

**VETERAN'S LAW UPDATE: September 2013****CASE LAW**

1. [**Kernea v. Shinseki**](#), 724 F.3d 1374 (Fed. Cir. Aug. 1, 2013)
Regulation that bars claims for enhanced dependency and indemnity compensation (DIC) benefits based on hypothetical entitlement can be applied retroactively.

World War II veteran was service connected for diabetes, with a 40% disability rating. In 1961, VA increased his disability rating to 60%. In 1965, VA increased his rating to 100%. Veteran died in 1969. Veteran's widow was awarded DIC benefits under 38 U.S.C. § 1310 that allows for benefits to survivors of veterans who die from a service-connected condition. In 2003, Mrs. Kernea applied for increased ("enhanced") DIC benefits, under 38 U.S.C. § 1311(a)(2), which allows for such benefits if a veteran received "or was entitled to receive . . . compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death." VA denied enhanced DIC benefits because the veteran had not been totally disabled for eight years prior to his death. While Mrs. Kernea appealed this decision, VA issued a new regulation that interpreted the phrase "entitled to receive" as prohibiting "hypothetical entitlement." Mrs. Kernea argued that this new regulation did not apply to her because it was issued after she filed her claim.

The Board of Veterans' Appeals determined that the regulation could be retroactively applied to her claim under the retroactivity analysis in *Princess Cruises, Inc. v. United States*, 397 F.3d 1358 (Fed. Cir. 2005). The Veterans Court and the Federal Circuit affirmed the Board's decision. In *Princess Cruises*, the Federal Circuit identified three factors to consider in assessing whether applying an agency's regulation to conduct that predated the regulation's issuance would have an improper retroactive effect. The factors are: (1) "the nature and extent of the change of the law"; (2) "the degree of connection between the operation of the new rule and a relevant past event"; and (3) "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Princess Cruises*, 397 F.3d at 1364. The Federal Circuit assessed these three factors and determined that all three weighed in favor of retroactive effect and against Mrs. Kernea's position.

2. [**NOVA v. Shinseki**](#), docket no. 2011-7191 (Fed. Cir. Aug. 5, 2013)
The National Organization of Veterans' Advocates challenged a VA rule that appeared to eliminate rights for veterans appearing at hearings before the Board of Veterans' Appeals. While on review at the Federal Circuit, VA agreed that the rule

was invalid, and assured NOVA that it would no longer apply the rule. When VA Board members continued to apply the rule, the Federal Circuit ordered VA to show cause why it should not be sanctioned for its actions. VA conceded error and provided the Court with a plan for notifying every claimant affected by the invalid rule. The notice would also offer to vacate the Board decision and to provide the claimants with new hearings. The Court approved the plan and did not issue sanctions. However, the Court has retained jurisdiction until both parties indicate that judicial review is no longer needed.

3. [Middleton v. Shinseki](#), 727 F.3d 1127 (Fed. Cir. Aug. 15, 2013)
Assignment of a 40% disability rating for diabetes under Diagnostic Code (DC) 7913 requires that all three criteria in the diagnostic code are met – including the administration of insulin. This rating is not available to a claimant who uses another drug that causes the body to secrete insulin.

Veteran was service connected for diabetes, rated 20% disabling. He sought a higher rating because he was treated with three oral medications and daily injections of Byetta, a drug that induces the body to secrete insulin. VA denied the higher rating because the veteran did not use insulin to regulate his diabetes. The Board of Veterans' Appeals held that the use of insulin was necessary to obtain the 40% rating. The Veterans Court and Federal Circuit affirmed. The Federal Circuit noted that the diagnostic code expressly calls for the use of insulin and does not provide for the use of another compound. The Federal Circuit agreed with the Secretary that the diagnostic code for diabetes (DC 7913) is a successive and cumulative rating schedule that requires the veteran to satisfy all criteria for the specific rating. The Court found that 38 C.F.R. § 4.7 did not apply in a case such as this because there was no question as to which rating applied when the veteran did not satisfy all the criteria of the higher rating, but did satisfy all the criteria for the lower rating.

4. [Wingard v. Shinseki](#), docket no. 11-1214 (Vet. App. Aug. 16, 2013)
VA's assignment of 0% disability ratings is valid and not inconsistent with the veterans' benefits statutory scheme.

