VETERAN'S LAW UPDATE: March 2015
Amy B. Kretkowski, Veterans Law Attorney

Summaries of Precedential Cases Issued by
the U.S. Court of Appeals for Veterans Claims and
the U.S. Court of Appeals for the Federal Circuit

Wingard v. McDonald, 779 F.3d 1354 (Fed. Cir. Mar. 10, 2015)
38 U.S.C. § 7252(b); REVIEW OF VA'S RATING SCHEDULE
Held: 38 U.S.C. § 7252(b) precludes CAVC review of challenges to the content of VA's rating schedule. The Federal Circuit, in turn, is precluded from reviewing the CAVC's refusal to review a challenge to the rating schedule.

Veteran was service connected for inguinal hernia, rated 0%. After he died, from nonservice-connected conditions, his daughter filed claims for burial plot or internment allowance and burial benefits. She was awarded the burial plot/internment allowance, but denied burial benefits, which are only available to veterans who are "in receipt of compensation" or pension. Because the veteran was rated 0%, VA determined that he was not "in receipt of compensation" and, therefore, not entitled to burial benefits.

At the Veterans Court, the daughter argued that "in receipt of compensation" should be interpreted to include a veteran who was *entitled* to receive compensation. She also argued that 38 U.S.C. §§ 1110 and 1155 prohibit VA from assigning a 0% rating for a service-connected condition because § 1155 directs VA to create a rating schedule that provides "ten grades of disability and no more" in 10% increments, from 10 to 100. By assigning 0% ratings, VA had created an 11th rating.

The Veterans Court first addressed its jurisdiction to review this issue. The Court found that even though 38 U.S.C. § 7252(a) excludes the rating schedule and any VA action "in adopting or revising that schedule" from its review, the Court was not precluded "from deciding whether the Secretary properly adopted a non-compensable disability rating." The Court then held that VA's interpretation of 38 U.S.C. §§ 1110 and 1155 as allowing VA to assign 0% ratings was reasonable. The Court thus concluded that the veteran was not "entitled to compensation" and denied the appeal.

The Federal Circuit disagreed with the Veterans Court's initial determination regarding its jurisdiction to even review this issue, stating that Congress precluded the Court from reviewing VA's rating schedule, and that § 7252(b) "squarely precludes the Veterans Court from determining whether the schedule, by including a 0% rating, substantively violates statutory constraints." The Federal Circuit noted that this case did not involve a constitutional challenge, a question of regulatory interpretation related to the schedule,

or a purely procedural challenge, but rather "[i]t involves a substantive challenge to the schedule as conflicting with the statute." As such, the Court stated that "our precedent is clear in giving effect to the statutory language: § 7252(b) 'broadly preclud[es] judicial review of the contents of the disability rating schedule.'" (citing *Wanner v. Principi*, 370 F.3d 1124, 1130 (Fed. Cir. 2004)). The Court reiterated that this statute "'removes from the Veterans Court's jurisdiction *all* review involving the content of the rating schedules and the Secretary's actions in adopting or revising them.'" The Court further concluded that the statute specifically barred its review of the Veterans Court's refusal to review the rating schedule and that the "statutory scheme" – including §§ 502, 7252, and 7292 – "'consistently excludes from judicial review all content of the rating schedule.'" *Id*. The Court reiterated that it is precluded "from reviewing, on appeal from the Veterans Court, a substantive statutory challenge to [VA] rating-schedule regulations."

Rickett v. McDonald, 27 Vet.App. 240 (en banc order) (Mar. 10, 2015)
TREATMENT OF APPEAL WHEN APPELLANT DIES PRIOR TO DECISION
Held: When an appellant dies during the pendancy of an appeal and no one seeks to substitute for the deceased appellant, "the Court will withdraw its orders disposing of substantive matters in the case that were issued after the appellant's death."

This case stems from an April 2009 appeal of a November 2008 Board decision. In July 2009, the Secretary filed a motion to dismiss based on the untimely filing of the appeal. The Court granted the motion, dismissed the appeal, and the appellant appealed to the Federal Circuit. The Federal Circuit held that the appeals deadline was not jurisdictional and remanded the case to the CAVC. In December 2011, the appellant died.

