VETERANS LAW JOURNAL

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

2024, Vol IV

National Veterans Law Moot Court Competition Results

The annual National Veterans Law Moot Court Competition was held on November 9 and 10, 2024. The competition is an opportunity for law students to hone their research and advocacy under the mentorship of expert practitioners. This year, 26 teams from 20 different law schools participated.

The overall champions of this year's competition are Mimi Mays and Savanna Clendining of the University of Richmond School of Law.

(Pictured, from left to right: Savanna Clendining, Judge Bartley, Chief Judge Allen, Judge Jaquith, Mimi Mays)

Competitors received the problem in mid-September. The teams submitted their briefs for scoring in October. The George Washington University Law School hosted two preliminary rounds and the quarterfinals on Saturday, November 9. The Court of Appeals for Veterans Claims hosted the semi-final and final rounds on Sunday, November 10.

Chief Judge Michael Allen, Judge Margaret Bartley, and Judge Grant Jaquith heard the final round. A video recording of the final round and the award ceremony is available on the Court's YouTube page: https://www.youtube.com/watch?v=wrjJMAqOXrw

Runners up were Edward Linczer and Jacob Hooper from George Mason University Antonin Scalia School of Law. Semi-finalists included Daniel Armenta and Cassidy Irwin from South Texas College of Law Houston, and Courtney Culhane and Elizabeth Henning from Villanova University Charles Widger School of Law.

TABLE OF CONTENTS

The prize for best oral advocate went to both Edward Linczer and Jacob Hooper from George Mason University Antonin Scalia School of Law.

(Pictured, from left to right: Judge Jaquith, Edward Linczer, and Jacob Hooper)

Best petitioner's brief went to Wilson Marinez and Rachel Lucchini from University of the Pacific McGeorge School of Law. Emily Lentzner and Maddee Williams Koeller from Baylor University School of Law took second place.

(Pictured from left to right: Wilson Marinez, Rachel Lucchina, and Judge Jaquith)

Best respondent's brief went to Courtney Culhane and Elizabeth Henning from Villanova University Charles Widger School of Law. Callie Stevens and Christiana Lano from The George Washington University Law School took second place.

(Pictured, from left to right: Courtney Culhane, Elizabeth Henning, and Judge Jaquith)

Congratulations to all the winners, runners-up, and participants of the 2024 National Veterans Law Moot Court Competition. And thank you to the CAVC Bar Association members who volunteered. We hope to see you again next year!

Panel Discussion on the Creation of the Moot Court Competition

On October 16, 2024, the CAVC Historical Society and the CAVC Bar Association co-hosted a panel discussion exploring the creation and development of the National Veterans Law Moot Court Competition.

First organized in 2009, this competition has become the nation's premier moot court focusing on veterans law. Currently, it is co-sponsored by the CAVC, the CAVC Bar Association, and the George Washington University School of Law.

The panel members included Chief Judge Michael P. Allen, David M. Johnson, Yelena Duterte, Jon Gaffney, and Alice Kerns. The moderator was James Ridgway.

A video recording of the panel discussion is available at the CAVC Bar Association website: www.cavcbarassociation.org

Message from Chief Judge Allen

Hello colleagues!

I am thrilled to be writing to you as the new Chief Judge. My short tenure has coincided with a very busy time of year for our Court. In just 3 months, the Court held its 16th Judicial Conference, hosted our annual moot court competition, finished out the 2024 fiscal year with the second highest number of appeals ever, and had two of our appeals heard by the Supreme Court. Exciting and busy times, indeed!

The judicial conference was a great success and a wonderful opportunity to engage in some meaningful discussions and thought-provoking panels about our ever-growing area of the law. I hope that you all learned a lot to take with you into your practice. I am especially grateful to everyone who participated in the Passing of the Gavel Ceremony as part of the conference, including my colleagues on the bench, many of whom traveled to be a part of the special occasion. It was a great honor to be able to share that moment in our Court's history with our community. A special thanks to my colleagues on the Judicial Conference Planning Committee: Judge Pietsch, Judge Jaquith, Tiffany Wagner, Frank Vila, and Alice Kerns, as well as, Paulette Burton, Shereen Marcus, Nathan Kirschner, Diane Boyd Rauber, Janelle Reid, Sonia Mezei, Courtney Smith, Ashley Varga, Morgan MacIsaac-Bykowski, and Diane Fulton. And thank you to all our moderators and panelists for facilitating such great discussions. A final thank you to all our Court staff volunteers – none of this would be possible without you!

A week after the judicial conference, the Court closed its books on fiscal year 2024. The final tally of appeals for the year was 8,930 – just 24 appeals shy of the Court's highest appeals in history in 2020. This is the highest number of appeals in a federal appellate court and a 121% increase from 2017, the year I joined the Court. Our Central Legal Staff conducted 7,542 Rule 33 conferences. And for the first time, AMA cases are outpacing legacy appeals. In the month of August, 62% of the Court's cases were AMA. Needless to say, it was a very busy year at the Court, and our staff did an incredible job keeping up with the growing number of appeals.

A couple of cases in particular made a big splash this past year. On October 10, 2024, the Supreme Court heard argument in *Bufkin v. McDonough* and its companion case *Thornton v. McDonough*. The cases involved our Court's assessment of whether VA complied with its duty to provide a veteran the "benefit of the doubt." This argument marks the fourth term of the Supreme Court in a row with a veterans law case on its docket. This is all the more remarkable given that the Supreme Court issues only about 65-70 merits cases each term.

Finally, on November 9-10, 2024, the Court held the 16th annual National Veterans Law Moot Court Competition, and it was a great success. Twenty-six teams from around the country participated. Congratulations to the winners, Mimi Mays and Savanna Clendining from the University of Richmond School of Law. And a big thank you to all who help to make this event a hallmark of the Court's yearly calendar, creating the problem, grading briefs, and judging argument. A special thank you to Judge Jaquith, the head of the Court's Outreach Committee; Dan DiLuccia, co-director of the moot court competition; and Ashton Habighurst, who led the problem development team. The moot court competition is a partnership between the Court, George Washington University Law School, the CAVC Bar Association, and the

Veterans Consortium Pro Bono Program. We could not continue this honored tradition without the tireless efforts of our partners and all those who volunteer their time (on a weekend) to participate. If the last few months are any indication, it will be a very exciting time as Chief Judge! I am looking forward to working with you to continue to provide justice for our Nation's veterans and their families. We all have an important role to play in the process, and, as Chief Judge, it is my goal to support you so that you feel empowered to do your part to your utmost ability. I know there will be challenges ahead, but I know we will continue to be successful if we work together and communicate openly.

As the year comes to an end and my tenure begins, I wish everyone a happy and restful holiday season!

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 has been engaged in its mission to constantly improve the practice of law and the administration of justice in the U.S. Court of Appeals for Veterans Claims. That work begins with our members. Therefore, if you have ideas or feedback for the CAVC Bar Association, the Board of Governors wants to hear from you! Please email cavcbar@gmail.com any time.

The CAVC Bar Association held our annual meeting in September 2024 during the 16th CAVC Judicial Conference in Washington, DC. We honored outgoing officers Jillian Berner (Immediate Past President), Christopher Casey (Secretary), and (Tom Susco (Treasurer), who completed their terms. We announced the election of Board members Meghan Gentile (President-Elect), James Hekel (Secretary), Emma Peterson (Treasurer), Debra Bernal (Governor-at-Large), Kirsten Dowell (Governor-at-Large), and Tom Susco (Governor-at-Large). Ashley Varga became Immediate Past President, and I became President for the 2024-2025 year. The new Board of Governors already has been busy planning a slate of programs and events to educate and engage our geographically diverse membership throughout the year. The CAVC Bar Association, in partnership with the Veterans Consortium Pro Bono Program, also funded competitive scholarships that allowed five current law students to attend the 16th CAVC Judicial Conference.

The 16th CAVC Judicial Conference also marked the passing of the gavel from Chief Judge Margaret Bartley to Chief Judge Michael P. Allen. The CAVC Bar Association wishes to thank Judge Bartley for her support of the bar association and her leadership of the Court as Chief Judge. We also welcome Chief Judge Allen to his new role on the Court. Many members will be happy to hear that, during my initial discussion with Chief Judge Allen, I learned that one of the Court's priorities is modernization of the e-filing system.

In October 2024, the CAVC Bar Association sponsored a group admission ceremony at the U.S. Supreme Court. This unforgettable experience allowed 12 members to be sworn in in-person as members of the bar of the U.S. Supreme Court. We hope to offer this members-only opportunity again in the future.

In November 2024, along with the George Washington University Law School and the U.S. Court of Appeals for Veterans Claims, the CAVC Bar Association sponsored the National Veterans Law Moot Court Competition (NVLMCC). Congratulations to all the team and individual award winners and to all the student competitors! Special thanks also to the many volunteers who made the competition possible and provided the authentic and quality experience that makes the NVLMCC a premier moot court competition.

The CAVC Bar Association held a November 2024 educational program on the topic of billing for attorneys fees and expenses under the Equal Access to Justice Act (EAJA), from the perspective of the appellant's bar. If you were unable to attend in-

person or watch the livestream, this program, along with many others, is available to view any time on our website cavcbarassociation.org

On December 14, our geographically diverse membership came together by participating in local Wreaths Across America events. If you participated, please share your photos via Instagram by tagging #cavc_bar or @cavcbar or by sending your photos to cavc_bar. Our Instagram feed is also available to view on our website cavcbarassociation.org. We hope to see you remembering the fallen, honoring those who serve, and teaching the next generation the value of freedom.

