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CAVC Panel Travels to Stetson Law for Oral Argument

by Morgan MacIsaac-Bykowski

On Monday, February 10, Stetson University College of Law in Gulfport, Florida, hosted an oral argument for the U. S. Court of Appeals for Veterans Claims. Consisting of Chief Judge Michael Allen (a former Stetson Law professor and Stetson Veterans Law Institute director), Judge Margaret Bartley, and Judge Grant Jaquith, the panel heard argument in *Loyd v. Collins* (No. 22-5998), an appeal of a Board of Veterans' Appeals decision that addresses a novel issue in the AMA system.

The morning of the argument, the judges sat on a panel and spoke to 1L students about legal writing in appellate law. From there, they joined the Veterans Law Institute, law students, and guests of Stetson Law—including CAVC Bar Association members—for a mixer. Following the argument, students, faculty, and guests of Stetson joined the judges, court staff, and attorneys for a luncheon cosponsored by the Veterans Law Institute, the Federal Bar Association, and the CAVC Bar Association. Stetson Law thanks the Court for traveling to its campus and the CAVC Bar

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Association for sponsoring a successful luncheon program.

Morgan MacIsaac-Bykowski is an adjunct law professor and associate director of the Veterans Law Institute at Stetson Law.

Message from Chief Judge Allen

Colleagues and friends,

Happy spring! As the temperatures warm and the flowers bloom, we enter a period of growth and renewal. That is certainly true for the Court! In December 2024, the President signed the Veterans Benefits Improvement Act of 2024 into law. This legislation added an additional temporary active judge to the Court. It also extended the sunset provision for the Court's now-three temporary judgeships until the end of 2027. This means the Court immediately gained a vacancy to add a new tenth active Judge and that any vacancies in the next three years can be filled. We are appreciative of Congress for recognizing the Court's increasing workload and the need for additional judges as we navigate that workload. And thanks to all of you who helped make this important development happen.

The Court is also in the process of obtaining and implementing a new docketing system. As many of you are probably very aware, CM-ECF, our current docketing system, is quite outdated and has required significant workarounds over the years. A dedicated task force of Court staff has been working on solutions and have found a new system to meet our needs and provide additional functionality that is simply not possible with CM-ECF. While I recognize that change can be difficult and that a change of this magnitude will not be without its own challenges, the Court is very excited about this important step into the future. We look forward to sharing more information as we continue this exciting, and mission-critical, process.

One final change to report. Since May 2021, the Court has operated the Rule 33 Pilot Program, allowing unrepresented appellants to opt in to representation for the purpose of participating in a Rule 33 conference. The Court has recently decided to make that program permanent. We have received great feedback from appellants and representatives alike, and we are proud of the great outcomes achieved for so many who navigated the veterans benefits system alone for many years. Connecting them with experienced counsel has been a gamechanger, and we thank all of you who have contributed (and will continue to contribute) to helping these veterans and their families.

In addition to these changes, the Court remains committed to engaging with our legal community. On November 21, 2024, the Court participated in a roundtable discussion hosted by the Senate Veterans' Affairs Committee staff that included the so-called "four corners"—representatives of the majority and minority of both the Senate and House Veterans Affairs Committees. It was a great opportunity to hear from various stakeholders about their concerns and ideas to ensure we're all doing our best to work together.

On February 10, 2025, the Court held oral argument in *Loyd v. Collins* (No. 22-5998) at Stetson University College of Law in Gulfport, Florida. Stetson hosted several events that allowed law students to hear from the judges and veterans law attorneys. I also joined Kenneth Walsh and Megan Kral from VA's Office of the General Counsel, Robert Chisholm and Zachary Stolz from Chisholm, Chisholm, and Kilpatrick, and Stetson professors Stacey-Rae Simcox

and Morgan MacIsaac-Bykowski in teaching a weekend seminar on veterans law. The trip was a great opportunity to spread the word about our Court and veterans law generally. Thank you to everyone at the Court, the private bar, and VA's OGC who always go above and beyond to make these trips a success—and a special thanks to Stetson for being such a great host. We have another outreach oral argument planned at Suffolk University School of Law in Boston, Massachusetts, on March 27, 2025, and look forward to another opportunity to spread the word about our veterans law community.

On February 4, 2025, the Court hosted several law students who are part of The Appellate Project and have an interest in veterans law. The students attended an oral argument, received a Court tour, and met with the three-judge panel that had heard the case they observed and various other Court staff, as well as the counsel who argued on behalf of the petitioner and Secretary. This program was another excellent way to engage with the legal community. Thank you to Joshua Wolinsky and Rosy Garza for facilitating the visit and all those who took time to speak with the law students.

Finally, we continue to see a high number of appeals filed at the Court. The first quarter numbers for fiscal year 2025 are well ahead of the pace we saw during the first quarter of 2024 – a nearly 20% increase in appeals. And the trend continued in January, the first month of the second quarter of the fiscal year. CLS continues to conduct an incredibly high number of conferences – 2,401 in the first quarter of 2025, more than it conducted during the same time last year. Our Court employees remain dedicated to efficiently tackling this high case volume, and I am proud of all of their hard work.

While many aspects of the Court are changing and growing, our commitment to veterans and justice does not waver. We remain steadfast in our mission, and I am grateful that we tackle that mission with such valued colleagues. I hope you all enjoy some warmer weather and fresh air and experience your own growth and renewal this spring!!

Message from Bar Association President James R. Drysdale

Dear Fellow Bar Association Members,

Since the Veterans Law Journal was last published, the CAVC Bar Association and its various committees have been working to bring you engaging programming, useful resources, and meaningful opportunities for professional connection. As a member-supported organization, we rely on annual dues and your generous donations to support our mission of improving the practice of law and the administration of justice in the U.S. Court of Appeals for Veterans Claims. If you have not yet renewed your 2025 membership, now is the time. Please visit cavcbarassociation.org/plans-pricing to join or renew today.

Thank you to all who were able to join us in person or via livestream in January when the CAVC Bar Association proudly presented the program, "Less than Honorable Discharges due to 'Don't Ask, Don't Tell' and LGBTQ+ Discrimination," with Dana Montalto of the Veterans Legal Clinic at the Legal Services Center of Harvard Law School. You can view this and other CAVC Bar Association programs from our website anytime by visiting https://cavcbarassociation.org/.

The CAVC Bar Association may be coming to a location near you! On March 27, 2025, the CAVC Bar Association will host a reception in **Boston, MA**, at 5:30 p.m. (ET) following the Court's oral argument at Suffolk University School of Law. Please email cavcbar@gmail.com for more information. On April 3-4, 2025, the CAVC Bar Association will be in **Minneapolis, MN**, as an exhibitor at the National Organization of Veterans Advocates (NOVA) conference. Please look for our table and stop by to join or renew your membership!

On Tuesday, April 29, 2025, you will not want to miss our "View from the Bench" program. This panel discussion will feature several judges of the U.S. Court of Appeals for Veterans Claims providing useful insights about practicing before the Court. Please plan to join us in person or via livestream. This summer, we are looking forward to opportunities to volunteer together in **Washington, DC**, to wash the memorials on the National Mall and to greet an arriving Honor Flight. Please watch for more information about these volunteer opportunities.

For members only: The CAVC Bar Association will coordinate another group admission ceremony at the U.S. Supreme Court Bar on November 5, 2025. Space is limited. More information will be forthcoming soon. Please ensure your 2025 dues are paid in full if you are interested in participating. We had a wonderful group last year, with each member able to bring a guest to the U.S. Supreme Court for breakfast in the West Conference Room and to witness the swearing-in ceremony with the justices before attending oral argument.

Finally, I would like to express my sincere gratitude to members of the CAVC Bar Association who have answered the call to participate as the CAVC Bar Association launched a new "Careers in Veterans Law" section on its website. If you are an employer seeking to fill a veterans-law related position or an employee seeking a new career challenge, the CAVC Bar Association wants to help you connect. Please contact cavcbar@gmail.com for more information.

As always, thank you for your support of the CAVC Bar Association!

James R. Drysdale is President of the CAVC Bar Association. He serves as Senior Appellate Counsel in VA's Office of General Counsel. Any views and opinions provided by Mr. Drysdale herein are made solely in his capacity as President of the CAVC Bar Association and do not represent the views of the Department of Veterans Affairs or the United States.

Bar Association Program Recap: Helping LGBTQ+ Vets and Servicemembers

by Alyssa E. Lambert

"A lot of work needs to be done to build trust so that this part of the veterans community can access the benefits available to them," said Dana Montalto, Associate Director of the Veterans Legal Clinic for the Legal Services Center at Harvard Law School. Hosted by the CAVC Bar Association in late January, Montalto spoke to both a virtual and in-person audience about representing LGBTQ+ veterans in discharge upgrades and handling VA character of discharge determinations (CODs) when someone has received a less than honorable discharge due to their sexual orientation or gender identity.

Montalto focused on three main areas: (1) a veteran's discharge status and why it matters; (2) Department of Defense discharge upgrades for LGBTQ+ veterans; and (3) CODs for veterans and their survivors. To start, she noted that there were a lot of misconceptions about VA benefits eligibility for LGBTQ+ veterans.

"I've spoken to a lot of veterans who believed they were not eligible for VA benefits, even if they had an honorable discharge, because they were told they weren't welcome or entitled to them," Montalto said.

For over a decade, Montalto has worked at Harvard's Veterans Legal Clinic—a clinical teaching site where law school students work under the supervision of attorneys to provide pro bono services to veterans and their survivors. A lot of their focus is on helping veterans who unjustly received a less than honorable discharge and are going through the COD process, not only at the administrative level but also in the federal courts.

"There are numerous factors that we know can contribute to people receiving a less than honorable discharge, and they include mental health, discrimination based on race, gender, or LGBTQ+ identity, and even disparate branch and command practices. At a much higher rate, post 9/11 vets have received a discharge that is not fully honorable, which has downstream consequences for what their postservice life looks like," she said. "Succeeding in a discharge upgrade or a COD can be really lifesaving and life changing. I've seen that personally from the work that we do in the clinic with less than honorably discharged veterans."

Don't Ask, Don't Tell (DADT) was the formal policy in place from 1994 to 2011, which roughly barred open service by LGB servicemembers, although there were similar policies that came before it. Montalto presented data showing that about 32,800 people were discharged from the military due to their sexual orientation between 1980 and 2011. But she noted that those numbers don't present the full picture.

"One thing we know from our own work is that a lot of people who were pre-DADT or transgender may have been targeted or discharged for other reasons, but where their experiences that led to that discharge are directly related to their identity. Sometimes we call this pretextual discharge—that they were discharged for something else, but the real cause or background that led to their discharge was their sexual orientation or gender identity," Montalto noted. "DADT was in place for so long, and it harmed a lot of people. It ended a lot of careers. After it was repealed, I don't think there was really a reckoning of how to make sure that everyone has the honorable discharge that they deserve and that no one is denied benefits that they should have received."

Montalto then addressed discharge upgrades, including the various legal standards that apply, and offered attendees some advice for issue spotting. For instance, Montalto said that most DADT related upgrades fall into the category of injustice or inequity, "because the injustice can either exist at the time of the discharge or develop after the discharge." But if "you are working with a veteran seeking a discharge upgrade, even if there are very strong arguments about either procedural errors or equity and fairness, it's very common, and often good practice, to include a clemency-based argument as well" explaining that clemency is "formally the legal standard that the [review] board applies for discharge upgrades of those who receive punitive discharges."

Unlike the typical evidentiary burdens that apply in VA cases, Montalto said that discharge upgrades are subject to a preponderance of the evidence standard with no benefit of the doubt rule. "There is a presumption of government regularity unless substantial credible evidence rebuts it. In actual practice, this feels like a much higher standard than preponderance of the evidence. The burden is really on the veteran to prove their case," she said.

Circling back to injustice and inequity in the context of DADT and its subsequent repeal in 2011, Montalto noted that a class action was filed in 2023 due to ongoing discrimination caused by Form DD214s that indicated veterans' actual or perceived sexual orientation. A proposed settlement was reached in January 2025, and a final settlement approval hearing was held mid-March. For more information, visit https://www.justiceforlgbtqveterans.com/.

Montalto turned lastly to CODs, which VA uses to decide whether a servicemember's discharge is "other than dishonorable" or "honorable." She presented a nuts-and-bolts breakdown of the various statutory and regulatory bars that have affected LGBTQ+ veterans and the implications for

access to VA benefits for those who receive less than honorable discharges.

Montalto also noted how current events are affecting LGBTQ+ veterans and servicemembers with the issuance of two recent Executive Orders. One "rescinded the Biden era policy that transgender servicemembers could openly serve in the military" and is now being challenged in court. But the Pentagon recently directed all trans servicemembers to be removed from the military, although waivers may be possible on a case-by-case basis if certain requirements are met. A second Executive Order directed servicemembers to be reinstated if they were discharged for refusing to get the COVID-19 vaccine, and Montalto noted that order directly referenced "the military review boards and the authority that they may have to upgrade discharges, award back pay, and so forth."

Before the Pentagon ban was announced, Montalto already indicated that the order specifically directed to transgender military service would affect servicemembers "relatively quickly. We'll have to think about representing servicemembers and veterans though the separation [process] and potentially the discharge upgrade process."

To listen to Montalto's entire presentation and access her materials, visit the Bar Association's website.

Alyssa E. Lambert is a legal editor at the U.S. Court of Appeals for Veterans Claims and a former member of the appellants' bar.

Upcoming Events at a Glance

March 27: CAVC Oral Argument at Suffolk Law

April 23: Veterans Law Journal Planning Meeting

April 29: CAVC Bar Program: A View from the Bench

CLERK'S CORNER: Tips from the Public Office on Nonconforming Pleadings

by Michael Burnat

The Public Office (PO) reviews thousands of pleadings each year, and although most comply with the Court's Rules, here is the general process of how we communicate noncompliance to counsel, as well as some examples of defective pleadings.

If the pleading is noncompliant, the docket clerk will mark the pleading as "Received" on the docket, provide a brief reason why the pleading is not compliant, and cite the relevant Rule. The docket clerk then creates a notice in CM-ECF to the parties, which generates an email to counsel. Then counsel can check the docket to determine the nature of the problem or contact the Court with questions. If counsel has a question about a pleading, the best course of action is to contact the docket clerk. The last number in the docket number that the Court assigns to a case corresponds to the docket clerk assigned to process that case. If the number ends in "0" (for example, 24-1200), call 202-501-5970, ext. 1000, to reach that docket clerk. If the case ends in "1" (for example, 24-1201), call 202-501-5970, ext. 1001.