In order to obtain VA non-service-connected burial benefits, a veteran must be "in receipt of" VA compensation at the time of death. The veteran was service connected for a hernia, rated 0%. He died from non-service-connected conditions. VA denied non-service-connected burial benefits because his service-connected condition was rated as 0% disabling – and, therefore, he was not "in receipt of" compensation. The veteran's surviving daughter appealed, arguing that the pertinent statutes did not provide for a 0% disability rating. The Veterans Court found that the assignment of a 0% rating was valid and in line with the statutory scheme.

5. [Garow v. Shinseki](#), docket no. 12-548(E) (Vet. App. Aug. 30, 2013)
In this Equal Access to Justice (EAJA) case, the Veterans Court held that the parties' agreement to a Joint Motion to Vacate the Board's decision based on a lack of jurisdiction did not confer "prevailing party" status on the veteran's attorney, and thus denied EAJA fees.
6. [Cline v. Shinseki](#), docket no. 10-3543(E) (Vet. App. Aug. 30, 2013)
In this Equal Access to Justice (EAJA) case, the Veterans Court applied the "totality of the circumstances" approach to reviewing whether the Secretary's actions were substantially justified and determined that they were not. Nevertheless, the Court reduced the attorney's fees because the attorney did not (1) reduce the amount of hours spent by his paralegal on "non-prevailing" issues, pursuant to *Vazquez-Flores v. Shinseki*, 26 Vet.App. 9, 15 (2013), and (2) specify what his "travel expenses" were.
7. [Ratliff v. Shinseki](#), docket no. 11-3243 (Vet. App. Sept. 11, 2013) (order)
A written expression of disagreement with a Board decision that is filed with a VA regional office during the 120-day appeal period will abate the finality of that Board decision for the purposes of appealing to the Court until (1) VA determines that the written disagreement is a Notice of Appeal (NOA) and returns it to the claimant with information on the proper location or forwards it to the Veterans Court; (2) the Board Chairman determines the status of the written disagreement and notifies the claimant; or (3) the claimant files an NOA with the Court after filing a written disagreement with the RO, and the Court determines that the written disagreement was a misfiled NOA.
8. [Schertz v. Shinseki](#), docket no. 11-2694 (Vet. App. Sept. 26, 2013)
Under 38 U.S.C. § 1151, an "event not reasonably foreseeable" is an objective standard based on what a reasonable health care provider would have foreseen. Actual foreseeability by the patient's medical provider is not dispositive.

This case involves a veteran who suffered partial paralysis as a result of VA surgery. Prior to surgery, he and his wife had been informed, both in writing and orally, of the potential risks of surgery, to include paralysis. The veteran lost the use of his legs shortly following surgery and filed a claim for service connection under section 1151. The Court reviewed the statute and VA's implementing regulation, and determined that while the term "reasonably foreseeable" is ambiguous, VA has adopted an objective standard to interpret the term, based on the "reasonable health care

provider.” The Court held that what was actually foreseen by the physician – and what was provided in the informed consent – is not dispositive, but rather is evidence to be weighed in determining whether an event was reasonably foreseeable such that a reasonable health care provider would have disclosed the risk. 38 C.F.R. §§ 3.361(d)(2), 17.32. Because the Board did not consider whether a “reasonable health care provider” would have disclosed the possibility of spinal cord injury and paralysis as a reasonably foreseeable risk, the Court remanded the case back to the Board to make this determination in the first instance.

9. [**AZ v. Shinseki**](#), docket no. 2012-7046 (Fed. Cir. Sept. 30, 2013)
In evaluating PTSD cases based on military sexual assault, the Federal Circuit held that “the absence of a service record documenting an unreported sexual assault is not pertinent evidence that the sexual assault did not occur.” The Court further held that VA and the Veterans Court “may not rely on a veteran’s failure to report an in-service sexual assault to military authorities as pertinent evidence that the sexual assault did not occur.”

The Court found that the lack of service records showing that an alleged assault occurred or was reported in service is NOT pertinent evidence that the assault did not happen because it is not reasonable to believe that these assaults are reported. The Court relied on statistics from the Department of Defense showing that the vast majority of these incidents are not reported to military authorities. The Court also relied on the common-law approach that gives weight to the absence of evidence only if the event was normally recorded. In-service sexual assaults are not usually reported – and therefore are normally not recorded – so it is not reasonable to construe the absence of such evidence (reporting/recording) as negative evidence against the claim. The Court in this case stated that “where an alleged sexual assault, like most in-service sexual assaults, is not reported, the absence of service records documenting the alleged assault is not pertinent evidence that the assault did not occur.” *AZ v. Shinseki*, at *28-29.