As the end of calendar year 2024 approaches, and 2025 begins, it is a great time to renew your annual CAVC Bar Association membership. Renewals may be completed online at cavcbarassociation.org by clicking on "Join or Renew" at the top right of the home page. As an all-volunteer organization, we depend on your dues and the goodwill of our members to bring you programs and events all year long. Please join or renew today!

Finally, on behalf of the Board of Governors of the CAVC Bar Association, we extend our best wishes for the holiday season and a happy new year! And, as always, thank you for your support of the CAVC Bar Association. We look forward to engaging with you in 2025!

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 Panel Tackles EAJA Best Billing Practices & Challenges

by Alyssa E. Lambert

Be detailed and know your audience: Those were two main takeaways from the CAVC Bar Association's panel discussion about how to approach Equal Access to Justice Act (EAJA) fee applications.

The event was hosted by U.S. Court of Appeals for Veterans Claims courthouse library on November 19, 2024. The panelists talked about key considerations in EAJA billing, from covering the basics, to block billing, to fee disputes—and focused on what is reasonable and how the Court's decisions have impacted best billing practices.

Four of the five panelists presented the perspective of appellant's counsel: Benjamin Binder from the Law Office of Benjamin R. Binder; Christine Cote Hill of the National Veterans Legal Services Program (NVLSP); Sharon Kim of Bergmann & Moore; and Adam Luck of Glover Luck. As the fifth panelist, Central Legal Staff attorney Katherine Ebbesson brought the Court's perspective. And the event was moderated by the CAVC Bar Association's Immediate Past President Ashley Varga, a law clerk for Judge Meredith,

Cote Hill started by discussing the "ranges of reasonableness" for billing, which is based on the litigation and whether an appeal is disposed of via a joint motion for remand (JMR) or goes to briefs. She noted that the average range for cases that end in

JMRs is about $3,000 to $7,000, and for cases that go to briefs it's about $8,000 to $10,000. Factors that impact the amount of EAJA fees sought include the size of the record before the agency (RBA), Rule 33 conference negotiations, how many issues are being appealed, etc.

"We know we have all these responsibilities, but if you are at the top level or exceed the expected range of reasonableness, it will be especially critical, in that case, to provide detailed descriptions and exercise billing judgment, maybe even aggressive billing judgment," Cote Hill emphasized. "Our big thing is be detailed and know who you are writing for. Make sure the task can be understood by your reader and describe the legal task that was performed."

Both Cote Hill and Kim offered tips for parsing administrative from legal tasks when submitting the final billing accounting to the Court.

"Very clearly, filling out forms, checking the docket, updating your calendar—those are administrative tasks we eliminate in billing judgment," Cote Hill said. "But drafting the notice of appeal and notice of appearance—those are not clerical, which we know from *Baldridge v. Nicholson*, 19 Vet. App. 227 (2005). The gauge is: Is this a task that could easily be performed by a legal assistant?"

Kim noted that reviewing docket notices and emails from opposing counsel, for example, are not just administrative tasks.

"In the context of managing an appeal, an attorney must review a document to ensure its accuracy and that it complies with the Court's rules," Kim said.

The panel also touched on some common misconceptions about what appellant's counsel can and cannot bill for.

"You can't bill for something that you weren't successful on—for example, you file a motion for oral argument, and it gets denied—but that's a misconception. If you filed something, thinking it would help your case, you can bill for it," Binder said.

Varga then directed the panel to weigh in on block billing, noting that the Court sees a lot of arguments about what constitutes block billing.

Cote Hill commented that attorneys should avoid block billing based on *Baldridge* and *Andrews v. Principi*, 17 Vet. App. 319 (2003) (per curiam order). "Originally, when *Andrews* came out, it was misunderstood. It was not really suggesting you can't bill over three hours, but it seems like it's evolved, and the judges want to see 3-hour increments or less," she said. "*Baldridge* also talks about billing for multiple tasks without attributing time to each task."

Kim noted that her firm limits billing entries to 3 hours each. "It's clearer for us, our clients, and the Court," she said.

Ebbesson, who handles EAJA settlement conferences when fee disputes arise, said that block billing has come up in almost every EAJA conference she's had. "Being descriptive when billing in chunks is helpful. Even when you're billing for the RBA review, it can be helpful to know what pages you're reviewing," Ebbesson said.

"The larger the chunk of billing, the more detail you need, and the more scrutiny that comes," Luck added.

"It is the responsibility of the applicant to support why those hours were reasonable, which is why you need to provide as much detail as you can," Cote Hill emphasized. As a further example, she pointed to motions for extension—something seen at every phase of the litigation. "Generally, the case law says that the thinking is you cannot bill for motions for extension due to workload. The only warning is that this is where your cause in the motion matters. If you have an RBA dispute, you may need a motion for extension, so that's different."

The panelists then pivoted to how much time is reasonable to spend on RBA review, specifically in consolidated cases and repeat client cases.

"*Smith v. McDonough*, 995 F.3d 1338 (Fed. Cir. 2021), has some very strong language about knowing the record in your case. I think there are some judges at the Court who take the view that if you've already had that client, you should already know the record. But you may not have seen the case for a year or 2 or 3 or maybe it's a different issue on appeal," Luck said.

Cote Hill agreed that *Smith* dictates that attorneys must have a good understanding of the record, and that matters first. "Be really detailed in your task descriptions or it might mean you need to reduce the billing," she said.

Kim noted that her firm assigns a returning client case to the same attorney, but that "it really depends on what kind of case it is and what did the Board find. We ask our attorneys to specify and give detailed descriptions of why it took so much time, if it did, to review."

As for billing for legal research and supervisory review, the panelists generally agreed you can't bill for learning the law and getting up to speed, even due to inexperience. But Kim and Cote Hill agreed that supervisory review is both billable and crucial.

Following a brief discussion on EAJA conferences, where Ebbesson emphasized the importance of negotiating those disputes between the parties, the panel took questions from the in-person and virtual audience.

Several questions focused on how to find the balance between what will pass muster as reasonable under EAJA while simultaneously ensuring clients are satisfied. For example, one audience member asked about when to cut off billing time for client communications for clients who call frequently—and the conversations last longer than what's expected. Luck pointed out that what may be seen as "excessive" is not excessive to the clients. "To them, that's normal and reasonable, and we need to remember that."

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

PRACTICE SERIES ARTICLE: Court's Central Legal Staff

Practice Tips for Rule 33 Conferences

By Andrew Parler Reynolds

"IT AIN'T OVER 'TIL IT'S OVER . . ."

. . . is a colloquialism that Wikipedia tells us means that "one should not presume to know the outcome of an event which is still in progress." Yogi Berra purportedly said this when the Mets trailed the Chicago Cubs by 9½ games in the National League East in July 1973. The Mets rallied to clinch the division title and eventually reached the World Series. This line inspired the song "It Ain't Over 'til It's Over" by Lenny Kravitz. This colloquialism can also be applied to the Court's Rule 33 conferencing process.

The parties do a good job thoroughly discussing the issues during a conference. But once in a while, the process gets rushed in proceeding to briefs. In these instances, the Secretary indicates that he is defending his position and proceeds with responding to the argument(s) in the summary of the issues. Appellant's counsel usually replies to the Secretary's defenses. Then, either party will pronounce that it is settled—they are going to briefs. But whoa, Nelly. Not so fast. I have not had an opportunity to mediate.

Two examples illustrate why it ain't over 'til it's over. Let's call the first example a "diamond in the rough" and the second example the "never say die." A "diamond in the rough" can involve a single claim

negotiation, while the "never say die" example involves multiple claim negotiations.

A single claim may seem straightforward. Everyone clearly understands the issue, and the parties just see the matter differently. However, with additional questioning, discussion, and brainstorming, we may find a diamond in the rough. Perhaps we can uncover a nuanced or unusual substantive fact. Maybe we have a particularly sympathetic case that might make an alleged error carry more weight. Or the alleged error needs to be reframed or approached from a different angle. At a minimum, patiently participating in the process presents an opportunity to fine-tune the matter, and at best, find a diamond in the rough.

The "never say die" example can happen when you least expect it. It may go something like this: four claims—the Secretary offers a remand on one claim and explains why he is defending on the other three—appellant replies, but the parties conclude they are going to briefs because there are still three claims on the table, and thus they are too far apart. But are they?

Appellant might agree to drop the least meritorious of the claims if the parties could start narrowing the issues. Of the two remaining claims, the Secretary may agree that he was on the fence on one of them and that his supervisor might be persuaded if the parties could otherwise reach an agreement. That leaves a single remaining claim. The optics of that one claim now look different, and thus, the never say die case is still alive.

So the next time you have a conference that looks like a dead end, ask yourself, could this be a diamond in the rough or the never say die? As Lenny Kravitz sings on his hit song: "How many times did we give up, But we always worked things out . . . It ain't over 'til it's over."

Andrew Parler Reynolds is an attorney for the Court's Central Legal Staff.

Federal Circuit Defines "The Date of Final Decision" for "Past-due Benefits"

By Joseph T. Leonard

Reporting on *Dojaquez v. McDonough,* 112 F.4th 1349 (Fed. Cir. 2024).

In *Dojaquez v. McDonough*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") issued a precedential opinion written by Judge Hughes, which affirmed a United States Court of Appeals for Veterans Claims ("Court") decision limiting additional agent's and/or attorney's fees under 38 U.S.C. § 5904(d)(3) to the date of the final decision of the award, regardless of when notice of that final decision is received.