If the pleading is not timely corrected, I will issue a formal notice of nonconforming documents and stay the case for 7 days. In my experience, most counsel correct their noncompliant pleadings within a day, which avoids the need for formal notice.

Some common examples of defective pleadings include:

- Extension of Time, Rule 26. Motions for extension of time may contain computation errors, such as errors in calculating extended or revised deadlines. Most errors can be avoided by using a date calculator, by double checking the docket to determine when the last operative

pleading was filed, and by determining whether the Court is closed on the day the pleading would otherwise be due. Another common error is failing to include the total number of days previously granted to the movant and the other party in the merits or the EAJA application phase (and not just how many days the movant was previously granted for the same pleading). The Court has a template for a motion for extension of time on the Court's website, which you may find useful. *See* http://www.uscourts.cavc.gov/forms_fees.php.

- Appellant's Initial Brief, Rule 31. The appellant's initial brief is due no later than 60 days after the notice to file the brief, or 30 days after the Rule 33 staff conference is completed, *whichever is later*. Do not assume the deadline is 30 days after the conference, because it depends on the case.

- Length of Briefs, Rule 32. Principal briefs may not exceed 30 pages, and reply briefs may not exceed 15 pages, not counting the table of contents and the other items excluded in Rule 32(e). Counsel may, of course, file the appropriate motion requesting permission to exceed the page limit, and the PO will forward it to a motions judge. In expedited cases (Rule 47), principal briefs are limited to 15 pages and reply briefs are limited to 7 pages.

- EAJA Application, Rule 39. Although the EAJA application may be signed by any counsel of record, the billing statement must be signed by the lead representative. *See* Rule 39(f).

Thank you for your efforts to ensure compliant pleadings, which avoid delay and benefit case processing overall.

Michael A. Burnat is Chief Deputy Clerk of Operations for the Clerk of the Court.

PRACTICE SERIES ARTICLE: VA Office of General Counsel

Important Changes for Receiving EAJA Payments: VA Switching to All-Electronic Payments on June 1, 2025

by Debra Bernal, Catherine Chase, and Kirsten Dowell

Under the Equal Access to Justice Act (EAJA), "a prevailing party in litigation against the government is entitled to recover reasonable attorney fees and expenses 'unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.'" *Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) (quoting 28 U.S.C. § 2412(d)(1)(A)). To be timely, an application for attorney fees and other expenses pursuant to EAJA must be filed within 30 days after this Court's judgment becomes final. *See* U.S. VET. APP. R. 39(a); *see also* U.S. VET. APP. R. 36 (entry of judgment). The Court's judgment generally becomes final 60 days after it issues a decision. *Bly v. Shulkin*, 883 F.3d 1374, 1376 (Fed. Cir. 2018); *see* 38 U.S.C. § 7292(a); U.S. VET. APP. R. 36(a).

Mandate is when the Court's judgment becomes final and is effective as a matter of law pursuant to 38 U.S.C. § 7291. *See* U.S. VET. APP. R. 41(a); *Sapp v. Wilkie*, 32 Vet. App. 125, 146 (2019) (per curiam order) ("Mandate finalizes and effectuates the Court's judgment on a matter."). The entry of mandate is the public notice that judgment has become final, and it occurs when the Court's mandate order is entered onto the docket. The Court's Rules of Practice and Procedure contain a practitioner's note advising that, "[b]ecause entry of mandate on the docket is a ministerial act and may not occur on the date of mandate, practitioners are cautioned to use diligence when calculating time periods so as to ensure timely filing." U.S. VET. APP. R. 41, Practitioner's Note.

The 30-day EAJA filing period is statutory, 28 U.S.C. § 2412(d)(1)(B), but not jurisdictional. *See Scarborough v. Principi*, 541 U.S. 401, 414, (2004); *see also Coley v. Wilkie*, 32 Vet. App. 284, 286 (2020) (per curiam order). The Court may equitably toll the deadline for EAJA applications. *Coley*, 32 Vet. App. at 287. But the EAJA applicant must show that equitable tolling is warranted. *Mead v. Shulkin*, 29 Vet. App. 159, 163 (2017) (per curiam order).

After an EAJA application is granted by the Court, the EAJA payment is processed by the VA Office of General Counsel, Court of Appeals Litigation Group (CALG). Historically, EAJA payments were issued in the form of a paper check; however, over the past year CALG has been gradually transitioning to issuing electronic payments.

On **June 1, 2025**, CALG is switching to **all electronic EAJA payments**. As of this date, to receive an EAJA payment, attorneys must be vendorized to receive an Automated Clearing House (ACH) deposit directly from the United States Department of the Treasury.

To become vendorized, attorneys must submit a vendor request through VA's Financial Services Center Customer Engagement Portal: **www.cep.fsc.va.gov.** The vendor request typically takes 3 to 5 business days to be processed.

If already vendorized or once the vendor request is submitted, attorneys should send an email to CALG's EAJA mailbox at **electroniceajapayments@va.gov** and provide the following information: (1) bank name, (2) account type, (3) tax ID number, and (4) last 4 digits of account number. This will allow VA's Financial Services Center to confirm the account. Any questions related to the switch to electronic payments should be directed to CALG's EAJA mailbox at electroniceajapayments@va.gov.

Catherine Chase is Deputy Chief Counsel and Debra Bernal and Kirsten Dowell are Appellate Counsel in VA's Office of General Counsel, Court of Appeals Litigation Group. The views and opinions provided are the authors' own and do not represent the views of the Department of Veterans Affairs or the United States. The authors are writing in a personal capacity.

Supreme Court Argument Preview for *Soto*: Is Combat Related Special Compensation Limited by Federal Settlement Statute of Limitations?

by Claire L. Hillan Sosa

Reporting on *Soto v. United States,* 92 F.4th 1094 (Fed. Cir. 2024), *cert. granted,* 220 L. Ed. 2d 420 (U.S. Jan. 17, 2025) (No. 24-320).

The U.S. Supreme Court granted certiorari in *Soto v. United States* and set oral argument for April 28, 2025. The case tackles whether claims for combat related special compensation (CRSC) under 10 U.S.C. § 1413a—essentially concurrent retirement and VA disability compensation for qualifying veterans—are limited to the Barring Act's waivable six-year statute of limitations on settlements of military-related claims.

Although the case does not directly address VA disability compensation claims, it will affect the total compensation of retirees with combat disabilities. And it could, perhaps, result in additional Supreme Court guidance on the pro-veteran canon of statutory interpretation.

<u>Entitlement to CRSC and Statute of Limitations for Settlement of Federal Claims</u>

Veterans, as a general rule, may not receive both military retirement pay and VA disability compensation. There is an exception, however, under 38 U.S.C. § 1413a, which allows retirees with combat-related disabilities to apply to the DoD for CRSC. In 2008, Congress amended the law to expand eligibility to not just 20-year retirees, but medically retired servicemembers as well.

Subsection 1412a(g) specifies that CRSC payments are not retired pay.

DoD regulations implementing § 1413a state that, retirees "'may submit an application for CRSC at any time' and CRSC will be paid 'for any month after May 2003 for which all conditions of eligibility were met, subject to any legal limitations.'" *Soto*, 92 F.4th at 1097.

On the other hand, the Barring Act, 31 U.S.C. § 3702, provides that "[t]he Secretary of Defense shall settle claims involving . . . retired pay." The Act sets a statute of limitations for claims against the government under § 3702 of "6 years after the claim accrues except as provided in this chapter or another law."

Soto Raises Competing Statutory Interpretations of Whether CRSC Statute Is a "Settlement" Provision

The issue in *Soto* arose when a medically retired veteran, Simon Soto, applied for CRSC in 2016, seven years after becoming eligible (when VA granted a disability rating). The Navy, interpreting 10 U.S.C. § 1413a to be limited by the Barring Act's statute of limitations, granted only six years of retroactive CRSC.

A class of similarly situated retirees argue that the Barring Act is a general statute, whose statute of limitations is set aside by the more specific CRSC statute.

The government counters that the CRSC statute is not more specific in this particular context because it includes no explicit "settlement" provision. The Barring Act, therefore, would apply to limit retroactive recovery of CRSC.

Procedural History of *Soto*

In class-action proceedings, the U.S. District Court for the Southern District of Texas ruled in favor of the retirees and held that the Barring Act did not apply, and thus retirees' CRSC backpay is not limited to six years. In reaching its conclusion, the District Court applied the pro-veteran canon of statutory construction.

Reviewing de novo, the U.S. Court of Appeals for the Federal Circuit reversed and held in favor of the government's interpretation. The Federal Circuit reasoned that the CRSC statute sets forth eligibility for payments, but not how the claims should be so-called settled—and thus contained no specific provision supplanting the general applicability of the Barring Act. The ruling came down to a disagreement over the meaning of "settle"; the opinion of the Court relied on *Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), to explain that a statute includes a settlement provision only if it authorizes the Secretary to "administratively determine the validity" of a claim—whereas § 1413a sets forth only substantive rights of the claimant. A settlement statute, by contrast, would typically use the term "settle" or set a period of recovery.

The Federal Circuit also rejected the claimant's argument that CRSC is not "retired pay" within the scope of the Barring Act because § 1413a(g) states: "Payments under this section are not retired pay." It reasoned that the Barring Act applies to "claims *involving* . . . retired pay" and provisions in § 1413a setting forth the amount of CRSC depending on the amount of retired pay.

Finally, the majority opinion rejected Mr. Soto's argument that an exception of the Barring Act applied to toll the statute of limitations during war time because it applies only to active-duty members.

Federal Circuit Judge Reyna dissented, reading § 1413a more broadly to authorize the Secretary to settle claims because it directs determination of the amount of CRSC to be granted, including retroactive payments, and the fiscal source of payments.

In battling footnotes, the majority and dissent disagreed over whether the pro-veteran canon has any role in the case. The majority asserted that the plain meaning of "settle" controlled and it did not need to reach the canon. But the dissent found

doubt in the interpretation of "settle" and "claim" such that the canon should apply.

Uncertainty About the Pro-Veteran Canon and the Fate of *Auer* Deference After *Loper Bright*

At the time of this writing, the Supreme Court docket includes only briefing for the petition for certiorari stage; merits briefing is not yet filed. But to the extent that the certiorari briefing telegraphs merits arguments, neither the parties nor the amicus curiae raise the pro-veteran canon.

The Federal Circuit is divided over whether the pro-veteran canon is a so-called traditional tool of construction to be applied to determine whether ambiguity exists during the first step of deferential analysis under *Chevron v. NRDC*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997), or whether it should apply only after ambiguity is found using other tools of construction. *Chevron* and *Auer* have to do with judicial deference to agency interpretation of ambiguous statutes and regulations, respectively. Although *Chevron* is no more, the *Soto* majority's footnote three and Judge Reyna's dissenting footnote four suggest there remains a dispute as to whether the pro-veteran canon should apply as part of the determination of a statute's plain meaning.

Chief Judge Prost and Judges Chen, Hughes, Lourie, Moore, Stark, Taranto, and Wallach believe that interpretive doubt is a precondition for application of the pro-veteran canon. *See Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (Moore, J., opinion of the Court); *Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021) (Prost, C.J. concurring), *id.* at 1360 (Hughes, J., concurring); *Nat'l Org. of Veterans' Advocs. v. Veterans Affs.*, 48 F.4th 1307, 1320 (Fed. Cir. 2022) (Prost, C.J., dissenting); *Soto*, 92 F.4th at 1099 n.3 (Hughes, J., opinion of the Court).

On the other hand, Judges Moore, Newman, O'Malley, and Reyna assert that the pro-veteran canon should be one of the tools used to determine whether ambiguity exists, rather than reserving its use for after other tools fail to find a plain meaning. *See Procopio*, 913 F.3d at 1382 (O'Malley, J., concurring); *Kisor*, 995 F.3d at 1366 (O'Malley, J., dissenting); *Soto*, 92 F.4th at 1103 n.4 (Reyna, J., dissenting).

Soto may present an opportunity for the Supreme Court to resolve this question and others about operation of the pro-veteran canon.

Claire L. Hillan Sosa is a Senior Veterans Disability Attorney at Deuterman Law Group.

Editors' Note: On March 5, 2025, the U.S. Supreme Court issued a decision in Bufkin v. Collins *(No. 23-713). The Supreme Court affirmed the Federal Circuit's opinion, holding that VA's determination that the evidence regarding a service-related disability claim is in "approximate balance" is a predominantly factual determination reviewed only for clear error. A full summary of that decision is forthcoming in the upcoming June issue of the VLJ. A copy of the slip opinion is available here:* https://www.supremecourt.gov/opinions/24pdf/23-713_jifl.pdf.

A Claim for Pension May Not Always Include a Claim for Compensation

by Dalia Abdelbary

Reporting on *Champagne v. McDonough*, 122 F. 4th 1325 (Fed. Cir. 2024).

In *Champagne v. McDonough*, the U.S. Court of Appeals for the Federal Circuit affirmed the decision of the U.S. Court of Appeals for Veterans Claims ("the Court") that affirmed the denial by the Board of Veterans' Appeals of an effective date earlier than July 14, 2003, for the grant of service connection for cerebellar degenerative disorder (CDD).

In September 1987, Mr. Champagne filed a "Veteran's Application for Compensation or Pension," using VA Form 21-526EZ, with the Department of Veterans Affairs (VA) seeking benefits relating to his CDD. The VA regional office (RO) construed the 1987 application as an application for "pension benefits." In December 1987, the RO granted Mr. Champagne "disability pension."

In August 1999, Mr. Champagne filed a "Statement in Support of Claim," seeking service connection for a malaria condition, as well as any residual illnesses associated with his service. In November 2001, the RO granted service connection for malaria but did not grant service connection for any residual illnesses, to include CDD. In July 2003, Mr. Champagne filed a Notice of Disagreement contending that his CDD was secondary to his malaria. In April 2004, the RO denied service connection for CDD.

Subsequently, after multiple proceedings, the RO granted service connection for CDD effective February 5, 2005. Mr. Champagne appealed the effective date of the grant, and the RO granted him an earlier effective date of July 14, 2003. Mr. Champagne appealed this decision. He contended that the effective date for the grant of service connection for CDD should be the date of his 1987 claim for pension, as that claim should have also been a claim for compensation.

