



LEGAL NEWS UPDATE: January 2013

CASE LAW

1. ***Checo v. Shinseki***, docket no. 11-3683 (per curiam order) (Vet. App. Jan. 4, 2013)
Homelessness can be an extraordinary circumstance that would warrant equitable tolling of the 120-day deadline to file a Notice of Appeal with the CAVC. However, the appellant must also demonstrate that the untimely filing was a direct result of the homelessness and that due diligence was exercised in pursuing the appeal. The Court did not answer “the question of the time period during which diligence must be shown” – because the veteran “neither alleged nor demonstrated diligence during *any* period of time” even though the Secretary specifically raised the issue at oral argument. Similarly, the veteran’s attorney failed to explain how the veteran’s homelessness was a direct result of the late filing. Note to advocates: don’t forget to include some facts when arguing about the law.

2. ***Harris v. Shinseki***, docket no. 2012-7111 (Fed. Cir. Jan. 4, 2013)
This case affirms the Federal Circuit’s case law regarding VA’s duty to fully develop and generously construe a pro se veteran’s filings to determine all possible claims raised by the evidence. In this case, the veteran had applied for and was awarded service-connection benefits in 2002. He appealed, arguing for an earlier effective date based a 1985 VA medical examination that included an Agent Orange Registry Code Sheet and an application for medical benefits. The Board held that the 1985 exam was neither a formal nor informal claim for benefits, and denied the appeal. The CAVC affirmed the Board’s decision, finding no clear error in the determination that the 1985 documents did not constitute a claim.

The Federal Circuit found that the CAVC did not apply the proper legal standard in reviewing the Board’s decision because there was no indication that the court “acknowledged its obligation to require that the Board generously construe the evidence in this case.” The Federal Circuit acknowledged that the Board “‘considered the applicability of the benefit-of-the-doubt doctrine,’” but noted that the duty to fully and sympathetically develop a veteran’s claim is separate from that doctrine. The duty to fully and sympathetically develop a veteran’s claim to its optimum is placed on VA *prior* to adjudicating the claim on the merits, whereas “the benefit-of-the-doubt rule assists the VA in deciding a veteran’s claim on the merits after the claim has been fully developed.”

3. ***King v. Shinseki***, docket no. 2011-7159 (Fed. Cir. Dec. 5, 2012)
The Federal Circuit affirmed a CAVC decision that found that the Board of Veterans’ Appeals properly considered lay evidence and found that it was outweighed by “competent medical evidence of record.” The majority here found that the Board and the CAVC did not act in violation of the Federal Circuit’s case law on the treatment of lay evidence, even though the Board cited older cases that had been overturned and appeared to expressly reject lay testimony as incompetent simply because the lay persons in question did not “possess the requisite medical training, expertise, or credentials needed to render a diagnosis or a competent opinion as to medical causation.”

In a strongly worded dissent, Judge O'Malley stated that "we have repeatedly have had to reverse the Veterans Court for endorsing the Board's failure to even consider competent lay evidence when considering medical causation." The dissent pointed out that there is no difference between the language used by the Board in this case and that used by the Board in *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009) – so it is not clear why the majority found that this case involved merely a weighing of the evidence, whereas the Court in *Davidson* found that the categorical rejection of lay evidence as incompetent was impermissible.

4. ***Cameron v. Shinseki***, docket no. 10-4168 (Vet. App. Nov. 28, 2012)

The CAVC held that an informal claim for an increased disability rating that arose after the record before the Board was closed was a second "case" – and not part of the initial claim for benefits still on appeal – even though the additional claim was related to the same disability as the initial claim. The Court found that the second "case" was a stand-alone claim for an increased rating – and that the veteran's attorney was not entitled to a fee on this claim because no Notice of Disagreement had been filed.

In this case, the attorney represented the veteran in her appeal to the Court of a Board decision that denied an earlier effective date for an award of service connection for depression. (That appeal remains pending at the Court.) Before the attorney became involved with the case, but after the Board had issued its decision, the veteran was treated at a VA medical facility. The RO failed to recognize this as an informal claim for an increased rating. Several months later, the veteran, through her attorney, filed a request to reopen an increased-rating claim. The attorney submitted additional correspondences to the RO stating that it had failed to adjudicate the increased-rating claim and identifying the date of the medical treatment as an informal claim. The attorney petitioned the Court, expressly stating that the increased rating claim was separate from her initial claim. Following the petition, the RO awarded an increased rating of 100%, effective as of the date of the medical treatment. The RO declined to award an attorney fee, stating that this was a separate claim and that an NOD had not been filed on this claim.

The question before the Court was whether the veteran's initial claim for service connection for depression, which was awarded in 1996 and is still on appeal to the Court, and subsequent claim for an increased rating for her service-connected depression constitute one "case" for purposes of 38 U.S.C. § 5904(c)(1). The Court found that the claim for an increased rating was a separate "case" under section 5904(c)(1) "because it involved evidence that was not part of her original claim and the 2001 Board decision that remains on appeal."