Veteran Billy Wayne Slaughter served in the U.S. Navy from August 1985 to August 1995. Mr. Slaughter sought an increased rating for his service-connected right ulnar nerve entrapment. In 2013, the U.S. Department of Veterans Affairs ("VA") continued Mr. Slaughter's 10 percent rating. Mr. Slaughter appealed to the Board of Veterans' Appeals ("Board"), and the Board determined, in a decision dated December 18, 2018, that Mr. Slaughter was entitled to a 40 percent disability rating for his disability. The Regional Office (RO) implemented the 40 percent rating in a decision dated March 2, 2019, and assigned an August 1, 2012, effective date. The RO notified Mr. Slaughter of its March 2, 2019, decision on April 26, 2019, the date of a letter from the VA.

Kenneth Dojaquez, the attorney for Mr. Slaughter, challenged the use of March 2, 2019, as the endpoint for the attorney's fees calculation, arguing that the endpoint should be April 26, 2019, the date of notification of the March 2, 2019, decision.

The Board concluded that Mr. Dojaquez was only entitled to attorney's fees through March 2, 2019, the

date of the RO's decision. The Court affirmed the Board's decision based on its interpretation of 38 U.S.C. § 5904(d)(1) and established caselaw.

The Federal Circuit affirmed the Court's decision. Citing *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007), and relying on the plain language of 38 U.S.C. § 5904(d)(3) within the structure and context of the statute, the Federal Circuit found that the "date of the final decision" was unambiguously the date of the RO's decision assigning an effective date. As noted in the decision, past-due benefits are defined by regulation, 38 C.F.R. § 14.636(h)(3), and constitute "any compensation not paid to the claimant in a given month." When a final decision retroactively recognizes that unpaid compensation should have been awarded to the claimant, the claimant receives these past-due benefits in a lump sum payment. Federal statute, 38 U.S.C. § 5904(d)(1), "limits the fee which an attorney can earn to the past-due benefits awarded to the veteran, and further limits the amount of the fee to no more than 20 percent of the total past-due benefits awarded." *Snyder*, 489 F.3d at 1216.

As many veterans and their beneficiaries enter into a fee agreement for an agent's services, and as fee agreements are awarded based on the Secretary withholding a portion of the past-due benefits from the claimant, Congress intentionally drafted the statute to limit the amount that agents and/or attorneys would be allowed to receive "at the veteran's expense." More specifically, the Secretary cannot withhold any portion of the veteran's recurring benefits after "the date of the final decision." 38 U.S.C. § 5904(d)(3). As the claimant is being awarded a lump-sum payment from the date of entitlement to the date of the award, the amount of past-due benefits must be limited by a beginning and end date.

Mr. Dojaquez argued that "the date of the final decision" should be calculated based on the date notice of the decision was sent, not the date of the decision. The Federal Circuit rejected this argument. Based on the plain language of the statute, and the disallowance of having fees paid from a claimant's recurring benefits payments, the Federal Circuit concluded that the most logical reading of the statute is that the end date for the past-due benefits calculations is the "date of the final decision," not the date that the final decision is received.

Had the Federal Circuit been persuaded by Mr. Dojaquez's arguments, the date of the "final decision" could be different from the "end date" for the past-due benefits calculations and thus the attorney or agent could end up receiving more than 20 percent of the claimant's award, an outcome explicitly prohibited by the statute. As an administrative matter, if the Federal Circuit had agreed with Mr. Dojaquez's arguments, the VA would be incentivized to limit the time between when a final decision is reached, and the claimant is subsequently notified of that final decision. However, as seeing nothing in the language of 38 U.S.C. § 5904(d) requires notice, the Federal Circuit could not reasonably determine that the "date of the final decision" could not be more clearly answered by the statute itself.

Joseph T. Leonard is Counsel at the Board of Veterans' Appeals. The views and opinions provided by Mr. Leonard are his own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. Mr. Leonard is writing in his personal capacity.

A Class for Mistakes – Erroneously Closed Legacy Appeals in VACOLS

by Ben Small

Reporting on *Freund v. McDonough,* 114 F.4th 1371 (Fed. Cir. 2024).

In *Freund v. McDonough*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") issued a panel decision (Dyk, Hughes, and Stoll, Judges), vacating and remanding a decision by the

U.S. Court of Appeals for Veterans Claims ("Court"), which dismissed a petition for class action and class certification against the Department of Veterans Affairs ("VA") for claimants whose timely Substantive Appeals to the Board of Veterans' Appeals ("Board") were erroneously closed by Veterans Appeals Control and Locator System (VACOLS) software in the legacy appeals system.

VACOLS is an automated electronic database that is used by VA to track and monitor legacy appeals, i.e., initial decisions issued by a VA Regional Office ("RO") before February 19, 2019. In the legacy appeals system, a claimant dissatisfied with his or her initial decision was able to initiate an appeal by filing a Notice of Disagreement (NOD) within one year of the decision notification. Once received, VA would issue a Statement of the Case (SOC) to the claimant concerning the issues, evidence of record, and applicable laws and regulations so that the claimant could better prepare his or her appeal to the Board.

To perfect his or her appeal to the Board, a claimant was required to submit a VA Form 9 ("Substantive Appeal") within 60 days after the SOC was issued or within one year of the initial decision being appealed, whichever was later. Once the Substantive Appeal was received by the RO, the case was certified and sent to the Board for processing and docketing. As action was taken on a given appeal, the updated data was entered manually into VACOLS by RO employees, up to and including certification to the Board.

Among the tracking functions of VACOLS was recording the date of initial decisions being appealed, the date an SOC was issued, and the date a Substantive Appeal was received. Using this information, VACOLS had a filter that identified unperfected appeals on the first day of every month, following 65 days after an SOC was issued or one year after the initial decision was mailed. At issue in this case was the fact that neither VACOLS nor VA notified claimants when a legacy appeal was closed once it was flagged as failing to meet the requirements for a perfected appeal.

The petitioners, Mr. Freund and Mrs. Mathewson, were claimants who timely perfected appeals to the Board, according to applicable laws and regulations, and as conceded by VA. Unfortunately, due to what VA described as "human error," which could have occurred anywhere from mail intake to quality control review, the appeals of both petitioners were identified as unperfected in VACOLS and were subsequently closed out. In an unusual procedural move, the petitioners filed a joint mandamus petition for declaratory relief, including an order for VA to "reactivate" their respective Board appeals, in addition to requesting class action and class certification on behalf of all claimants similarly affected by erroneous appeal closures. VA did not oppose the joint filing of the petitioners.

Following oral argument on the merits, the Court ordered VA to provide some context as to the extent of any erroneously closed legacy appeals. In response, VA reported that, between May 15, 2017, and January 31, 2022, 5,456 legacy appeals were closed by VACOLS, and of those, 3,806, 69.8%, were erroneously closed, while otherwise complying with applicable laws and regulations for a perfected appeal, including those of the petitioners. VA reopened the appeals of the petitioners and argued before the Court that the claim brought by the petitioners was therefore moot.

While the Court agreed with the petitioners that they did not receive all their requested relief (i.e., declaratory relief under 38 U.S.C. § 7261(a)(2), "action of the [VA] unlawfully withheld or unreasonably delayed," and violation of the fair process principles of 38 C.F.R. § 19.32, Closing an appeal for failure to respond to Statement of the Case), the Court held that the petitioners did not have standing to seek declaratory relief that VA acted unlawfully.

Further, the Court declined class certification for the petitioners based on lack of adequacy and commonality. Regarding adequacy, the petitioners sought to represent a class of persons whose appeals were closed without notice. Because the petitioners had their respective appeals reopened, they were no

longer members of the class they sought to represent. Addressing commonality, the petitioners did not meet their burden to present common questions capable of class-wide resolution, notably, the lack of a requirement that its members had their appeals erroneously closed by VA without notice.

The petitioners agreed with the Court that their class action claim was moot due to the reopening of their respective Board appeals. However, the petitioners maintained that the issue was not moot regarding potential class members and argued in favor of class certification.

The Court declined to address whether class certification was moot as to a class of potential litigants, while acknowledging the "inherently transitory" exception, i.e., that an issue is not moot as to a class of persons, even after the petitioners' individual claims become moot, if the claimed harm has such a short or indefinite duration to consider certifying a class action. *Godsey v. Wilkie*, 31 Vet. App. 207, 219 (2019).

In closing, the Court added that it was "heartened that [VA] appears to have recognized the seriousness of the situation and has undertaken steps to address the issues that led to the filing of this action."

The Federal Circuit found that the Court abused its discretion in reviewing the petitioners' class certification request, that the Court erred in its standing analysis, having "confused standing with mootness," and vacated the Court ruling regarding standing, adequacy, and commonality.

As to adequacy, the Federal Circuit found that each of the petitioners, while eventually receiving notice that their respective appeals were closed, did not know their respective appeals were closed at the time the action was taken pursuant to a VACOLS error. Therefore, the petitioners suffered the same harm as potential class members and had no conflict of interest to prevent them from serving as class representatives.

Regarding commonality, the Federal Circuit found a common question to identify potential claimants, those with erroneously closed, yet timely perfected, appeals.

VA argued that it would be impossible to identify any potential class members because efforts to reactivate erroneously closed appeals due to VACOLS identifiers and criteria meant that no remaining class members existed. Ascertaining class members not identifiable through VACOLS would require VA "to manually review every single [] file closed for the lack of a substantive appeal since 2003," requiring "at least hundreds of thousands of workhours."

VA's argument, known as "administrative feasibility" in determining a class, was rejected by the Federal Circuit. As pointed out by the Federal Circuit, most circuit courts of appeal do not deny class certification based on lack of determinability simply because identifying class members is difficult or burdensome. Moreover, the Federal Circuit left the question of "superiority," whether resolution of the issue in question is better resolved on a case-by-case basis or by class certification, to the Court on remand.

Addressing mootness for a potential class of litigants, the Federal Circuit recognized that any individual claim on the issue would likely become moot as VA reactivated any timely perfected appeal it learned was erroneously closed, usually within days.