In October 2020, the Board denied an effective date earlier than July 14, 2003. The Board found that the Veteran's 1987 claim made "no suggestion of an intention . . . to make a claim for service-connected disability benefits [i.e., compensation] in addition to the non-service-connected pension benefits." Thus, the Board found that Mr. Champagne's claim for pension was not also a claim for compensation for a service-connected disability.

Mr. Champagne appealed the Board's decision to the Court. In July 2022, the Court affirmed the Board's October 2020 decision, citing *Stewart v. Brown*, 10 Vet. App. 15 (1997), which ultimately held that "VA may consider a claim for pension to include a claim for compensation, but it is not required to do so."

Mr. Champagne presented two arguments as the basis of his appeal to the Federal Circuit. First, he contended that 38 C.F.R. § 3.151(a) required VA to treat his 1987 application as both a claim for pension and for service connection disability compensation, warranting him an effective date as to the date of the 1987 claim. Mr. Champagne also argued that the Court engaged in impermissible factfinding.

With respect to Mr. Champagne's first argument, the question is whether 38 C.F.R. § 3.151(a) requires VA to construe a claim for pension as also a claim for compensation.

Pursuant to 38 C.F.R. § 3.151(a), "[a] specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by the VA. (38 U.S.C. § 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded unless the claimant specifically elects the lesser benefit."

In furtherance of his argument that a claim for pension is also a claim for compensation, Mr. Champagne pointed to the first part of the third sentence of 38 C.F.R. § 3.151(a), which states that "[t]he greater benefit will be awarded" with respect to pension or compensation benefits. Thus, he argued that to determine which is the greater benefit, VA must consider both pension and compensation.

However, the Federal Circuit held that VA may exercise its discretion to consider a claim for pension to also be a claim for compensation. In reaching this determination, the Federal Circuit construed the meaning of 38 C.F.R. § 3.151(a) by examining the plain language of the regulation. The Federal Circuit noted the term 'may' is a permissive word and should not be read as mandatory (citing *Ravin v. Wilkie,* 956 F.3d 1346 (Fed. Cir. 2020) ("The

fact that [a statute] uses the term 'may' means the statute should not be read as mandatory."); *Andersen Consulting v. United States*, 959 F.2d 929 (Fed. Cir. 1992) ("The use of the permissive 'may' instead of the mandatory 'shall,' authorizes the board to employ its discretion.")). Thus, the Federal Circuit held that "the plain language of § 3.151(a), then, establishes that the VA is allowed, but not required, to consider a pension claim as a compensation claim, and vice versa."

Furthermore, the Federal Circuit held that Mr. Champagne's argument that the third sentence of the regulation required the consideration of both claims because a determination could not be made as to the greater benefit, was not persuasive. Notably, the Federal Circuit held that the third sentence applies to instances only when VA considers both pension and compensation claims.

The Federal Circuit also addressed Mr. Champagne's argument that the "special election" language of the third sentence removed any discretion from VA to not consider both pension and compensation claims. In this regard, Mr. Champagne contended that his option to select the benefit required VA to consider both pension and compensation claims. Mr. Champagne pointed to the third sentence of 38 C.F.R. § 3.151(a), stating that "[t]he greater benefit will be awarded unless the claimant specifically elects the lesser benefit."

The Federal Circuit held that this argument lacked merit, stating that "[t]his language, instead, simply functions to provide the veteran with the ability to choose which benefit he wishes to elect *when* the VA evaluates his claim for both pension and compensation."

The Federal Circuit also pointed to another regulation to emphasize the distinction between "may" and "will." The Federal Circuit cited 38 C.F.R. § 3.152(b)(1), which states that "[a] claim by a surviving spouse or child for compensation or dependency and indemnity compensation *will* also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension *will* be considered to be a claim for death compensation or dependency and indemnity compensation and accrued benefits." (*emphasis added*). The Federal Circuit noted that the distinction between the use of "may" and "will" in these two regulations reflects that if the VA intended to impose a requirement on itself, it would do so.

Thus, the Federal Circuit held that based on the plain language of 38 C.F.R. § 3.151(a), by the use of a permissive "may" as well as the regulatory scheme as a whole, 38 C.F.R. § 3.151(a) gives VA discretion to determine if a veteran is seeking only pension or compensation benefits.

With respect to Mr. Champagne's second argument that the Court engaged in impermissible factfinding, the Federal Circuit stated that it was not clear what fact Mr. Champagne was referring to.

Notwithstanding, the Federal Circuit held that the Court did not engage in factfinding. To the contrary, the Federal Circuit held that the Court explicitly stated that it "need not determine whether the [RO] made a finding" as to whether the veteran's 1987 application was for pension and for compensation, as the Board would not be bound by that finding.

Accordingly, the Federal Circuit affirmed the Court's decision ultimately finding that the plain language of 38 C.F.R. § 3.151(a), by the use of the permissive "may," indicates that VA has discretion to construe whether a pension claim is also a claim for compensation.

Dalia Abdelbary is an Attorney at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Correct Standard for Constructive Possession Is Whether Evidence Is Relevant and Reasonably Connected to the Claim

by Belmari Gonzalez-Maldonado

Reporting on *Conyers v. McDonough*, 91 F.4th 1167 (Fed. Cir. 2024).

In *Conyers v. McDonough*, the U.S. Court of Appeals for the Federal Circuit vacated a decision by the U.S. Court of Appeals for Veterans Claims ("the Court") because the Court applied the incorrect standard for constructive possession by requiring a direct relationship between the evidence and the claim.

Mr. Conyers applied for employment benefits under the Veteran Readiness and Employment program (VRE), a program administered by the Department of Veterans Affairs (VA). The VA denied Mr. Conyers' application, finding the chosen vocational goal was not feasible. He requested an administrative review of the decision, which resulted in another denial of benefits. Mr. Conyers appealed this determination to the Board, which affirmed the denial of benefits and then appealed to the Court.

During the appeal before the Court, Mr. Conyers submitted a motion to compel VA to add certain documents to the administrative record. Following some developments, the VA served Mr. Conyers an amended version of the record. However, VA refused to add some documents to the record that had not been before the Board.

On April 2020, the Court denied Mr. Conyers's motion to compel VA to add the documents, finding the argument that the documents had been within the Board's constructive possession to be without merit, as Mr. Conyers had not shown how the documents were relevant to the claim, nor had he established prejudice. The Court's April 2020 Order denying the motion to compel cited *Euzebio v. Wilkie*, 31 Vet. App. 394 (2019) ("*Euzebio I*")- holding that for a document to be within the Board's constructive possession there needed to be a direct relationship between the document and the claim. The Court also denied a motion for reconsideration in March 2021, noting that any argument as to the materials within the Board's constructive possession could be dealt with during the Court's review of the merits of the appeal.

In August 2022, the Court issued a single-judge decision affirming the Board's denial of the claim for VRE benefits. The Court stated that as to constructive possession, the completeness of the record had been adjudicated in the prior order. Mr. Conyers moved for a panel decision in September 2022, arguing the Court had overlooked *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021) ("*Euzebio II*"). The panel affirmed the single-judge decision without addressing *Euzebio II*.

Mr. Conyers appealed to the Federal Circuit, arguing that the Court had not applied the correct legal standard for constructive possession. VA argued that the Court had not erred by relying on *Euzebio I* because Mr. Conyers had failed to show how the documents were relevant to his claim or how he was prejudiced. VA also argued the Court's use of the word "relevant" in the April 2020 Order was consistent with *Euzebio II*.

The Federal Circuit agreed with Mr. Conyers. In its brief discussion of the doctrine and applicable law, the Federal Circuit emphasized the correct standard for constructive possession is whether the evidence is relevant and reasonably connected to a veteran's claim, as held in *Euzebio II*. The Federal Circuit found nothing in the Court's April 2020 Order, issued before *Euzebio II*, recognizing a distinction between the "direct relationship" and "relevance" standards. Finding no basis to conclude the Court had applied the correct standard as articulated in *Euzebio II* and noting it lacked jurisdiction to apply the law to the facts to assess whether under the correct legal standard the Board had constructive possession of the documents, the Federal Circuit vacated the Court's decision and remanded the case

with instructions to apply the correct standard as set forth in *Euzebio II*.

Belmari Gonzalez-Maldonado is Counsel at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Federal Circuit Disagrees With Everyone but the Board on the Court's Jurisdiction Over Attorney Fee Reasonableness Review

by Michal Leah Kanovsky

Reporting on *Goss v. McDonough,* 122 F.4th 1332 (Fed. Cir. 2024).

In a November 2020 decision, the Board of Veterans' Appeals granted the veteran relief from the payment of attorney fees to his attorney, Robert Goss, from past due benefits (PDB). It found that while the veteran had appointed Mr. Goss and the fee agreement was valid, there was no evidence of work performed by Mr. Goss that contributed to the award of the contested-PDB such that attorney fees were reasonable. The Board recounted its three previous remands instructing the agency of original jurisdiction (AOJ) to request that Mr. Goss provide an itemized account for reasonable attorney fees and then readjudicate the claim by addressing the reasonableness of attorney fees: it then stated that Mr. Goss would not comply with the AOJ's requests because he argued that the Department of Veterans Affairs (VA) had no statutory or regulatory authority to request an itemized account.

Even though the AOJ did not complete the reasonable fee analysis, the Board found substantial compliance with its remand directives because the AOJ was frustrated by Mr. Goss's refusal to comply with its request for an itemized account of work performed. The Board noted Mr. Goss's attorney's argument that the reasonableness of the fee was not at issue in the appeal because the veteran did not request a review of reasonableness under 38 C.F.R. § 14.636(i). But the Board found that *Scates v. Principi,* 282 F.3d 1362 (Fed. Cir. 2002) controlled the outcome, holding that an attorney with a contingent fee contract for payment of 20% of PDB, who is discharged by the client before the case is completed, is not automatically entitled to a 20% fee, but may receive only a fee that fairly and accurately reflects his contribution to and responsibility for benefits awarded.

The Board further found that the fee agreement between Mr. Goss and the veteran limited the award to *reasonable* fees if Mr. Goss was discharged. The Board determined: Mr. Goss became the veteran's representative after the veteran already filed the notice of disagreement (NOD); Mr. Goss's only communication with VA consisted of his power of attorney, fee agreement submission and a request for a copy of the veteran's claims file; Mr. Goss was only the representative for 7 of the 26 months of the appellate period; Mr. Goss's refusal to provide the requested accounting made it purely speculative to determine how much time Goss spent on the case; and, at most, possibly an hour was needed to draft the request for the claims file and such request did not result or contribute in any way to the award of PDB.

Before the U.S. Court of Appeals for Veterans Claims ("the Court"), Mr. Goss argued that the Board lacked subject matter jurisdiction to address the issue of reasonableness because neither the VA's Office of General Counsel (OGC) nor the veteran had made a timely motion for review of Mr. Goss's fee agreement in accordance with § 14.636(i). He argued that the only issue the veteran raised in his NOD was whether Mr. Goss was eligible to charge and receive a fee based on a mistakenly marked box on VA Form 21-22a, so the Board's jurisdiction was limited to whether the 21-22a had a mistakenly marked box.

The Secretary defended the Board decision, arguing it had jurisdiction to review the issue of reasonableness because it was explicitly included in the fee agreement between Mr. Goss and the veteran *and* the veteran's NOD statement that Mr. Goss had not performed any work on his case raised the issue of the reasonableness of the fee such that the Board had a duty to address it.

On reply, Mr. Goss argued that the Secretary had never made a decision on whether his fee was excessive or unreasonable, so the Board lacked subject matter jurisdiction to review his fee agreement without a decision by the Secretary in the first instance.

After the case was submitted to a panel, the Secretary changed his position and told the Court that he now agreed with Mr. Goss that the Board did not have jurisdiction to determine the reasonableness of fees because OGC had to consider reasonableness in the first instance. He requested vacatur of the Board decision and dismissal of the appeal. But Mr. Goss responded that he disagreed with the Secretary's proposed remedy of vacatur and dismissal and requested a reversal of the Board's decision.

The Court dissolved the panel over Judge Jaquith's dissent, which argued that the parties' jurisdictional agreement confused jurisdiction with claims-processing rules and that the Court was not bound to accept the Secretary's concession or the parties' agreement.

In a motion to suspend the Court's rule on motions for reconsideration, Mr. Goss responded to Judge Jaquith's dissent and clarified that his jurisdictional argument was based on whether the Board may consider reasonableness in the first instance where OGC is designated to first do so in § 14.636(i). The Secretary responded asking the Court to deny Mr. Goss's motion because there had not yet been a Court decision.

In an October 2022 memorandum decision, the Court denied Mr. Goss's motion. It found no reason to reject the parties' agreement that the Board exceeded its jurisdiction when it addressed the reasonableness of the amount paid under the fee agreement, and decided that because the Board lacked jurisdiction, the Court lacked jurisdiction. It vacated the part of the Board's decision that addressed the reasonableness of the awarded fees and dismissed the appeal for lack of jurisdiction.

Mr. Goss requested panel review, arguing that the single judge misunderstood that the Board had jurisdiction to decide whether he was entitled to have his fee withheld from the veteran's PDB but did not have the authority to address the issue of reasonableness in the first instance. Mr. Goss argued that because the only matter the Board had jurisdiction to decide (the validity of the fee agreement) was resolved in his favor, the Court's conclusion that it lacked jurisdiction was erroneous and the required remedy was reversal of the Board's order that the veteran was entitled to relief from the payment of his attorney fees. The Court denied the panel motion over Judge Jaquith's dissent (for the reasons he had set forth in his dissent from the order dissolving the panel).

Mr. Goss appealed to the U.S. Court of Appeals for the Federal Circuit with the same argument he made in his motion for panel review – namely, that while the Secretary had correctly conceded the Board lacked jurisdiction to address the reasonableness of the awarded fees, it had jurisdiction to review the Secretary's decision that he was entitled to fees, so the Court made an error in law in dismissing the appeal by finding that it lacked jurisdiction.

The Department of Justice (DOJ), representing the Secretary, responded that the appeal should be dismissed as moot because the Court's vacatur of the November 2020 Board decision meant that there was no longer a live controversy, and Mr. Goss had not demonstrated any meaningful difference between the remedy he desired and the remedy he received. Alternatively, the DOJ argued that the Court's decision should be affirmed because it appropriately concluded that since the Board lacked

jurisdiction to address the reasonableness of the fee amount, so did the Court.

