pursuing a course of instruction at an approved educational institution" between the ages of 18 and 23. Ms. Petite argued that she met the definition of "child" provided in the third scenario because she was between the ages of 18 and 23, she was enrolled in a part-time program, and section 101(4)(A)(iii) does not require the course of instruction to be full-time.

The Secretary, in contrast, relied on the definition of "child" found at 10 U.S.C. § 1072, a statute relating to TRICARE. The Secretary asserted that TRICARE's definitions are incorporated into CHAMPVA pursuant to 38 U.S.C. § 1781(b). TRICARE defines a "child" as one who "is enrolled in a full-time course of study." 10 U.S.C. § 1072(2)(D)(ii). Thus, the Secretary argued that Ms. Petite was ineligible to receive continued CHAMPVA benefits because she was not pursuing a full-time course of study, as required under TRICARE's definition of a "child."

The Court began its analysis with the language of the CHAMPVA statute. Because the statute does not define "child," the Court noted it must look beyond the statute for a definition. The Court turned to 38 U.S.C. § 101(4)(A), which defines "child" and is "broadly applicable to title 38 programs," including CHAMPVA. The Court highlighted that section 101(4)(A)(iii) provides only one requirement for the course of instruction, namely that it is offered by "an approved educational institution." The statute makes no reference to whether the course of instruction must be full-time or whether part-time enrollment will suffice.

This silence, the Court observed, is significant, as the next subsection (101(4)(B)), requires "full-time attendance" for determining whether an individual adopted under the laws of a jurisdiction other than a state meets the criteria of section 101(4)(A). Because section 101(4)(B) contains an express requirement for "full-time" student status in another specific context, the absence of the same requirement in section 101(4)(A) is "compelling evidence" that Congress did not intend full-time enrollment to be a requirement to meet the definition of a "child." As a result, the Court found section 101(4)(A)'s definition of "child" unambiguous. Accordingly, the Court held that "unless a particular statute indicates otherwise whether an individual's course of instruction is full-time or part-time is not a relevant consideration under section 101(4)(A)(iii) when determining whether an individual is a 'child' for CHAMPVA purposes."

The Court then addressed and rejected two additional arguments advanced by the Secretary. First, the Secretary argued that Congress incorporated TRICARE's definition of "child" into CHAMPVA via 38 U.S.C. § 1781(b), which states that "the Secretary shall provide for medical care in the same or similar manner and subject to the same or similar limitations as medical care is furnished" under TRICARE. Declining to accept this argument, the Court noted that even if the CHAMPVA statute aligned itself with TRICARE "in certain respects," the Secretary had not demonstrated that the "similar manner" and "similar limitation" requirements of section 1781(b) went so far as to encompass TRICARE's "full-time course of study" provision. In this regard, section 1781(b) contains specific actions in subparagraphs (1) and (2) by which the Secretary

is mandated to provide for medical care in the same or similar manner as TRICARE. The Court reasoned that the Secretary did not explain how his argument was impacted by the specific actions required in the subparagraphs, none of which imported TRICARE definitions into CHAMPVA.

Second, the Secretary argued that 38 U.S.C. § 1781(c) expressly establishes a full-time study requirement for a recipient to retain CHAMPVA benefits. Section 1781(c) provides that to retain benefits after incurring a disabling illness or injury, the beneficiary must be "pursuing a full-time course of instruction." The Court highlighted, however, that this provision concerned retention of CHAMPVA benefits after a recipient becomes disabled, and not eligibility for CHAMPVA benefits in general. Importantly, the retention provision of 1781(c) is the only section of CHAMPVA that imposes a full-time course of instruction requirement. The Court noted that section 1781(c) applies "only to a very narrow factual situation" in which a student becomes disabled after already establishing CHAMPVA eligibility. The Court viewed the express inclusion of a full-time requirement in 1781(c) and the exclusion of the same from the rest of section 1781 to be a strong indication that the full-time requirement was intended as an exception to retain CHAMPVA benefits and not for determining eligibility in general. The Court also pointed out that 1781(c) provides four requirements for retention of benefits, one of which states that a child must be pursuing a "full-time course of instruction." Thus, the Secretary's interpretation would create an unnecessary redundancy.

Accordingly, the Court reversed the Board's August 2019 finding that Ms. Petite was ineligible to receive CHAMPVA benefits due to her course of instruction not being full-time.

Devin deBruyn is Associate Counsel at the Board of Veterans' Appeals.

CAVC Holds That Pre-Appeal Period Blood Pressure Readings Should be Considered in Evaluating Hypertension Under the Ratings Schedule

by Jason Massey

Reporting on *Wilson v. McDonough,* Vet. App. No. 19-6020 (Dec. 20, 2021).

In *Wilson,* the U.S. Court of Appeals for Veterans Claims (Court) issued a precedential decision written by Judge Toth (with Judges Pietsch and Greenberg concurring) that held that the Board of Veterans' Appeals (Board) erred in declining to consider Mr. Wilson's pre-rating period blood pressure readings in determining the appropriate rating for hypertension under the General Schedule of Ratings for the cardiovascular system.

Under Diagnostic Code (DC) 7101, a veteran is entitled to a minimum compensable rating for hypertension when there is a "history of diastolic pressure predominantly 100 or more [that] requires continuous medication for control." 38 C.F.R. § 4.104, DC 7101. The M21-1 (VA's internal guidance manual) provides that "if current predominant blood pressure readings are non-compensable, a 10 percent evaluation may be assigned if . . . continuous medication is required for blood pressure control, and . . . past diastolic pressure (before medication was prescribed) was predominantly 100 or greater." M21-1, pt. V, subpt. iii, ch. 5, sec. 3.b.

Mr. Wilson was diagnosed with hypertension during service in 1991. Before his diagnosis, service treatment records (STRs) showed a number of diastolic blood pressure readings in excess of 100. Upon being diagnosed, he was prescribed medication to control his hypertension. Thereafter, STRs showed diastolic blood pressure readings below 100. After separating from service, Mr. Wilson continued taking medication to control his hypertension. VA granted service connection for hypertension in 2003, and Mr.

Wilson was assigned a noncompensable rating at that time. In 2008, he submitted an increased rating claim, which VA denied.

After a Board denial and a 2018 Court remand, the Board again denied entitlement to a minimum compensable rating for hypertension in 2019. In denying the appeal, the Board found that a compensable rating for hypertension was not warranted because the diastolic blood pressure was not predominantly 100 or greater during the appeal period. The Board declined to address blood pressure readings taken before the appeal period—specifically, those taken before he started taking medication to treat hypertension. In response to the 2018 Court remand, the Board found the M21-1 provision applied only to initial ratings for hypertension and therefore did not apply to Mr. Wilson's increased ratings claim. The Board reasoned that "a current rating based on measurements taken in 1991 is manifestly inconsistent with establishing the degree of disability shown during the period of the appeal."

The Court held that the plain language of DC 7101 directs VA to consider historical, rather than current, blood pressure readings, i.e., those taken before Mr. Wilson began medication. The Court reasoned that DC 7101 provides three avenues to obtain a 10 percent rating: (1) diastolic pressure predominantly 100 or more; (2) systolic pressure predominantly 160 or more; or (3) a history of diastolic pressure predominantly 100 or more requiring continuous medication for control. Thus, the Board's interpretation of prong (3) requiring diastolic pressure readings of predominantly 100 or more during the current appeal period would render that prong extraneous, effectively collapsing it into the first prong.

Furthermore, the Court noted that it previously found in *McCarroll v. McDonald*, 28 Vet.App. 267, 273 (2016), that DC 7101 contemplated the ameliorating effects of medication and that a veteran can be entitled to a compensable rating even if he or she does not have current blood pressure above the statutory thresholds. Based on this analysis, the Court found that the Board should have considered the 1991 pre-medication blood pressure readings to determine whether Mr. Wilson has a history of diastolic pressure at 100 or above.

The Court further found its plain language interpretation consistent with the M21-1. Pursuant to *Overton v. Wilkie*, 30 Vet.App. 257 (2018), and *Healey v. McDonough*, 33 Vet.App. 312 (2021), the Court found that the Board can neither merely invoke nor ignore a relevant guidance provision to support its decision but must provide an independent rationale relating its decision to the relevant guidance document. Therefore, the Board's rationale for departing from the M21-1 guidance —that it applied only to initial ratings and was therefore irrelevant to increased rating claims —was lacking and directly contradicted by the relevant text.

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

Federal Circuit Abandons "Preponderance of the Evidence" Language and Clarifies that the Benefit of the Doubt Rule Does Not Apply When Evidence "Persuasively Favors One Side or the Other"

by Rakhee Vemulapalli

Reporting on *Lynch v. McDonough*, No. 2020-2067 (Fed. Cir. Dec. 17, 2021).

In *Lynch v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) vacated a June 3, 2021, panel decision in an order granting Mr. Lynch's petition for rehearing *en banc* for the limited purpose of addressing *Ortiz v. Principi,* 274 F. 3d 1361 (Fed. Cir. 2001).

Relying on *Ortiz,* the Court of Appeals for Veterans Claims (Court) determined that the benefit-of-the doubt rule under 38 U.S.C. § 5107(b) did not apply to Mr. Lynch's case. *Ortiz* states that "the benefit of the doubt rule is inapplicable when the

preponderance of the evidence is found to be against the claimant." The Court affirmed the Board of Veterans' Appeals (Board) denial of Mr. Lynch's claim for entitlement to a disability rating greater than 30 percent for service-connected posttraumatic stress disorder.

The applicable law, 38 U.S.C. § 5107(b), codifies the benefit-of-the-doubt rule and sets forth in pertinent part, "[w]hen 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."

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, reading out the modifier "approximate" from the term "approximate balance." He made a two-pronged argument. First, he argued that *Ortiz* expressly requires equipoise of the evidence for a claimant to receive the benefit of the doubt. Second, he contended that *Ortiz's* statement that the "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant" is contrary to the statutory "approximate balance" standard.

