HOEFER LAW FIRM PLLC

MARY K. HOEFER
JEREMY FLAMING
AMY B. KRETKOWSKI

VETERAN'S LAW UPDATE: November 2013

Summaries of Precedential Cases Issued by
the U.S. Court of Appeals for Veterans Claims and
the U.S. Court of Appeals for the Federal Circuit,
October and November 2013

1. ***Kyhn v. Shinseki***, 26 Vet.App. 371 (Vet.App. Oct. 22, 2013)
   This decision is the result of a Federal Circuit opinion that found that the CAVC acted outside its jurisdiction when it relied on extra-record evidence to determine that VA had properly notified the veteran of a scheduled examination, based on the presumption of administrative regularity. *See Kyhn v. Shinseki*, 716 F.3d 572 (2013). On remand, the CAVC returned the case to the Board to explain its determination that Mr. Kyhn was properly notified of the scheduled examination. The CAVC noted that the Board did not discuss the documents it relied on in finding that Mr. Kyhn was notified of the examination and did not discuss whether this finding was based on the presumption of regularity. The Court stated that if the Board bases its finding on the presumption of regularity, it "should explain in detail the regular and established procedure that VA follows" to schedule and notify claimants of examinations.

2. ***Wagner v. Shinseki*****,** 733 F.3d 1343 (Fed. Cir. Oct. 24, 2013)
   Filing a supplemental Equal Access to Justice Act (EAJA) application does not abate the finality of a previously filed EAJA application for which judgment and mandate have already been entered. A pending request for supplemental EAJA fees is separate from the underlying application for EAJA fees.

   In this case, the appellant won a remand from the CAVC and filed an EAJA application. The government conceded that the appellant was a prevailing party, but contested the amount. The CAVC granted the fee application, but reduced the fee in response to the government's challenge.

   The appellant then filed a supplemental EAJA application. Before ruling on the supplemental application, the CAVC entered judgment on the initial award. The Court revoked judgment the next day, with no explanation. The appellant moved the Court to enter judgment and the Court denied the motion. That same day, the Court denied the supplemental EAJA application.

   The appellant appealed this decision to the Federal Circuit, which reversed, holding that because Mr. Wagner was partially successful in defending the initial EAJA

application, he was entitled to a commensurate supplemental fee. The CAVC subsequently granted Mr. Wagner's supplemental EAJA application and entered judgment – but the judgment order did not explicitly say whether it applied to both the initial and/or supplemental EAJA applications.

Mr. Wagner then filed a *second* supplemental application, this time for his successful appeal to the Federal Circuit. Nine months later, Mr. Wagner had yet to receive any payment on his initial or supplemental EAJA applications. He filed a motion for judgment with the CAVC. The Court granted his second supplemental EAJA application, reducing his fees by 41.5 fewer hours than he had requested. The Court denied the motion for judgment because it stated that the Secretary opposed the motion and the Court would not "circumvent his appellate rights."

Mr. Wagner appealed the CAVC's refusal to order the government to promptly pay his initial and first supplemental EAJA applications. The Federal Circuit concluded that the CAVC "relied on an incorrect view of the law" in denying the appellant's motion for judgment on the initial and first supplemental EAJA applications. The Federal Circuit found that the CAVC's sole explanation for its decision – to not "circumvent [the Secretary's] appellate rights" – was erroneous because the Secretary did not appeal the CAVC's decisions regarding the initial and first supplemental EAJA awards.

The government also argued that the timing provision of the EAJA itself precluded entry of judgment on a fee application if a supplemental application was pending. The Federal Circuit rejected this argument, finding that the EAJA's timing requirement is satisfied when an initial application is filed within 30 days of the merits judgment and that this timing provision does not apply to supplemental EAJA applications. The Federal Circuit noted that nothing in the EAJA supports long delays in issuing enforceable judgments for payments – and that the prompt payment of attorney's fees "plays the particularly important role in the veterans' adjudicatory system of ensuring that litigants will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." *10 (internal quotation marks omitted).