On reply, Mr. Goss argued a controversy remained as the Board should have denied the veteran's appeal and left his award of attorney fees in place but failed to do so, and the Court was then required to affirm, modify, or reverse the Board's decision, but it did not have the power to dismiss his appeal.

In October 2024, the parties engaged in a spirited oral argument before the Federal Circuit. The panel questioned both parties about the scope of the Board's jurisdiction given that the veteran clearly discussed Mr. Goss's poor performance in his NOD responding to VA's notification that attorney fees would be awarded from his PDB. In response to the DOJ stating that the veteran had chosen not to intervene in the Court proceedings so we do not know his side, a judge interjected, "But you know what side of the story we do know, the government's side, and the government sucks in this case."

In December 2024, the Federal Circuit reversed and remanded the Court decision. It determined that because the veteran's challenge to Mr. Goss's fee eligibility remained unadjudicated, the claim was not moot. On the question of the Board's jurisdiction to address the reasonableness of the amount of fees awarded to Mr. Goss, it noted that it was not bound by the parties' agreement that the Board lacked jurisdiction. It noted that the statute provides that the Secretary, on its own motion or request of a claimant, may review a fee agreement for reasonableness and that such a decision is reviewable by the Board. Thus, it framed the question as whether the Board could review the merits of a reasonableness challenge where the Board had remanded that matter three times to VA to adjudicate and VA had, three times, refused to provide full reasons or bases for its denial of the veteran's claim (challenging the attorney fees it had awarded to Mr. Goss).

The Federal Circuit discussed that § 14.636(f) only provides a presumption of reasonableness of an award of 20% of PDB to an attorney whose representation continued through the date of the decision awarding benefits but no presumption applied in this case where Mr. Goss was discharged prior to the decision awarding benefits. Thus, the Secretary was required to make a factual finding regarding the reasonableness of the fee award.

Moreover, Mr. Goss's fee agreement contained the same requirement that only a reasonable attorney fee would be remitted if he were discharged prior to the receipt of benefits. The statute bestows upon the Secretary, not the Board, the authority to determine reasonableness of the fee in the first instance and the Board remanded the claim three times for the AOJ to make that determination "with full reasons and bases," but that was frustrated by Mr. Goss's refusal to provide an account of the work he had performed.

Still, the AOJ had issued multiple Supplemental Statements of the Case that continued to deny the veteran's claim. While these AOJ decisions lacked reasons and bases, they still amounted to a denial of the veteran's claim regarding attorney fees and, under the statute, if the Secretary denies a challenge to the reasonableness of an attorney fee award, such a decision is appealable to the Board. Therefore, the Federal Circuit held that the Board had jurisdiction to review the Secretary's denial of the veteran's claim that the fee award was unreasonable. It reversed the Court's determination that it lacked jurisdiction over the Board's decision and the portion of the Court decision vacating the portion of the Board's decision addressing reasonableness of the fee award, and it reinstated the Board's decision addressing reasonableness.

Michal Leah "Lila" Kanovsky is a managing attorney at Bergmann & Moore, LLC.

VA Must Determine Whether a Party Is an Eligible Substitute Claimant Before the Court May Do So

by Kathryn L. Blevins

Reporting on *Rodenhizer v. McDonough*, 124 F.4th 1339 (Fed. Cir. 2024).

In a precedential opinion, U.S. Court of Appeals for the Federal Circuit Judge Dyk, joined by Judges Taranto and Stoll, held that, when there is a factual question as to a party's eligibility to be substituted for a deceased veteran claimant before the U.S. Court of Appeals for Veterans Claims ("the Court"), the Court should stay proceedings on the substitution motion and case dismissal pending a final determination of eligibility by the Department of Veterans Affairs (VA). The Federal Circuit further held that the Court lacks jurisdiction to make factual determinations regarding a successor's eligibility for substitution and accrued benefits in the first instance.

Thomas Rodenhizer, a U.S. Army veteran, appealed to the Court seeking an earlier effective date for veterans' benefits. Mr. Rodenhizer died while his appeal was pending at the Court. Within one year of the veteran's death, his mother, Deborah Rodenhizer, filed a VA Form 21P-0847, "Request for Substitution of Claimant Upon Death of Claimant" with the VA. Thereafter, she moved at the Court to be substituted as the appellant on the basis that she was entitled to accrued benefits as the person who bore the expenses of the veteran's burial under 38 U.S.C. § 5121(a)(6).

Before VA determined whether Ms. Rodenhizer was an eligible substitute claimant, the Court denied her motion, vacated the Board of Veterans' Appeals decision, and dismissed the appeal, finding that there was no evidence that Ms. Rodenhizer had filed an application for accrued benefits with VA within one year of the veteran's death, as required by 38 U.S.C. § 5121.

The Federal Circuit vacated the judgment of the Court and remanded the matter with instructions to hold the appeal and substitution motion in abeyance pending the outcome of the parallel substitution proceeding before VA. The Federal Circuit found that the Court erred in denying the substitution motion and dismissing the appeal because VA had not yet determined Ms. Rodenhizer's eligibility for substitution. As eligibility was a factual matter in dispute, and the Court lacked jurisdiction to resolve that issue in the first instance, the Court should have stayed the substitution motion and case pending the outcome of the parallel VA substitution determination.

Rule 43 of the Court's Rules of Practice and Procedure provides for substitution when a veteran dies while their case is pending before the Court. Rule 43 provides that "the personal representative of the deceased party's estate or any other appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person." U.S. VET. APP. R. 43(a)(2). An appropriate person is one who: files an application for accrued benefits within a year of the deceased party's death, 38 U.S.C. § 5121(c), and falls within the list of individuals eligible for accrued benefits listed in 38 C.F.R. § 3.1000(a). This includes persons who can recover "accrued benefits" that were "due and unpaid" at the time of the deceased party's death to reimburse expenses of the deceased party's last sickness and burial. 38 C.F.R. § 3.1000(a)(5).

At the Court, there were two questions of fact regarding whether Ms. Rodenhizer is an "appropriate person" eligible to be substituted under Rule 43(a)(2): whether her filing of the VA Form 21P-0847 satisfies the requirement that she file an application for accrued benefits within one year of the veteran's death, and whether she is "the person who bore the expense of the veteran's last sickness and burial."

The Court relied on its decision in *Breedlove v. Shinseki*, 24 Vet. App. 7 (2010) (per curiam order), in determining that it had "no basis to find that [Ms. Rodenhizer] is an eligible accrued-benefits claimant, which is a prerequisite for her to be substituted before [the Veterans] Court" because there was no evidence that Ms. Rodenhizer had filed an application for accrued benefits with VA within one year of the veteran's death, as required by 38 U.S.C. § 5121.

The Federal Circuit vacated the Court's judgment, holding that the Court cannot resolve issues of fact as to eligibility for substitution in the first instance. The Federal Circuit explained that, because the Court lacks jurisdiction to find facts *de novo*, it must obtain from VA a determination of whether a particular movant is an eligible accrued benefits claimant before it can determine whether a party is an eligible substitute under Rule 43(a)(2). The Court may only determine eligibility for substitution in the first instance if eligibility presents only a legal question, or is conceded by VA.

In finding the Court erred in denying the motion to dismiss, the Federal Circuit referenced the policies behind 38 U.S.C. § 5121A (providing for substitution at the agency level). First, the Federal Circuit reasoned that allowing the Court to make factual determinations regarding eligibility for substitution before VA made those same determinations was "contrary to the principles of expediency, fairness, and efficiency served by this statutory scheme as recognized in connection with the related procedures of § 5121A." This is so because, had VA found Ms. Rodenhizer to be an eligible substitute, she would have been forced to restart the merits proceeding since the Court had already dismissed the appeal. However, if the Court had stayed the appeal, the merits proceeding could continue once VA made its determination.

Second, other federal courts have approved the stay of proceedings pending a determination of who is the "personal representative" of a deceased party under Federal Rule of Appellate Procedure 43, a rule like the Court's Rule 43.

Accordingly, the Federal Circuit held that "when there is a fact question as to eligibility, the Veterans Court should stay action on a motion to substitute in the original claimant's case and stay the determination of whether the case should be dismissed pending a final determination on eligibility in the VA proceeding."

Kathryn L. Blevins is Special Counsel in the Immediate Office of the Chief Counsel at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Federal Circuit Affirms CAVC's Ruling That Revision Based on CUE Contemplates Only the Law on the Date of Adjudication Being Appealed

By Suzanne Whitaker

Reporting on *Siples v. Collins*, 127 F.4th 1325 (Fed. Cir. 2025).

In *Siples v. Collins,* the U.S. Court of Appeals for the Federal Circuit affirmed the U.S. Court of Appeals for Veterans Claims ("the Court"). Pursuant to 38 C.F.R. § 4.59, a motion for revision asserting clear and unmistakable error (CUE) must be reviewed and decided based on the law that existed at the time of adjudication, regardless of any subsequent change in the law or regulation, or a new interpretation of either.

Clinton Siples is an Air Force veteran who honorably served from 1978 to 2003. Shortly after discharge, he sought VA disability compensation for bilateral shoulder dislocations and bilateral shoulder subluxations. Pain limited his range of motion, and the regional office (RO) found service connection, rating Mr. Siples at 10% in July 2004. Mr. Siples did not timely appeal the RO's decision.

In 2017, Mr. Siples launched a collateral attack on the 2004 adjudication, filing a motion to revise the RO's decision by alleging CUE. He argued that §4.59 required that he be compensated at the "minimal compensable rating [20% for bilateral shoulder] due to the functional loss caused by pain on range of motion."

The RO and the Board of Veterans Appeals denied relief. Mr. Siples then appealed to the Court, which affirmed the denial in a single-judge memorandum decision. This appeal followed.

Mr. Siples argued that he should be compensated for painful motion as contemplated in §4.59 where it states, "[P]ainful motion is an important factor of disability . . . It is the intention to recognize actually painful, unstable, or [misaligned] joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint." Other symptoms mentioned in the regulation include, "crepitus in the soft tissues or within joint structures . . . [pain in] flexion . . . pain on both active and passive motion, in weight bearing and non-weight-bearing."

The Secretary argued that CUE should be granted only pursuant to the law at the time of the original adjudication (July 2004); that no subsequent interpretation would apply retroactively. Mr. Siples claimed he was not seeking retroactive application.

At oral argument, Mr. Siples agreed that, in July 2004, the meaning of § 4.59 was unsettled. The Federal Circuit noted that earlier unreported CAVC cases prior to July 2004 diverged on whether §4.59 applied to any condition other than arthritis, stating, "The Veterans Court . . . also correctly noted the apparent lack of a settled interpretation of § 4.59 prior to *Burton,"* referring to *Burton v. Shinseki*, 25 Vet. App. 1 (2011), *aff'd*, 479 F. App'x 978 (Fed. Cir. 2012) (per curiam judgment).

The Federal Circuit noted that CUE is a "very specific and rare kind of error." The Federal Circuit then reviewed the three elements of a CUE: First, "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or regulatory provisions extant at the time were incorrectly applied." Second, "the error must be outcome determinative and undebatable . . . such that reasonable minds could not differ," quoting *Willsey v. Peake*, 535 F.3d 1368 (Fed. Cir. 2008) and citing 38 CFR § 3.105(a)(1)(i), referring to RO decisions. Finally, the "determination that there was CUE must be based on the record and the law that existed at the time of the prior adjudication in question," quoting *Willsey*.

A few months after Mr. Siples's July 2004 RO decision rating his shoulders, the Department of Veterans Affairs (VA) issued VA Fast Letter 04-22 (October 1, 2004). Mr. Siples argued on appeal that, because of the October 2004 Fast Letter, issued a few months after his 2004 RO adjudication, his shoulder condition should be analyzed pursuant to 38 CFR § 4.59. In July 2004, VA applied § 4.59 only to arthritis cases. Mr. Siples never claimed arthritis, and his x-rays were negative for arthritic findings in 2004.

It was not until *Burton,* 25 Vet. App. 1, that the Secretary interpreted §4.59 to apply to any condition other than arthritis. The Federal Circuit noted that the regulation immediately preceding (38 CFR § 4.58) dealt exclusively with arthritis. In *Burton*, the Court's granted the veteran's motion for a panel decision, to "clarify the law as to whether § 4.59 is applicable only to claims involving arthritis." The Secretary changed his position during *Burton*, and conceded that § 4.59 may apply in cases other than arthritis, citing the October 2004 Fast Letter.

The Federal Circuit reviewed the history of §4.59. The regulation was created in 1964, and the Court pointed out that "the authorities dating back to 1928 confirm that a determination that there was 'clear and unmistakable' error must be based on the record and the law *that existed at the time of the prior VA decision"* (emphasis in original).

Thus, the Federal Circuit ruled that a CUE must be based on the law at the time of the decision (for Mr. Siples, July 2004), and in July 2004, §4.59 "was not undebatably understood as applying to claims other

than arthritis, nor was it so clear on its face as to compel applicability to non-arthritis claims."

The Federal Circuit cited and quoted several cases, noting that the Court in those cases held that "CUE must be analyzed based on the law as it was *understood at the time* of the original decision and cannot arise from a subsequent change in the law or interpretation thereof to attack a final VA decision." The Court emphasized that it was not called upon to conclusively decide the proper interpretation of §4.59. The Court considered Mr. Siples' other arguments on appeal, but found them unpersuasive, affirming the Court's decision.

Regardless of later changes, neither a new regulation nor a new interpretation will support a CUE motion for revision, because veterans' claims of CUE are viewed only in context with the law that existed at the time of the decision that is being appealed, rather than any later position or interpretation asserted by VA. If there is room for argument regarding an interpretation, the meaning of a regulation is deemed unsettled; therefore, it cannot be an "unmistakable" or undebatable error. However, misapplication of the law/regulation can constitute a CUE.

What does this mean for veterans and advocates now that the *Chevron* agency-interpretation deference doctrine has been overturned? It is now questionable whether an agency interpretation, or a reinterpretation, is entitled to any deference. Per *Siples*, advocates must bear in mind that a CUE revision is viewed back-in-time, at the time of the decision being appealed based on CUE. Did VA's RO make a clear and unmistakable error, one not open to debate or other interpretations, at the time of that decision? If not, there is no basis for revision based on CUE.

Suzanne Whitaker is an Arizona attorney in private practice.

Federal Circuit Declines to Recognize New Exception for Judicial Bias in Non-Final Remand Orders

by Trey Skinner

Reporting on *Winterbottom v. McDonough*, 124 F.4th 933 (Fed. Cir. 2024).