Where some claims are so inherently transitory that a court will not have enough time to rule on a motion for class certification before the proposed class representative's individual interest expires, the "relation back" doctrine applies, and the question of whether an issue is moot is considered as it stood when the complaint was filed. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (citing *Swisher v. Brady*, 438 U.S. 204 (1978)).

In conclusion, the Federal Circuit held that the inherently transitory exception applied to class

certification, but ultimately left the decision of how to best resolve the issue of litigation, i.e., individual versus class action, including the appropriate relief to a potential class of members, to the Court.

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

The Federal Circuit Reviews Avenues for Substitution: Caselaw, Regulations, and the Doctrine of Nunc Pro Tunc

by Mariana H. Monforte

Reporting on *Smith v. McDonough*, 112 F.4th 1357 (Fed. Cir. 2024).

In *Smith v. McDonough*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") evaluated several arguments for substitution presented by the claimant-appellant, Karen Hicks. Ultimately, the Federal Circuit affirmed the U.S. Court of Appeals for Veterans Claims' ("Court") denial of Ms. Hicks' motion to substitute, holding that Ms. Hicks could not pursue her father's claim.

Ms. Hicks's father, Thomas Smith, served in the Air Force and the National Guard. Due to a service-connected lower back disability, Mr. Smith used spa therapy. In 2007, Mr. Smith attempted to obtain Specially Adapted Housing benefits ("SAH") for a home spa, but Mr. Smith ended up building the spa before the Regional Office's ("RO") response regarding SAH. Eventually, the RO denied the SAH request, and Mr. Smith did not appeal.

A few years later, Mr. Smith filed to obtain reimbursement for the home spa, which both the RO and the Board of Veterans' Appeals ("Board") subsequently denied. Mr. Smith then appealed to the Court in August 2018 but died in June 2019 before briefs had been submitted. Instead of vacating the Board's decision and dismissing Mr. Smith's appeal, Ms. Hicks argued that she should be substituted for her father in order to continue pursuit of the appeal. In a majority decision, with one judge dissenting, the Court vacated the Board's decision and dismissed the appeal, finding that Ms. Hicks did not meet her burden to demonstrate substitution. Ms. Hicks appealed to the Federal Circuit.

Reviewing each issue *de novo*, the Federal Circuit considered whether the Court erred in denying substitution, whether Ms. Hicks should be permitted to pursue Mr. Smith's claim under 38 C.F.R. § 36.4406 (which governs reimbursement for SAH benefits), and whether the equitable doctrine of nunc pro tunc should be modified to allow substitution in this case.

Beginning with the first issue, the Federal Circuit determined whether Ms. Hicks's substitution was proper. Through 38 U.S.C. § 5121A, an individual can file for substitution if a claimant dies while an appeal of a decision regarding benefits is still pending. Following § 5121A, in *Breedlove v. Shinseki*, 24 Vet. App. 7 (2010), the Court held that the specific language in § 5121A, "appeal of a decision," exclusively means appeals before VA, excluding appeals at the Court. However, the Court noted that if someone seeks substitution before the Court, then the Court can use its discretion, but determining whether someone is eligible for substitution is a factual determination outside the Court's jurisdiction. The Court acknowledged that while VA is the entity that makes factual determinations to determine proper substitution, the Court can make subsequent determinations as to the substitution's validity when the issues before it are legal issues.

In response to Ms. Hicks's arguments, the Federal Circuit first discussed whether *Breedlove* could apply to nonperiodic benefits claims, like the SAH benefits at issue. However, the Federal Circuit found that it did not need to answer this issue of first impression since Ms. Hicks did not demonstrate she was an

eligible accrued-benefits claimant under § 5121A, which is necessary for *Breedlove* to apply. The Federal Circuit noted that despite having the opportunity to submit an application for benefits, Ms. Hicks did not apply for a VA eligibility determination as an accrued benefits claimant within one year of Mr. Smith's death, as required.

On appeal, Ms. Hicks argued that the Court should have unilaterally determined whether she was an eligible claimant, adopting the Court's dissenting opinion. Ms. Hicks presented several facts in support of her argument; however, the Federal Circuit confirmed that the Court does not have jurisdiction to make factual findings, and therefore her arguments under *Breedlove* could not succeed.

In a final argument under this first issue, Ms. Hicks argued that because she proceeded with filings in this case and filed a VA Form 21-22A, she timely provided notice of substitution, and therefore, a formal request for accrued benefits eligibility was not necessary. However, the Federal Circuit stated it did not have jurisdiction to evaluate this argument as it required a review of the record and her eligibility.

Moving to the second issue, Ms. Hicks argued that the Court erred in determining that 38 C.F.R. § 4406, which governs SAH benefits after the claimant's death, did not grant her substitution. The Court did not grant Ms. Hicks substitution because she did not apply for reimbursement within one year of Mr. Smith's death, as the regulation requires. On appeal, Ms. Hicks again presented several facts to demonstrate that the one-year requirement did not apply in her case. However, the Federal Circuit affirmed the Court, rejecting her argument as any interpretation rendering the one-year time limit inapplicable goes against the regulation's plain language.

In the third issue, Ms. Hicks argued that under the equitable doctrine of nunc pro tunc, she should be granted substitution. One of the three factors necessary to obtain substitution under the nunc pro tunc doctrine is "that the veteran died after the case was submitted to the Veterans Court for decision." Mr. Smith died before the case was submitted to the Court, so the court rejected Ms. Hicks' argument. On appeal, Ms. Hicks argued the Federal Circuit should expand this factor, which relied on *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007), for a more equitable interpretation and application. However, the Federal Circuit noted that the *Padgett* case was issued by a panel and constituted a binding precedential opinion. Therefore, the Federal Circuit affirmed the Court, rejecting Ms. Hicks's arguments for an expansive and more equitable interpretation of the nunc pro tunc doctrine.

Ultimately, the Federal Circuit affirmed the Court's denial of the motion to substitute, holding that Ms. Hicks could not pursue her father's claim.

Mariana Monforte is a 3L at Stetson University College of Law.

Receipt of a Board Decision is Presumed Even When Mailed to Only One of Two Addresses for Appellant's Counsel

by Meagan Lynch

Reporting on *Burgan v. McDonough*, 37 Vet. App. 448 (2024) (per curiam order).

In *Burgan v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") considered whether the presumption of regularity afforded to the Secretary is rebutted when a claimant's counsel uses both a post office (P.O.) box number and a physical street mailing address, but VA mistakenly sends a Board of Veterans' Appeals ("Board") decision only to the physical mailing address and whether use of counsel's physical address was consequential to delivery. The Court concluded that the appellant had not demonstrated that the use of only the street address was alone sufficient to rebut the

presumption, and granted the Secretary's motion to dismiss the appeal.

Mr. Burgan served in the US Marine Corps from 1965 to 1968 and from 1974 to 1976. He applied for and was denied entitlement to a total disability rating based on individual unemployability ("TDIU") in 2018. Mr. Burgan appealed this decision to the Board and appointed attorney Kenneth M. Carpenter as his representative in 2019. Mr. Burgan was denied entitlement to TDIU again in 2021. On Mr. Burgan's appointment form, he listed Mr. Carpenter's address as a P.O. box with a different ZIP code than the physical address that was listed in the Board decision. Mr. Burgan appointed a veterans service organization as his representative for a separate claim in 2022, and re-appointed Mr. Carpenter as his counsel in 2023 to file a Notice of Appeal (NOA) to the Court more than 2 years after the date of the Board's decision.

The Court first discussed timely filings of NOAs, which must be filed within 120 days of the date the Board decision was mailed. It then discussed the Court's practice of acting on matters of timeliness only when the Secretary raises the issue in a motion to dismiss within 45 days of filing the Board decision with the Court. When the Secretary files a motion to dismiss, an appellant may seek equitable tolling by demonstrating extraordinary circumstance that prevented timely filing or that he never received the Board decision due to a defect in mailing.

The Court then discussed the presumption of regularity in mailing. The presumption is that, put simply, what appears regular is regular. In determining whether an NOA is timely filed within the 120-day period, the Court presumes that the public officers properly completed their duties in accordance with the law. The Court applies this presumption to the VA administrative process as a whole, including mailing procedures by a regional office and the Board. The Court then discussed Mr. Burgan's ability to rebut the presumption by providing "clear" evidence that VA did not follow its regular practices regarding its mailing processes or that its procedures are not regular. The Court explained that for mailing practices, there must be an error consequential to delivery, such as an addressing error. If Mr. Burgan could meet this burden, then the burden shifts to the Secretary to establish proper mailing or actual receipt.

The Secretary moved to dismiss the appeal because 834 days had passed between the decision and NOA filing date without a showing of compelling reasons for Mr. Burgan's failure to submit his NOA on time. Mr. Burgan asserted that neither he nor his counsel received the Board decision, nor did they learn of it until 2023, shortly before the NOA was filed.

Mr. Burgan argued that although the mailing address on the copy mailed to him was accurate, the mailing address of the copy mailed to his counsel was incorrect, as it did not include the P.O. box number and contained the incorrect ZIP code. He also argued that the Secretary waived his right to assert the presumption of regularity.

The Secretary filed a preliminary record on May 6, 2024, which showed that the Board decision was mailed to Mr. Burgan and his counsel and included declaration from the Deputy Vice Chairman of the Board acknowledging the incorrect address on the decision mailed to Mr. Burgan's counsel. In a single-judge order, the Court determined that the presumption of regularity attached under the circumstances of the case, held the Secretary's motion to dismiss in abeyance, and ordered the parties to file supplemental memoranda explaining whether there is clear evidence to rebut the presumption and whether there was a consequential effect on the delivery of the Board decision.