The Federal Circuit was unpersuaded by Mr. Lynch's interpretation of *Ortiz*. It held that *Ortiz* correctly applied the statutory language and required that the benefit-of-the-doubt rule may be triggered in situations other than equipoise of the evidence, including where the evidence is "nearly equal." The Federal Circuit also concluded that *Ortiz* correctly established that the benefit-of the-doubt rule does not apply when a factfinder is persuaded by the evidence to make a particular finding. However, it determined that while *Ortiz's* preponderance of the evidence formulation correctly viewed the issue as one of persuasion, it could nonetheless be confusing because other cases link "preponderance of the evidence" to the concept of equipoise. To eliminate this potential for confusion, the Federal Circuit explained it would depart from *Ortiz's* "preponderance of the evidence" language and determined that the benefit-of-the-doubt rule applies if the competing evidence is in "approximate balance," which *Ortiz* correctly interpreted as evidence that is "nearly equal." The Federal Circuit described a corollary that evidence is not in approximate balance or nearly equal when the evidence "persuasively favors one side or the other." Therefore, the benefit-of-the-doubt rule would not apply in such an instance.

Of particular interest is footnote six of the opinion, which explains that the Federal Circuit's decision would not provide grounds for claims of clear and unmistakable error (CUE) for prior Board decisions (which frequently used the "preponderance of the evidence" language). In arriving at this conclusion, the Federal Circuit quoted 38 C.F.R. § 20.1403(e), which addresses a change in interpretation and states, "[c]lear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." However, the validity of 38 C.F.R. § 20.1403(e) will soon be debated before the Supreme Court of the United States, which granted a petition for a writ of certiorari in the case of *George v. McDonough*, 991 F.3d 1227 (Fed Cir. 2021).

Circuit Judge Reyna wrote a partial concurrence and partial dissent, which was joined by Circuit Judges Newman and O'Malley. They concurred in part and dissented in part from section IIB of the majority's opinion, which addressed whether *Ortiz* correctly concluded that the benefit-of-the-doubt rule does not apply when the preponderance of the evidence is found to be against the claimant. They agreed with the majority's decision to repeal the preponderance of the evidence rule adopted in *Ortiz* but disagreed with the decision not to overturn *Ortiz* in its entirety. A particular concern with the majority's view was that close cases may evade appellate review. Circuit Judge Reyna explained that if VA finds the evidence to be close, but ultimately finds the evidence persuasively precludes the veteran's claim, VA will not need to disclose that the evidence may have been close. He opined that VA should be required to include a statement and explanation in cases where VA concludes the evidence is not in approximate balance, but thought the case was a close call, to ensure that the question

of whether the evidence is in approximate balance under 38 U.S.C. § 5107(b) is meaningfully subject to appellate review in all cases.

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Retroactively Assigned Ratings Not Subject to Post-Treatment Examinations under 38 C.F.R. § 4.114, Diagnostic Code 7343

by Payton Fletcher

Reporting on *Breland v. McDonough*, No. 2020-2199 (Fed. Cir. Jan. 11, 2022).

In *Breland*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) affirmed the Court of Appeals for Veterans Claims (Court) decision applying a note contained within 38 C.F.R. § 4.114, Diagnostic Code (DC) 7343, requiring a post-treatment VA examination to prospective disability ratings only. That is, the Federal Circuit held that the DC 7343 note requiring a post-treatment VA examination does not apply to retroactive ratings.

Willis E. Breland is a United States Army veteran exposed to Agent Orange while serving in Vietnam. In October 2006, Mr. Breland was diagnosed with squamous cell carcinoma of the tongue. In December 2006, Mr. Breland filed a claim with the VA for his tongue cancer. The VA denied the claim due to lack of service connection and because tongue cancer is not a presumptive condition of Agent Orange exposure.

In February 2008, Mr. Breland underwent surgery to remove affected portions of his tongue. Five months post treatment, Mr. Breland's tongue cancer became benign. In December 2008, he filed a Notice of Disagreement (NOD) with the VA Regional Office (VARO). In May 2010, Mr. Breland had a VA examination that stated his tongue cancer remained benign and determined it was "less likely related" to Agent Orange. The VARO again denied Mr. Breland's claim in August 2010.

In 2015, after Mr. Breland submitted new evidence, the VARO retroactively granted service connection and awarded a 100 percent rating for Mr. Breland's tongue cancer, effective for eight months from December 2006 to August 2007. From 2007 onward, Mr. Breland was awarded a noncompensable rating for his tongue cancer.

Mr. Breland filed another NOD in August 2016 in response to the noncompensable rating, stating he experienced residual conditions related to his tongue cancer treatment. He had another VA examination in 2017 for residual conditions. No recurrence or metastasis of his tongue cancer was found.

In February 2018, the VARO granted service connection for some of Mr. Breland's residual conditions and assigned an effective date of August 5, 2016. The VARO also retroactively granted Mr. Breland a 100 percent disability rating for his tongue cancer for eight months only, beginning in January 2008.

Mr. Breland appealed the VARO's noncompensable rating to the Board of Veterans' Appeals (Board), asserting that the VA failed to correctly apply DC 7343 because a mandatory VA examination was not conducted six months after his cancer treatment concluded.

The Board denied Mr. Breland's appeal, explaining that since both rating decisions were granted retroactively, a VA examination six months post-treatment was not possible. Further, the Board explained that § 4.114 allows for conditions to be rated on residuals if there is no recurrence or metastasis of cancer, so Mr. Breland's residuals rating was correct. Mr. Breland appealed this decision to the Court.

The Court affirmed the Board's decision and held that the note to DC 7343 applies only to prospective ratings, not retroactive ratings, so Mr. Breland's request for a 100 percent rating from 2007 to 2017 was correctly denied. Mr. Breland appealed the

Court's decision to the Federal Circuit, stating that it misinterpreted the note.

The Federal Circuit agreed with the Court and held the plain language of the note to DC 7343 does not apply to retroactive ratings, as a mandatory six-month VA examination cannot be given retrospectively.

The Federal Circuit limited its interpretation to DC 7343 and ultimately held that the note, when read as a whole, applies only to prospective rating changes and not retroactive ratings for specific periods. Therefore, the Federal Circuit determined Mr. Breland would be overcompensated if he was retroactively granted a 100 percent disability rating for ten years of tongue cancer.

Payton Fletcher is a third-year student at Stetson University College of Law, where she is a Teaching Assistant for Stetson's Veterans Advocacy Clinic.

"As a Matter of Discretion:" CAVC's Latest Approach to *Nehmer*

by Benton Jay Komins

Discussion of *Constantine v. McDonough*, Vet. App. No. 18-7044 (Jan. 14, 2022).

In two prior articles, I discussed the ineluctability of the 1991 *Nehmer* Consent Decree, which has survived multiple challenges on multiple grounds for the past 31 years. Despite many efforts to circumscribe the parameters of the *Nehmer* class, its applicability to emergent disease entities, its geographical applicability, and its jurisdictional scope, VA has not prevailed in its challenges or defenses.

In *Constantine*, the U.S. Court of Appeals for Veterans Claims (CAVC) declined to exercise subject-matter jurisdiction over a "novel" *Nehmer* claim, underscoring that the U.S. District Court for the Northern District of California first assumed jurisdiction and "has actively supervised" the application of the Consent Decree. Despite the 1988 VJRA (Veterans Judicial Review Act), which gave CAVC exclusive jurisdiction to review decisions of the Board of Veterans' Appeals (38 U.S.C. § 7252(a)) and thereby transferred subject matter jurisdiction away from U.S. District Courts, *Constantine* presented issues that were best left undisturbed in the interests of "wise" judicial administration and comity.

To comprehend CAVC's posture of restraint, some facts are necessary. Mr. Constantine appealed an October 2018 Board decision, which denied an earlier effective date for the grant of service connection for coronary artery disease (CAD). In pertinent part, the Board relied upon 38 C.F.R. § 3.816(b)(1)(i) ("[F]or the purposes of this section—Nehmer class member means: A Vietnam veteran who has a covered herbicide disease."). The Regional Office had originally granted an effective date of December 11, 2015; however, the Board, applying the benefit-of-doubt doctrine, granted an earlier effective date of August 31, 2010 (the date of the law that added ischemic heart disease (IHD) to the list of presumptive diseases related to herbicide agent exposure), pursuant to 38 C.F.R. § 3.114(a)(1). Constantine then filed an appeal, grounded in the theory that membership in the *Nehmer* Class is not dispositive of geography (applicable service in the Republic of South Vietnam), but rather, membership is dispositive of herbicide exposure—regardless of the place of exposure. As such, Mr. Constantine averred that he was entitled to the effective date as delineated in the Consent Decree (effectively, decades earlier, as Constantine's CAD symptoms began in the 1990s).

Neither party to the appeal disputed that there had been no active-duty service in the Republic of South Vietnam or its territorial seas. Neither party disputed that Mr. Constantine is presumed to have been exposed to certain herbicides during active-duty service at the Korean DMZ (Demilitarized Zone) between April 1969 and August 1969. As already noted, neither party to the appeal argued that CAD (as a form of IHD) was not added to the list of herbicide-related disease entities, effective August 31, 2010. 38 C.F.R. § 3.309(e) (2010). Even though the parties concurred that Mr. Constantine's active-duty service at the Korean

DMZ did not comport with *Nehmer* Class membership under 38 C.F.R. § 3.816(b)(1)(i), Mr. Constantine insisted that this regulation only partially describes the *Nehmer* Class. Precisely at this point, CAVC invoked discretion:

> *These arguments create an intersection between our exclusive jurisdiction over [Mr. Constantine's] individual appeal of a final Board denial of an earlier effective date of benefits and the District Court's ongoing jurisdiction over Nehmer litigation and enforcement.*

Exceptionally, CAVC did have exclusive jurisdiction over the specific subject matter of Mr. Constantine's case, as it falls squarely within the ambit of CAVC's exclusive subject matter jurisdiction as envisaged by the VJRA. The Court opined that while it had addressed issues tangential to *Nehmer*, such issues were never as fundamental as what constitutes membership in the *Nehmer* Class.

