HOEFER LAW FIRM PLLC

MARY K. HOEFER
JEREMY FLAMING
AMY B. KRETKOWSKI

VETERAN'S LAW UPDATE: July 2013

CASE LAW

1. ***Kelley v. Shinseki***, 26 Vet.App. 183 (2013)
   In November 2012, VA rescinded its policy that honored exclusive-contact requests from attorney-represented veterans. Prior to this, when a veteran was represented by an attorney, VA would honor requests from the attorney that VA contact the attorney exclusively regarding the veteran's claim. In this case, the veteran contacted the regional office by email to obtain the status of his claim, and a VA employee called the veteran back and provided information. The veteran's attorney reminded VA about the exclusive-contact request, and was told that VA was no longer honoring these requests. The attorney petitioned the Court of Appeals for Veterans Claims (CAVC), arguing that VA's contact with the attorney-represented veteran prohibited the veteran from benefiting from the advice of counsel and interfered with the attorney-client relationship. The Court denied the petition, finding that the attorney did not show that the veteran's contact with the RO interfered with the attorney-client relationship. The Court expressed its concern with VA's new policy, but found that it did not, in this case, prevent the veteran from obtaining advice from his attorney or otherwise interfere with the attorney-client relationship.

2. ***Solze v. Shinseki***, 26 Vet.App. 118 (2013)
   Both parties to a case have a duty to notify the Court of any "development that could deprive the Court of jurisdiction or otherwise affect its decision." This case involved a motion for reconsideration of the Court's denial of a petition regarding a VA fiduciary matter. While the motion for reconsideration was pending for full-court review, the Board of Veterans' Appeals issued a decision. The Court ordered the parties to explain why they did not inform the Court of the Board's decision, and why the Court should not impose sanctions or start disciplinary proceedings against them. Following oral argument, the Court held that both parties are under a duty to inform the Court of significant developments in a case, particularly in petitions, where the Court is being asked to "interject its authority into a live controversy."

3. ***Parks v. Shinseki***, 716 F.3d 581 (2013)
   The presumption that a VA examiner is qualified by training, education, or experience in a particular field can be overcome by showing a lack of those presumed qualifications. In this case, the veteran argued that the Board erred in relying on a medical opinion provided by an advanced nurse practitioner because it was not "competent medical evidence." The CAVC rejected this argument as a matter of law because the veteran had not raised this argument at the Board or the regional office. The veteran appealed to the Federal Circuit.

The Federal Circuit framed the issue as whether the veteran "waived his right to overcome the presumption that the selection of a particular medical professional means that the person is qualified for the task." *6. The Federal Circuit held that the first step to overcoming the presumption is to object to the examiner's qualifications – and that this applies even to *pro se* veterans. *7. The next step would be to show that the examiner lacks the necessary education, training, or experience to provide the requested opinion. *8. The Court pointed out VA's purpose in adopting the regulation regarding competent medical opinions was that "competency requires some nexus between qualification and opinion." *Id*. Because the veteran never raised the issue of the ARNP's competency below, the Federal Circuit affirmed the CAVC's decision.

4. ***Kyhn v. Shinseki*****,** 716 F.3d 572 (2013)
The Federal Circuit determined that the CAVC improperly relied on evidence that was not in the record before the Board to determine that the presumption of regularity applied in this particular situation. In this case, the veteran failed to attend for a schedule audiology examination, and VA denied his claim for service connection for tinnitus based on the existing evidence of record. On appeal to the CAVC, the veteran asserted that VA never notified him of the examination. The CAVC ordered VA to provide the Court with information regarding VA's process used to notify veterans of examinations. The Secretary submitted two affidavits from VA employees, only one of whom had professional knowledge of the notification process. The CAVC relied on this evidence to determine that the presumption of regularity applied – and that the absence of a notice from VA in the veteran's claims file did not rebut the presumption.

The Federal Circuit found that the CAVC exceeded its jurisdiction when it relied on the extra-record affidavits that were not in the record before the Board. The Court found that the CAVC engaged in impermissible fact finding to determine that VA did have a regular process for notifying veterans of scheduled examinations, and remanded the case.

5. ***Beraud v. Shinseki***, docket no. 11-726 (Vet. App. May 17, 2013)
A pending claim based on the submission of new and material evidence can be terminated by a subsequent rating decision on the same issue – even if that later decision did not consider the new and material evidence. In this case, the veteran submitted a claim for benefits in March 1985. In November 1985, the RO sent a letter to the veteran requesting the location of additional service records, and giving the veteran 60 days to submit any new evidence. Seventeen days later, the RO denied the veteran's claim. Shortly after the RO sent that decision, the veteran responded to the RO's request for information. The veteran did not file a Notice of Disagreement. Over the years, the veteran submitted additional requests to reopen

his claim, and the RO continued to deny the claim. The RO finally awarded benefits in December 2005.

In an effort to obtain an earlier effective date for the award of benefits, the veteran argued that his 1985 letter in response to the RO's request for information constituted new and material evidence that gave rise to a pending and unadjudicated claim. He also argued that there was clear and unmistakable error in the 1985 decision because the RO failed to obtain the identified service records. The Court held that if a claim is pending based on the submission of new and material evidence under 38 C.F.R. § 3.156(b), a subsequent final decision on the same issue terminates that pending claim. A dissenting judge argued that the regulation requires VA to consider new evidence submitted during the relevant period and determine whether it is new and material – and that the decision only becomes final when VA has considered the new evidence. Because the RO never obtained the service records identified in the veteran's letter, the dissenting judge argued that the Court should remand the case to allow the Board to address the applicability of § 3.156(b). This case is being appealed to the Federal Circuit.