3. ***Sprinkle v. Shinseki***, 733 F.3d 1180 (Fed. Cir. Oct. 24, 2013)
The fair process doctrine is not implicated when a regional office considers and summarizes new evidence in a Supplemental Statement of the Case (SSOC). The fair process doctrine is only triggered when the Board obtains evidence after the SOC or SSOC has been issued.

In this case, the Board remanded to the RO to obtain a medical opinion. The RO obtained the medical evidence and summarized it in an SSOC, in which the veteran

was informed that he had 30 days to submit additional evidence. The veteran responded that he had no additional evidence to submit and requested that the RO return his case to the Board. The RO certified the case to the Board and informed the veteran that he had 90 days to send the Board additional evidence. The veteran then retained an attorney, who requested a copy of all evidence obtained by VA since December 2004, which would include the most recent medical opinion. The attorney submitted this request, along with subsequent follow-up requests, to the RO. Because the appeal had been certified to the Board – and the veteran's file was already at the Board – the RO forwarded the requests to Washington, DC. The Board finally sent the attorney the requested documents – and issued a decision less than 30 days later. The veteran appealed, arguing that the Board failed to afford him fair process by not providing him a copy of the newly obtained medical opinion until less than 30 days before issuing its decision. The CAVC affirmed the Board's decision, finding that the veteran had not been denied fair process.

The Federal Circuit agreed, explaining that the regulation regarding advisory medical opinions obtained by the Board, 38 C.F.R. § 20.903(a), does not apply when the *RO* obtains a medical opinion. The Court found that the "fair process doctrine," developed by the Veterans Court in the context of evidence obtained and relied on by the Board *after* the issuance of the most recent SOC or SSOC, is not implicated when the RO obtains evidence and summarizes it in an SSOC. The Federal Circuit noted that the veteran in this case "has not challenged the adequacy of the summary" and that he had 30 days to respond to the SSOC. The Federal Circuit held that "[b]ecause the [RO] received and considered the evidence before summarizing it in a [SSOC], this case does not implicate the statutory exception to the prohibition against first-instance Board review of evidence that the fair process doctrine is designed to safeguard." Advocacy Practice Note: If you have requested and *not* received medical evidence developed by the RO that has been summarized in an SOC or SSOC, challenge the summary of the evidence and state that you will clarify your challenge once you have received and have had a chance to review the evidence.

4. ***Gill v. Shinseki***, docket no. 12-3428 (Vet.App. Oct. 28, 2013)
The diagnostic code (DC) for hypertension requires multiple blood pressure readings over multiple days to confirm the diagnosis of the condition. The CAVC held that this requirement only applies to the confirmation of the diagnosis – and not to the assignment of a disability rating.

In this case, the veteran was awarded service connection for hypertension, rated 10% disabling. He appealed the rating assigned, arguing that the medical evidence of record was inadequate because it did not contain reports of two or more blood pressure readings on at least three different days, as required by 38 C.F.R. § 4.104,

DC 7101 Note 1. The Court paid substantial deference to the Secretary's interpretation of VA's regulation and held that the regulation's requirement of multiple blood pressure readings over multiple days only applies to the initial confirmation of the diagnosis of hypertension.

5. ***Geib v. Shinseki*****,** 733 F.3d 1350 (Fed. Cir. Oct. 29, 2013)
In a claim for a total disability rating based on individual unemployability (TDIU), VA is *not* required to obtain a single medical opinion that addresses the combined effect of all the claimant's service-connected disabilities on employability. *Geib*, 733 F.3d at 1353-54 ("Although the VA is expected to give full consideration to 'the effect of combinations of disability,' [] neither the statute nor the relevant regulations require the combined effect to be assessed by a medical expert.")

In this case, the veteran was service connected for multiple disabilities. He applied for TDIU and was ultimately afforded two examinations – one for hearing loss and the other for trenchfoot. The audiology examiner opined that the veteran's hearing loss and tinnitus do not prevent gainful employment. The trenchfoot examiner opined that his trenchfoot did not prevent gainful employment. The RO denied the TDIU claim. The veteran appealed, arguing that the Board was required to obtain a single medical opinion that addressed the impact of *all* his service-connected conditions. The Veterans Court affirmed the Board's denial, and the Federal Circuit agreed.

