



VETERANS' LAW UPDATE: May 2013

CASE LAW

1. ***Beasley v. Shinseki***, docket no. 2012-7029 (Fed. Cir. Mar. 11, 2013)

The U.S. Court of Appeals for the Federal Circuit reaffirmed that it has jurisdiction to review denials of petitions for writs of mandamus from the U.S. Court of Appeals for Veterans Claims (CAVC). The question on the merits of the case was whether VA's duty to assist required VA to obtain a medical opinion from the veteran's VA physician based on evidence that had not been submitted to the Board. The Federal Circuit held that VA's duty to assist is not an "open-ended obligation . . . to provide a medical examination or opinion upon demand."

In a spirited dissent, Judge Newman frames the issue as whether VA "can prohibit a veteran's VA physician from reviewing the veteran's evidence of service connection, lest the physician's opinion present a 'conflict of interest.'" Judge Newman states that "[t]his cannot be what Congress intended by the 'duty to assist'" and asserts that the petition for mandamus should be granted.

2. ***Robertson v. Shinseki***, docket no. 11-3521 (Vet. App. Mar. 15, 2013)

Any failure on the part of VA to fully explain its character-of-discharge determination cannot be "clear and unmistakable error" because it is simply a breach of VA's duty to assist. This case also reaffirmed prior holdings that a Presidential pardon only relieves the legal punishment of a general court-martial conviction, "but does not eliminate the consideration of the conduct" that resulted in conviction. In other words, a clemency discharge does not automatically entitle a veteran to VA benefits. VA is still allowed to consider the conduct that resulted in the discharge when considering eligibility to VA benefits.

3. ***Vazquez-Claudio v. Shinseki***, docket no. 2012-7114 (Fed. Cir. Apr. 8, 2013)

A veteran with a claim for service connection for a mental condition may only qualify for a disability rating under 38 C.F.R. § 4.130 (the regulation regarding disability ratings for mental conditions) "by demonstrating the particular symptoms associated with that percentage or others of similar severity, frequency, and duration" and by showing that those symptoms result in occupational and social impairment in a number of areas listed in the regulation, "such as work, school, family relations, judgment, thinking, or mood." A claimant *cannot* satisfy a particular rating by only showing that he/she has occupational and social impairment in most of the listed areas.

4. [Trafter v. Shinseki](#), docket no. 10-3605 (Vet. App. Apr. 29, 2013)
The evidence needed to obtain a medical opinion in section 1151 claims is the same as that needed to obtain a medical opinion in regular disability claims – meaning that the evidence only needs to *indicate* that the claimant's disability or symptoms *may* be associated with the VA hospital care, medical or surgical treatment, or examination provided by a VA employee or in a VA facility or as part of a VA rehabilitation program, i.e., Compensated Work Therapy.

VA POLICY NEWS

- From VA's Compensation Service Bulletin (March 2013):
 - VA may accept a veteran's lay statement as sufficient proof to establish a stepchild as a dependent, as long as the statement includes (1) the date (month and year) and place of the event; (2) the full name and relationship of the other person to the claimant; and, (3) where the claimant's dependent child does not reside with the claimant, the name and address of the person who has custody of the child. In addition, a claimant must provide the Social Security number of any dependent on whose behalf he or she is seeking benefits. 38 C.F.R. § 3.204(a)(1).
 - VA has revised its Application for Disability Compensation and Related Compensation Benefits, [Form 21-526EZ](#), which will replace VA Forms 21-526 (application for compensation and/or pension), 21-526b (supplemental claim form), and 21-526c (pre-discharge compensation claim). The new application form is essentially only two (2) pages long – but it is accompanied by six (6) pages of information regarding the Fully Developed Claim process and the evidence needed to support various types of claims. This change is in response to legislation that revises VA's notification requirements.
- VA released a draft of its Gulf War Task Force Report. It is available at http://www.va.gov/opa/publications/Draft_2012_GWVI-TF_Report.pdf. The report describes how VA is addressing the concerns of veterans who deployed during the Gulf War in 1990 and 1991. The report is open to public comment until June 12, 2013. Instructions on how to submit comments can be found at www.regulations.gov.