In the supplemental briefing, Mr. Burgan first objected to the application of the presumption. He argued that the failure to use a complete accurate mailing address for the decision mailed to counsel was consequential to the delivery of the decision and therefore is clear evidence rebutting the presumption. He then conceded that if the mailing error was truly inconsequential, the Secretary's motion to dismiss must be granted. However, he argued that he successfully rebutted the

presumption of regularity, and the Secretary had not carried his burden.

The Secretary argued that Mr. Burgan only pointed to his counsel's non-receipt of the Board decision but did not argue the mailing issue regarding his own receipt of the Board decision. The Secretary then argued that the incorrect mailing to Mr. Burgan's counsel's physical address was due to the counsel's own error of providing an incorrect mailing address on the appointment paperwork, and noted that the decision was never returned to VA as undeliverable. The Secretary also argued that the omission of the P.O. box number and incorrect ZIP code was inconsequential because the street address and ZIP code listed on the Board decision is correct for counsel's physical address.

The appeal then went to panel and the Court issued its decision dismissing the appeal. The Court explained that the presumption of regularity can be determined though independent legal authority rather than evidentiary findings. The Court then looked to the facts of the case to determine whether the error in addressing the mail caused a consequential impact on delivery. Here, the Court, referred to the U.S. Postal Service's Domestic Mail Manual, which provides that when a piece of mail contains both a street address and a P.O. box number listed on separate lines, the priority is to deliver the mail to the address element immediately above the city, state, and ZIP code line. Here, the ZIP code listed matched that of the address immediately above the city, state, and ZIP code line. There is no argument made by Mr. Burgan that discussed his counsel's use of a dual mailing address, nor why use of only one of the addresses would be consequential to delivery.

The Court found that absent these errors, there was no demonstration that the Board's omission of the P.O. box was consequential to delivery. Additionally, Mr. Burgan made no argument as to how the mailing of the Board decision to his counsel's physical address, which was correct on the Board's decision, was irregular.

The Court found that Mr. Burgan failed to meet his burden to rebut the presumption of regularity and failed to demonstrate that the omission of the P.O. box information was consequential to the delivery of the Board decision to his counsel.

Because Mr. Burgan failed to meet these burdens, the Court found no reason to excuse the filing of the NOA after the 120-day period to appeal and dismissed the appeal. Mr. Burgan has filed an appeal of this order to the U.S. Court of Appeals for the Federal Circuit.

Meagan Lynch is a 3L at Stetson University College of Law.

Board Remands Remain Unappealable in Spite of the Changes Implemented by the Modern Appellate Framework

by David R. Seaton

Reporting on *Cooper v. McDonough*, No. 23-5963 (Vet. App. Sept. 18, 2024) (per curiam order).

In *Cooper v. McDonough,* John A. Cooper attempted to appeal a decision by the Board of Veterans' Appeals ("Board") to the Court of Appeals for Veterans Claims ("Court"). Unlike most appeals to the Court, the Board determination Mr. Cooper sought to appeal in this case did not adjudicate the veteran's claim on the merits but instead remanded the claim back to the agency of original jurisdiction (AOJ) for further development. Mr. Cooper contended that, in spite of these circumstances, the Board remand was appealable, arguing that the modernized review system implemented under the Appeals Modernization Act (AMA), Pub. L. No. 115-55, 131 Stat. 1105 (2017) rendered all Board decisions final, including Board remands. The Court rejected this argument, instead holding that Board decisions

cannot be considered final as their very nature anticipates further litigation.

In July 2023, the Court granted a joint motion by Mr. Cooper and the Department of Veterans Affairs ("VA") to remand a Board decision (the original decision) that was on appeal before the Court. The Court found that in the original decision, the Board did not properly analyze the impact of any of several recently declassified documents on the veteran's claims. Additionally, the Court found that the Board failed to reconcile inconsistent findings that were included in one of the VA examinations contained in the claims file. The Board responded to the joint motion by remanding the case back to the AOJ (the Board remand) to obtain an addendum report addressing the inconsistencies identified by the Court as well as to conduct any additional development the AOJ deemed necessary in light of the recently declassified documents identified by the Court.

Mr. Cooper appealed the Board remand back to the Court. The Secretary moved to dismiss Mr. Cooper's appeal on the grounds that the Board remand was not a final agency decision and thus unappealable to the Court. Mr. Cooper responded by arguing that – since under the modernized review system Board remands no longer automatically return to the Board – the AMA has fundamentally altered the nature of Board remands such that they may be considered final decisions for the purposes of establishing jurisdiction before the Court.

The Court began by comparing and contrasting the legacy appellate framework with the modern appellate framework. Specifically, before the passage of the AMA, appeals were commenced by filing a notice of disagreement before proceeding linearly through a series of waypoints: a statement of the case, a substantive appeal, and finally a Board decision. In the event that the Board remanded a claim back to the AOJ, the issue would be automatically returned to the Board upon the AOJ's completion of the Board's remand instructions. The Court noted that this single path with no off ramps led to a large backlog of cases; this was one reason for passage of the AMA.

Under the AMA, a claimant has multiple paths to challenge a case of which an appeal to the Board is but one, and cases that are remanded by the Board are not automatically returned to the Board. Rather, after complying with the Board's remand instructions, the AOJ issues a new decision which a claimant may or may not challenge, and the path that the claimant chooses may or may not be another appeal to the Board. Thus, the Court identified the congressional intent of the AMA as seeking to eliminate the backlog caused by a single path with no off ramps by creating multiple paths with off ramps.

Next, the Court reviewed jurisdiction under the legacy appellate framework. The Court observed that it only had jurisdiction over final decisions, which in turn necessitated defining exactly what a final decision is. The Court held that "a 'final decision' bears two discrete characteristics: (1) it is not tentative or interlocutory in nature but instead marks the 'consummation' of the agency's decision-making process; and (2) it is one by which 'rights or obligations have been determined' or from which 'legal consequences flow.'" The Court noted Board remands were traditionally found under the legacy appellate framework as "missing the mark on both fronts[, b]ecause they necessarily contemplate future litigation, [and therefore] . . . have been viewed as non-final and as falling short of effecting a grant or denial of benefits."

Finally, the Court turned to whether the AMA resulted in any changes to the Court's jurisdiction. The Court noted that the AMA, in spite all of its sweeping changes, did not alter the statutes that outline the jurisdiction of the Court, and, consequently, the jurisdiction of the Court remained based on the same three factors as before the AMA: "(1) whether a ruling constitutes a decision . . . ; (2) whether it is 'final' . . . ; and (3) whether it is adverse." Based on these criteria, the Court ultimately ruled that the fact that a remand "necessarily contemplates future litigation within

the Agency" serves as an "insuperable obstacle" to the veteran's argument. "[A] remand falls short on all three counts: it requires future litigation and so is non-final; it doesn't involve the grant or denial of a claim; and, aside from delay (the remedy for which is a mandamus petition), it's not adverse as there's no denial of benefits."

While the gravamen of the Court's reasoning seems to fairly conclusively shut the door on whether or not the Court will accept jurisdiction over appeals of remands, the Court did leave one important door open: namely, the ability to seek a writ of mandamus or some other form of extraordinary relief pursuant to 28 U.S.C. § 1651. In the event a veteran alleges that the remand constitutes an unnecessary delay, then a claimant may file suit in the Court seeking extraordinary relief. Although not technically an appeal, this *potentially* could be used to appeal a remand in all but name.

Under the modernized review system, the Board may not remand a decision simply due to error by the AOJ; rather, a remand is not appropriate if "the issue or issues can be granted in full." 38 C.F.R. § 20.802(a). Consequently, a veteran – assuming the presence of a favorable enough fact pattern – could challenge a Board remand through a petition for extraordinary relief by arguing that the facts of record were sufficient to grant the claim in full and that the Board should be required to do so.

This possibility must be held in stark relief against the fact pattern that the Court was considering in *Cooper*. Not only did Mr. Cooper fail to procedurally characterize the claim as a petition for mandamus or extraordinary relief, but the Court held that in joining the Secretary in a joint motion to remand the original case back to the Board, Mr. Cooper essentially conceded that the relief that the Board had ordered was necessary to the ultimate resolution of the claim. "Based on the July 2023 [joint motion for remand (]JMR[)] he [, the veteran,] all but endorsed the Board's development."

In sum, in *Cooper*, the Court ruled that Board remands remained interlocutory decisions regardless of the sweeping changes of the AMA, and that the Court no more had the jurisdiction to review Board remands under the modernized review system than it did under the legacy appellate framework. Nevertheless, the Court left open one possible avenue to challenge a Board remand: a petition for mandamus or other extraordinary relief. This narrow caveat aside, Board remands remain unappealable.

David R. Seaton 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 Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Court Addresses SMC Aid and Attendance for Veterans with TBI

by Amanda Medley

Reporting on *Laska v. McDonough*, No. 22-1018 (Vet. App. Sept. 6, 2024).

In *Laska v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") held that VA exceeded its authority under 38 U.S.C. § 1114(t) by requiring a "higher level of care" rather than "regular aid and attendance" in determining eligibility for special monthly compensation (SMC) due to traumatic brain injury (TBI). The Court set aside and invalidated 38 C.F.R. § 3.352(b)(2)(ii), finding that VA exceeded its authority by requiring a higher level of care than Congress intended.

The statutory provisions addressing special monthly compensation have two different "types" of aid and attendance: "regular" aid and attendance, and a "higher level of care." The former is addressed in 38 U.S.C. § 1114*(l)*. The latter, addressed in 38 U.S.C. § 1114(r)(2), provides the greatest level of SMC benefits for veterans who require a higher level of care in addition to regular aid and attendance, *and* in the absence of such care would require hospitalization,

nursing home care, or other residential institutional care. 38 U.S.C. § 1114(r)(2).