Indeed, the subject matter jurisdiction of *Nehmer* Class membership is not clear cut. In this rather unique situation, Mr. Constantine had not sought appellate review in District Court and CAVC could assume subject matter jurisdiction. But such jurisdiction, the Court reasoned, would "weigh in" on a fundamental question concerning the *Nehmer* Consent Decree and conceivably disrupt the District Court's ongoing robust enforcement.

The Court made short shrift out of Mr. Constantine's argument that the *Nehmer* Class status of Korean DMZ service members had been settled. Upon a lengthy discussion of the holdings of the 6 respective *Nehmer* cases, the Court found that Mr. Constantine's argument was flawed. While the Northern District of California and the Ninth Circuit have held that the Consent Decree must be interpreted broadly, these tribunals have not provided guidance as to the status of herbicide-exposed service members at the Korean DMZ. Stated differently, the District Court that first assumed jurisdiction and "has actively supervised" the application of the Consent Decree for over three decades has yet to address the issue of geographic limitation to the *Nehmer* Class. "As a matter of discretion," CAVC declined to seize this subject matter jurisdiction in favor of judicial economy, the "historical trajectory" of *Nehmer* and its progeny, and to avoid the possibility of conflicting outcomes. Consequently, *vis-à-vis* "wrongful treatment" as a Korean DMZ *Nehmer* Class member, Mr. Constantine, with the CAVC dismissal, only had recourse with the Northern District of California.

In a partial dissent, Judge Greenberg indicated that the Court should not have declined subject matter jurisdiction. Here, he emphasized that CAVC has exclusive jurisdiction to review Board decisions to the extent necessary, regardless of "duplicative litigation." Nevertheless, Judge Greenberg found that the majority's opinion is consistent with precedent (though this may have rung hollow for the worthy veteran who has been turned away).

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Retroactive Benefit Reduction is Proper When Veteran is Incarcerated

by Morgan MacIsaac-Bykowski

Reporting on *Gurley v. McDonough*, No. 2021-1490 (Fed. Cir. Jan. 20, 2022).

In *Gurley*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued a precedential opinion written by Judge Taranto. The Federal Circuit affirmed a decision of the Court of Appeals for Veterans Claims that VA is not required to act during the incarceration period to implement a mandated benefits reduction for the period of incarceration under 38 U.S.C. § 5313.

Randolph Gurley was incarcerated for a felony conviction for six months after being granted disability benefits from the VA. As mandated by 38 U.S.C. § 5313, benefits are substantially reduced after the sixty-first day of incarceration. Accordingly, Mr. Gurley, who was rated at 100%, would have only been entitled to the 10% disability rate after 61 days of incarceration.

VA was not made aware of Mr. Gurley's incarceration until after he was released from custody, so the reduction in benefits did not occur during the incarceration. Accordingly, VA retroactively reduced his benefits for this period by withholding payment of future benefits until the amount he was overpaid was recouped. Mr. Gurley appealed to the Board of Veterans' Appeals and subsequently to the Court of Appeals for Veterans Claims, arguing that 38 U.S.C. § 5313 does not authorize VA to make retroactive reductions of benefits.

The Federal Circuit first looked to the plain meaning of 38 U.S.C. § 5313 and determined that the only temporal aspect of the statute refers to the period of incarceration and that nowhere does the statute require a reduction that is concurrent with the incarceration. The Court also considered that several other statutes address reductions and the remedying of overpayments through withholding future benefits but that no statutory provision bars retroactive reductions in benefits.

The Federal Circuit then looked to Congress's intent and the legislative history of the statute. It held that there is no evidence that Congress intended to require the VA to have contemporaneous knowledge of a veteran's incarceration. Finally, the Federal Circuit quoted its opinion in *Mulder v. McDonald*, 805 F.3d 1348 (Fed. Cir. 2015), which held that Congress did not intend for tax dollars to be spend on the same veteran through both prison funding and disability benefits.

Ultimately, the Federal Circuit held that the VA did not err when it retroactively reduced Mr. Gurley's disability benefits for the time he was incarcerated and overpaid under 38 U.S.C. § 5313.

Morgan MacIsaac-Bykowski is a staff attorney at the Stetson University Veterans Law Institute.

CAVC Invalidates Regulation Providing That Only Family Members Can Apply for a Headstone or Marker to Memorialize Deceased Veterans

by Sarah "Sally" Battaile

Reporting on *Bareford v. McDonough*, Vet. App. No. 19-4633 (Feb. 28, 2022).

In *Bareford*, a panel of the U.S. Court of Appeals for Veterans Claims (Court), comprised of Chief Judge Bartley, Judge Pietsch, and Judge Falvey, invalidated 38 C.F.R. § 38.361(c), after concluding its requirement that only a family member may apply for a headstone or marker to memorialize a veteran is inconsistent with its enabling statute. The Court then vacated and remanded the Board of Veterans' Appeals (Board) decision denying appellant Richard Bareford's application for a government-furnished headstone or marker to memorialize veteran Roy H. Anderson.

By way of background, Mr. Anderson was one of 25,000 World War I veterans enrolled during the Great Depression in the Emergency Conservation program, a precursor to the Civilian Conservation Corp. Approximately 700 veterans, including Mr. Anderson, were sent to the Florida Keys to build bridges to complete a highway between Key West and the mainland to boost tourism and revitalize the economy in the Keys. The veterans were housed in three work camps in the Florida Keys. In September 1935, an unnamed Category 5 hurricane made landfall and tragically killed over 250 of the veterans in the work camps.

While 80 veterans whose bodies were recovered in the first few days were buried with full military honors, Florida's then-governor ordered the remaining bodies be cremated due to health concerns. At least 168 veterans' bodies, including the body of Mr. Anderson, were cremated together with civilian dead. In 1937, the commingled remains were interred in an Islamorada, Florida, memorial to all victims of the 1935 hurricane. Individual remains

could not be separated, and the interred veterans were not individually memorialized. Mr. Anderson had no immediate surviving family, as his wife predeceased him in 1930 and they had no children.

In 2017, after pursuing various other avenues, Mr. Bareford requested that VA provide a government-furnished headstone or marker to memorialize Mr. Anderson. The VA National Cemetery Administration denied the request on the basis that Mr. Bareford was not a recognized applicant under 38 C.F.R. § 38.630, governing burial headstones and markers, or under 38 C.F.R. § 38.631, governing memorial headstones and markers.

Mr. Bareford appealed and in July 2019, the Board denied the claim, finding that Mr. Bareford was not a family member and thus not a proper applicant for a government-furnished headstone or marker to memorialize Mr. Anderson.

Under 38 U.S.C. § 2306, an appropriate memorial headstone or marker commemorating an eligible individual in an unmarked grave, or when the remains are unavailable, shall be furnished by the Secretary upon request. The regulations restrict authorized applicants and, in the case of veterans whose remains are unavailable, only family members may apply.

Mr. Bareford appealed the Board's decision, arguing the plain language of subsections 2306(a) and (b) does not identify who is authorized to request a memorial headstone or marker, reflecting Congress's unambiguous intent that anyone may make such a request. Therefore, he argued, 38 C.F.R. § 38.631(c) conflicts with those statutory subsections by imposing limits as to who may make such requests.

Although Mr. Bareford argued that both § 38.630(c) and § 38.631(c) are arbitrary and capricious, the Court preliminarily held that because the difference between the sections was whether a veteran's remains were identified and available, it was undisputed that Mr. Anderson's remains were not identifiable or available, and Mr. Bareford's arguments before the Board and the Court were specific to applicants for memorial headstones or markers, the issue before the Court was procedurally limited to § 38.631(c).

The Court analyzed 38 U.S.C. § 2306 under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). Thus, the Court first addressed whether § 2306 is unambiguous or whether a gap exists for VA to fill (*Chevron* step one).

Section 2306(b)(1) provides that "[t]he Secretary shall furnish, when requested, an appropriate memorial headstone or marker for the purpose of commemorating an eligible individual whose remains are unavailable." Subsection (c) discusses the material out of which headstones and markers may be made and references "the person entitled to request such headstone or marker," but does not explicitly state who can make these requests. Looking to the legislative history of § 2306, the Court determined that Congress intended that some persons are entitled to request government-furnished headstones and markers, and others are not. Because Congress was silent as to who is entitled to make these requests, it left a gap for VA to fill.

The Court next turned to determine whether VA's interpretation of § 2306, as reflected in the implementation regulation § 38.631(c), was permissible (*Chevron* step two). This second analysis determines whether the implementing regulation reflects a reasonable interpretation of the statute, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the statute.

The Court discussed the history of the regulation, noting that prior to 2016, VA's policy was to treat burial and memorial headstones and markers the same, which made sense as Congress intended this to be the same, regardless of the availability of the decedent's remains. But, for the first time, in amendments effective April 2016, VA provided different eligibility requirements for applicants for burial headstones and markers than for applicants for memorial headstones and markers. The 2016 revisions to the regulations broadened the category of applicants for burial headstones and markers, but

limited applicants for memorial headstones and markers to family members only.

In the proposed rule, VA explained the limitation on memorial headstones and markers was proposed so that they retain the same symbolism as burial headstones and markers, remarking that memorial headstones and markers allow the decedent's family to commemorate their loved one individually, not just the service of that individual. In the comments to the final rule, VA determined that requests for memorial headstones and markers should be made by family members who are likely to want to memorialize an individual whose life had a specific meaning to them.

Noting that Congress intended to treat headstones and markers the same, whether the decedent's remains were available for burial or not, the Court found that VA failed to provide a rational explanation as to why memorial headstone and marker applicants should be restricted to family members only, since the only difference from burial headstones and markers is the unavailability of the decedent's remains. Thus, the Court held that the absurd result under the current § 38.361(c) is that when no surviving family members are available, deceased veterans and their service contributions remain unmemorialized simply because their remains are not available for burial. The Court therefore concluded that § 38.631(c) is arbitrary and capricious.