Without knowledge of the appellant's death, the Court continued its work on the Federal Circuit's remand, holding oral argument and submitting the case to the en banc Court for review. In March 2013, the Court issued an en banc order denying the Secretary's July 2009 motion to dismiss and ordering the parties to proceed with the appeal. The parties entered into a JMR. The appellant in this case died more than three years prior to the issuance of the Court's order granting the parties' joint motion for remand. Several months later, the Secretary notified the Court that the appellant had died, and asked the Court to recall mandate, withdraw two prior orders, vacate the 2008 Board decision that had been appealed, and dismiss the appeal. The Court recalled mandate, withdrew the order that granted the JMR, and withdrew the order that awarded EAJA fees to the deceased appellant's attorney. The attorney returned the EAJA fees to the government.

In this present decision, the Court withdrew the March 2013 en banc order that had denied the Secretary's motion to dismiss the case based on the untimely filing of the Notice of Appeal. Even though the order was nearly two years old and had been cited in numerous Court orders as precedent on equitable tolling matters, the majority of this panel concluded that "the law is clear: Where an appellant dies while the appeal is pending here and no person seeks to be substituted for the deceased appellant, the Court will withdraw its orders disposing of substantive matters in the case that were issued after the appellant's death." (citing *Leavey v. McDonald*, 27 Vet.App. 226**.**)

In a dissent, three judges found that "as precedential authority, the en banc order has since provided valuable guidance on misfiled NOAs, and has been cited in dozens of cases," and need not be withdrawn. The dissent characterized the March 2013 order as "procedural," and stated that judicial precedents "should stand unless a court concludes that the public interest would be served by a vacatur." (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1944)). The dissent stated that "the majority here has not explained why the public interest is served by a vacatur of the en banc procedural order or why it is appropriate to sua sponte decide, without input from the parties, to withdraw a presumptively correct and valuable judicial precedent."

Palomer v. McDonald, 27 Vet.App. 245 (order) (Mar. 18, 2015)
EQUITABLE TOLLING
Held: The finality of a Board decision may be abated even when an appellant files a motion for Board reconsideration after the expiration of the 120-day appeal period – as long as the circumstances warrant equitable tolling. In this case, however, the Court found that the circumstances did NOT warrant equitable tolling.)

Veteran residing in the Philippines submitted a motion for reconsideration of a Board decision 133 days after the decision was mailed – and then filed his Notice of Appeal to the CAVC 102 days after the Board denied reconsideration. The Secretary moved to dismiss the appeal because neither the motion for reconsideration nor the NOA was filed within the 120-day appeal deadline. Mr. Palomer argued that the Court should not dismiss his appeal and should equitably toll the 120-day appeal period based on the delay in receiving mail in the Philippines, his deteriorating physical condition, and VA's confusing notice of appellate rights.

The Court discussed the history of the law surrounding equitable tolling. The Court noted that "equitable tolling is a matter to be decided on a case-by-case basis," and that the burden is on the appellant to demonstrate entitlement. In this case, though, the Court found that Mr. Palomer's circumstances did not warrant equitable tolling.

The Court first found that the 15-day delay in receiving mail in the Philippines did not rise "to the level of an extraordinary circumstance warranting equitable tolling." The Court next found that, apart from making vague assertions about his health, Mr. Palomer did not offer evidence to demonstrate that his physical condition prevented him from handling his affairs. The Court also found that Mr. Palomer failed to demonstrate that the notice of appellate rights was inadequate or confusing, noting that the Federal Circuit has previously found this notice to be sufficient. (citing *Cummings v. West*, 136 F.3d 1468, 1474 (Fed. Cir. 1998)).

Mr. Palomer additionally argued that even if the Court does not equitably toll the time to file the motion for reconsideration, the Court can still review his appeal of the Board's denial of his motion because that was timely filed and the Court can review Board denials of reconsideration motions based on new evidence or changed circumstances. (citing *Patterson v. Brown*, 5 Vet.App. 362 (1993)). He argued that the Board erred by

relying solely on a response from the National Personnel Records Center in assessing his veteran status and did not seek verification from the service department "as to whether he served he served as a member of an unrecognized guerilla group." (citing *Tagupa v. McDonald*, 27 Vet.App. 95, 101, 103-04 (2014)). The Court acknowledged that while it can review Board denials of reconsideration motions where the motion was based on new evidence or changed circumstances, the appellant must have filed that motion for reconsideration within the 120-day appeal period. The Court held that it "does not have independent jurisdiction over an appeal from a denial for reconsideration" when the motion for reconsideration was not timely filed. (citing *Patterson*; *supra*, and *Mayer v. Brown*, 37 F.3d 618, 620 (Fed. Cir. 1994)).