In *Winterbottom v. McDonough*, the U.S. Court of Appeals for the Federal Circuit dismissed an appeal seeking review of a non-final order from the U.S. Court of Appeals for Veterans Claims ("the Court"). The Federal Circuit reaffirmed that it lacked jurisdiction to review non-final remand orders except in narrowly defined circumstances. Despite Mr. Winterbottom's request for a new exception based on judicial bias, the Federal Circuit adhered to its established doctrine that finality was a prerequisite for appellate review.

The case arose when Mr. Andrew J. Winterbottom, a Veteran (and police officer), appealed a decision issued by a VA regional office, which denied entitlement to rating in excess of 50 percent for his service-connected PTSD. The criteria for a higher 70 percent rating includes symptoms "such as unprovoked irritability with periods of violence." 38 C.F.R. §4.130. At a Board of Veterans' Appeals hearing, a Veterans Law Judge (VLJ) asked a series of questions to determine whether Mr. Winterbottom's violent incidents were provoked or unprovoked.

The questioning included specific inquiries about Mr. Winterbottom's actions as a police officer, such as an arrest where he allegedly made threatening statements and incidents of road rage. Mr. Winterbottom testified that his actions were often reactive, suggesting that others "went too far," and he did not typically initiate violence. If Mr. Winterbottom, in his job as a police officer, acted violently after being provoked, that would not be the type of action referenced in the criteria. Therefore, the VLJ sought to clarify whether the veteran's

behaviors aligned with unprovoked violence. This line of questioning was central to the Board's ultimate denial of a higher rating.

In his appeal to the Court, Mr. Winterbottom alleged that the VLJ's inquiries showed judicial bias, as an effort to minimize his symptoms. The Court determined that the questions were aimed to distinguish provoked from unprovoked violence, as relevant to the criteria, and did not reflect bias. While the Court remanded the matter to the Board due to inadequate reasons and bases in the weighing of a private counselor's opinion, it declined to order reassignment of the VLJ.

Mr. Winterbottom then appealed the remand order to the Federal Circuit. He argued that claims of judicial bias warrant immediate review, even in the absence of a final judgment. In doing so, he urged the Federal Circuit to create a new exception to the finality requirement specifically for judicial bias claims. The Federal Circuit rejected this proposal, relying on its decision in *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002).

Under *Williams*, the Federal Circuit may review non-final remand orders only if: (1) there has been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if reversed by the Federal Circuit, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and, (3) there must be a substantial risk that the decision would not survive a remand (i.e., that the remand proceeding may moot the issue). *See* 275 F.3d at 1364. Since none of these criteria applied, the Federal Circuit concluded that it lacked jurisdiction.

In response to Mr. Winterbottom's proposal for a new exception, the Federal Circuit emphasized that mandamus relief remains the proper procedural avenue for interlocutory review of judicial bias claims. By requiring adherence to finality principles, the Federal Circuit aimed to maintain consistency with general appellate practice and prevent piecemeal litigation. The Federal Circuit clarified that its decision does not preclude review of judicial bias claims entirely but limits such review to either mandamus petitions or final appeals.

The Federal Circuit's ruling reinforces its commitment to jurisdictional finality in veterans' cases. Above all, the decision ensures that similarly situated appellants understand the necessity of either seeking mandamus relief or awaiting a final order before pursuing an appeal on claims of judicial bias.

Trey Skinner is an Attorney Advisor at the Board of Veterans' Appeals and was previously a Rating Veterans Service Representative (RVSR) at the Winston-Salem VA Regional Office. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Court Clarifies Jurisdiction and Orders VA to Expedite Veteran's Long-Delayed Mental Health Claim

by Sydnie Rouleau

Reporting on *Heller v. McDonough*, No. 24-3504 (Vet. App. Nov. 21, 2024) (per curiam order).

In the case of *Heller v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("the Court") addressed a petition involving an Advance on the Docket (AOD) of Mr. Heller's appeal based on severe suicidal ideation and financial hardship. The Board of Veterans' Appeals repeatedly denied his requests to advance his appeal due to his suicidal ideation, despite extensive medical evidence, including multiple crisis line notes and medical records documenting suicidal ideation, self-harm, and a high risk for suicide.

The Court determined that the Board denied Mr. Heller's requests without meaningful explanation by only stating that his condition did not meet the threshold for advancement.

Mr. Heller petitioned for a writ of mandamus arguing that the Board unreasonably denied his requests to advance his appeal for both his mental health condition as well as a foot condition. He contended that the Board's repeated denials lacked sufficient reasoning and sought either a decision on his claims or a clear explanation for the denial of advancement.

In response, the Court ordered the Secretary to address the delay in adjudicating Mr. Heller's appeals and whether suicidal ideation qualifies as a "serious illness" under 38 U.S.C. § 7107(b)(3)(B) and 38 C.F.R. § 20.800(c)(1).

Before the Secretary filed his response, the Board granted service connection for Mr. Heller's bilateral foot condition, rendering that portion of the petition moot. As to his mental health claim, the Secretary opposed the writ, arguing that the delay was not unreasonable given the Board's workload and that the Court lacked jurisdiction to review AOD denials, as they are not final decisions. The Secretary also asserted that while suicidal ideation is serious, it does not automatically warrant advancement under § 20.800(c)(1) and he noted that Mr. Heller's medical records contained instances where he denied suicidal ideation as well.

In a single-judge decision, the Court denied Mr. Heller's petition after Judge Falvey found that Mr. Heller had not shown clear entitlement to relief. Mr. Heller requested reconsideration by a panel to clarify whether the Court has jurisdiction to interpret whether suicidal ideation can qualify as "serious illness" in the context of an AOD under 38 U.S.C. § 7107(b)(3)(B) and 38 C.F.R. § 20.800(c)(1). The Secretary opposed the request for reconsideration, maintaining that the Court did not have jurisdiction to review AOD denials because they are not final Board decisions.

The Court then directed Mr. Heller to address the jurisdictional issue, to which he responded that AOD rulings meet the definition of a "decision" under prior caselaw and involve a benefit granted by Congress. Ultimately, after reviewing additional briefing, the Court agreed to convene a panel to clarify its mandamus authority over AOD requests.

Regarding the jurisdictional issue, the Court clarified that it does not have direct jurisdiction over Board denials of AOD requests because they are not final decisions involving benefits, relying on *Cooper v. McDonough*, 38 Vet. App. (2024) (per curiam order), *appeal docketed sub nom. Cooper v. Collins,* No. 25-1166 (Fed. Cir. Nov. 12, 2024). AODs are procedural and interlocutory; therefore, they are not appealable to the Court. However, according to *Wolfe v. McDonough*, 28 F.4th 1348, 1357 (Fed. Cir. 2022), the Court does have the authority to compel an action by the Secretary that is unreasonably delayed or unlawfully withheld. Here, the Court explained that the appropriate recourse for an unreasonable delay or denial, like in Mr. Heller's case, is a petition for a writ of mandamus and not a direct appeal.

After establishing jurisdiction and its authority to do so, the Court applied the *TRAC* factors from *Martin v. O'Rourke*, 891 F.3d 1338, 1343-46 (Fed. Cir. 2018) to determine if VA's delay was unreasonable. The mandamus standard is set up through *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004), which indicates that a writ of mandamus is a remedy that is available when the petitioner has no alternative way to get relief, there is a clear and indisputable right to relief, and the circumstances warrant issuing the writ.

In the case of Mr. Heller, the Court found that he presented strong medical documentation of persistent suicidal ideation. The documentation provided by Mr. Heller included 10 pieces of evidence, detailing records of plans, and attempts, as well as assessments indicating he was a strong suicide risk. Additionally, he provided documentation of severe financial hardship. The appeal had been pending for over two years with no action from VA, despite 38 U.S.C. § 7107 stating that

cases involving severe illness or hardship are to be expedited.

The Court granted Mr. Heller's mandamus petition, ordering the Board to issue a decision on Mr. Heller's mental health condition within 30 days. As to the portion of his petition regarding his foot condition, the Court dismissed it as moot, as the Board had already resolved that appeal in his favor.

Sydnie Rouleau is a third-year law student at Stetson University College of Law.

Doctrine of Equitable Estoppel and Constitutional Challenges Not Applicable Where VA Misdiagnosis Prevents Filing of Service Connection Claim

by Jasmine A. Crawford

Reporting on *Ley v. McDonough*, No. 23-1547 (Vet. App. Jan. 2, 2025).

In *Ley v. McDonough,* the United States Court of Appeals for Veterans Claims ("the Court") affirmed a decision of the Board of Veterans' Appeals, which denied Mr. Ley entitlement to an effective date earlier than January 29, 2015, under 38 U.S.C. § 5110, for chronic lymphocytic leukemia (CLL), giving consideration to the doctrine of equitable estoppel and constitutional principles.

Richard J. Ley honorably served in the United States Marine Corps from October 1962 to December 1966. In 2012, Mr. Ley visited a hematologist who diagnosed him with monoclonal B-cell lymphocytosis and concluded that his blood work showed levels less than the official criteria of 5000 for CLL; therefore, Mr. Ley would only need an annual check-up. The VA hematologist specifically indicated in his contemporaneous notes that he did not use the term leukemia to describe Mr. Ley's disability, instead telling Mr. Ley that further investigation might be warranted in 20 years. After his examination, Mr. Ley did not apply for benefits. In January 2016, a VA oncologist diagnosed Mr. Ley with CLL, presumptively resulting from Agent Orange exposure, and determined that Mr. Ley met the diagnostic criteria for CLL since 2010.

Subsequently, Mr. Ley filed a claim for service connection of CLL. In August 2016, a regional office (RO) of the Department of Veterans Affairs (VA) granted service connection for CLL with a 100 percent disability rating effective January 29, 2016, the date VA received Mr. Ley's claim. Mr. Ley appealed the issue of an earlier effective date to the Board in February 2020. In February 2021, the Board denied an earlier effective date. Mr. Ley appealed this decision to the Court, arguing that he was prevented from filing a claim earlier because VA failed to properly inform him of his CLL diagnosis. In April 2022, the Court remanded the matter to the Board because it had not considered entitlement to an earlier effective date within the one year prior to the filing date of the claim under 38 C.F.R. § 3.114. In a December 2022 decision, the Board granted an earlier effective date of January 29, 2015, one year prior to VA receiving the initial claim. Although the Board found that Mr. Ley met the diagnostic criteria for CLL as early as July 2010, it also held that the law did not allow for an effective date earlier than January 29, 2015, because a misdiagnosis, even if it was VA's error, was not an exception to the effective date rules.

Mr. Ley's two main arguments before the Court were: (1) due to the fact that VA misdiagnosed/withheld information about his CLL diagnosis which prevented him from filing an earlier claim, VA was equitably estopped from enforcing section 5110's effective date limits; and (2) that 38 U.S.C. § 5110's effective date limitations were unconstitutional as applied to his situation because VA actively interfered with his right to access the benefits system when VA medical personnel failed to properly inform him of a CLL diagnosis before January 2016.

In addressing these arguments, the Court discussed *Taylor v. McDonough*, 71 F.4th, 909 (Fed. Cir. 2023). In *Taylor*, the majority opinion, which was binding, held that equitable estoppel did not apply to limiting section 5110's effective date limits. However, the issue of an as-applied constitutional challenge to the application of section 5110 based on the right of access to a court system deeply divided the Federal Circuit, and there was no majority opinion on this issue. The plurality opinion, which was not binding, held that section 5110 was subject to an as-applied constitutional challenge, and that the situation constituted a rare circumstance in which there was a constitutional violation of Mr. Taylor's right to access the court system such that the assignment of an earlier effective date was warranted.

In Mr. Ley's case, the Court concluded that the doctrine of equitable estoppel was not available against the federal government to the same extent it was available against private litigants. The Court noted that Mr. Ley's argument that the government should be equitably estopped from enforcing the effective date limits of section 5110 was not allowed just as it was not allowed in *Taylor*.

Next, the Court considered whether Mr. Ley's argument that section 5110 was unconstitutional as applied. Mr. Ley argued that he was prevented from applying for benefits because of the VA hematologist's misdiagnosis/withholding concerning CLL. The Court adopted the Federal Circuit plurality's reasoning in *Taylor* to determine if an as-applied constitutional violation occurred regarding the right to access an exclusive adjudicatory forum. The Court agreed with the plurality in *Taylor* that nothing prevented section 5110 from being subject to an as-applied constitutional challenge. However, a successful as-applied constitutional challenge to 5110's effective date rules would only happen if a "very rare set of circumstances" existed.

The Court held that showing a backward-looking constitutional right of access violation required Mr. Ley to show that his opportunity to litigate an underlying legal entitlement was no longer available because of undue active interference on the part of the government. Mr. Ley must identify a remedy that was within the Court's power and not available anywhere else or by other means. Additionally, a justification for unconstitutional interference by the government must pass strict scrutiny.

Here, the Court found that Mr. Ley had an underlying legal entitlement, his claim for benefits, and the opportunity to adjudicate the entitlement between 2010 and January 2016 was unavailable. Mr. Ley identified a remedy; an effective date calculated as if the alleged interference did not occur. He also sought a remedy that the Court had the power to award which was no longer available by any other means. However, Mr. Ley did not establish a violation of his constitutional right of access. There was no active interference from the government that prevented Mr. Ley from filing a claim for VA benefits.

The Court contrasted Mr. Ley's case with the facts of *Taylor*. In *Taylor*, the government actively prevented the veteran from having access to VA's benefits system, in that the veteran faced the affirmative threat of prosecution for attempting to support his claim for benefits. The veteran in *Taylor* was in a then-secret Army program as to which he was sworn to secrecy by taking an oath that forbade him from revealing any information about the program, with a threat of a court-martial and criminal penalties for violating the secrecy prohibition. Thus, Mr. Taylor refrained from filing a claim with VA for disability compensation until after the government had released him and similarly situated participants from their oaths.

The Court concluded that Mr. Ley did not have any similar government imposed barriers in accessing the VA's benefits system as the veteran did in *Taylor*. Mr. Ley's main argument was that VA hematologist's misdiagnosis/withholding information prevented him from filing a claim earlier than he originally did, which would make the application of section 5110's effective date rules unconstitutional as applied to him. Ultimately, the

Court found that Mr. Ley's situation was not one of the very rare set of circumstances that violated Mr. Ley's constitutional right to access the court system. In other words, the misdiagnosis or withholding of information by a VA medical provider did not qualify as a constitutional violation that would allow for the assignment of an earlier effective date under section 5110.