Section 1114(r)(2) defines this higher level of care as "personal health-care services, provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional." *Id.*

Additionally, Section 1114(t) uniquely addresses veterans with TBIs. It provides that for any veteran who is in need of regular aid and attendance due to TBI residuals, and is not otherwise eligible for compensation under Subsection (r)(2), *and* in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care, then the veteran shall be paid at the SMC(r)(2) rate – i.e., at the "higher level of care" rate.

Thus, the language of Section 1114(t) tracks Section 1114(r)(2) in stating that in the "absence" of the referenced care, the veteran would require residential institutional care, but the "absence" of the type of care referenced is different between the two sections. Section 1114(r)(2) refers to a higher level of care (i.e., licensed in-home health care providers), whereas Section 1114(t) does not contain this language — it refers to regular aid and attendance.

VA's implementing regulation with respect to SMC(t) for TBI veterans, 38 C.F.R. § 3.352(b)(2), adopted the "higher level of care" language, stating, in pertinent part, that a veteran with TBI would be authorized to receive the higher level of aid and attendance amount (i.e., the SMC(r)(2) rate), if the veteran required a higher level of care (as defined in subsection (r)(2)), and, in the absence of such higher level of care, would need residential institutional care.

In the underlying appeal, the veteran, Mr. Haskell, sought entitlement to SMC(t) based on his TBI residuals. The Board had initially remanded the matter for further development, and the record contained multiple opinions regarding the level of care Mr. Haskell required due to the residuals of his TBI. Ultimately, the Board credited one VA opinion over other opinions that were more favorable to the Mr. Haskell, finding that he only required "regular" aid and attendance from his spouse, Ms. Laska, but did not require at-home, daily, personal services provided by a licensed health-care professional. Therefore, as Mr. Haskell did not require a higher level of care, the Board denied entitlement to SMC(t).

During the course of the appeal, Mr. Haskell died, and Ms. Laska, as his surviving spouse, was substituted as the appellant. She argued that the plain language of Section 1114(t) did not require a higher level of care, and that the implementing regulation for SMC(t), section 3.352(b)(2), exceeded the authorizing statute by improperly imposing Section 1114(r)(2)'s higher-level of care requirement onto SMC(t).

The Court agreed, holding that the plain language of Section 1114(t) definitively specified that the level of care needed for SMC(t) was the need for regular aid and attendance. The Court noted that although subsection (t)'s third requirement borrowed the language of subsection (r)(2) in referencing the need for "hospitalization, nursing home care, or other residential institutional care," "in the absence of such regular aid and attendance," it did not reference or restate subsection (r)(2)'s requirement for a higher level of care.

The Court thus found that the regulation, in engrafting a requirement for a higher level of care for SMC(t), was at odds with the plain language Congress had used in choosing to compensate the disabling cognitive, psychological, and other effects of TBI at the same rate as disabilities required for entitlement under subsection (r)(2). The Court noted that it would make little sense for Congress to have created a separate provision for TBI in the first place, if the SMC(t) requirements to obtain the SMC(r)(2) rate were identical to the SMC(r)(2) requirements of a higher level of care, as with anatomic loss, blindness, or deafness. The fact that

Congress drafted a separate section, specific to TBI, and explicitly used a different and well-known standard — "regular aid and attendance" — in that section, was evidence that SMC(t) did not require a higher level of care.

In short, the Court held that the plain language of Section 1114(t) provides that where a veteran suffering from TBI residuals would require residential institutional care *in the absence of regular aid and attendance*, then the veteran is eligible for SMC at the (r)(2) rate, even though subsection (r)(2) itself would require residential institutional care for the applicable physical disabilities in the absence of a "higher level of care," rather than regular aid and attendance. TBI is a specific carve-out.

The Court also addressed the legislative history of subsection (t), noting that many veterans with TBIs require a high level of assistance distinct from veterans with physical disabilities. For example, veterans with TBI not only need assistance with tasks they can no longer perform but need someone to facilitate tasks they cannot keep up with. In the veteran's case, the evidence reflected he needed constant reminders from Ms. Laska for medication and safety, and that he could not drive or attend medical appointments alone due to memory problems. The Court highlighted that in designating subsection (t), Congress had recognized that veterans with TBI may require 24-hour care, supervision for safety, assistance with most higher-level activities, or prompting or much longer time to perform activities of daily living than they did pre-injury, and that such assistance can be provided by a family member rather than by a licensed health-care professional.

Accordingly, the Court vacated the Board's January 2022 decision that denied entitlement to SMC(t), set aside the regulation 38 C.F.R. § 3.352(b)(2) as invalid, and remanded the claim for further adjudication. The Board was instructed to readjudicate the SMC(t) claim in accordance with the "plain language" of Section 1114(t).

Additionally, the Court noted that the parties had conceded that the Board erred in failing to adequately explain why it assigned higher probative value to one medical opinion than to other, more favorable, opinions. This provided an additional basis for remand to the Board.

In summary, although the rate of payment for SMC(t) is the same as the SMC(r)(2) rate, the standards are not. In determining eligibility for SMC(t) based on the need for aid and attendance due to residuals of TBI, the requisite level of care required is the need for "regular aid and attendance," addressed in 38 U.S.C. § 1114*(l)*, which is often provided by a family member, and not the "higher level of care" addressed in 38 U.S.C. § 1114(r)(2), which is provided by a licensed in-home health care provider. If, in the absence of such regular aid and attendance, the veteran would require residential institutional care, then the veteran meets the criteria for SMC(t), paid at the SMC(r)(2) rate.

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

Deference Afforded to VA's Interpretation of Ambiguous Regulations in Precedential Decisions pre-*Kisor v. Wilkie*

by Rochelle O. Brunot

Reporting on *Rorie v. McDonough*, 37 Vet. App. 430 (2024).

In *Rorie v. McDonough*, a panel of the U.S. Court of Appeals for Veterans Claims ("Court") held that the deference to the Department of Veterans Affairs' ("VA") interpretation of 38 C.F.R. § 3.157(b) in

Pacheco v. Gibson, 27 Vet. App. 21 (2014) (en banc) remained binding despite the ruling in *Kisor v. Wilkie*, 588 U.S. 588 (2019). The Court determined that under the principle of horizontal *stare decisis*, prior precedential decisions should only be revisited when the rulings are "clearly irreconcilable" with the change in case law by the relevant court of last resort.

By way of background, in June 1970, Mr. Rorie filed a service connection claim for flat feet. In October 1970, the Regional Office ("RO") granted service connection for bilateral pes planus and assigned a noncompensable disability rating. In March 1974, the disability rating was increased to 10 percent. In August 1980, Mr. Rorie was diagnosed with tinea pedis. In April 1983, Mr. Rorie submitted a statement seeking re-evaluation of his foot condition due to increased pain and a worsening skin irritation on his feet. This statement was characterized as an increased rating claim for Mr. Rorie's service-connected bilateral pes planus and a service connection claim for his tinea pedis. These claims were denied in a July 1983 rating decision. He appealed the decision, and in March 1985, the Board of Veterans' Appeals ("Board") denied the claims.

On August 5, 1985, Mr. Rorie underwent a VA examination that noted his treatment for a fungal infection in both feet. On November 6, 1987, VA received a statement from Mr. Rorie requesting an increased rating for his service-connected disabilities because his "service-connected disability rating [was] worsening due to a continual worsening of compensa[]ble related conditions previously identified." Then, on November 18, 1988, Mr. Rorie sent a letter expressly concerning his tinea pedis claim and asked that it be addressed along with his pending hearing loss claim. This request was characterized as a request to reopen his previously denied tinea pedis service connection claim. In January 2010, the RO granted the service connection claim for tinea pedis, with an effective date of March 1, 2007, based on examination findings. However, a May 2020 Board decision determined the proper effective date was November 18, 1988.

Mr. Rorie appealed this decision, seeking an earlier effective date. In December 2021, the Court returned the case to the Board to address whether the veteran's November 1987 correspondence constituted a service connection claim for tinea pedis. In an August 2022 decision, the Board concluded that the November 1987 letter was an increased rating claim for Mr. Rorie's bilateral pes planus. Further, there was no evidence of an informal claim prior to November 18, 1988, and after the March 1985 Board denial. Thus, the effective date of November 18, 1988, for Mr. Rorie's tinea pedis was continued.

Mr. Rorie appealed the decision asserting that he was entitled to an effective date of August 5, 1985. He articulated two arguments in support of his contention, but the Court noted that one of his arguments would not be addressed because it was not raised in his initial brief. Mr. Rorie asserted that the August 5, 1985, VA examination constituted an informal claim pursuant to 38 C.F.R. § 3.157(b) (1985). The regulation stated that "once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of the following will be accepted as an informal claim for increased benefits or an informal claim to reopen."

The regulation went on to indicate that the types of documents accepted as an informal claim included reports of examination or hospitalization by VA, with the date of outpatient or hospital examination to be accepted as the date of receipt of claim. In 1987, this provision was amended to specify that 38 C.F.R. § 3.157(b)(1) only applied when "such reports relate to examination or treatment of a disability for which service-connection has previously been established or when a claim specifying the benefit sought is received within one year from the date of such examination, treatment or hospital admission."