In his dissent, Judge Greenberg argued that because of the two-to-three week mail delay, Mr. Palomer "never received the statutorily mandated 120 days to file an appeal." Judge Greenberg asserted that Mr. Palomer's untimely filing was "*because* of the mail delay, not *in addition* to it," and thus warranted equitable tolling.

ADVOCACY NOTE: The burden is on the appellant to demonstrate – with specific evidence and not "vague assertions" – that equitable tolling is warranted. Instead of simply asserting that deteriorating health prevented timely filing, advocates should explain *how* the deteriorating health impacted the ability to timely appeal.

Reliford v. McDonald, 27 Vet.App. 297 (Mar. 20, 2015)
SUBSTITUTION, ACCRUED BENEFITS
Held: VA is required to notify an accrued benefits claimant of the right to waive substitution.

Veteran filed claim for benefits and was afforded a VA medical examination. The examiner opined that his condition began while in service, but two months later provided an addendum stating that she changed her opinion based on new evidence. The RO denied the claim and the veteran appealed to the Board and then the Court. The Court remanded the appeal, specifically finding that the VA examiner failed to explain why she changed her mind. The veteran died while the remanded appeal was pending at the Board.

His surviving spouse filed an accrued benefits claim that VA treated as a request for substitution. The Board remanded the matter for additional development – and obtained a new medical opinion that was negative. The Board relied on that opinion to deny the claim.

On appeal to the Court, the surviving spouse argued that she never requested substitution – only accrued benefits – and that, as such, VA erred by relying on evidence that was developed and added to her late husband's file after his death. Alternatively, she argued that only a substituted claimant – and not VA – can develop the record after the veteran's death. The Secretary argued that VA's treatment of her claim was consistent with VA policy and the "veteran-friendly" provisions of 38 U.S.C. § 5121A. *(Developing negative evidence doesn't sound too "friendly" to me.)*

The Court framed the issue in this case as "whether a proper interpretation of the statutory provisions, 38 U.S.C. §§ 5121A and 5121(a), requires, or at a minimum allows, the Secretary to unilaterally process an accrued-benefits claim solely as a request for substitution."

The Court discussed both statutes – noting that an accrued benefits claim under section 5121(a) "is separate and distinct from the deceased claimant's underlying claim" and is treated as a new claim. This means that an accrued-benefits claimant "is relegated to the beginning of the process . . . regardless of where the underlying claim had been in the appeals process." In addition, an accrued- benefits claim must be based on the evidence in the record at the time of the deceased claimant's death – so no additional development occurs in these claims.

Substitution under section 5121A, on the other hand, allows an eligible accrued benefits beneficiary "to proceed in the place of the deceased claimant to the completion of the original claim." It is not a new claim for benefits – rather, it is a continuation of the underlying claim. The key distinction between these two "paths" to accrued benefits is that substitution allows the claimant to further develop the record, including with the assistance of VA, whereas an accrued benefits claimant is limited to the evidence in the file at the time of the veteran's death.

The Court stated that a potential accrued-benefits claimant can either (1) request substitution and carry on the appeal of the underlying claim (with additional development, if needed) or (2) not request substitution, allow the underlying decision to be vacated, and file a new claim for accrued benefits (with no additional development). The Court noted that VA's guidelines on substitution (Fast Letter 10-30, issued August 10, 2010), states that an application for accrued benefits "will be accepted as both a claim for accrued benefits and a substitution request" – and "specifically permits an accrued-benefits claimant to 'waive the opportunity to *substitute*/submit additional evidence in support of the claim.'" (quoting Fast Letter at 3, emphasis in decision). The Secretary acknowledged that there may be some accrued-benefits claimants who would rather proceed on the existing record and forego any additional development.

The Court declined to address the question of whether VA could unilaterally process an accrued-benefits claim solely as a substitution request – because it determined that VA failed to comply with its own procedures by not informing the claimant in this case that she had the "right to 'waive the opportunity to substitute.'" The Court noted that most claimants would benefit from being able to substitute and submit additional evidence – however, that did not relieve VA of its duty to inform claimants of their right to waive that opportunity. In this case, VA had notified Mrs. Reliford that she could waive the right to submit additional evidence – but did not inform her that she could waive substitution. The Court held that this error harmed her because the Board had not yet adjudicated her claim "against the proper factual background" (i.e., *without* the negative evidence

that had been obtained). The Court remanded the case for the Board to adjudicate Mrs. Reliford's claim "based on the file as it existed at the time of her husband's death."