



2013 VETERANS CASE LAW

Precedential Decisions of
the U.S. Court of Appeals for Veterans Claims (CAVC) and
the U.S. Court of Appeals for the Federal Circuit (CAFC)

Solze v. Shinseki, 26 Vet.App. 118 (Jan. 4, 2013) (per curiam order)

FIDUCIARY, PETITION FOR WRIT OF MANDAMUS

The Court denied the petitioner's request for a writ of mandamus because it found that the petitioner had alternative means to obtain the relief sought – namely to continue to pursue the appeal of VA's assignment of a fiduciary to the Board of Veterans' Appeals. The Court expresses its concern over VA's "reluctance to utilize other methods by which it is authorized to distribute benefits during the dispute over the appointment of a fiduciary," and stated that VA "cannot delay payment forever." 26 Vet.App. at 124. However, the Court found itself "constrained by the law" to act. *Id.*

Checo v. Shinseki, 26 Vet.App. 130 (Jan. 4, 2013)

EQUITABLE TOLLING

Homelessness can be an extraordinary circumstance that would warrant equitable tolling of the 120-day deadline to file a Notice of Appeal (NOA) with the CAVC. However, the appellant must demonstrate that (1) the untimely filing was a direct result of the homelessness and (2) due diligence was exercised in pursuing the appeal.

Harris v. Shinseki, 704 F.3d 946 (Jan. 4, 2013)

DUTY TO FULLY AND SYMPATHETICALLY DEVELOP CLAIM

This case affirms the Federal Circuit's case law regarding VA's duty to "read liberally . . . [and] fully develop any filing made by a *pro se* veteran by determining all potential claims raised by the evidence." 704 F.3d at 948. In this case, the veteran was awarded benefits in 2002, and appealed for an earlier effective date based on a 1985 VA medical examination report and application for VA *healthcare* benefits. The Federal Circuit acknowledged that the Board considered the applicability of the benefit-of-the-doubt rule, but reiterated that the duty to fully and sympathetically develop a claim is separate from that doctrine and is placed on VA *prior* to adjudicating the claim on the merits.

El-Amin v. Shinseki, 26 Vet.App. 136 (Jan. 15, 2013)

ADEQUACY OF MEDICAL OPINION

A medical opinion that only addresses direct causation is inadequate to address whether a service-connected condition *aggravated* a second condition. In this case, the VA examiner stated that the cause of death was "related to" factors other than his service-connected condition – and the Court found that it was not clear from this

statement that the examiner “considered whether Mr. El-Amin’s post-traumatic stress disorder aggravated his alcohol abuse.” 26 Vet.App. at 140. 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 aggravation. *Id.*

Clennan v. Shinseki, 26 Vet.App. 144 (Jan. 24, 2013)

COMPETENCY; SUPERVISED DIRECT PAY; FIDUCIARY

Participation in VA’s supervised direct pay program does not void or negate a determination of incompetency.

Deloach v. Shinseki, 709 F.3d 1370 (Jan. 30, 2013)

REVERSAL V. REMAND

The case involved two consolidated appeals in which the records contained at least one favorable opinion from a private physician and one ambiguous opinion from a VA doctor that was relied on by VA to deny the claim. The CAVC remanded, and the appellants argued that the CAVC should have reversed. The Federal Circuit 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.” 709 F.3d at 1380. 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.

Andrews v. Shinseki, 26 Vet.App. 193 (Jan. 31, 2013)

VOCATIONAL REHABILITATION BENEFITS

The eligibility period for the use of VA Voc Rehab benefits is stayed while a veteran’s appeal of an adverse decision regarding those benefits is pending. The Court also held that the Board was required to seek a new 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, but relied on a 1991 VA psychologist’s report that did not consider the effect of those additional disabilities.

Viegas v. Shinseki, 705 F.3d 1374 (Jan. 31, 2013)

38 U.S.C. § 1151 – DIRECT CAUSATION

Direct causation, under section 1151, includes not only “direct involvement with VA staff,” but also “the medications and equipment necessary to provide such treatment.” 705 F.3d at 1381. A disabled veteran receiving physical therapy at a VA medical facility was injured in the bathroom when the handicap bar came loose from the wall – and the Court held that his 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.” *Id.* at 1379.

Bowers v. Shinseki, 26 Vet.App. 201 (Feb. 19, 2013)

PRESUMPTION OF SERVICE CONNECTION – ALS (38 C.F.R. § 3.318)

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 can show that he/she incurred and became disabled (or died) from the condition *during* that active duty for training.

Walker v. Shinseki, 708 F.3d 1331 (Feb. 21, 2013)

CONTINUITY OF SYMPTOMATOLOGY – CHRONIC CONDITIONS

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).

Shephard v. Shinseki, 26 Vet.App. 159 (Feb. 27, 2013)

WITHHELD BENEFITS DURING INCARCERATION

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). This case holds that if the conviction is *not* overturned, the veteran *cannot* receive the amount withheld during incarceration.