Judge Jaquith dissented. He agreed that the doctrine of equitable estoppel did not apply to Mr. Ley's circumstances and that nothing prevented section 5110 from being barred from an as-applied constitutional challenge. However, Judge Jaquith disagreed with the majority's conclusion that section 5110 was not unconstitutional as applied to Mr. Ley. He found that VA's decision not to properly inform Mr. Ley of his CLL diagnosis was the kind of extraordinarily rare circumstance that justified the award of an earlier effective date.

Jasmine A. Crawford is Counsel at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

VA's Actions Can Heighten Its Duty to Notify Claimants of Decisions

by Max C. Davis

Reporting on *Sellers v. McDonough*, No. 23-4114 (Vet. App. Dec. 20, 2024) (order).

In *Sellers v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("the Court") issued an order denying a motion to dismiss the appeal as untimely filed. The Court held that the Department of Veterans Affairs (VA) heightened its duty to notify the veteran, Wayne Sellers, of an agency decision when it went beyond the legally required procedure for notifying Mr. Sellers of a Board of Veterans' Appeals decision.

The Board issued a decision in June 1996 denying the Mr. Sellers's claims for entitlement to service connection for an acquired psychiatric disorder and to a permanent and total disability rating for pension purposes. Earlier in the proceedings, the VA regional office (RO) had attempted to identify a current mailing address for Mr. Sellers, including contacting his veterans' service organization and searching within the VA's healthcare system records. The Board's June 1996 decision noted that all the VA's efforts had failed to identify a current address, and when the Board mailed the decision to the last known address it had on file, the mailing was returned as undeliverable. The Board then took an additional action: it forwarded a "Referral of Correspondence" to the RO with an instruction to re-mail notice of the June 1996 Board decision to Mr. Sellers when "the correct address is ascertained." An updated address was eventually discovered, but the RO never took any further action on the Referral of Correspondence.

In July 2023, Mr. Sellers filed a Notice of Appeal (NOA) seeking the Court's review of the June 1996 Board decision. It was not until that month, Mr. Sellers said, that he appointed an attorney who reviewed his electronic records and discovered the June 1996 Board decision. NOAs, however, generally must be filed within 120 days after the Board mails notice of the decision, 42 U.S.C. § 7266(a), so the Secretary moved the Court to dismiss the appeal as untimely filed. Mr. Sellers argued that his NOA should be accepted as timely because he never received a copy of the June 1996 Board decision and only learned of it once his attorney accessed his records earlier that month.

The Court framed its analysis in terms of the presumption of regularity, which, as applied to the Board, presumes that the Board properly mails a copy of any decision to a claimant's last known address on the date the decision is issued. *Davis v. Principi*, 17 Vet. App. 29 (2003). The presumption is rebuttable, though, if a claimant establishes that

(1) the decision was mailed to an incorrect address or was returned as undeliverable, and (2) at the time the decision was issued, there were other possible and plausible addresses available to VA.

The Court noted the "oddity" of considering the presumption of regularity in the situation where "we know for a fact that VA mailed the June 1996 Board decision to the last known address in appellant's file and that the decision was returned as undeliverable. . . . But *Davis* frames the matter under the rubric of the presumption of regularity, so we use that framework here." Within that framework, only the second rebuttal prong was at issue—whether there were other possible and plausible addresses of record available to VA at the time of the Board's decision. Given that VA had taken "a wide variety of actions" to try and find a good address for Mr. Sellers before the Board issued its June 1996 decision, VA "was not required to do more than the laudable actions it already performed in searching for a viable address for the appellant."

But, the Court added, "the presumption of regularity does not decide this matter." Even though under *Davis* VA satisfied its notice obligations, and the presumption of regularity was not rebutted, the Court could not "overlook the fact that the Board here specifically directed VA to do more than what the law requires" by issuing the Referral of Correspondence. Briefly passing over "whether *Davis*'s articulation of VA's duty to notify remains constitutional—particularly when the Board has actual knowledge that its notice procedures will not work," the Court decided Mr. Sellers's case on nonconstitutional grounds. It relied on the "longstanding practice of requiring an agency to follow its own internal guidance and policies, even when such policies impose obligations beyond those imposed by binding legal authorities" (centrally, in the line of cases requiring the Board to discuss relevant provisions of *VA's Adjudication Procedures Manual* (M21-1)). Applying the same principle here, the Court concluded that when the Board issued its Referral of Correspondence "it changed VA's notice obligations" and left the obligations open until, as the Referral of Correspondence said, "'the correct address is ascertained.'" Because there was no evidence that the VA took any action after the Board issued the Referral of Correspondence, the Court found that VA had failed to satisfy its modified duty to notify Mr. Sellers of the June 1996 Board decision.

Given VA's noncompliance with its heightened notice obligations and Mr. Sellers's filing of an NOA shortly after learning of the June 1996 Board decision, the Court accepted the NOA as timely filed and denied the motion to dismiss.

Max Davis is Counsel at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Court Declines to Impose Sanctions Against VA Secretary in Fiduciary Case

by Sydney A. Smith

Reporting on *Shorette v. Collins*, No. 23-7775 (Vet. App. Feb. 6, 2025).

In *Shorette*, the U.S. Court of Appeals for Veterans Claims ("the Court") issued a *per curiam* order which concluded the nearly six-year fight of the petitioner, Karen Shorette, in receiving unpaid benefits from VA she was entitled to as both a dependent of the veteran and for her husband in her role as his VA fiduciary. In its third published *per curiam* order involving this dispute, the Court concluded that because the Department of Veterans Affairs (VA) had ultimately afforded Mrs. Shorette the relief she initially sought, it would grant her motion to withdraw her petition for a writ of mandamus. Of particular note here, however, was the Court's decision not to impose sanctions against the Secretary for failing to correct statements it claimed

VA knew to be false prior to oral argument before the Court.

Mrs. Shorette has been the legal guardian of the veteran, Mr. Shorette, since February 2009, and served as his VA fiduciary from December 2008 until March 2018, when she was removed after a VA medical center psychologist alleged she had been misusing the veteran's funds. VA suspended payment of the veteran's benefits at that time and appointed a successor fiduciary for the veteran in November 2018.

In spite of a valid July 2010 fiduciary agreement in which VA approved monthly expenses to support the veteran's family, the appointed fiduciary neglected to allocate any benefits to the veteran's dependents during the entirety of their tenure as fiduciary. Furthermore, in March 2021, VA determined Mrs. Shorette in fact did not misuse the veteran's funds, yet abstained from restoring her as his fiduciary. VA also failed to ensure that the appointed fiduciary was acting in the best interests of the beneficiary and his dependents, despite Mrs. Shorette's repeated complaints.

VA's continuous inaction prompted Mrs. Shorette to file her initial petition—resulting in the Court's first published order in *Shorette v. McDonough* (*Shorette I*), 36 Vet. App. 297 (2023) (per curiam order), in which she requested the Court to compel VA to: (1) issue a decision regarding whether she should be reinstated as representative payee for Mr. Shorette; (2) address her complaints that the appointed fiduciary was violating the valid fiduciary agreement; and (3) release the funds that had been withheld since her removal in March 2018.

The Court granted the petition in part with respect to her first request, ordering the Secretary to issue a Statement of the Case in response to Mrs. Shorette's November 2018 Notice of Disagreement regarding her removal as fiduciary. However, the Court declined to address the issues raised regarding the unpaid familial benefits, urging her to attempt to resolve the matter with VA directly once more.

Mrs. Shorette's efforts to resolve the issue without the aid of the Court were again unsuccessful, prompting her to file another petition in December of 2023. In this subsequent petition for extraordinary relief, Mrs. Shorette urged the Court to compel VA to: (1) pay her the accumulated familial benefits withheld since March 2018; (2) restore her as the veteran's fiduciary and representative payee; and (3) provide her with a copy of the veteran's VA fiduciary file.

Mrs. Shorette was eventually reinstated as the veteran's spouse payee fiduciary by VA in January 2024, and she was provided with copies of the veteran's fiduciary file in both January and August of 2024, resolving two of her three requests for relief, leaving only the payment as a remaining issue.

At oral argument in August 2024, the Secretary conceded that numerous errors were made by both VA and the fiduciary appointed by VA with respect to the disbursement and management of the veteran's disability benefits. The Secretary also appeared to disavow representations he had made weeks prior in response to an inquiry of the Court regarding whether VA's permission was required for Mrs. Shorette to reimburse herself for the unpaid expenses, to which he had previously responded in the affirmative. At oral argument, however, the Secretary's counsel stated the opposite: that it would not violate fiduciary rules for Mrs. Shorette to reimburse herself, and that she *would not* need permission from VA to do so. Furthermore, counsel was unable or unwilling to confirm during oral argument that VA would *not* investigate Mrs. Shorette if she were to reimburse herself with the funds that had accumulated in the veteran's account for expenses she incurred while the funds were being withheld, albeit due to the errors of VA and the prior appointed fiduciary.

After oral argument concluded, the Court issued its second published order in *Shorette v. McDonough* (*Shorette II*), 38 Vet. App. 10 (2024) (per curiam order). There, the Court ordered the Secretary to show cause why sanctions were not appropriate where counsel failed to correct statements that it

claimed VA knew to be false prior to the oral argument. The Court also ordered the Secretary to file a supplemental memorandum of law addressing why VA was unwilling to make a preemptive decision that it would *not* initiate a misuse determination or seek to remove Mrs. Shorette as fiduciary if she reimbursed herself for the unpaid familial expenses since March 2018.

With respect to the unpaid expenses, the Secretary responded that VA had thereafter made a preemptive decision on October 1, 2024, in which it determined that if Mrs. Shorette found it was in the best interest of the veteran and his dependents, a one-time lump sum reimbursement of $228,110.93 may be paid out to her from the VA funds under her control as fiduciary. VA also noted that it would not deem the action to be a misuse of funds nor grounds for removing her as fiduciary.

Notwithstanding this decision, Mrs. Shorette still had concerns about the equivocal interpretation of "best interest." Specifically, she was concerned that VA's fiduciary service might disagree with her "best interest" determination and find that she misused funds to remove her as fiduciary once again.

After both parties participated in a Court ordered staff conference, the Secretary agreed to send a second letter to Mrs. Shorette clarifying the intentions and effect of the October 1 decision. In the letter, VA acknowledged that Mrs. Shorette had determined it was in the best interest of the veteran and herself (as his spouse, dependent, and fiduciary) to reimburse herself the lump sum, confirmed that it would not contest her decision, and confirmed that proceeding with the transaction would not result in a determination of misuse of funds or be grounds for removal from service as a fiduciary. Thereafter, Mrs. Shorette proceeded with the reimbursement, and upon receipt of the funds, filed a motion to withdraw her petition for extraordinary relief.

Having been afforded all of the relief she initially sought in her December 2023 petition, ultimately rendering it moot, the Court agreed to grant Mrs. Shorette's motion to dismiss the petition in the instant order. *Shorette v. Collins* (*Shorette III*), No. 23-7775 (Vet. App. Feb. 6, 2025).

As for the Court's order in *Shorette II* requiring the Secretary to explain why sanctions should not be imposed for failing to correct statements made prior to oral argument, the Secretary maintained that he did not consider his initial responses to the Court's inquiry about whether Mrs. Shorette needed permission to reimburse herself for unpaid expenses to be false. He acknowledged that while the response could have been clearer, his affirmative statement merely pertained to the fact that permission would need to be obtained *only* for her to ensure that the reimbursement would not later be scrutinized and prompt her removal as fiduciary.

The Secretary further explained that he had nonetheless consistently represented to the Court that VA does not control the funds—the fiduciary does—and VA's duties merely involve appointment, oversight and removal of fiduciaries. Counsel's statements at oral argument, he claimed, were only intended to reiterate that the fiduciary is the sole individual in possession of the funds and is always empowered to make payments without advance permission.

The Court agreed that the Secretary's response to the Court's inquiry could and should have been clearer, and accepted counsel's representation that VA did not intentionally provide false information to the Court. Further, in light of counsel's proactive attempts to clarify the nuances of VA's initial response at oral argument, the Court concluded that it was not clear and convincing that VA failed to comply with an order of the Court and accordingly declined to impose sanctions.

In a concurring opinion, Judge Bartley emphasized that VA's actions in the instant matter were at odds with its mission to care for both veterans *and* their families. Judge Bartley also empathized with Mrs. Shorette's inference that VA's actions were punitive and retaliatory, and urged that the VA's Veterans Benefits Administration Pension and Fiduciary Service to require significantly more thorough

oversight to avoid wasting government funds in unnecessary retaliation against the veterans and family members it is charged with protecting and assisting.

Sydney Smith is a third-year law student at Stetson University College of Law.

Determining the Correct Legal Standard is Essential in an Analysis of CUE

by Sharla T. Dixon

Reporting on *Baker v. McDonough*, No. 2023-1972 (Fed. Cir. Dec. 19, 2024).

In a nonprecedential decision, the U.S. Court of Appeals for the Federal Circuit vacated and remanded a U.S. Court of Appeals for Veterans Claims ("the Court") affirmance of a Board of Veterans' Appeals decision that denied a motion alleging clear and unmistakable error (CUE) in a regional office (RO) decision.

During service, the veteran, Ms. Baker, was diagnosed with "probable multiple sclerosis (MS)" after a neurologist found that she did not meet the full criteria. Based on that finding, Ms. Baker was placed on a temporary disability retirement list (TDRL), and later medically discharged. Immediately afterwards, Ms. Baker filed a claim for compensation with the Department of Veterans Affairs (VA) for MS. When examined in April 1992, the VA examiner stated that the diagnosis in service was "possible MS" and provided a negative nexus opinion. The VA examiner was not provided with Ms. Baker's file or the in-service MRI that found fluid in her spine. After being provided with the claims file, the examiner again concluded there was no diagnosis of clinical MS.

In September 1992, the RO denied the claim for service connection. Ms. Baker did not appeal that decision. In 2009, she filed to reopen the claim. It was granted in 2014, with an effective date of May 8, 2009, the date she filed to reopen the claim.

Ms. Baker appealed, contending that the effective date should be September 1992 because the original denial of the claim contained CUE. The Board denied the CUE motion, and the Court affirmed. Ms. Baker appealed to the Federal Circuit, arguing that in its September 1992 rating decision, the RO failed to apply the correct legal standard to the issue of whether she had a diagnosis of MS. Ms. Baker argued that the RO required a definitive diagnosis of MS, which is a much stricter requirement than the equipoise standard under the benefit of the doubt rule of 38 U.S.C. § 5107(b). That statute provides, "The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under the laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding an issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."