5. ***Monzingo v. Shinseki***, docket no. 10-922 (Vet.App. Nov. 21, 2012)

In this case, the CAVC expanded on its case law surrounding the theory of constructive possession, finding that two scientific reports that were published with VA involvement were not "constructively" part of the record before the Board. The Court also clarified its case law on the adequacy and inadequacy of medical opinions.

In *Monzingo*, the Board denied the veteran's claim for entitlement to service connection for hearing loss. On appeal to the Court, the veteran argued that the Board failed to (1) address the possibility that his service-connected tinnitus was evidence of ongoing hearing loss since service and (2) explain its reliance on a medical opinion that found that his hearing acuity actually improved during service. To support these arguments, the veteran relied on two

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scientific reports from 2006 and 1982. The 2006 report had been partly commissioned by VA. The 1982 report had been prepared with the participation of a VA employee. The veteran had not submitted either of these reports to VA during the pendency of his claim.

Following a full discussion of the Court's case law on the theory of constructive possession, the Court found that there was no evidence that the two reports in question were constructively before the Board. The fact that VA sponsored and received a copy of the 2006 report was not enough to establish constructive possession. And the fact that the report was about military-related hearing loss was "too tenuous" a connection to support an expectation that the report would be in the record of every hearing loss claim. Similarly, the Court found that apart from noting the involvement of a VA employee in its preparation, there was no other support that the 1982 report was constructively before the Board. The Court found that "absent Mr. Monzingo's submission of the document to VA or his request that it be obtained," there was no reasonable expectation that this report would be in the record before the Board.

The Court also declined to take judicial notice of the findings in the two reports, stating that the findings were "neither facts of universal notoriety nor facts not subject to reasonable dispute." The Court found that the Board did not err by failing to address these reports, since the veteran did not raise these reports and their findings to the Board, and they were not reasonably raised by the record.

Finally, the Court elaborated on what makes a medical opinion adequate. The Court began by reiterating that medical examiners are not required to address every piece of favorable evidence of record, citing *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (noting no reasons-or-bases requirement for examiners). The Court stated that "examination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." The Court cited *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008), to support this statement – but it seems to me that the Court's statement loosens the standard enunciated in *D'Aries*. See *D'Aries* ("An opinion is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's 'evaluation will be a fully informed one.'").

With respect to the medical examiner's rationale, the Court acknowledged that the rationale provided in this case "did not explicitly lay out the examiner's journey from the facts to a conclusion." However, the Court found that that was not sufficient to render the report inadequate. Instead, the Court found that "the medical report must be read as a whole," and that review of the entire report in this case demonstrated the basis for the examiner's rationale.

The Court added that the veteran failed to show that he himself was competent to rebut the examiner's opinion, citing *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting the competence of laypersons to testify as to symptoms, but not diagnoses). However, the Court later stated that the question in this case is whether the veteran's "hearing acuity worsened during service," (which seems to me to be more a question of symptomatology than diagnosis).

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The Court noted that even if a medical opinion is inadequate to decide a claim, it is not necessarily entitled to *no* probative weight. If the opinion “is merely lacking in detail, then it may be given some weight based upon the amount of information and analysis it contains.” The Court stated that “VA is not permitted to completely ignore even an ‘inadequate’ opinion or examination, whether it is in favor or against a veteran’s claim.”

REGULATORY NEWS

On Monday December 10, 2012, VA published a proposed regulation that would make 5 illnesses secondary to service-connected TBI (traumatic brain injury). The new subsection of 38 C.F.R. § 3.310 would state that if a veteran is service-connected for TBI and also has one of the five illnesses, then that illness will be service-connected as secondary to the TBI. The proposed rule is based on the findings of the National Academy of Sciences, Institute of Medicine that there is “sufficient evidence of a causal relationship” between **moderate or severe** levels of TBI and (1) diagnosed unprovoked seizures, (2) Parkinsonism; (3) dementias (to include presenile dementias of the Alzheimer type and post-traumatic dementia), (4) depression (also associated with **mild** TBI), and (5) diseases of hormone deficiency that may result from hypothalamo-pituitary changes.

The full text of the proposed regulation is in the Federal Register:
<http://www.gpo.gov/fdsys/pkg/FR-2012-12-10/pdf/2012-29709.pdf>

Comments on the proposed rule must be received by VA on or before February 8, 2013.

VA POLICY NEWS

On December 20, 2012, VA announced that it will implement a new process to confirm ongoing eligibility for pension benefits by eliminating the need for veterans to complete an annual Eligibility Verification Report (EVR). Instead of requiring annual reports, VA will work with the Internal Revenue Service and the Social Security Administration to verify continuing eligibility for pension. Veterans who currently receive VA pension benefits will receive a letter from VA explaining the changes. The text of the full press release can be found at:
<http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2414>.

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