The Federal Circuit noted that the regulations "place responsibility for the ultimate TDIU determination on the VA, not a medical examiner." *Id*. at 1354 (citing 38 C.F.R. § 4.16(a)). The Court stated: "Where, as here, separate medical opinions address the impact on employability resulting from independent disabilities, the VA is authorized to assess the aggregate effect of all disabilities, as it did." *Id*. The Court emphasized that "the VA is expected to give full consideration to 'the effect of combinations of disability.'" *Id*. (citing 38 C.F.R. § 4.15). The Court added that "[w]here neither the regional office nor the Board addresses the aggregate effect of multiple service-connected disabilities," the record is inadequate for review. *Id*.

6. ***Floore v. Shinseki*****,** 26 Vet.App. 376 (Vet.App. Nov. 5, 2013)
This panel opinion was circulating within the Veterans Court for review when the Federal Circuit issued *Geib v. Shinseki*. The primary issue in *Floore* is the same as in *Geib* – whether VA is required to obtain a single medical opinion that assesses the aggregate effect of all service-connected conditions to determine entitlement to TDIU.

In *Floore*, the Court discussed and distinguished the various cases relied on by the appellant, and found that none of these cases held that a combined-effects

examination is required in assessing TDIU claims. The Court also considered VA's Fast Letter 13-13, and found that this letter provides guidance, not direction, and that it is ultimately up to the rating agency to determine the need for a medical opinion. The Court held that "the need for a combined-effects medical examination report or opinion with regard to multiple-disability TDIU entitlement decisions is to be determined on a case-by-case basis, and depends on the evidence of record at the time of decision by the [RO] or the Board." *Floore*, 26 Vet.App. at 381.

Nevertheless, the Court remanded because it found the Board's reasons or bases inadequate for review. The Court stated that even though a combined-effects examination is not necessary, "the Board nevertheless must adequately explain how the record evidence supports its determination that the combined effects of multiple disabilities do not prevent substantially gainful employment." *Id*. at 382. The Court noted that while the Board "recognized that the cumulative effects of service-connected disabilities can prevent substantially gainful employment, the Board addressed the effects of Mr. Floor's disabilities individually, and never explained what the cumulative functional impairment of all his service-connected disabilities might be and why they do not prevent substantially gainful employment." *Id*. The Court noted that the Board failed to discuss the effects of the veteran's diabetes, one of his service-connected conditions. The Court also noted that the Board was influenced by the fact that the veteran terminated his employment as a result of non-service-connected conditions, but failed to explain how evidence of that termination was weighed and "to what extent it is even relevant to its determination that Mr. Floore's service-connected disabilities do not prevent him from undertaking any substantially gainful employment." *Id*. at 383. Advocacy Practice Note: Many veterans are denied TDIU because they obtained Social Security disability benefits for non-service-connected conditions. The language in this case should be helpful in requiring VA to explain the relevance of such SSA decisions on the TDIU decision.

7. ***Prinkey v. Shinseki***, 735 F.3d 1375 (Fed. Cir. Nov. 19, 2013)
The question of whether a medical opinion is adequate is a question of fact and, therefore, beyond the Federal Circuit's jurisdiction.

In this case, the veteran was awarded service connection for Type II diabetes due to Agent Orange exposure in 2003. He sought to reopen his claim in 2005. On review of his file, a nurse practitioner discovered that Mr. Prinkey had a pancreatectomy in 1994 – two years before his diabetes diagnosis. The regional office (RO) obtained an opinion from an endocrinologist stating that his diabetes was due to the pancreatectomy and not Agent Orange exposure, and subsequently severed the award of service connection. The Board of Veterans' Appeals and the U.S. Court of Appeals for Veterans Claims (CAVC) affirmed the RO's decision.

On appeal to the Federal Circuit, the Court held that it lacked jurisdiction to review the CAVC's assessment of the adequacy of the medical opinion because that was a question of fact. The Federal Circuit determined that the appellant's other two arguments lacked merit, and affirmed the CAVC's decision.