Judge Falvey dissented, but agreed with the *Chevron* step one analysis finding that § 2306 left a gap as to who could request a headstone or marker for VA to fill. However, Judge Falvey wrote that VA's differentiation between applicants for burial versus memorial headstones and markers was reasonable. Judge Falvey noted that VA responded extensively to public comments to the proposed rule for the 2016 amendments, including Mr. Bareford's comments, and further noted VA's repeated emphasis in those responses on the prioritization of family members' wishes in the remembrance of their loved ones, especially regarding memorial markers. Judge Falvey would therefore find VA's explanation of its differentiation between applicants for burial and for memorial headstones and markers was reasonable, would give deference to VA's decision, and would not invalidate the regulation.

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Court Interprets the Extent of Additional SMC Payable Under 38 U.S.C. § 1114(p)

by Dan Brook

Reporting on *Barry v. McDonough*, Vet. App. No. 10-3367 (Feb. 3, 2022).

Mr. Barry, a veteran, appealed a March 2020 Board of Veterans' Appeals (Board) decision, which denied entitlement to a higher rate of special monthly compensation (SMC) under 38 U.S.C. § 1114(n). The Court of Appeals for Veterans Claims (Court) affirmed the Board decision in an opinion delivered by Judge Allen and joined by Judge Falvey. The Court held that 38 C.F.R. § 3.350(f)(3) allows for a single application of a half-step increase in SMC, rather than *multiple* half-step increases, and in not considering the award of such multiple increases, the Board did not err. Judge Jaquith concurred in part and dissented in part, writing that section 3.350(f)(3) allows for up to *two* half-step increases in SMC, that the Board erred in not considering this, and that the proper remedy was reversal and an award of an additional half-step increase in SMC up to the rate authorized under section 1114(n).

SMC(k), authorized by 38 U.S.C. § 1114(k), allows for payment of SMC for each of a number of types of loss of use up to a specified maximum rate. The statute indicates that this compensation can be added to SMC amounts awarded for qualifying disability presentations under 38 U.S.C. § 1114(l), (m), or (n) (i.e. SMC(l), (m), or (n), or, "full-step SMC rates"), up to a specified maximum rate.

38 U.S.C. § 1114(p) indicates that "in the event that the Veteran's service-connected disabilities exceed the requirements for any [prescribed SMC rates], the Secretary may allow [entitlement to] the next higher rate or an intermediate rate," up to a maximum statutory rate.

The regulation, 38 C.F.R. § 3.350(f), generally implements section 1114(p) and allows for higher rates of SMC for certain additional disability presentations at an intermediate rate, or at the next higher rate, up to a maximum statutory rate.

Section 3.350(f)(3) specifically provides for awarding SMC rates a half step above the SMC(l), (m), and (n) rates, along with rates a half step above any intermediate rates assigned pursuant to 38 C.F.R. § 3.350(f)(1-2), for "additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more." Such disability must be "separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. § 1114(l) through (n) or the intermediate rate provisions outlined [in 38 C.F.R. § 3.350(f)(1-2)]." The maximum amount of SMC payable under this provision is that provided by 38 U.S.C. § 1114(o) (i.e. SMC(o)).

In addition to the full-step SMC rates under section 1114(l-n) and any intermediate rates under section 3.350(f)(1-3), 38 C.F.R. § 3.350(f)(4) provides for a full-step increase in SMC rate based on an "additional single permanent disability independently ratable at 100 percent apart from any consideration of [total disability due to] individual unemployability [(TDIU)]. This disability must be "separate and distinct and involve different anatomical segments or bodily systems" from the disabilities that form the basis for the existing level of SMC under section 1114(l-n) or the intermediate rate provisions of section 3.350(f)(1-3). The maximum rate available under this provision is also the SMC(o) rate.

Another regulation, 38 C.F.R. § 3.321(b)(1), authorizes the VA Director of Compensation to approve an extraschedular rating "in an exceptional case where the schedular evaluation is inadequate to rate a single service-connected disability." The extraschedular evaluation must be "commensurate with the average impairment of earning capacity due exclusively to the disability."

Pertinent to the appeal, Mr. Barry had already been awarded SMC(m) for loss of one leg and loss of use of the other leg. He was also assigned a 70 percent rating for PTSD, a 60 percent rating for right shoulder disability, a 50 percent rating for left shoulder disability, two 30 percent ratings for left eye disabilities, a 20 percent rating for bilateral hearing loss, and 10 percent ratings for lumbar spine disability, right hand disability, left hip disability, right hip disability, hypertension and tinnitus. Through application of section 3.350(f)(3), VA had determined that compensation at the intermediate rate between SMC(m) and SMC(n) (i.e. SMC(m)+ ½) was appropriate due to SMC(m) entitlement for the loss of use of the legs combined with an additional half-step increase for having at least one separate and distinct disability, independently ratable at 50 percent or more involving a separate bodily system or anatomical segment. However, in the March 2020 decision, the Board denied entitlement to the higher level of SMC(n), determining that Mr. Barry had already been awarded the available intermediate SMC rate increase under section 3.350(f)(3) and was not eligible for a full step SMC increase under section 3.350(f)(4) because he did not have a qualifying additional disability rated at 100 percent.

On appeal, Mr. Barry primarily argued that the plain language of section 3.350(f)(3) allows for "as many intermediate increases as a claimant's condition can justify," subject only to the maximum SMC(o) rate. Thus, he contended he was entitled to four separate intermediate SMC increases corresponding to his PTSD, eye conditions, combined left and right shoulder disabilities, and the remainder of his disabilities, leading to overall compensation at the SMC(o) rate.

Alternatively, Mr. Barry argued that the section 3.350(f)(4) requirement that the qualifying,

independent 100 percent rating not be based on TDIU was invalid as it was contrary to other VA regulations, and he should have been awarded a higher rate of SMC (i.e. a full-step increase) under this provision for additional disability independently qualifying for TDIU. Additionally, he contended that his request for a "total rating" for purposes of establishing entitlement to this full-step increase amounted to a request for extraschedular consideration and that this total rating assertion is all that is required under 38 C.F.R. § 3.321(b)(1) to trigger a finding that a request for extraschedular rating has been raised by the record.

VA argued that Mr. Barry initially raised the section 3.350(f)(3) and (f)(4) arguments before the Court, not before the Board. Thus, as a threshold matter, it was inappropriate for the Court to address them. VA also argued that it was inappropriate for the Court to address the veteran's extraschedular argument as it was not raised before the Board or raised by the record. Additionally, VA contended it was inappropriate for the Court to address the section 3.350(f)(4) argument because Mr. Barry was not in receipt of a TDIU rating, so requesting invalidation of this provision was "tantamount to asking the Court to issue a prohibited advisory opinion."

Concerning the merits of the 3.350(f)(3) argument, VA asserted that its interpretation of the provision was correct or should receive deference as an agency interpretation, if the meaning was ambiguous. Concerning the merits of the 3.350(f)(4) argument, VA contended that the prohibition against a TDIU rating qualifying as the single, independently ratable 100 percent disability was valid.

The Court held that it would address Mr. Barry's contentions after applying "traditional issue exhaustion principles." The Court noted that the argument that section 3.350(f)(4) was invalid could not feasibly be presented to the Board since that body is bound to follow VA regulations. Also, addressing the section 3.350(f)(3) and extraschedular arguments involved "purely legal determinations," which the Court addresses de novo. Additionally, as a veteran, Mr. Barry belonged to a "favored class." Moreover, his case involved complex legal issues and at the Board level, he had been represented by a non-attorney agent. The Court acknowledged that VA has "an important interest in addressing regulations within its expertise," creating a potential institutional basis for applying the doctrine of issue exhaustion. However, this institutional interest had been protected by the judicial process permitting VA to present its "views about the legal questions at issue." The Court concluded that VA's institutional interests did not outweigh the interests of the veteran, allowing the Court to hear his arguments.

Concerning section 3.350(f)(3), the Court determined that the plain language of the provision did not clearly indicate whether it authorized multiple half-step increases in SMC or only a single half-step increase. However, the language contained in section 1114(p), implemented by section 3.350(f), specifically indicated that "one 'singular' rate would be provided through any regulation the Secretary adopted to implement the statute," an interpretation that was "most consistent with the rest of the statute's language and structure." The Court noted that in contrast to section 1114(p), section 1114(k) allows for increasing rates of SMC for each additional qualifying loss of use and that 38 C.F.R. 3.350(a), which implements this provision, similarly recognizes these multiple awards. The Court emphasized that "when Congress drafted section 1114 and chose to include certain language in one situation but not in another, we can assume that this decision was intentional. Thus, if VA or Congress intended section 1114(p) to allow for multiple applications, like section 1114(k), both the statute and implementing regulations would have been written differently." The Court concluded that section 3.350(f)(3), by allowing only single half step increases in SMC, "does precisely what Congress authorized" in section 1114(p) and that even if it could be interpreted as authorizing more than this, the Court "would not lightly assume that the Agency went beyond the authority Congress provided," emphasizing that "when a regulatory provision can be interpreted in a way that harmonizes it with the

statute it implements, courts should adopt such a harmonious interpretation."

Also, interpreting section 3.350(f)(3) in this way was consistent with section 3.350(f)(4), which specifically provides requirements for a veteran to receive a full-step increase in SMC. The Court indicated that "it would be odd to say that a veteran may obtain higher benefits using multiple half steps to get a full-step increase (or, as [the veteran's] example for his case shows, even more) under subsection (f)(3), without meeting the fairly restrictive requirements for the full-step increase under subsection (f)(4)." Consequently, Mr. Barry's interpretation of subsection (f)(3) was inconsistent with subsection (f)(4), thus favoring VA's interpretation. Accordingly, the Court held that section 3.350(f)(3) only allowed for a single half-step increase in the SMC rate and that "the Board did not err when it failed to consider the application of § 3.350(f)(3) more than once in its assessment of whether [the veteran] was entitled to a higher SMC rate."

