VETERAN'S LAW UPDATE: March 2013

CASE LAW

1. ***El-Amin v. Shinseki***, 26 Vet.App. 136 (Jan. 15, 2013)
   A VA examiner's statement that the condition that caused the veteran's death was "related to" factors other than his service-connected condition did not rule out the possibility that his service-connected condition did not *aggravate* the condition that led to his death. In this case, a deceased veteran's widow sought service-connected death benefits, asserting that his service-connected PTSD caused or aggravated his alcoholism, which in turn led to the cirrhosis that ultimately caused his death. The Board denied the claim, relying on a VA examiner's opinion that it was "more likely than not that the veteran's alcohol abuse was *related to* factors other than the veteran's post-traumatic stress disorder." The U.S. Court of Appeals for Veterans Claims (CAVC) determined that the Board failed to address the aggravation issue and found that it was not clear "how the Board could interpret the examiner's statements as having considered whether Mr. El-Amin's post-traumatic stress disorder aggravated his alcohol abuse." The Court added that the inadequate medical examination was due to a faulty "inquiry request" that improperly limited the examiner's response to one of six standardized answers, none of which discussed whether the veteran's PTSD *aggravated* his alcoholism.

2. ***Clennan v. Shinseki***, docket no. 10-1375 (Vet. App. Jan. 24, 2013)
   In this case, a VA regional office determined that a veteran was incompetent to manage his own funds and placed him in their supervised direct pay program. In this program, disability benefits are paid directly to the incompetent veteran who is subjected to periodic VA field examinations. Five years after being declared incompetent by VA, the veteran was awarded 100% service-connected disability benefits, resulting in a large retroactive award. Shortly thereafter, VA appointed a fiduciary to manage the veteran's funds and authorized payment to the fiduciary of 4% of the veteran's disability benefits. The veteran argued that VA's decision that he was incompetent was nullified based on VA's payments to him under the supervised direct pay program for so many years. The Court rejected this argument, finding that participation in the supervised direct pay program does not void or negate a competency determination.

3. ***Deloach v. Shinseki***, 709 F.3d 1370 (Jan. 30, 2013)
   The U.S. Court of Appeals for the Federal Circuit reviewed the CAVC's authority to reverse rather than remand. The case involved two consolidated appeals. In both appeals, the records contained at least one favorable medical opinion from a private physician and one ambiguous or inconclusive opinion from a VA doctor that was

relied on by VA in denying the claims. The CAVC remanded both appeals to the Board. The appellants argued that the CAVC should have reversed. The Court held that "where the Board has performed the necessary fact-finding and explicitly weighed the evidence, the [CAVC] should reverse when, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." Because the CAVC found that the Board provided inadequate explanations for its denials and failed to provide an adequate medical exam, the Federal Circuit determined that the CAVC properly remanded to the Board.

4. ***Andrews v. Shinseki***, docket no. 09-2065 (Vet. App. Jan. 31, 2013)
This case involves the question of whether the time period to use VA's vocational rehabilitation benefits runs while a veteran is appealing a denial of a claim for such benefits. The CAVC held that the 12-year eligibility period for the use of VR benefits was stayed while the veteran's appeal of an adverse decision regarding such benefits was pending. The Court also held that the Board was required to seek an additional opinion from a counseling psychologist before determining that the veteran did not suffer from an employment handicap sufficient to warrant an extension of benefits. The Board recognized that in 1994 the veteran had additional service-connected disabilities. Nevertheless, it relied on a 1991 VA psychologist's report that did not include an assessment of the effect of the veteran's subsequently adjudicated disabilities.

5. ***Viegas v. Shinseki***, 705 F.3d 1374 (Fed. Cir. Jan. 31, 2013)
In this case, a disabled veteran who was receiving physical therapy at a VA medical facility was injured when he fell in the bathroom after the handicap bar came loose from the wall. In assessing "causation" under 38 U.S.C. § 1151 (VA's version of a medical malpractice claim), the Federal Circuit appeared to ease the requirements of showing that a veteran's injury was "directly" caused by the "actual" medical care provided by VA personnel. The Court stated that "VA cannot reasonably furnish hospital care[] or medical treatment to disabled veterans without also providing access to handicapped-accessible restrooms," and found that the veteran's injury was not "merely 'coincident'" with his physical therapy, "but was instead caused by the VA's failure to properly maintain and install the equipment required so that that treatment could take place." The Court held that "while the medical treatment provided by the VA typically includes 'direct involvement with VA staff,' [] this does not mean that it does not also include the medications and equipment necessary to provide such treatment."