In *Pacheco v. Gibson,* 27 Vet. App. 21 (2014), the Court determined that the part of 38 C.F.R. § 3.157(b) permitting the use of an examination report to reopen a claim was ambiguous. VA interpreted the regulation to mean that examination reports could

only be used to reopen service connection claims that were previously denied because the disability had not manifested to a compensable degree. The U.S. Supreme Court ("Supreme Court") held in *Auer v. Robbins*, 519 U.S. 452 (1997), that federal courts should defer to an agency's reasonable interpretation of an ambiguous regulation unless the interpretation is inconsistent with language in the regulation, is clearly erroneous, or does not represent the agency's considered view on the matter. In considering *Auer*, the Court determined that deference should be afforded to VA's interpretation of the regulation. Therefore, in *Pacheco*, the Court held that subsequent VA treatment records may only be used to reopen a service connection claim when the claim was initially denied because it was not compensable.

Mr. Rorie conceded that under the regulatory interpretation provided in *Pacheco*, he was not entitled to an earlier effective date for his tinea pedis service connection claim. His claim was not denied because it was noncompensable. Thus, the August 1985 VA examination would not qualify as a permissible VA treatment record to reopen his service connection claim. Instead, Mr. Rorie argued that the Supreme Court's ruling in *Kisor v. Wilkie*, 588 U.S. 588 (2019), challenged when administrative agencies are afforded deference for their interpretations of ambiguous regulations. Accordingly, the Court was not bound by the ruling in *Pacheco*, based on an *Auer* analysis, that deferred to the VA's interpretation of 38 C.F.R. § 3.157(b).

The Court considered whether the ruling in *Kisor* applied only to future cases or whether prior decisions in which courts deferred to an agency's interpretation should be reconsidered. The Court noted that it faced this issue in *LaBruzza v. McDonough*, 37 Vet. App. 111 (2024). In *LaBruzza*, the Court considered whether it was bound by the prior regulatory interpretation set forth in *Cantrell v. McDonough*, 28 Vet. App. 382 (2017). In *Cantrell*, the Court deferred to VA's interpretation of "employment in a protected environment" in C.F.R. § 4.16, based on the *Auer* doctrine. Consequently, in *LaBruzza*, the Court concluded that based on *Kisor*, it needed to reconsider the deference afforded to VA's regulatory interpretation of "employment in a protected environment" in *Cantrell*.

Since the *Kisor* ruling, the Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruling its decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* doctrine previously provided the framework for determining when federal courts should defer to administrative agencies. However, in *Loper Bright*, the Supreme Court specifically indicated that it was not calling into question previous cases that had relied on the *Chevron* doctrine.

The Court concluded that it should not follow the analysis set forth in *LaBruzza* concerning whether to revisit cases decided under the *Auer* doctrine. The Court was careful to note that it was not holding that the *LaBruzza* decision was incorrect in its analysis. At the time of the *LaBruzza* decision, *Loper Bright* had not been decided. Furthermore, the Supreme Court's decision in *Kisor* provided no direction on how prior precedential decisions that interpreted ambiguous regulations should be considered.

To determine how previous decisions should be handled, the Court adopted the holding of *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003), which found that prior precedential decisions should not be overturned unless the previous decision is "clearly irreconcilable" with the new decision rendered in the relevant court of last resort. Applying *Miller*, the Court determined that using the *LaBruzza* approach to revisiting existing precedent based on *Kisor* was "clearly irreconcilable" with the holding of *Loper Bright*. Based on the ruling in *Kisor*, the Court in *LaBruzza* determined that it was necessary to revisit the deference afforded to VA's interpretation of an ambiguous regulation. Conversely, in *Loper Bright*, the Supreme Court indicated that the change in deference afforded to an agency's interpretations should apply to future cases.

While *Kisor* and *Loper Bright* addressed different frameworks for agency deference, both cases considered how federal courts should interpret

ambiguous controlling legal authority. Additionally, both cases challenged the pre-existing legal framework and presented the same issue on whether the new analysis should apply to existing cases. Accordingly, the Court was bound by *Pacheco*, a precedential decision, and its holding concerning when a service connection claim may be reopened under 38 C.F.R. § 3.157(b). As noted by Mr. Rorie, under this interpretation of 38 C.F.R. § 3.157(b), his argument for an earlier effective date fails. Thus, the Court affirmed the Board's denial of an earlier effective date of August 5, 1985.

The Court also addressed Mr. Rorie's contention that he was entitled to an earlier effective date of November 6, 1987. He asserted that his November 1987 letter was an attempt to re-raise his tinea pedis service connection claim. As evidence, Mr. Rorie noted that his correspondence used the phrase "compensable related conditions previously identified" because he considered his pes planus and tinea pedis as one claim. Mr. Rorie asserted that the Board's finding that his correspondence did not constitute an informal claim failed to comply with the requirements set forth in *Shea v. Wilkie*, 926 F.3d 1361 (Fed. Cir. 2019), which provides that when identifying the benefit sought, a claim should be sympathetically read.

The Court noted that determining whether a claimant filed an informal claim is a finding of fact made by the Board. The Court only reviews findings of fact for clear error. A factual finding is only reversed when there is a "definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948)).

The Court noted that the Board discussed that in Mr. Rorie's November 1987 letter, he specifically requested a re-examination of his service-connected disabilities, which at the time included bilateral pes planus, not tinea pedis. The Board noted that unlike in *Shea*, Mr. Rorie's letter failed to provide any specific evidence suggesting service connection was warranted. Even considering Mr. Rorie's claim sympathetically, it did not constitute a claim to reopen his service connection claim for tinea pedis. The most reasonable interpretation of Mr. Rorie's letter was as an increased rating claim for his service-connected bilateral pes planus. The Court determined that the Board's finding that Mr. Rorie's November 1987 letter was not an informal service connection claim decision complied with the requirements in *Shea*. Therefore, the Court affirmed the Board's decision that Mr. Rorie was not entitled to an earlier effective date of November 6, 1987 for his tinea pedis service connection claim.

Rochelle O. Brunot 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 Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Court Considers Sanctions after the Secretary Fails to Correct, Prior to Oral Argument, Statements Made to the Court Concerning a Veteran Spouse's Ability to Pay Familial Expenses as VA Fiduciary

by C. Jeffrey Price

Reporting on *Shorette v. McDonough*, No. 23-7775 (Vet. App. Sep. 20, 2024).

In *Shorette*, the Court of Appeals for Veterans Claims ("Court") issued a *per curiam* order that addresses issues related to the petitioner, Karen Shorette, serving as VA fiduciary for her veteran spouse and the receipt of benefits as the veteran's dependent to cover the family's expenses. Although the Court did not issue a memorandum decision resolving the merits of the case, of particular note here is the Court's "show cause" order requiring the Secretary to explain why sanctions should not be imposed against him. That is, the Court's order notes that, in response to prior orders for supplemental briefing, the Secretary made written

representations to the Court that were later contradicted by the Secretary at oral argument.

Mrs. Shorette previously filed a petition related to her role as the veteran's Department of Veterans Affairs ("VA") fiduciary, which resulted in the Court's published *per curiam* order in *Shorette v. McDonough*, 36 Vet. App. 297 (2023). In that case, VA had, in error, removed Mrs. Shorette as the VA fiduciary in November 2018, and from that point on the VA-appointed successor fiduciary for the veteran refused to allocate any benefits for the veteran's dependents, such as family expenses. In March 2021, the VA determined the removal of Mrs. Shorette as VA fiduciary was wrong. Yet, VA did nothing to restore her as fiduciary. VA's inaction prompted Mrs. Shorette to file her first petition with the Court in April 2022, which resulted in the prior published order.

However, the issue regarding the payment of past familial expenses went unresolved and returned to the Court when Mrs. Shorette filed a second petition in December 2023. The petition in this matter asserts, among other things, that despite prior Court proceedings, VA did nothing to address Mrs. Shorette's repeated complaints that the fiduciary had not been providing for the veteran's dependents since 2018.

On May 2024, the Court ordered the parties to file memoranda of law addressing in part whether the petitioner's letters requesting reimbursement for familial expenses entitle her to a written decision from VA. Given the Secretary's contention that VA does not possess the veteran's funds and that it is the fiduciary who makes decisions regarding expenditures, the Court further ordered the Secretary to explain whether Mrs. Shorette, acting in her role as fiduciary, would require VA's permission to reimburse herself, as the veteran's dependent, for those expenses unpaid from 2018. In response, the Secretary submitted a declaration from a management and program analyst with the Pension and Fiduciary Service. Significantly, the analyst responded to the Court's inquiry that "[y]es, the fiduciary must provide evidence that reimbursement is warranted before VA will authorize a reimbursement of funds." The analyst further stressed that Mrs. Shorette's failure to comply with a budget outlined in a notification letter could result in another fiduciary replacement.

At oral argument, held on August 27, 2024, the Secretary conceded numerous errors made by VA and the prior paid fiduciary related to the disbursement of funds to the beneficiary and his dependents. The Court's order specifically sets forth ten separate concessions by the Secretary. In short, VA admittedly erred in 2018 when it determined that Mrs. Shorette misused the veteran's funds, VA compounded that error over the next six years by ignoring Mrs. Shorette's complaints, and VA failed to ensure the paid fiduciary was fulfilling his duties to assess the welfare and overall financial situation of the veteran's dependent.

Given these concessions, the Court ordered the Secretary to file a supplemental memorandum addressing why VA is unwilling to make a preemptive decision that it will not initiate a misuse determination or seek to remove Mrs. Shorette if she reimburses herself the amount of familial expenses that was in the prior budget but unpaid. The Court also ordered that, after the supplemental briefing, the parties participate in another conference with the Court's Central Legal Staff to discuss whether there is a mutually agreeable resolution to the matter.