The Court also determined that it could not consider Mr. Barry's challenge to section 3.350(f)(4), emphasizing that even if it invalidated the regulation, the appellant would not be able to obtain an increased rate of SMC, as such an increase would be predicated on him having been awarded TDIU, an outcome that had not occurred. Thus, ruling on the challenge to the validity of the regulation would amount to providing an impermissible advisory opinion. The Court agreed with VA that until VA granted entitlement to TDIU, the veteran's challenge to the regulation was "not ripe."

The Court noted that although Mr. Barry was receiving service-connected compensation for multiple disabilities, he had not specifically alleged that any of these impairments warranted extraschedular consideration. Even assuming that such consideration was raised by the record "for some (unidentified disability) for some (unidentified) reason," Mr. Barry had conceded that the matter would need to be forwarded to the VA Director of Compensation for consideration. Thus, because "there [was] no guarantee that [the veteran] would be awarded an extraschedular rating for any of his disabilities," the Court could not analyze the potential impact of any extraschedular consideration on his level of SMC, just as it could not address his argument that section 3.350(f)(4) was invalid in disallowing TDIU as a basis for the required, independently ratable 100 percent disability. The Court emphasized that the veteran "[did] not seriously address these significant flaws in his argument." Thus, the Court determined that the argument was "purely speculative and severely underdeveloped" and concluded that further analysis was unnecessary.

The Court noted that Mr. Barry had also presented argument concerning application of section 3.321(b)(1) and "the continued viability of this Court's caselaw in the extraschedular arena in light of the amendment to [the regulation]." However, as the contentions concerning extraschedular consideration could not be addressed, this argument was similarly "not ripe for review" and the Court did not address its merits.

In a dissent, Judge Jaquith determined that reversal of the Board decision was appropriate to award Mr. Barry SMC at the higher rate payable under section 1114(n). He emphasized that section 3.350(f)(3) clearly indicates that the permitted increases are "in addition to those under the other intermediate rate or next higher rate provisions" and does not indicate that "only one disability, or combination of disabilities, rated at 50" percent could form the basis for such an increase. Thus, the majority had impermissibly "read into the regulation a limitation to its applicability that [was] simply not there."

Judge Jaquith also noted that "section 1114(p) limits the SMC rate increase for service-connected disabilities that exceed the requirements for the 1114(k) prescribed rates not just to an intermediate rate, but to the next higher rate." Citing *Payne v. Wilkie,* 31 Vet. App. 373, 385 (2019), he noted that in previously interpreting a different aspect of section 1114, the Court had indicated that if Congress wanted the law to have a more limited effect, it could have used "stricter and more narrowly tailored language."

He emphasized that "the actual words of § 3.350(f)(3) limiting entitlement 'to the next higher intermediate rate or if already entitled to an intermediate rate, to the next higher statutory rate' dovetail with and give effect to—the section 1114(p) language allowing 'the next higher rate or an intermediate rate.'" Accordingly, an increase in the rate of SMC of up to two half steps, equivalent to one whole step, was authorized by both the statute and the regulation.

Moreover, Judge Jaquith determined that "nothing about [this interpretation] rendered [subsection](f)(4)] superfluous or meaningless." He noted that allowing for an immediate full-step increase in SMC for "additional single permanent disability independently ratable at 100 percent" under this provision was consistent with allowing a potential SMC increase of two intermediate steps over time for "two single permanent disabilities or combinations of permanent disabilities independently ratable at 50 percent or more" under section 3.350(f)(3). He then emphasized that "Mr. Barry's circumstances illustrate [the] point emphatically. Using common math, the 12 additional compensable disabilities listed in Mr. Barry's December 2014 rating decision total 320%! And applying the VA formula for arriving at combined rating results in a 100% rating when just his four highest rated additional disabilities are counted."

In addition, Judge Jaquith determined that both VA's duty to maximize benefits and the pro-veteran canon supported the more expansive interpretation of section 3.350(f)(3). Concerning maximization, in determining the appropriate rate of SMC, VA was required to consider all the veteran's disabilities and combinations thereof and to resolve doubt in his favor. Thus, by impermissibly "reading restrictions into § 3.350(f)(3) that are not there," VA failed in this duty. Because VA had at best established "ambiguity in the text and meaning of 38 C.F.R. § 3.350(f)(3)," the pro-veteran canon required that such interpretive doubt be resolved in the veteran's favor.

Finally, Judge Jacquith indicated that it was not until oral argument that VA first contended that deference was due to its interpretation of section 3.350(f)(3), if the regulation was determined to be ambiguous, because of VA's "consistent approach and interpretation" of the provision. In support of this position, VA relied on provisions in the M21-1 Adjudication Manual instructing Veterans Benefits Administration (VBA) adjudicators to "apply the provisions of 38 C.F.R. § 3.350(f)(3) or 38 C.F.R. § 3.350(f)(4), whichever is appropriate, only once in a rating decision" and emphasizing that "concurrent entitlement to SMC under both 38 C.F.R. § 3.350(f)(3) and 38 C.F.R. § 3.350(f)(4) is prohibited." Judge Jaquith noted that "the M21-1 provision was never [previously] cited or discussed—by the parties, the regional office, or the Board—so there is no indication that it was the basis of the denial of the veteran's request for SMC at a higher rate." He also noted that "interpretations according to agency manuals lack the force of law and do not warrant deference" and the limiting nature of the M21-1 interpretation conflicted with the "more expansive reading" required by the pro-veteran canon. Additionally, he emphasized that "VA should not be allowed to institute, via its procedures manual, more restrictions on veterans benefits than it proposed and adopted through notice and comment rulemaking." Accordingly, he concluded that "deference is unwarranted under the circumstances presented in this case because [it] would permit VA, under the guise of interpreting § 3.350(f)(3), "to create de facto a new regulation."

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Book Review: *There and Back Again: America Through the Eyes of a Traveling Veterans' Disability Attorney*

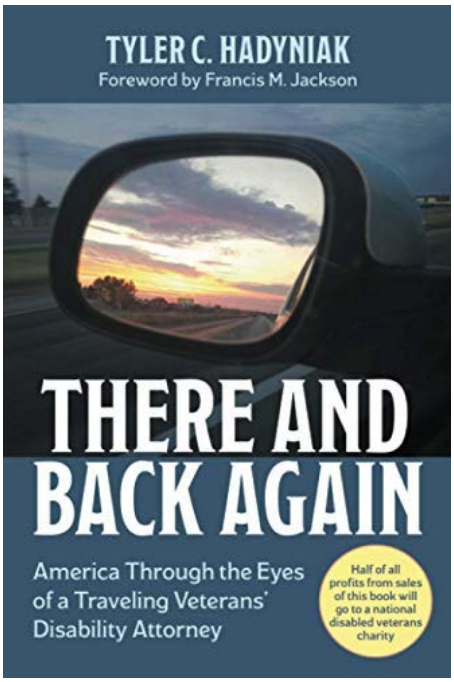
by Kenneth Meador

Tyler Hadyniak's *There and Back Again: America Through the Eyes of a Traveling Veterans' Disability Attorney* is a veterans law/hiking/American travel lover's book. If you're into any of those things, you

should consider reading the book and, well, if you're reading this review, in this publication, I think it's a safe bet that you're into at least one of those things.

Tyler somehow luckily fell into his job as a traveling veterans law attorney, flying around the country to represent veterans at Board hearings, just at the right time – right before COVID. Reading the book as COVID restrictions are finally beginning to ease, I had dual thoughts. First, I can't believe that people flew around like this once and, second, someday, people might do this again.

I'm always fascinated with people's paths to veterans law. I went to law school because I'd seen my friends and fellow veterans struggle to access VA benefits, and I wanted to help them. Since then, like so many of you, I've been humbled by the chance to be part of this great community of attorneys working in this field on both sides of the veterans law Bar. But I know many of us didn't go to law school knowing this type of law was a career path for them. That was the case for Tyler—he received an offer from a firm that worked in veterans benefits, and, after consulting with his grandfather, a Vietnam veteran, Tyler took the job and was off to the races, quite literally.



His book chronicles his journey, week by week, from June 2019 flying and driving around the country attending Board hearings on behalf of his veteran clients, until COVID ground his travels to a halt in March 2020. He very wisely took the chance to hike and sightsee while traveling. Along the way, he visited the Kennedy Space Complex in Florida, stopped at a piano bar in New Orleans, visited Bighorn National Forest in Wyoming, climbed mountains, put the gas pedal to the floor on a long open stretch of road in the desert, and visited many more well-known American landmarks. *There and Back Again* really is a chronicle of something that I feel, in our age of Netflix and 24/7 digital entertainment, so many of us miss out on, the great American road trip. Tyler luckily got to have his road trip experience while serving veterans, and I am grateful he had the foresight to take you and me along for the ride.

Tyler's memoir also gave me a window into something I don't typically get to see or experience in my appellate practice as a veterans law attorney, sitting with a veteran (and sometimes their family members) before and after they tell their stories in a Board of Veterans' Appeals hearing. In these scenes in his book, he talks about what it was like as an attorney to balance the complex challenges of things like escorting a veteran with schizophrenia to his hearing (without any real experience dealing with mental health disorders) or walking his veteran clients through their combat experiences during the hearings themselves (and the emotional toll that could sometimes take on the veteran). Tyler's narrative is consistently insightful and, throughout the book, his compassion for his veteran clients and their needs shines.

Although Tyler is a veterans' advocate, and that is clear from his narrative, he makes sure throughout to note the critical role that VA employees play in the system. He makes sure to note, "VA employees carry out the veteran-friendly policies enacted by the executive and legislative branch. What they do is supremely important. Next time you see one, thank them."