6. ***Bowers v. Shinseki*****,** docket no. 10-3399 (Vet. App. Feb. 19, 2013)
The presumption of service connection for amyotrophic lateral sclerosis (ALS) is available only to those who meet VA's definition of "veteran" – and is, therefore, not available to those whose only period of active service was active duty for training, *unless* the claimant shows that he/she incurred the condition *during* that active duty

for training. The veteran in this case sought service connection for ALS on a presumptive basis under 38 C.F.R. § 3.318. The veteran served in the National Guard from March 1972 to March 1978, with a continuous period of active duty for training that exceeded 90 days. VA denied the claim because it found that there was no evidence that he had a disease or injury that was incurred or aggravated during his period of active duty for training – and, therefore, that period of service did not qualify him for VA benefits. The CAVC affirmed.

7. ***Walker v. Shinseki*****,** docket no. 2011-7184 (Fed. Cir. Feb. 21, 2013)
The Federal Circuit held that the theory of establishing service connection via a showing of "continuity of symptomatology," under 38 C.F.R. § 3.303(b), is limited to only chronic conditions listed in 38 C.F.R. § 3.309(a). In this case, a claimant tried to establish service connection for hearing loss with lay statements showing that his hearing worsened in service and continued to worsen following service – in other words, by showing "continuity of symptomatology." The Federal Circuit held that this method of establishing entitlement to service connection is limited to only to those chronic conditions listed in § 3.309(a). The Federal Circuit acknowledged that there was no specific cross-reference to § 3.309(a) in § 3.303(b), but found that a "harmonious reading" of these regulations (along with § 3.307(a)) "supports an implicit cross reference to § 3.309(a) in § 3.309(b).

8. ***Shephard v. Shinseki*****,** docket no. 11-2074 (Vet. App. Feb. 27, 2013)
This case involves the question of whether a veteran is entitled to recoup disability benefits that were withheld while the veteran was incarcerated. When a veteran who is receiving monthly VA benefits is incarcerated for a felony conviction, a portion of benefits is withheld starting on the 61st day of incarceration. 38 U.S.C. § 5313(A)(1). Upon release, the veteran's full benefits can resume. 38 C.F.R. § 3.665(i). If the veteran's conviction is overturned, the amount withheld can be restored. 38 C.F.R. § 3.665(m). But unless the conviction is overturned, the veteran is not entitled to receive the amount withheld during incarceration. The Court held that the governing statute "contains neither an implicit nor explicit command to pay, upon a veteran's release from incarceration, those sums previously reduced."

VA POLICY NEWS

- In Fast Letter 12-23, VA clarified its policy regarding whether the cost of room and board at senior or independent living facilities qualifies as an unreimbursed medical expense (UME) that can be deducted from income for pension purposes. VA policy is that the cost of room and board at such facilities is only a UME when the facility provides "custodial care" – which involves assisting with activities of daily living (ADLs). VA defines ADLs as "basic self-care and includes bathing or showering, dressing, eating, getting in or out of bed or a chair, and suing the toilet." 38 C.F.R. § 4.124a note 3. A facility provides custodial care for VA purposes if it assists a person with two or more ADLs. The cost for room and

board at these types of facilities can also qualify as a UME if a person's physician states in writing that the person residing in such facility requires (and contracts for) custodial care from a third-party provider.

Costs for assistance with meal preparation, housework, shopping, laundry, etc., are not UMEs for pension purposes because these are not medical or nursing services. VA will, however, deduct these costs from the individual's income when that person receives pension at the "aid and attendance" or "housebound" rate, or a physician certifies that the person needs to be in a protected environment, AND the facility also provides medical services or assistance with ADLs to the individual.

- VA announced a new initiative in processing disability claims called Acceptable Clinical Evidence (ACE), which will allow VA to assess a veteran's claim for benefits without conducting an in-person medical examination, as long as there is sufficient medical evidence in the record to decide the claim. Under this new process, a VA physician will complete a questionnaire based on review of the medical evidence in the veteran's file – and the regional office will make its decision based on that review. Several veterans' advocates (myself included) are concerned that this may not always be in the veteran's best interest. Veterans who file claims for disability compensation benefits and feel that they need an in-person medical examination, should request one in writing to the RO.

- Carpal tunnel syndrome is an "organic disease of the nervous system" and, therefore, is a chronic condition that is subject to service connection via legal presumption under 38 C.F.R. § 3.309(a). Veterans who are diagnosed with carpal tunnel syndrome within a year of discharge from service may be eligible for service connection without having to provide medical evidence of a link between their condition and their service.

- Vietnam veterans who participated in Operation Ranch Hand in 1961 can establish direct exposure to Agent Orange with adequate records from their military personnel file. This would include records showing temporary duty assignments in Southeast Asia or award of the Armed Forces Expeditionary Medal, which was issued for Vietnam service prior to the Vietnam Service Medal.