



LEGAL NEWS UPDATE: November 2012

1. In [*Procopio v. Shinseki*](#), docket no. 11-1253 (Oct. 16, 2012, Vet.App.), the U.S. Court of Appeals for Veterans Claims (CAVC) held that a Board member conducting a hearing has a duty to explain the issues and suggest the submission of evidence relevant to those issues, just as a hearing officer would be required to do at a regional office hearing.

The veteran in this case asserted that his prostate cancer and diabetes were related to Agent Orange exposure, even though the ship on which he was stationed was not on VA's list of ships whose crew members are presumed to have been exposed to Agent Orange. To support his claim, he submitted medical treatise evidence and a statement from his private physician. The regional office denied the claim because there was no evidence of direct exposure to Agent Orange. The veteran testified at a video conference before a member of the Board of Veterans' Appeals, who affirmed the RO's decision and denied the claim.

The Court found that the Board failed to ensure that the hearing officer suggested evidence to submit to substantiate the veteran's claim. The Court noted that, at the Board hearing, the veteran had requested that the record be held open an additional 60 days to allow him to submit another medical opinion. The Court stated that the Board member should have explained to the veteran that a nexus opinion alone would not substantiate the claim – because that would still not establish that he was directly exposed to Agent Orange in service. The Court held that the Board member did not comply with his duty to inform the veteran of “the elements of his claim that still needed to be proven and to suggest the submission of evidence . . . that he might have overlooked.” *Procopio* at *11.

2. In [*Gilbert v. Shinseki*](#), docket no. 11-2355 (Vet. App. Oct. 24, 2012), the CAVC clarified the law on when the presumption of soundness applies. The Court held that the presumption of soundness applies only when a condition that is not noted upon entry into service manifests in service, and there is a question as to whether the condition preexisted service. In order to be entitled to the presumption of soundness, therefore, the veteran must show that the condition (1) was not noted upon entry into service and (2) manifested (was incurred) in service.

In order to rebut the presumption of soundness, the Secretary must “prove by clear and unmistakable evidence” that the condition “both preexisted service and was not aggravated by service.” If the Secretary rebuts the presumption, then the veteran has not established that the condition manifested in service – and service connection is not warranted. If the Secretary fails to rebut the presumption of soundness, the veteran is not entitled to the presumption of aggravation. Instead, the condition is deemed incurred in service. Finally, even if the presumption of soundness applies – and is un rebutted by the

Secretary – the veteran must still prove that the current disability is related to that in-service condition (the nexus element).

3. In [*Jones v. Shinseki*](#), docket no. 11-2704 (Vet. App. Oct. 26, 2012), the CAVC held that VA cannot deny a higher disability rating based on “relief provided by medication when those effects are not specifically contemplated by the rating criteria.” In this case, the Board denied a 30% disability rating for the claimant’s irritable bowel syndrome because his symptoms were relieved by medication – even though the effect of medication is not among the criteria for consideration in the relevant diagnostic code. The Court found that the Board committed legal error by doing so, expanding on its prior holdings that VA cannot consider “factors which are wholly outside the rating criteria provided by the regulations.” *Jones* at *7 (citing *Massey v. Brown*, 7 Vet.App. 204, 208 (1994)); *see also Otero-Castro v. Principi*, 16 Vet.App. 375, 382 (2002).
4. In [*Youngman v. Shinseki*](#), docket no. 2011-7139 (Fed. Cir. Nov. 9, 2012), the U.S. Court of Appeals for the Federal Circuit held that a veteran’s fiduciary does not have the authority to receive accrued benefits that were awarded but unpaid at the time of the veteran’s death. The only beneficiaries who can receive accrued benefits are designated family members (surviving spouse, children, dependent parents) as provided in 38 U.S.C. § 5121(a). The only other payments allowed by that statute are for reimbursement of expenses for the veteran’s last illness and burial.

In [*Youngman*](#), the veteran was awarded 100% disability in May 2005, effective March 1986. This resulted in a back award of approximately \$350,000. At the time of the award, the veteran had a VA-appointed fiduciary. Proceedings had commenced in state court to appoint this fiduciary as the veteran’s “curator” under Kansas law. The VA regional office acknowledged that the funds could be released to the fiduciary, but later informed the fiduciary that they would not release funds until the state-court appointment was completed. The veteran died before the state proceedings were completed, and the award remain unpaid.

VA refused to pay the award to the fiduciary because neither she nor the veteran’s heirs (his cousins) were eligible accrued beneficiaries under VA law. 38 U.S.C. § 5121(a). The Federal Circuit held that § 5121(a) applied to the distribution of accrued benefits in all cases, and that there was no exception for fiduciaries.

5. In [*Copeland v. Shinseki*](#), docket 11-2408 (Vet. App. Nov. 14, 2012), the CAVC held that Congress’s assignment of an effective date for 38 U.S.C. § 5121A (the statute that allows a deceased veteran’s surviving spouse to be substituted for the veteran in a pending claim or appeal) did not violate the equal protection clause of the Fifth Amendment of the U.S. Constitution. The Court held that the veteran’s surviving spouse did not demonstrate that the assignment of the effective date was “patently arbitrary and irrational,” which would be required to find the statute constitutionally defective under rational basis review. The Court acknowledged that the effective date resulted in disparate treatment of survivors of those who died before and after the effective date, but determined that “the differing treatment is caused by an effective date that has a rational relationship to a legitimate governmental purpose for enacting legislation,” and thus did not violate the Constitution.

In a dissent, Judge Hagel asserted that the Court lacks the power to declare any statute unconstitutional.

If you have any questions, or need additional information, please feel free to call
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