I think my only limited critique of Tyler's book comes down to what drew me to it and what I liked about it so much when I read it—that it is personal. *There and Back Again* contains Tyler's thoughts and musings about what it was like to travel around our great country doing the work that so many of us love: serving those who have served. If that doesn't sound like the kind of book you'd want to read, then

maybe it isn't for you. I had the exact opposite feeling and I was not disappointed as turned the pages and saw American through the eyes of a traveling veterans law attorney; I'd venture a guess that many of y'all will enjoy the trip too.

I am happy to highly recommend *There and Back Again: America Through the Eyes of a Traveling Veterans' Disability Attorney*! It's available on Amazon and Tyler is donating 50 percent of the proceeds to a veteran's charity. Happy reading!

Kenneth Meador is an appellate attorney at the National Veterans Legal Service Program and a U.S. Army veteran.

A Two-Hundred-Million-Dollar Question About "Day One" in VA's Overpayments to Incarcerated Beneficiaries

by Anna Kapellan

Logic: The art of thinking and reasoning in strict accordance with the limitations and incapacities of the human misunderstanding.

Ambrose Bierce

"People who think they know everything are a great annoyance to those of us who do," teased Isaac Asimov, a brilliant American science fiction writer. Of course, it cannot be ruled out that Asimov's cheeky tease was a mere somber reflection on the often-science-fiction-like applications of 38 U.S.C. §§ 1505 and 5313 and 38 C.F.R. §§ 3.665 and 3.666.

These two enabling statutes and their implementing regulations either markedly limit the amounts of or outright bar disbursements of VA monetary benefits under certain circumstances. Specifically, 38 U.S.C. § 5313 and 38 C.F.R. § 3.666 dramatically limit the amount of VA compensation benefits disbursed to an incarcerated veteran during his/her portion of penal confinement following the initial 60 days when related to a felony conviction.[i] In a similar fashion, 38 U.S.C. § 1505 and 38 C.F.R. § 3.665 bar any disbursements of VA monetary benefits to a VA pensioner held in penal confinement following the initial 60-days of incarceration, be it based on a misdemeanor or a felony offense. Simply put, the only way a VA beneficiary held in confinement in connection with criminal prosecution is guaranteed to remain in uninterrupted receipt of full VA monetary benefits is if the veteran is charged with a penal offense but found not guilty (or the charges are withdrawn or dismissed, e.g., based on a violation of the right to a speedy trial), or if the veteran is charged with and convicted of a penal offense but spends only 60 days or less in a penal confinement related to that offense.

Therefore, factoring out the distinction between a misdemeanor and a felony (so to focus only on the umbrella scheme of 38 U.S.C. §§ 1505 and 5313 and 38 C.F.R. §§ 3.665 and 3.666), the legal inquiry triggered by these provisions could be reduced to a chain of three questions: (1) Was there a penal conviction? If yes, (2) was there a prison-like confinement causally related to this conviction? If also yes, (3) did such a confinement last longer than 60 days? If the answer to the last question remains "yes," then the 38 U.S.C. §§ 1505 and 5313 and 38 C.F.R. §§ 3.665 and 3.666 mandates should be applied on the 61st day of penal confinement and continue until the date following the date of the VA beneficiary's release, be it an unconditional release into general population (*i.e.*, the penal sentence is "maxed out") or to serve the remainder of the sentence in a "non-prison environment," (*i.e.*, in a halfway house, mental health facility, on parole, or any combination of these options.)

To illustrate, if a VA beneficiary is convicted of a felony, *i.e.*, a penal offense that applies to all types of VA beneficiaries, and the court of conviction imposed a penal sentence of one year, but – on the 61st day of confinement – the beneficiary was released into a non-prison environment (for

instance, due to the spread of Covid-19 pandemic in prison facilities), then the 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 mandates could not be triggered at all, since any form of release qualifies as a release into a non-prison environment. However, these provisions would be triggered on the 61st day of prison confinement if that release takes place on the 61st day of confinement at a prison-like environment or at any later date. Therefore, it is not surprising that the causal relationship between these provisions and a prisoner's release into a non-prison environment is, as a general matter, duly applied by VA -- because VA beneficiaries have been vigorously litigating any continuous reduction or elimination of their VA monetary benefits after their release from a prison-like environment and their arguments have sunk in.

At this point, two brief clarifications are warranted. First, distinctions between confinements *other* than those in a "non-prison environment" are immaterial for the purposes of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666. Simply put, any distinction between an inmate's confinement at a jail (*i.e.* a municipally or county-operated facility generally meant to house only pretrial detainees, convicted prisoners who serve short-term sentences, and inmates who are in transit from one facility to another) and confinement at a prison (*i.e.*, a state or federally-operated facility meant to house prisoners who are serving longer sentences) is immaterial for the purposes of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666, because all these facilities are a prison-like environment qualitatively different from that of a halfway house or a mental health institution, or a place of civil confinement (even if it is a jail utilized as a civil commitment facility housing sexually violent predators who had fully served their penal sentences).[ii]

Second, to establish a beneficiary's 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 penal conviction, the form of the penal process underlying the conviction is also immaterial. Therefore, a conviction is equally valid if it ensues from a jury verdict, a bench verdict, a guilty plea, or any other plea, e.g., a *nolo contendere* or *Alford-Serrano* plea.[iii]

However, while the concept of a non-prison environment is familiar to VA, the concept of confinement at a prison-like environment that is causally related to a penal conviction has been, regrettably, misunderstood and misapplied by VA. Seemingly, this error is due to VA's conflation of two legal concepts: "confinement" and "penal sentence." Such a conflation is not uncommon, as the length of confinement is typically perceived by laypersons and popularized by the media as equal to the length of a penal sentence due to the long history of conflation in fictional literature.[iv]

However, in reality, a "penal confinement" almost never coincides, either in terms of its beginning or ending dates, with the underlying "penal sentence." The latter, expressed in a number of months stated by a court in a convicted criminal defendant's sentencing order, is merely a starting point in the calculation that is theoretically performed by the offices of the federal Attorneys General or state Attorneys General to determine the point in time when a prisoner becomes eligible for parole or placement in a halfway house or entitled to an unconditional release into the general population.

However, the offices of Attorneys General delegate this tedious calculative task to the Federal Bureau of Prisons (BOP) for prisoners who are convicted of Federal penal offenses, or to states' Departments of Corrections (DOCs) regarding prisoners convicted of state penal offenses.[v] Hence, while technically a penal sentence cannot start before the date when a convicted criminal "defendant is received in [BOP's or DOC's] custody awaiting transportation to, or arrives voluntarily to commence service of [his/her penal] sentence at, the official detention facility at which the sentence is to be served,"[vi] any period of confinement at a prison-like environment that is deemed related to conviction (*i.e.*, the period of confinement at the heart of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666) almost never starts to run on the same date the sentence begins to run.

Rather, just like a penal sentence could end much later than the last day of a convicted criminal's confinement at a prison-like environment, the period of confinement at a prison-like environment related to conviction might also begin many months or even years *earlier* than the date when the sentence technically begins to run.

In other words, unlike an order of penal conviction, which is critical for VA's purposes, a court's order providing a VA beneficiary's penal sentence merely serves as a gentle reminder that VA should start calculating.

Unfortunately, in its calculative efforts, VA focuses exclusively on the portion of a VA beneficiary's period of confinement at a prison-like environment starting from the date of penal conviction, *i.e.*, the period of post-conviction confinement. It is worth noting that the period of post-conviction confinement may consist of up to three subperiods: (1) the time from the date of conviction to the date preceding the date of sentencing (*i.e.*, the pre-sentencing subperiod); (2) the time from the date of sentencing to the day preceding the date when the convicted prisoner arrives at a BOP- or DOC-operated correctional facility (*i.e.*, the post-sentencing subperiod); and (3) the time from the date of such arrival to the date of release into any non-prison environment or the general population. Thus, if a criminal defendant is never placed in custody until arrival at a BOP or DOC correctional facility, then the pre-sentencing and post-sentencing subperiods of the period of post-conviction confinement would be nonexistent -- but such a scenario is exceedingly rare.

Notably, while the entire period of post-conviction confinement (even including the pre-sentencing subperiod) is usually acknowledged by VA, the period of confinement at a prison-like environment that often precedes a post-conviction confinement is overlooked by VA, thus creating a nearly science-fiction version of the penal process. In other words, this overlooked period of pretrial detention has been treated as a *de facto* UFO of VA jurisprudence; while it exists theoretically, and there have been multiple records of its sightings by countless eyewitnesses, it has not been either acknowledged or acted upon, even though a period of pretrial detention might be not just long but longer than a post-conviction period, and, occasionally, might be the only period that a convicted VA beneficiary spends in a prison-like environment subject to 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666.

Specifically, the period of pretrial detention starts to run on the first day when a VA beneficiary is placed in the custody of law enforcement officers (e.g., upon his/her arrest by police officers) and then continues to run each day when (s)he either remains in – or reenters – a prison-like environment until the date of his/her criminal conviction. Moreover, it is rather common for pretrial detention to encompass many subperiods. To illustrate, an accused person might first be placed in custody upon arrest, (triggering the period of pretrial detention), then have a bail set and be released upon posting bail (stopping the run of the pretrial detention), but then have bail revoked and be placed, again, in custody (restarting the run of pretrial detention), but then, upon having his/her bail set higher, post an increased bail (stopping the run of pretrial detention period once again upon release), and then might be placed in custody anew, due to a revocation of this higher bail (which would restart the run of pretrial detention). In other words, a pretrial detention is a combined time period essentially measured by a "legal stop-watch," and so it could be perceived as a temporal quilt that *might* be stitched together of many subperiods of time.