Therefore, Ms. Baker alleged that had the correct legal standard (the benefit of the doubt rule) been applied, the result would have been manifestly different. In essence, Ms. Baker argued that had the RO applied the benefit of the doubt rule to the issue of her diagnosis of MS, she would have prevailed, given her in-service diagnosis of "probable MS," which she argued met the equipoise standard. Thus, Ms. Baker argued that the denial of her claim in September 1992 contained CUE.

The elements of CUE are: (1) either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the error was "undebatable" and of the sort that, had it not been made, would have manifestly changed the outcome at the time; and (3) a determination of CUE must be based on the record and law at the time of the prior adjudication.

Here, the Federal Circuit held that the Board and Court erred by failing to evaluate whether the evidence before the RO in 1992 was in equipoise, which would have required the application of the benefit of the doubt rule under 38 U.S.C. §5107(b). Further, the Federal Circuit held that although it cannot review factual findings, such as whether the evidence before the RO in 1992 was in equipoise, it can determine whether the correct legal standard was applied in the case.

The Federal Circuit found that the Board erred in its analysis that focused solely on whether Ms. Baker had an undebatable diagnosis of MS in 1992 rather than evaluating whether the evidence was in equipoise such that the benefit of the doubt rule should have been applied.

The Federal Circuit noted that the Board's analysis suggested that the evidence in 1992 may have been in equipoise, given the statement in its decision that reasonable minds could differ as to whether the veteran had MS at the time of the September 1992 rating decision. This suggested equipoise, and therefore because the Board did not discuss the benefit of the doubt rule, but instead referenced there being no "clear diagnosis," which suggested it applied a stricter standard, the Federal Circuit vacated the Court's decision and remanded the case.

Sharla T. Dixon is Counsel for the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Federal Circuit Allows for Implicit and Subsequent New and Material Determinations in Upholding VA's 38 C.F.R. § 3.156(b) Analysis in *Brown v. Hunter*

by Chennel Hall

Reporting on the nonprecedential decision in *Brown v. Hunter*, No. 2023-1847 (Fed. Cir. Jan. 24, 2025).

Mr. Brown argued that the U.S. Court of Appeals for Veterans Claims ("the Court") erred in finding that the Board of Veterans' Appeals was not required in the decision on appeal to determine whether a 1992 Department of Veterans Affairs (VA) examination, which found that Mr. Brown had post-traumatic stress disorder (PTSD) of "questionable" service connection, constituted new and material evidence pursuant to 38 C.F.R. § 3.156(b). In a nonprecedential decision, the U.S. Court of Appeals for the Federal Circuit affirmed the Court's decision.

38 C.F.R. § 3.156(b) states: "New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed . . . will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period."

Mr. Brown filed a claim for service connection for PTSD in January 1991. The VA regional office (RO) denied his claim in July 1991. In March 1992, within the one year of the July 1991 denial, a VA examiner diagnosed Mr. Brown with PTSD of "questionable" service connection. The RO did not address the new evidence.

Mr. Brown filed a request to reopen his claim in 1996 after a 1995 medical examination diagnosed him with PTSD. The Board denied his claim on the merits in a 1998 decision. The 1992 VA examination was discussed in the Board's 1998 decision. Therein, the Board found that the 1992 diagnosis was not a clear diagnosis of PTSD due to a verified in-service stressor, but regardless, the weight of the evidence was against Mr. Brown's claim. Mr. Brown did not appeal the Board's 1998 decision.

Mr. Brown sought to reopen his claim again in 2001, 2004, and 2005. Mr. Brown appealed the 2005 denial to the Board. The matter was remanded and in 2009 the Board found that no new and material

evidence had been submitted since the May 2001 adjudication of the PTSD claim. Reopening was denied and the Board remanded for consideration of an acquired psychiatric condition (other than PTSD). In 2021, the Board granted the claim for service connection for an acquired psychiatric condition and noted that the claim for PTSD was denied in a 2001 decision. The 2021 Board decision did not discuss the 1992 VA examination.

Mr. Brown appealed the Board's 2021 decision to the Court arguing that the Board should have adjudicated his claim for service connection for PTSD and determined whether the 1992 VA examination was considered new and material evidence under § 3.156(b).

The Court found the Board was not required to address § 3.156(b) in its 2021 decision because Mr. Brown did not appeal the 1998, 2001, or 2009 decisions; thus, it was irrelevant whether the June 1992 VA examination constituted new and material evidence received within one year of the July 1991 rating decision. Mr. Brown appealed this decision to the Federal Circuit. The Federal Circuit relied on its holdings in *Bond*, *Beraud*, and *Pickett* in affirming the decision of the Court.

In *Bond*, the Federal Circuit held that VA must explicitly address new and material evidence to fulfill VA's obligations under § 3.156(b). *Bond v. Shinseki*, 659 F.3d 1362 (Fed. Cir. 2011). The Federal Circuit in *Bond* declined to presume that VA implicitly considered evidence under § 3.156(b) because "such a presumption would effectively insulate the VA's errors from review whenever it fails to fulfill an obligation, but leaves no firm trace of its dereliction in the record." *Id*.

In *Beraud*, the Federal Circuit reaffirmed that VA is obligated to address new and material evidence under § 3.156(b); and until it does so, the claim remains open. *Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir. 2014).

The Federal Circuit in *Pickett* found that while VA must comply with the regulation, nothing in the text of the regulation states that VA must expressly state its analysis of the evidence. *Pickett v. McDonough*, 64 F.4th 1342 (Fed. Cir. 2023). The Federal Circuit concluded that there must be some indication that the proper analysis under the regulation occurred, but based on the regulatory text itself, § 3.156(b) does not require an explicit assessment nor the inclusion of "magic words." *Id*. Consistent with *Pickett*, VA can make the §3.156(b) determination implicitly "so long as there is some indication that . . . VA determined whether the submission is new and material evidence, and, if so, considered such evidence in evaluating the pending claim." *Id*.

In *Brown*, the Federal Circuit agreed with the Court in finding that the Board did not need to do more than it did. In its 1998 decision, the Board explained that the 1992 examination was not a clear diagnosis of PTSD, and the Board found in 2009 that new and material evidence had not been received since 2001 to reopen Mr. Brown's claim for service connection for PTSD. Thus, the Board did not need to address the 1992 medical examination again in 2021. Given that the Board made the determinations required by § 3.156(b) in its prior 1998 and 2009 decisions, the Federal Circuit affirmed the Court's ruling that VA satisfied its obligations under § 3.156(b).

While the Federal Circuit in this decision reiterated its holdings in *Bond* and *Beraud*, it seemed to retreat from a broad reading of these holdings. Under that broad reading, the RO's failure to explicitly adjudicate whether the evidence received within a year of the decision was new and material would result in the claim remaining pending regardless of a subsequent finding by the Board that the evidence was in fact not new and material. By highlighting its holding in *Pickett*, the Federal Circuit emphasized that § 3.156(b) allows for an implicit determination as to whether the evidence submitted within a year of a decision is new and material.

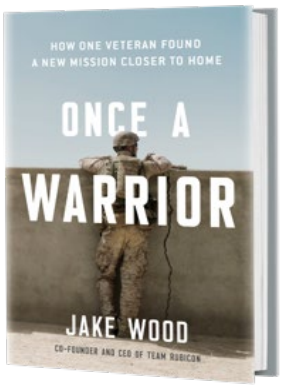
Moreover, the Federal Circuit noted its statement in a footnote in *Hampton v. McDonough*, 68 F.4th 1376, 1381, n. 5 (Fed. Cir. 2023), that its "precedent appears to allow the Board to make a new and material evidence determination in the first instance to

satisfy § 3.156(b)." In allowing implicit and subsequent new and material determinations, the Federal Circuit appears to be limiting the application of § 3.156(b) in rendering RO rating decisions nonfinal.

Chennel Hall is an Attorney-Advisor at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Book Review of *Once a Warrior: How One Veteran Found a New Mission Closer to Home*, by Jake Wood

Review by Shahin Mirzaei



Sentinel, New York, 2020. $20.65 (hardcover). 306 pages.

Jake Wood's book, *Once A Warrior*, is written based on the personal experience of the author, and this makes it incredibly authentic and moving. The first chapter of the book begins with the author hearing the news of a friend's loss in combat, taking the reader through the author's emotions. Jake Wood, a former Marine sniper who bravely served in Iraq and Afghanistan, shares his memoir—a blend of realities of war and struggles of returning home and finding a purpose.

The book contains some personal photos of Wood's family along with little notes specific to each one. You see him as a kid with his parents visiting a Nazi camp in Austria—an experience that inspired him to want to serve in the military—and as an adult with his newborn daughter, Hope, a name that perfectly reflects the book's central theme of resilience and purpose. Hope is often one thing that lots of American servicemembers lose when they get back home. It cannot be denied that having a unique experience such as serving in the military and then getting back to a postmilitary life can be overwhelming, and hope is the most essential tool for any person when faced with such a transition. Wood's book invites us all to think again about the needs of veterans and lets us know how finding a purpose after service can help veterans to feel included again.

The author himself once again found his purpose in helping others when they need it the most. He found a way to utilize his unique skill set, most of which he had learned in service, and co-founded *Team Rubicon,* a nonprofit organization that deploys veterans to disaster zones to provide emergency aid. This organization without a doubt stemmed from his individual experiences and his attempts to find a purpose. In doing so, he successfully built an organization that helps veterans reintegrate into society by offering them a renewed sense of purpose.

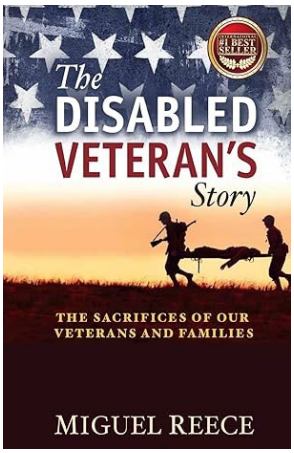
This book does an excellent job of portraying the sincere experience of a veteran while maintaining a raw, unfiltered tone that is often filled with moments of reflection. This unfiltered tone makes reading this book a breeze, and at the end, you feel like you know him as well as you know a friend. *Once A Warrior* is ideal for veterans, servicemembers, and anyone seeking insight into the challenges that veterans face, especially after leaving the military. It is also a must-read for those interested in disaster relief and leadership skills.

I certainly recommend reading this book. It offers so much even to nonveterans, as it is not just a military memoir but a story of resilience, loss, and the search for meaning. Wood's journey is inspiring, and his message is clear: Warriors do not stop fighting when they return home; they simply find new battles worth fighting. This book allows you to hear a veteran's experiences and thoughts firsthand, and reading it offers useful insight for supporting a loved one who has previously served in the military.

Shahin Mirzaei is a research assistant at Pennsylvania State University and holds a Master of Laws from Penn State Law.

Book Review of *The Disabled Veteran's Story: The Sacrifices of Our Veterans and Their Families*, by Miguel Reece

Review by Xuting Zhang



Miguel Reece Publishing, Minneapolis, 2014. $12.50 (paperback). 226 pages.

Major Miguel Reece is a veteran with over 30 years of service and a decade of experience with the Department of Veterans Affairs. When he worked as a field examiner, he was known as a "VA Man" by the veterans he visited. In this role, he listened attentively to their life stories. The individuals featured in his book *The Disabled Veteran's Story* come from a truly diverse background: a survivor of the Pearl Harbor attack who could still recall every harrowing detail, a Korean War soldier who remained haunted by his days of captivity in a POW camp, a Vietnam veteran named Ron who later identified as a woman, a female pilot who flew aircraft on noncombat missions during World War II, and many others. Reece reminds us that it was not until 1959 that female pilots from the Women's Army Auxiliary Corps could be credited with active duty and receive VA benefits. We also learn that, due to the lack of official records during the war, those female pilots struggled for years to have their service-connected conditions recognized.

Reece often described his visits as "walking on eggshells," as he not only met frustrated veterans but also dealt with complex family dynamics. In one case, he met a 19-year-old veteran, Shannon, who enlisted in the Army shortly after his marriage, in defiance of his mother's controlling ways. In a tragic turn, Shannon suffered a traumatic brain injury (TBI), leaving his wife and mother in a battle over who would be appointed as his VA fiduciary payee. This fight also placed Reece in a difficult position. In a similar story, a young man joined the military as an act of rebellion against his controlling father and later suffered a motorcycle accident. His family faced an even more difficult battle, as they had to prove that his injury was "in the line of duty" rather than caused by willful misconduct. Later, Reece visited another family where a mother cared for her son with a TBI. She was frustrated after receiving a letter accusing her of "misusing" VA funds to purchase a generator following blackouts during a hurricane even though her son's wheelchair required electrical power. Those dynamics often created an ethical dilemma for Reece, forcing him to balance his empathy with his duty as a VA field examiner.

One of Reece's key responsibilities, however, was to make sure that veterans' funds were not misused, as he has witnessed too many stories when veterans fell victim to unscrupulous individuals acting as their

fiduciary payees. In one case, a veteran's home, worth six figures, was arranged to be sold for just $2,000 and then rented back to her. In another, a daughter used the funds to purchase a house and a luxury car, claiming that her veteran father wanted to give her gifts as a way to repair their relationship. She worked at a law firm as an assistant and learned how to manipulate legal loopholes. As a veterans law practitioner, I was astonished to see that legal professionals did not always play positive roles in these stories. For example, one attorney took advantage of a veteran she met at a homeless shelter and listed herself as a beneficiary in the veteran's will. And when these veterans needed legal help, at least one large law firm was unwilling to take VA cases due to the complexity of VA laws. It seemed that when the book was published in 2014, pro bono legal services for disabled veterans remained scarce.

Many veterans in this book said they did not want VA benefits because they believed others were more deserving or in greater need. Many also encountered legal and administrative hurdles. In fact, some of these issues could be resolved through legal means, such as finding alternative evidence for lost records or simply educating veterans on the appeal process. Some skills, like reading case law to develop better strategies, can only be handled by lawyers.

By engaging with these veterans' stories, we as lawyers can gain a deeper understanding of how military service shapes young people, instills them with purpose, and often leaves them carrying burdens they cannot bear alone. This book is a powerful reminder that behind every case file is a disabled veteran's story, one that needs recognition and advocacy.