6. ***Hall v. Shinseki*****,** docket no. 2012-7115 (Fed. Cir. June 7, 2013)
A veteran alleging PTSD due to an in-service sexual assault cannot rely on the relaxed evidentiary standards of 38 C.F.R. § 3.304(f)(3) to require VA to accept his statements alone to prove that his in-service stressor occurred. This regulation only applies to a veteran whose in-service stressor "relates to an event or circumstance that a veteran experienced, witnessed, or was confronted with and that was perpetrated by a member of an enemy military or by a terrorist." The Federal Circuit noted, but did not address, the veteran's argument that the existence of § 3.304(f)(5) (regarding in-service personal assault) does not prevent the application of
§ 3.304(f)(3).

7. ***Pirkl v. Shinseki*****,** 718 F.3d 1379 (2013)
Finding clear and unmistakable error (CUE) in one decision does not necessarily void subsequent decisions, but may require the RO to consider the effects of the CUE decision on subsequent decisions. In this case, the Board found CUE in a 1953 decision, but did not find that the veteran was entitled to a 100% rating for the entire period of time between that decision and 1988 because there were several post-1953 decisions. The CAVC affirmed the Board's decision, finding that the subsequent decisions were not based on the 1953 decision.

The Federal Circuit remanded, holding that a finding of CUE in the 1953 decision "changed the factual and legal background against which subsequent reductions were made, and that the Board failed to consider the effect of this change in implementing its finding of CUE." *10. Because the finding of CUE in the 1953

decision resulted in the veteran's disability rating being reset to the 100% rate, the Federal Circuit determined that any subsequent reductions were from a 100% rating – and VA was required to follow the rules regarding reducing a total rating in effect at the time. The Federal Circuit remanded the case for the RO to consider, in the first instance, whether the subsequent rating reductions were proper in light of the finding of CUE in the 1953 decision.

8. ***Yonek v. Shinseki***, docket no. 2012-7120 (Fed. Cir. July 8, 2013)
In this case, the Federal Circuit held that a veteran is only entitled to a single disability rating under 38 C.F.R. § 4.71a, Diagnostic Code 5201, for each arm where there is limited motion of the shoulder. The Court held that a veteran cannot get separate ratings for flexion and abduction. The Court acknowledged that diagnostic codes for the knee and elbow allow for separate ratings for limitation of flexion and extension, but relied on the plain language of DC 5201 to find that any limitation of motion of the shoulder constitutes a single disability, regardless of the various ways in which the motion is limited.

9. ***Romanowsky v. Shinseki***, docket no. 11-3272 (Vet. App. July 10, 2013)
Evidence of a recent diagnosis of a disability that was made prior to the veteran's filing of a claim for that disability is relevant evidence that the Board must *address* in determining whether a current disability existed when the claim was filed or during its pendency. In this case, the veteran was diagnosed with an adjustment disorder in May 2008, which resulted in his discharge from service. He filed a claim for VA benefits for that disorder in November 2008. In December 2008, a VA examiner determined that the veteran did *not* have an adjustment disorder, and VA denied the claim the following month. The veteran appealed to the Board of Veterans' Appeals – and the Board relied on the CAVC's prior holding in *McClain v. Nicholson*, 21 Vet.App. 319 (2007), to determine that the May 2008 diagnosis falls outside the claim period, and that there was no current diagnosis for VA benefits purposes.

The Court held that the Board misconstrued *McClain* and erred by not considering whether the May 2008 diagnosis established that his disability existed at the time he filed his claim, even if the disability resolved prior to adjudication. The Court also provided a lengthy discussion of the appropriate remedy, and appeared poised to reverse, noting that "the 'clearly erroneous' standard applied by the Court is less deferential than the 'substantial evidence' standard applied by courts when reviewing non-VA administrative adjudication." Opinion at *10 (quoting R. Pierce, *Administrative Law Treatise* §§ 11.2, 11.3 (5th ed. 2010)). However, the Court determined that remand was appropriate in this case because of the Board's misinterpretation of *McClain* and its failure to weigh the evidence.

10. ***Burden v. Shinseki***, docket no. 2012-7096 (Fed. Cir. July 16, 2013)

In this case, the Federal Circuit affirmed the CAVC's opinion that state law, including state evidentiary standards, must be applied in determining the validity of a common-law marriage.

11. ***Massie v. Shinseki*****,** docket no. 2012-7087 (Fed. Cir. July 29, 2013)
In order for medical evidence to constitute a "report of examination" under 38 C.F.R. § 3.157(b)(1), and thus qualify as an informal claim for an increased rating, the medical evidence must (1) refer to at least one specific medical examination and (2) assert that the veteran's service-connected condition has worsened. In this case, the veteran attempted to assert that a letter from his VA doctor raised an informal claim for an increased rating – even though the letter did not mention an examination or state that the veteran's condition had worsened. The CAVC interpreted 38 C.F.R. § 3.157(b)(1) to require these two elements – and the Federal Circuit agreed.

VA POLICY NEWS

- VA clarified its procedures regarding claims for total disability ratings based on individual unemployability (TDIU). Significantly, VA will require the veteran to submit a completed VA Form 21-8940 before deciding the claim – and will deny claims if VA requested, but the veteran did not submit, the completed form. In addition, VA acknowledged that a medical examination is not required to determined entitlement to TDIU – and that the determination of unemployability rests with the rating specialist.