To add to the obscurity of this already abstract picture, it is not impossible for a pretrial detention period to be completely nonexistent. However, such a development occurs only in four scenarios. First, a criminal defendant may never be placed in pretrial custody and surrenders to law enforcement only after penal conviction. Alternatively, a criminal defendant might avoid pretrial detention if (s)he is

charged with a misdemeanor in a state that does not require arraignments on misdemeanor charges, or if arraigned and "bonded out" (*i.e.*, released on payment of a bail or a bond, or simply released on his/her own recognizance) on the very same date as being placed in custody, or if (s)he enters any plea other than not-guilty at an arraignment that is held on the date when (s)he had been taken in custody (and does not withdraw the plea at a later point).

However, while such developments have become more common during the last few years upon a wide adoption of so-called no-cash-bail laws,[vii] a criminal defendant still spends, on an average, 314 days, just over ten months,[viii] in pretrial detention—first waiting for an arraignment (typically, up to three days), then waiting for funds to post bail, and, if bail is denied or unaffordable, waiting for the criminal trial or plea hearing. Thus, even a three-year period of pretrial detention is common.[ix] Moreover, only a period far exceeding this three-year mark, if accompanied by other undue delays, might give rise to a successful motion to dismiss criminal charges for a violation of the right to a speedy trial.[x]

In addition, a pre-sentencing subperiod of a post-conviction confinement, *i.e.*, the subperiod that runs from the date of conviction to the date preceding the date of sentencing, lasts, on an average six months.[xi] Since persons convicted based on their election to enter a plea are usually spared from this pre-sentencing period (because plea hearings are habitually combined with sentencing hearings), and convictions upon trials amount to just three percent of all convictions in federal courts and six percent of all state court convictions,[xii] the combined effect of these statistics adds, on an average, seven days to the 314-day average period of pretrial detention applicable to all convictions, be they a verdict-based or based on a plea other than not guilty.

Accordingly, an average period of 321 (314 + 7) days expires between the first day of confinement in a prison-like environment for pretrial detention to the date when the BOP or a DOC takes a convicted prisoner (who could be a criminally convicted VA beneficiary) into post-conviction custody. Only upon taking a convicted VA beneficiary into custody would the BOP or DOC have a reason to notify VA of the beneficiary's penal conviction and incarceration.

It follows that such notice may never come. This is possible because 2.3 percent of convicted prisoners are sentenced to a so-called "time-served" term of imprisonment.[xiii] (Such a development is not uncommon as to those convicted defendants whose penal offenses do not entail sentences in excess of three years.) A "time-served" sentence is a *de facto* retroactively imposed period of incarceration equal to the sum of the pretrial-detention period and the pre-sentencing subperiod of the post-conviction period. Notably, while such sentences are, more often than not, imposed in conjunction with probation, community service, and monetary fines, none of these measures implicates 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666. Since neither the BOP nor a DOC would ever be notified of convicted criminal defendants sentenced to their "time served" (since BOP/DOC could not perform any functions as to such defendants), BOP and DOCs simply have no information to pass to VA. The information could come only from courts and probation offices. Therefore, left oblivious of such sentences, VA simply cannot act on "time-served" periods that VA beneficiaries spent in prison-like confinement.

Moreover, even if BOP or DOC provide VA with a notice as to a beneficiary's post-conviction incarceration, such a notice typically includes only the conviction date and the offense underlying the conviction and is silent as to any period of pretrial detention. VA never asks any pretrial-detention questions, even though BOP and DOCs are required to gather such information as to those prisoners whom they take into post-conviction custody. This requirement is part of the BOP/DOCs' obligation to calculate a prisoner's dates of eligibility for parole, placement into a halfway house, release into the general population, etc. The process of such

a calculation encompasses the BOP/DOCs' duty to "credit" a convicted prisoner's penal sentence with the entire period of pretrial detention (short of the portions thereof, if any, that had already been credited against his/her other penal sentences).[xiv]

Accordingly, while a prisoner's penal sentence, *i.e.*, a purely theoretical number of months stated in his/her sentencing order, cannot start to run until the date when (s)he is placed in the BOP or a DOC's custody, actual confinement in a prison-like environment for the purposes of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 starts to run on the first day of pretrial detention and then continues to run each time (s)he is placed in pretrial detention anew, for an average of 314 days.

Any notice by VA beneficiary to inform VA of the period of his/her period of pretrial detention would, indeed, operate as a wake-up call and trigger 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666. However, since VA has no established policy for or practice of making any inquiries about the periods of pretrial detention credited by the BOP/DOCs against post-conviction confinements of VA beneficiaries, VA *de facto* acts as if pretrial-detention periods are legally excluded from the reach of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666.

For example, suppose a VA beneficiary had been arrested, on felony charges on January 1, 2021, spent the nationwide average of 314 days in pretrial detention, was convicted on November 11, 2021, and, after spending an additional nationwide average of seven days in pre-sentencing confinement, until November 18, 2021, was sentenced to "time served." VA would not subject his/her benefits to any 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 limitations. This is not only because VA would never learn about such conviction and sentence from the BOP or a DOC but also because VA would be acting as if the beneficiary's period of incarceration at a prison-like environment was zero. Accordingly, the beneficiary would get a windfall of VA benefits for a period of 261 (321 – 60) days.

Further, imagine the same VA beneficiary had been convicted of a felony offense on the same date (November 11, 2021), after being placed in pretrial custody on the same initial arrest date (January 1, 2021), but was sentenced to a prison term of 374 days on November 18, 2021, (314 plus 60 days, rather than to 321 days of the "time served,"). The 60 days would include a brief period between conviction and sentencing, e.g., the seven-day average, and then 53 days of post-conviction and post-sentencing detention). (S)he would be first placed in BOP or DOC custody and then released from his/her post-conviction prison-like confinement 60 days later, on January 10, 2022. And yet, even though BOP/DOC would likely notify VA of the post-conviction confinement, VA would still not subject this beneficiary's VA benefits to any of the 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 limitations because VA would again ignore the pretrial detention and, thus, conclude that (s)he had been incarcerated for only 60 days due to VA's exclusive focus on the length of the period of confinement after penal conviction. Accordingly, the beneficiary would receive an even larger windfall for 321 days.

Furthermore, given that the bulk of states allow some prisoners to be released upon a grant of parole after serving just one-third of their criminal sentences, and this one-third period could be further reduced by up to 33 percent (through prisoners earning 10 days of credits for every 30 days of their good conduct at a prison-like environment), a VA beneficiary sentenced to a term of imprisonment of four years and eight months would still escape the reach of the 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 limitations. If (s)he succeeds at her parole hearing and earns all good-conduct credits available after spending the nationwide average 314 days in pretrial detention, the total period of her actual confinement would be 374 days, out of which only 60 would be spent in any form of post-conviction confinement. Given that post-conviction confinement is the only form of confinement that VA focuses on when applying

38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666, VA would conclude that (s)he was confined for only 60 days. Therefore, (s)he too would receive 314 days of a windfall.

In other words, VA's exclusive focus on the periods of post-conviction confinement leads VA to construe 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 as imposing financial limitations on, or fully barring VA's disbursements of, monetary benefits only as to the period of penal confinement that occurs "after" criminal conviction. However, VA laws do not authorize a construction of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 allowing ignorance of the period of pretrial detention and triggering the financial limitations only with regard to 60 days "after" conviction.

Indeed, both 38 U.S.C. § 5313 and 38 C.F.R. § 3.665 carefully use the coordinating conjunction "for" and guide that VA monetary benefits exceeding the limitation amount should not be disbursed effective the 61st day of incarceration "*for* conviction of a felony." In sync, 38 U.S.C. § 1505 and 38 C.F.R. § 3.666 carefully use the preposition "of" and fully bar VA disbursements of monetary benefits effective the 61st day of incarceration resulting from a "conviction *of* a felony or misdemeanor." And, since the plain meanings of the words "for" and "of" are crystal clear (the former is a function word used to indicate a purpose or relation, while the latter is a function word used to indicate a derivation or origin),[xv] VA's *de facto* substitution of "for" and "of" for "after" grossly distorts the statutory/regulatory mandates and is inconsistent with the governing case law. For instance, the U.S. Court of Appeals for the Federal Circuit has recently pointed out that the relation between 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.66 and criminal conviction is purely causal and connotes no temporal relation.[xvi]

Moreover, VA's unfortunate misreading of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.66 is at odds with the purpose of these statutes and regulations, which had been unambiguously

> *expressed by . . . Congress [as a measure required] to address the . . . problem of providing government benefits to individuals who were already being provided for by taxpayer funding of penal institutions. 126 Cong. Rec. 26,118 (1980) (statement of Rep. G.V. Montgomery) ("I do not see the wisdom of providing hundreds and thousands of dollars of tax-free benefits to such individuals when[,] at the same time[,] the taxpayers of this country are spending additional thousands of dollars to maintain these same individuals in penal institutions"); 126 Cong. Rec. 26,122 (1980) (statement of Rep. Chalmers Wylie) ("In the case of imprisonment, when a prisoner is being fully supported by tax dollars that fund the penal institution, it becomes ludicrous to continue payment of benefits designed to help him[/her] maintain a standard of living [outside a prison-like environment]").*[xvii]

Accordingly, VA beneficiaries convicted of penal offenses that trigger a 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 review should be subject to these provisions effective the 61st day of their confinement at *any* prison-like environment, even if a portion – and, potentially, the entirety – of such a confinement consists of their pretrial detention. In fact, Congress's financial considerations as to VA payments during a convicted VA beneficiary's period of post-conviction confinement are just as applicable to pretrial detention. This is so because an inmate's rights to shelter, food, clothes, medical care, etc. are automatically vested in him/her upon conviction, under the Eighth Amendment's prohibition against cruel and unusual punishment, while a pretrial detainee enjoys at least the same and, potentially, even greater rights under the Due Process Clause of the Fourteenth Amendment, which applies directly to any state's pretrial detainee

and, through the Fifth Amendment, to any federal pretrial detainee.[xviii]

VA cannot prospectively apply the mandates of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.66 to a VA beneficiary while (s)he is a pretrial detainee, *i.e.*, prior to his/her conviction (since VA cannot predict whether the beneficiary might be convicted at all and the specific offences of which (s)he might be convicted), once a penal conviction is obtained and a sentence is imposed (including a time-served sentence). However, VA is statutorily and regulatorily obligated to retroactively review the beneficiary's entire period of pretrial detention in order to determine whether that period exceeded 60 days (and, if the answer is "yes," charge an overpayment effective the 61st day of pretrial detention) or, if it was under 60 days, to deduct this period from a convicted VA beneficiary's first 60 days of post-conviction confinement in order to determine the "day one" when 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.66 had to apply.