Xuting Zhang is the attorney fellow at Emory Law's Volunteer Clinic for Veterans.

My Journey Through Time: 8 Days in Belgium With World War II Veterans

by Victoria Tamayo Seabol

By 2024, fewer than 1% of the 16.4 million Americans who served in World War II remained with us. Approximately 66,000 of these extraordinary individuals are still alive today, each carrying a wealth of stories, sacrifices, and life lessons that shaped not only the course of history but also the present we live in today. In December, I had the rare opportunity to live with five of these veterans for eight unforgettable days in Belgium. I assisted them in traveling back to the exact places where their courage and resilience shaped the outcome of one of the most pivotal battles of the war—the Battle of the Bulge. This was made possible by the generosity of my law firm, Sutton Snipes, and Andrew Biggio's "Back to the Battlefield" project, which aims to reconnect veterans with the battlefields they once fought on, offering them a chance to revisit their history and legacy.

Andrew Biggio, a Marine Corps veteran and the author of *The Rifle* and *The Rifle II*, has dedicated his life to preserving the stories of WWII veterans and ensuring that future generations never forget the sacrifices these men made. His project provides a once-in-a-lifetime opportunity for veterans to return to the places that defined their service, at no cost to them. For the veterans I traveled with, this journey was not just a trip back in time but a deeply emotional return to the battlefields where they risked everything. For me, it was a chance to bear witness to their stories and learn from their wisdom. The lessons I took from these incredible men continue to shape my perspective on life, history, and the human spirit.

The Veterans Who Left a Lasting Impact

Each of the five veterans I accompanied to Belgium had his own remarkable story, and each left a profound imprint on my heart.

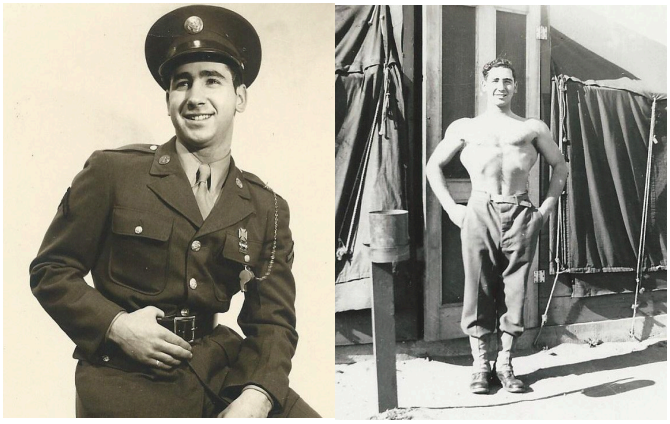
(Pictured, all five veterans in front of our bus used to travel around Belgium, Luxembourg, and Germany.)

Andrew Bostinto - The Bodybuilder Who Battled at the Front Lines

(Pictured, Andy Bostinto and Victoria Tamayo Seabol, standing at the location where one of the most famous WWII pictures was taken.)

At the age of 100, Andrew "Andy" Bostinto is a living testament to resilience. Serving with I Company, 101st Regiment, 26th Yankee Division, Andy fought in the Battle of the Bulge during brutal combat. He also completed 26 years of U.S. Army Reserve service. After the War, he became a professional bodybuilder and trainer, working with Hollywood icons such as Arnold Schwarzenegger, Al Pacino, and Patrick Stewart. While physical strength defined his professional life, it was the mental toughness he developed during his time in the service that left the deepest mark on me.

Andy's stories were filled with humor, humility, and pride. His sense of duty and his unwavering belief in perseverance were palpable. During our time in Belgium, he spoke of the camaraderie he shared with his fellow soldiers and how it helped them endure the harsh conditions of battle. His advice on staying physically and mentally fit truly resonated with me. A perfect example of his dedication was the morning of our flight to Belgium—instead of resting before the long journey, Andy insisted on going to the gym, showing his commitment to fitness and discipline even at 100 years old.



(Pictured, young photos of Andy Bostinto, including in his bodybuilding days.)

Ed Cottrell - The Hero Who Took to the Skies

(Pictured, Ed Cottrell and Victoria Tamayo Seabol)

Ed Cottrell, now 103, is a decorated fighter pilot with nine Air Medals. Flying P-47 Thunderbolts for the 493rd Fighter Bombardment Squadron, he completed 65 missions, including several during the Battle of the Bulge. Despite his extraordinary accomplishments, Ed was quick to credit his fellow pilots and ground crew, always emphasizing the importance of teamwork and trust.

His stories of flying through enemy fire were told with such clarity and precision that it felt as though we were witnessing history firsthand. What stood out most was his unshakable gratitude for the opportunities life had given him. In an incredible turn of events, nearly 80 years to the day of almost being shot down, Ed had the opportunity to get back into a WWII aircraft. With the help of a Belgian Air Force pilot, he soared over his old flight paths during the Battle of the Bulge, reliving history in a way that was both emotional and awe-inspiring.

(Pictured, Ed Cottrell back in a WWII aircraft 80 years later. Young Ed Cottrell ready for takeoff.)

Louis Brown - The Relentless Convoy Driver

(Pictured, Louis Brown and Victoria Tamayo Seabol)

(Pictured, Louis Brown in front of the same type of truck he drove during service)

Louis Brown, 100, served as a corporal in the 4036th Quartermaster, a "Red Ball Express" convoy unit known for operating 24 hours a day under intense conditions. His job was to deliver urgent supplies to the front lines and General Patton's forces, often under enemy fire.

Now nicknamed "The Godfather of Inglewood," Louis carried himself with wisdom, sharp wit, and a no-nonsense attitude that made every conversation with him a singular experience.

One special moment of the trip came when we encountered WWII reenactors who were driving the same type of truck Louis operated during the war. The reenactors invited him to take a ride. His face lit up with joy. It was the most animated we had seen him during the entire trip—a truly unforgettable sight.

Louis was also at the center of a deeply moving experience when we visited the site of the "Wereth 11." In Wereth, Belgium, 11 Black soldiers of the 333rd Field Artillery Battalion, having been separated from their unit during the German offensive, were taken in by kind-hearted Belgian civilians who offered them food and shelter. However, someone in town alerted the 1st SS Panzer Division, and the soldiers were forcibly removed from the dinner table, taken down the road, and brutally executed. Their bodies were not discovered until nearly two months later.

Louis Brown, possibly the last Black WWII veteran to visit this site, sat at the very table where these soldiers had their final meal. He took a moment of silence before rendering a solemn salute to his fellow segregated servicemen who had made the ultimate sacrifice. Standing at the monument erected in their

honor, he paid his respects, his presence a living tribute to their memory and the injustices they endured.

(Pictured, Louis Brown sitting at the table where the "Wereth 11" soldiers had their last meal)

(Pictured, artwork at the Wereth 11 site depicting their last dinner)

(Pictured, Louis Brown saluting the 11 soldiers at the monument)

(Pictured, Young Louis Brown)

Lester Schrenk - The POW and Ball Turret Gunner Who Met His Captor

(Pictured, Lester Schrenk and Victoria Tamayo Seabol)

Lester "Les" Schrenk, 101, served with the 8th Air Force, 92nd Bomb Group, 327th Squadron. As a ball turret gunner, he faced extreme conditions. The ball turret was only 3 feet in diameter, typically manned by soldiers no taller than 5'6"— but Les was nearly 6 feet tall. He had to curl into a ball for hours at a time, enduring freezing temperatures as low as -60°F during flights that could last up to 12 hours. His resilience in such brutal conditions was astounding.

(Pictured, Lester standing in front of a badly damaged ball turret, which is what he sat in as a "ball turret gunner." This was a display at the 385th Bomb Group Memorial Museum in Luxembourg.)

Les's B-17 bomber, *Pot O' Gold*, was shot down during a mission, and he was held as a prisoner of war for 15 months. During that time, he was forced to endure the "death march" that lasted three months, covering over 800 kilometers in bitterly cold conditions with no food. His comrades died all around him, and he was constantly on the verge of freezing and starving. Les showed me a picture of himself after he was freed—he was skin and bones.

His experiences as a POW were some of the most harrowing yet uplifting stories I have ever heard. One of the most profound moments of our trip was hearing Les recount his meeting with Hans Hermann Muller, the German pilot who had shot down his plane. In 2012, they met face-to-face and developed a deep respect for one another. The reconciliation between Les and Hans was a testament to the healing

power of forgiveness and the enduring bond that can form between former enemies.

(Pictured, Young Lester Schrenk)

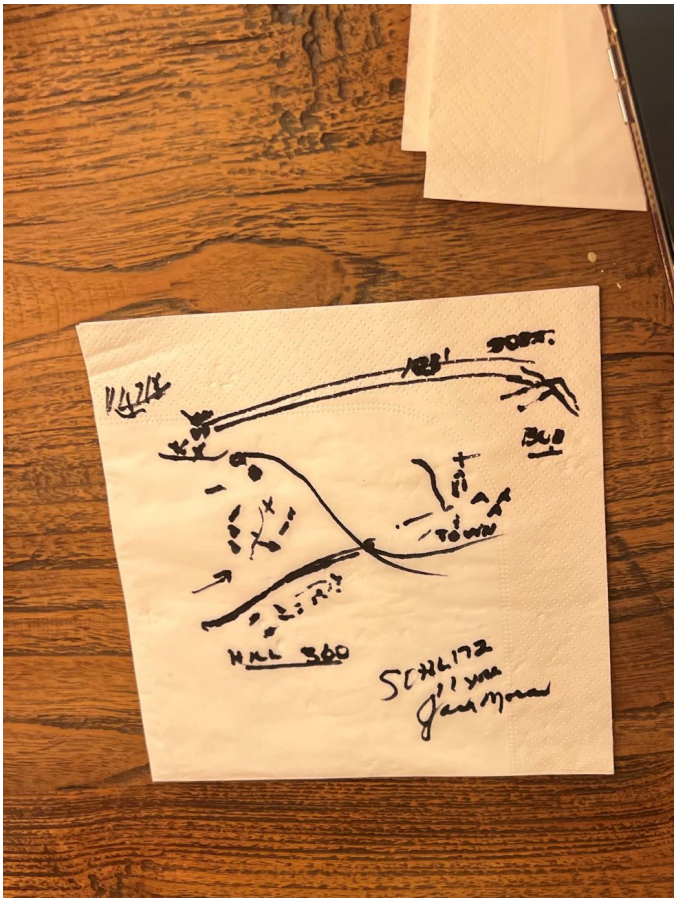
Jack Moran - The Soldier Who Fought His Way Across the Rhine River

(Pictured, Jack Moran and Victoria Tamayo Seabol)

Jack Moran, 99, fought with the 87th Division during the brutal and freezing days of the Battle of the Bulge. In just six days, his unit saw 96 men killed and 113 wounded. His firsthand accounts of the harsh conditions, the overwhelming fear, and the tragic losses he endured were profoundly impactful.

Jack had an incredibly sharp memory. One night, while we were relaxing at the house, he began drawing—on a dinner napkin—battle plans from when he served near the Rhine River. He meticulously illustrated where his fellow soldiers were, where the Germans were firing from, and the locations of certain landmarks he could remember. When another volunteer asked about the black dots he was sketching, Jack somberly responded, "They are dead bodies."

(Pictured, Jack Moran drawing battle plans from his memory on a napkin after dinner while describing the events to us.)



(Pictured, the completed drawing. One of the volunteers kept the drawing and planned to frame it.)

Jack also shared his thoughts on WWII's impact on the future. He discussed how the birthrate of males significantly rose after the loss of so many young men during the War, a fact I was unaware of until our conversation. Jack reflected that "God and the universe always find a way to make things right." His insights, combined with his remarkable memory, made a lasting impression on all of us.

(Pictured, young Jack Moran)

Other Notable Moments, Including an Unexpected Encounter with a Former SS Officer

One of the most unforgettable moments of the trip was participating in the 80th anniversary of the Battle of the Bulge parade in downtown Bastogne. The veterans were honored guests, receiving heartfelt thanks from the crowds that lined the streets. They even had the chance to meet the King and Queen of Belgium, a moment of recognition that profoundly touched them.

(Pictured, the Queen of Belgium and Ed Cottrell during the parade)

Everywhere we traveled in Europe, the veterans were met with overwhelming gratitude. At the airports, people would gather to welcome them, some with tears in their eyes, expressing their appreciation for the hardships they endured. Strangers approached them to share deeply personal stories of how Allied soldiers had saved their parents, grandparents, their childhood homes, or even their entire towns. The level of admiration and respect was humbling, and it served as a poignant reminder of the lasting impact these men had.

(Pictured, the veterans receiving hugs, tears, and "thank yous" from strangers at the airport)

Additionally, we had an unexpected yet fascinating encounter with a former SS officer, Gerhard Fempell. The interaction was surprisingly amicable—both sides expressed a desire to move forward from the past, acknowledging the tragedies of war while emphasizing the importance of reconciliation and peace. It was a powerful reminder of how time can transform even the most bitter of adversaries into individuals seeking understanding and healing.

(Pictured, Lester Schrenk and the SS officer, Gerhard Fempell, shaking hands)

(Pictured, the five veterans and the SS officer, Gerhard Fempell, drinking coffee and talking about the War)

(Then & Now photos of a bridge located in Koblenz, Germany. The top picture includes all five veterans, their family members, and the trip volunteers. By the end of the trip, we all felt like one big family. The bottom picture shows German prisoners guarded by a soldier of Jack Moran's 87th Infantry Division. This position shows the first POW collecting point during the early stages of the battle of Koblenz. On the shoulder of the American soldier with the gun, you can see the Golden Acorn Patch of the 87th Division.)

Conclusion

I am incredibly grateful for this experience and the friendships I made along the way. As a history nerd, every minute was fascinating, and I cherished the opportunity to learn directly from those who lived it. Their stories gave me a deeper appreciation of the sacrifices made during WWII and the importance of preserving their legacy.

I encourage other veterans law attorneys and advocates to find ways to work with the WWII veteran community. Whether through volunteer work or simply befriending a WWII veteran, these men and women are often eager to share their experiences with younger generations. It is crucial that we cherish the wisdom and history they offer while we still have the chance.

Victoria Tamayo Seabol is an associate attorney at Sutton Snipes.

If you are interested in contributing to the Veterans Law Journal, either as an author or editor, please reach out to Jeff Price, our Editor-in-Chief, at Jeffrey.Price@nvlsp.org.

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