Finally, the Court noted that the Secretary filed at least two pleadings representing to the Court that it is the VA-appointed fiduciary, not VA, who is responsible for managing a beneficiary's funds and determining the best interests of the beneficiary and the beneficiary's dependents. Yet, the Secretary's responses at oral argument contradicted these statements in the pleadings. Furthermore, the Court noted that it relied in part on the VA's management and program analyst's declaration to prepare for oral argument only for the Secretary to then disavow those representations. Thus, the Court ordered the Secretary to show cause why counsel's failure to correct statements that the VA

knew to be false prior to the oral argument is not an abuse of the judicial process that warrants sanctions.

Jeffrey Price is an appellate attorney at National Veterans Legal Services Program (NVLSP).

The Court Clarifies the Evidentiary Window of the AMA Hearing Docket When the Board Reschedules an Appellant's Board Hearing *Sua Sponte*

by Rebecca "Beck" Webster

Reporting on *Spigner v. McDonough*, No. 22-2636 (Vet. App. Nov. 7, 2024).

In *Spigner v, McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") held that when the Board of Veterans' Appeals ("Board") reschedules a hearing without a request from the veteran, it is not subject to 38 C.F.R. § 20.704(d), and therefore, evidence submitted within 90 days of the originally scheduled hearing is properly before the Board.

Mr. Spigner's appeal stems from a September 2014 claim for service connection for hearing loss and throat cancer that was denied by the agency of original jurisdiction (AOJ) in December 2015. He timely appealed the decision and opted into the Rapid Appeals Modernization Program (RAMP) through the higher-level review (HLR) lane. The AOJ denied service connection for hearing loss and throat cancer again in a July 2018 HLR decision. Mr. Spigner timely appealed the decision and elected the hearing docket.

In March 2021, the Board notified Mr. Spigner that his hearing was scheduled for May 25, 2021. This hearing was rescheduled due to a scheduling conflict. In June 2021, VA sent a letter to notify Mr. Spigner that his hearing was rescheduled for August 18, 2021, but he never received the letter due to a mailing contractor error.

On August 18, 2021, the date of the hearing, the Board notified Mr. Spigner that the hearing was rescheduled for October 5, 2021. On September 29, 2021, the Veteran submitted additional evidence to VA supporting his claims, and VA acknowledged receipt of the submission. On October 1, 2021, Mr. Spigner reported that he did not receive notice of the August 2021 Board hearing, and that he had new and relevant evidence to submit to the Board in support of his claim.

Mr. Spigner was afforded a Board hearing on October 5, 2021. During the hearing, the veterans law judge (VLJ) informed Mr. Spigner that the evidence he submitted in September 2021 could not be considered because it was not submitted during the proper evidentiary window. The VLJ advised him to resubmit the evidence within 90 days following the hearing.

The Board issued the decision on appeal in March 2022, denying service connection for hearing loss and throat cancer. It found that it could only consider evidence that was submitted prior to the April 2018 RAMP opt-in, or within 90 days following the October 5, 2021, Board hearing. Further, the Board determined that because Mr. Spigner had submitted evidence outside this window when he was advised to resubmit the evidence, and did not do so, it lacked legal authority to review the evidence submitted in September 2021. Mr. Spigner timely appealed to the Court.

The question before the Court was whether the Board had the legal authority to consider the evidence submitted in September 2021 given the strict evidentiary windows established under the Appeals Modernization Act (AMA) in 38 C.F.R. § 20.302.

In relevant part, 38 C.F.R. § 20.302(a) states that when an appellant elects the hearing docket, the Board's decision will be based on: "(1) Evidence of record at the time of the agency of original jurisdiction's decision on the issue or issues on appeal; (2) Evidence submitted by the appellant or his or her representative at the hearing, to include

testimony provided at the hearing; and (3) Evidence submitted by the appellant or his or her representative within 90 days following the hearing."

However, under 38 C.F.R. § 20.302(c), if an appellant does not attend a scheduled hearing and the hearing "is not rescheduled subject to § 20.704(d), the Board's decision will be based on a review of evidence described in paragraph (a)(1) of this section, and evidence submitted by the appellant or his or her representative within 90 days following the date of the scheduled hearing."

Mr. Spigner argued that the Board should have considered the evidence he submitted in September 2021 because he submitted the evidence within the 90-day window following the original date of the Board hearing.

In contrast, the Secretary argued that 38 C.F.R. §20.302(a) creates a bright-line rule establishing that an appellant is only able to submit evidence within 90 days following the rescheduled Board hearing.

The Court reviewed the text of 38 C.F.R. §20.302(c), relying on a plain language analysis to clarify that "the ability of an appellant to submit evidence within 90 days of a scheduled Board hearing is restricted only where § 20.704(d) is in play and applies."

38 C.F.R. § 20.704(d) provides that when an appellant fails to appear for a scheduled hearing, "and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn" unless good cause is shown.

The Court swiftly disposed of the notion that 38 C.F.R. § 20.704(d) applied in Mr. Spigner's case, as the veteran did not request that the Board reschedule the hearing. Rather, the Board rescheduled the hearing *sua sponte*, which is not considered a withdrawal.

The Court then reasoned that, because Mr. Spigner's hearing was not rescheduled subject to 38 C.F.R. § 20.704(d), the Board was required to base its review on the evidence of record at the time of the AOJ decision and evidence submitted by Mr. Spigner within 90 days following the date of the originally scheduled hearing under 38 C.F.R. § 20.302(a), (c).

The Court ultimately held, that because the Board rescheduled Mr. Spigner's hearing *sua sponte*, rather than at his request, and the Board's prompt rescheduling is inconsistent with withdrawal procedures, the Board was required to consider the evidence the veteran submitted on September 29, 2021. Accordingly, the Court vacated the Board's decision and remanded Mr. Spigner's claims for service connection for hearing loss and throat cancer.

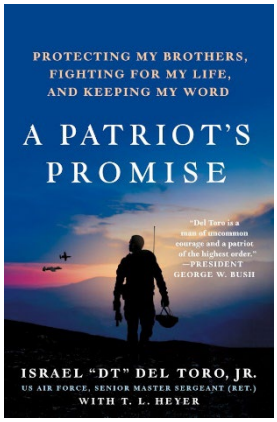
Rebecca "Beck" Webster is an Attorney-Advisor at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Book Review of *A Patriot's Promise: Protecting My Brothers, Fighting for My Life, and Keeping My Word*

by Israel "DT" Del Toro, Jr. with T.L. Heyer.

MacMillan Publishers, St. Martin's Press, New York, 2023. $27.00 (hardcover). 288 pages.

Review by Briana Tellado



Del Toro, a retired senior master sergeant in the U.S. Air Force, begins *A Patriot's Promise* by describing "a bad day at work"—perhaps the understatement of the year. He's hunting for a high-value target in Afghanistan. The Humvee that he's riding in explodes, setting him on fire. Undoubtedly the most suspenseful scene in the book, Del Toro ropes in the reader by opening with it.

Chapter two reverts to a phone conversation that serves as the basis for the book's title: Del Toro is a teenager in Chicago, and his father is calling from Mexico, where he's being treated for a fatal heart and lung condition. In what turns out to be their last conversation, Del Toro, Sr., asks his son to promise to take care of his siblings. When Del Toro, Jr.'s mother dies just a year later, the promise turns out to be more important than he could have imagined. The first part of the book concludes with Del Toro's early career in the Air Force, his multiple deployments, marriage, and the birth of his son before he deploys to Afghanistan.

The book then revisits the explosion and Del Toro's transfer to a hospital in San Antonio to recover, having sustained burns to over 80% of his body and eventually having over 150 surgeries. As he's in a coma for 4 months, this part of the book focuses on his wife's struggles. Carmen returned to her native Mexico so her family could help her care for her three-year-old child while Del Toro was deployed.

Although Carmen joins the author at the hospital by the time he wakes up from his coma, she is met with resistance and difficulty at each turn along the way. Aside from having no money, no job, no car, and no driver's license, she barely speaks any English and has problems getting into and staying in the country because she wasn't a citizen. Her experience is so well written that I became frustrated and angry on her behalf. During my time as a judge advocate in the Army, predeployment training always involved soldier readiness processing (SRP). This was a day for the servicemember to prepare for the worst—draft a will, sign powers of attorney for the spouse to have access to the bank account, authorize someone else to drive the car while it's in storage, etc. I couldn't help but wonder if Del Toro went through something like an SRP before he deployed because his experience could serve as a case study of what not to do.

The third part picks up as Del Toro discovers his talent at adaptive sports and competes in cycling, shooting, and track and field at the Invictus Games and the Paralympics. He decides to continue his active-duty career even though he's now 100% disabled and had his fingers amputated. He learns that while he was in a coma, President George W. Bush awarded him the Purple Heart. He becomes an advocate for disabled airmen, specifically those who suffered burns, to improve the landscape for injured airmen who come after him.

As an airman-turned-public speaker, he continues to advocate for himself and others. For example, as someone with smoke inhalation wounds, Del Toro struggles to breathe on a good day. So on a bad day, wearing a COVID mask is like asking him to stop breathing. The skin grafts on his face make it too painful. And the masks that loop around the ears were also out of the question. His ears were burned off. When refused entry to the base commissary during COVID for not wearing a mask, he advocated to the base commander to reconsider the mask mandate for all on-base facilities.

Overall, the book is a quick read, and it does a good job of highlighting the struggles that family members endure while a loved one is serving in the military or recovering from battle wounds. It also highlights how veterans can continue to serve and succeed—in or out of uniform—after injury.

Briana Tellado is a U.S. Army veteran and a legal editor at the U.S. Court of Appeals for Veterans Claims.

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.

Special thanks to Jon Hager for his help with the Veterans Law Journal. His contributions were made in his personal capacity and not on behalf of the government.