In other words, VA is without a basis to declare, without establishing a unique factual pattern, that a convicted beneficiary's "day one" confinement subject to the 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 limitations is the 61st day of post-conviction confinement. Rather, it is VA's duty to invest time and effort into determining the actual "day one," which is the 61st day of confinement at a prison-like environment that is causally related to the beneficiary's penal conviction. This way, a VA beneficiary found not guilty (or having penal charges dismissed or withdrawn) would still remain in uninterrupted receipt of VA benefits with regard to the period of his/her pretrial detention, while taxpayers would be able to prevent waste by recouping the funds that VA disbursed to beneficiaries whose entitlements have to be retroactively affected by their penal convictions.

How many taxpayers' dollars are wasted each year by VA due to VA's incorrect understanding of what qualifies as "day one" for the 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 purposes? While we cannot identify a specific figure, an approximation is feasible.

At this juncture, there are about 195,000 new convictions in the U.S. every year,[xix] with convictions in state courts outnumbering federal convictions at about two-to-one rate.[xx] Further, "veterans in state prisons account[] for 7.9 percent of all state prisoners," while accounting for six percent of all federal prisoners.[xxi] Accordingly, VA beneficiaries (factoring out DIC beneficiaries) account for about 12,935 new convictions per year.[xxii] Moreover, since an average yearly amount of VA benefits in 2020 was $18,320 (and has been increasing since),[xxiii] and about 2.3 percent of all convicted individuals are sentenced to time served upon spending, on the average, 321 days in their pretrial and pre-sentencing confinements (thus, escaping VA's attention), and the remaining 97.7 percent get, on the average, 321 days of windfall due to VA's undue equating of the dates of their convictions with the "day one" of their confinements, the total amount of funds paid by VA in error and in utter violation of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.66 is about $207,402,585.38.[xxiv] Thus, even assuming, *arguendo*, that a yearly cost of requesting and processing: (1) court and probation offices' information as to all "time-served" sentences; and (2) information as to pretrial detention credits granted by BOP and DOCs would cost VA as much as $7,402,585.38 per year,[xxv] the saving that taxpayers would reap from VA's correct application of the statutes and regulations would be, at the very least, $200 million a year. (This figure would, obviously, be even higher if VA's erroneous – but not amenable to a quick approximation – payments to DIC beneficiaries convicted of felony offenses were factored in.)

Moreover, VA's proper application of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666 would also prevent VA from *de facto* rewarding career offenders and those who commit particularly heinous crimes. Indeed, for the purposes of determining whether

a particular person charged with a criminal offense should be released on bail and the amount of bail, the three most important considerations applied by a court are: (1) the gravity of the charged offense(s); (2) the record of prior convictions; and (3) the ties the charged individual has with his/her community. Thus, a person who has had strong community ties, no prior criminal record, and is charged with minor offenses is highly likely to be released on bail and not have his/her bail revoked until after conviction. Thus, if convicted, such a person is likely to have a very minor windfall, if any. Specifically, under VA's current approach to 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666, such a windfall would last about three days, because an arraignment typically takes place within three days, and a small bail could be posted within a few hours after it has been set.

Conversely, a criminal defendant who is without any community ties, has an extensive record of prior convictions, or is charged with a serious offense warranting a high bail is rather unlikely to be released on bail due to its amount and might be denied bail altogether. Accordingly, such a person would be held in pretrial detention. However, VA would end up *de facto* rewarding such a person with thousands of taxpayers' dollars by ignoring the pretrial detention period. Correspondingly, due to VA's misguided reading of 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666, $200 million of taxpayers' dollars are spent every year on the persons who violate societal norms the most. Simply put, VA's practice unwittingly rewards bad behavior.

To VA's defense, the impact of a pretrial detention on the length of a period spent in post-conviction confinement is unknown to those other than BOP and DOC staff tasked with calculating prisoners' pretrial-detention credits. Indeed, even experienced criminal attorneys are frequently left unaware of this aspect unless they also have extensive experience with the narrow 28 U.S.C. §§ 2241 and 2256 habeas law, which often implicates aspects "uniquely difficult to classify as . . . a direct or a collateral consequence" of a penal conviction.[xxvi] However, mindful of this difficulty, the U.S. Supreme Court stressed that those who are involved in legal adjudication of such unique matters are expected to "advise themselves of the importance" of the relevant legal authority.[xxvii]

Correspondingly, it is long overdue for VA to heed the U.S. Supreme Court's wise guidance and to avoid the temptation of correlating VA beneficiaries' penal sentences solely with post-conviction confinements. After all, Thomas Sowell, an eminent American economist, observed, "one of the first things taught in introductory statistics textbooks is that correlation is not causation. It is also one of the first things forgotten."

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[i] The same rule also applies to persons who are in receipt of a VA Dependency and Indemnity Compensations (DIC).

[ii] *See, e.g.*, *Thomas v. Adams*, 55 F. Supp. 3d 552 (D.N.J. 2014).

[iii] *North Carolina v. Alford*, 400 U.S. 25 (1970); *People v. Serrano*, 15 N.Y.2d 304 (1964).

[iv] One may think of, e.g., Alexandre Dumas' colorful depiction of Edmond Dantès and Abbé Faria serving life sentences at the Château d'If.

[v] *See, e.g.*, *Armstrong v. Grondolsky*, No. 08-2851, 341 F. App'x 828, 830 (3d Cir. 2009).
[vi] *See, e.g.*, 18 U.S.C. § 3585(a).
[vii] https://stoprecidivism.org/why-are-more-states-than-ever-passing-laws-for-no-cash-bail-and-pretrial-detention/.
[viii] *See, e.g.*, Marie Vannostrand, *New Jersey Jail Population Analysis* at 14 (Mar. 2013), *available at* https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.
[ix] *See, e.g.*, Zina Makar, *How the right to Speedy Trial Can Reduce Mass Pretrial Incarceration* (Nov. 2015), *available at* https://scholarworks.law.ubalt.edu/all_fac/966/.
[x] *See Barker v. Wingo*, 407 U.S. 514 (1972) (considerations relevant to the right to a speedy trial under the Sixth Amendment).
[xi] http://gunsandbutter.blogspot.com/2012/01/criminal-law-how-long-does-criminal.html.
[xii] https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal/.
[xiii] *See, e.g.*, Virginia House Bill No. 818, https://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+HB818F160+PDF.
[xiv] *See, e.g.*, *United States v. Wilson*, 503 U.S. 329, 334-35 (1992); *see also* 18 U.S.C. § 3585(a).
[xv] https://www.merriam-webster.com/dictionary/for; https://www.merriam-webster.com/dictionary/of.
[xvi] *Gurley v. McDonough*, 23 F.4th 1253 (2022).
[xvii] *Philbrook v. McDonough*, No. 2020-2233, 2021 U.S. App. LEXIS 30265 at *3-4 (Fed. Cir. Oct. 8, 2021) (relying on *Wanless v. Shinseki*, 618 F.3d 1333, 1337 (Fed. Cir. 2010)).
[xviii] *See, e.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (right to adequate food, shelter, clothing, and medical care); *Fuentes v. Wagner*, 206 F.3d 335, 344 (3d Cir. 2000) (pretrial detainees have rights at least equal to those of convicted prisoners); *Durmer v. O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993) (an inmate's right to medical treatments); *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990) (a prison doctor who interferes with modalities of treatment prescribed by other physicians commits a constitutional violation); *Planker v. Christie*, No. 13-4464, 2015 U.S. Dist. LEXIS 6804 (D.N.J., Jan. 20, 2015) (an inmate's right to Kosher and Halal food based on sincerely held religious beliefs); *Tormasi v. Hayman*, No. 08-4950, 2009 U.S. Dist. LEXIS 84738 (D.N.J. Sep. 9, 2009) (an inmate's right to eye examinations and prescription eyeglasses); *Williams v. Monmouth County Sheriff's Med. Dep't of Monmouth County Jail*, No. 04-4952, 2005 U.S. Dist. LEXIS 29266 (D.N.J., Nov. 21, 2005) (an inmate's right to dental treatments).
[xix] https://baldanilaw.com/innocent-people-jailed-each-year/.
[xx] Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, *available at* www.prisonpolicy.org.
[xxi] https://www.ussc.gov/research/research-reports/federal-offenders-who-served-armed-forces.
[xxii] (7.9 x 1 + 6 x 2) / 3 x 195,000 / 100.
[xxiii] https://www.veteransaidbenefit.org/how-much-does-va-pay-for-veterans-disability-compensation.htm.
[xxiv] 12,935 /100 x 2.3 x 18,320 / 365 x 261 + 12,935 / 100 x 97.7 x 18,320 / 365 x 321.
[xxv] To put the $7,402,585.38 figure in fiscal perspective, the entire U.S. Merit Systems Protection Board has $48,371,700 budget for the fiscal year 2022: this budget is used to support all MSPB's regional offices charged with the task of adjudicating all Federal personnel's claims, plus the Office of Appeals Counsel that adjudicates all appeals from all administrative judges' decisions, and all MSPB's offices performing merit system studies and other clerical tasks, as well as the staff that performs IT tasks, internal administration, security, and janitorial functions, and, in addition, to cover all MSPB's GSA costs for its HQ office and for all of its regional offices nationwide. *See* https://www.mspb.gov/about/about.htm.
[xxvi] *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).
[xxvii] *Id.* at 368.

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