LEGAL NEWS UPDATE: July 2012

1. For combat veterans' service-connection claims, VA is required to presume in-service *incurrence* of disease or injury – not just that the alleged in-service event or exposure occurred. *Reeves v. Shinseki*, docket no. 2011-7085 (Fed. Cir. June 14, 2012). In this case, the surviving spouse of a World War II combat veteran asserted that (1) the veteran suffered acoustic trauma in service and (2) this noise exposure resulted in hearing loss *while in service*. The evidence he submitted included documentation that he worked as a heavy mortar crewman in service; statements from himself, his wife, his fellow service-members regarding in-service exposure and hearing loss; and a letter from his doctor stating that he diagnosed hearing loss in 1962 and attributed it to in-service noise exposure. Although VA presumed that the veteran experienced in-service noise exposure based on his status as a combat veteran, VA denied service connection because the first medical documentation of hearing loss was "too remote" from his active service.

   The Federal Circuit held that VA was required to apply the presumption of section 1154(b) to the questions of whether (1) the veteran experienced acoustic trauma in service *and* (2) he suffered permanent hearing loss while on active duty. The court found that even though "the record contained evidence of the *cause* of [the veteran's] disability . . . , he still had the right to invoke the section 1154(b) presumption in order to show that he incurred the *disability itself* while in service."

2. A veteran is presumed to have entered service in sound condition unless a preexisting condition is noted upon entry into service. 38 U.S.C. § 1111. Once this presumption of soundness applies, the burden falls on VA to rebut the presumption with "clear and unmistakable evidence" that the condition *both* preexisted service *and* was not aggravated by service. Even if there is evidence that the condition preexisted service, VA must still prove, with "clear and unmistakable evidence," that the condition was not aggravated in service.

   In this case, the Veterans Court held that a Medical Examination Board (MEB) report "containing only an unexplained 'X' in a box on a form" cannot constitute the "clear and unmistakable evidence" required to rebut the presumption of aggravation prong of the presumption of soundness. *Horn v. Shinseki*, docket no. 10-0853 (Vet. App. June 21, 2012). The Court stated that VA adjudicators "may not deny claims involving the presumption of soundness based upon MEB reports containing no supporting analysis."

3. The U.S. Court of Appeals for the Federal Circuit issued an opinion regarding a remarried widow's eligibility for Dependency and Indemnity Compensation (DIC) benefits. *Frederick v. Shinseki*, docket no. 2011-7146 (Fed. Cir. July 3, 2012). A veteran's surviving spouse can be eligible for DIC benefits upon the veteran's death. Before 2004, a surviving spouse would lose DIC benefits if he/she remarried. On

December 16, 2003, Congress enacted a law that enabled a surviving spouse who remarries after age 57 to remain eligible for DIC benefits. This law went into effect January 1, 2004.

If a surviving spouse (1) had been receiving DIC benefits prior to December 2004; (2) had remarried after age 57; and if (3) VA had stopped the DIC benefits after the remarriage, the surviving spouse would be entitled to reinstatement of those benefits – but only if he/she filed an application for such benefits "not later than the end of the one-year period beginning on the date of enactment," i.e., December 16, 2004. In this case, the court denied DIC benefits to a surviving spouse who had remarried after age 57 because she failed to file an application for reinstatement of those benefits prior to December 2004.

4. The standards for establishing entitlement to service connection for PTSD based on "fear of hostile military activity" do not apply to PTSD based on in-service assault by a fellow service-member. *Acevedo v. Shinseki*, docket no. 10-3402 (July 9, 2012).

   A veteran who claims entitlement to service connection for PTSD based on "fear of hostile military or terrorist activity," can establish the occurrence of the in-service stressor with his/her lay statements alone. 38 C.F.R. § 3.304(f)(3). A veteran who claims entitlement to service connection for PTSD based on in-service personal assault, however, must provide other evidence to corroborate his/her lay statements regarding the occurrence of the in-service assault. 38 C.F.R. § 3.304(f)(5).