Beasley v. Shinseki, 709 F.3d 1154 (Mar. 11, 2013)

DUTY TO ASSIST – DUTY TO OBTAIN MEDICAL OPINION

After VA refused to provide a medical opinion from the veteran's VA physician, stating that it would be a "conflict of interest," the veteran petitioned the CAVC to intervene. The CAVC held that the duty to assist does not require VA to obtain a medical opinion from a veteran's VA physician based on evidence that had not been submitted to the Board. In a strongly worded dissent, Judge Newman reframed 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.'" 709 F.3d at 1160. Judge Newman stated that "[t]his cannot be what Congress intended by the 'duty to assist'" and asserted that the petition for mandamus should be granted. *Id.*

Rickett v. Shinseki, 26 Vet.App. 210 (Mar. 12, 2013) (per curiam order)

EQUITABLE TOLLING – TIMELY MISFILING

Equitable tolling is warranted when a veteran submits an NOA to VA's Office of the General Counsel within the 120-day appeal period. The Court stated that "equitable tolling is predicated primarily on the due diligence of the prospective appellant as opposed to the particularity of the location at which the prospective appellant misfiles his or her NOA." 26 Vet.App. at 218. The criteria for equitable tolling in cases of timely misfilings are (1) a *timely* misfiling (i.e., within the 120-day appeal period); (2) the intent

to appeal as shown in the form and content of the NOA and the circumstances surrounding the filing of the NOA; (3) notice to VA of intent to appeal; and (4) relaxed due diligence for pro se appellant based on totality of the circumstances. *Id.* at 218-20.

Robertson v. Shinseki, 26 Vet.App. 169 (Mar. 15, 2013)
BREACH OF THE DUTY TO ASSIST CANNOT BE CUE

Any failure on the part of VA to fully explain its character-of-discharge determination cannot be “clear and unmistakable error” (CUE) 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.

Johnson v. Shinseki, 26 Vet.App. 237 (Mar. 27, 2013) (en banc)
EXTRASCHEDULAR CONSIDERATION (38 C.F.R. § 3.321(b)(1))

The Board is not required to consider whether a claimant is entitled to referral for extraschedular consideration of his multiple disabilities on a collective basis. An extraschedular evaluation is awarded solely on a disability-by-disability basis and not on the combined effect of multiple disabilities. *But see* concurring and dissenting opinions.

Vazquez-Claudio v. Shinseki, 713 F.3d 112 (Apr. 8, 2013)
DISABILITY RATING: MENTAL CONDITIONS

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 “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.

Trafter v. Shinseki, 26 Vet.App. 267 (Apr. 29, 2013)
EVIDENCE NEEDED TO OBTAIN MEDICAL OPINION UNDER 38 U.S.C. § 1151

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.

Kelley v. Shinseki, 26 Vet.App. 183 (May 3, 2013)
EXCLUSIVE CONTACT REQUESTS

In November 2012, VA rescinded its policy that honored exclusive-contact requests from attorney-represented veterans. A veteran’s attorney petitioned the CAVC, arguing that VA’s contact with the 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 VA prevented the veteran from obtaining advice from his attorney or otherwise interfered with the attorney-client relationship.

Solze v. Shinseki, 26 Vet.App. 299 (May 3, 2013) (per curiam order)

ATTORNEY'S DUTY TO NOTIFY THE COURT OF SIGNIFICANT DEVELOPMENTS

Both parties to a case have a duty to inform the Court of any "developments that could deprive the Court of jurisdiction or otherwise affect its decision." 26 Vet.App. at 301.

This duty is particularly significant in petitions, where the Court is being asked to "interject its authority into a live controversy." *Id.* at 302.

Kyhn v. Shinseki, 716 F.3d 572 (May 3, 2013)

PRESUMPTION OF REGULARITY AND EXTRA-RECORD EVIDENCE

The Court cannot rely on evidence that was not in the record before the Board to determine that the presumption of regularity applied. The Federal Circuit found that the CAVC's reliance on extra-record evidence exceeded its jurisdiction (impermissible fact-finding), and remanded the case. *See also Kyhn v. Shinseki*, 26 Vet.App. 371 (Oct. 22, 2013) (remanding for the Board to discuss the documents it relied on).

Parks v. Shinseki, 716 F.3d 581 (May 3, 2013)

PRESUMPTION THAT MEDICAL EXAMINER IS QUALIFIED

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 order to overcome the presumption, the claimant must first object to the examiner's qualifications, and then show that the examiner lacks the necessary education, training, or experience to provide the requested opinion.

Beraud v. Shinseki, 26 Vet.App. 313 (May 17, 2013)

NEW & MATERIAL EVIDENCE (38 C.F.R. § 3.156(b))

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 her dissent, Judge Bartley asserted that 38 C.F.R. § 3.156(b) 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.

Hall v. Shinseki, 717 F.3d 1369 (June 7, 2013)

PTSD EVIDENTIARY STANDARDS UNDER 38 C.F.R. § 3.304(f)(3) and (5)

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/her statements alone to prove that the in-service assault occurred. The relaxed standards in this regulation only apply 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.” 717 F.3d at 1372.

PirkI v. Shinseki, 718 F.3d 1379 (June 12, 2013)

THE EFFECT OF CUE ON SUBSEQUENT DECISIONS; RATING REDUCTIONS

Finding 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 – because CUE in the earlier decision may have “changed the factual and legal background” against which the subsequent decisions were made.

Cameron v. Shinseki, 721 F.3d 1365 (July 3, 2013)

ENTITLEMENT TO ATTORNEY FEE

An attorney fee may be charged “‘in the case of services provided’ after the date on which the Board ‘first makes a final decision in the case.’” 721 F.3d at 1368. The veteran in this case signed the fee agreement with the attorney *after* the Board issued its decision, but *before* it was implemented by the RO. The Court held that the veteran’s attorney was not entitled to a fee based on the Board award because he did not provide “services” relevant to that award.

Yonek v. Shinseki, 722 F.3d 1355 (July 8, 2013)

DISABILITY RATING: SHOULDER

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, and 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.

Romanowsky v. Shinseki, 26 Vet.App. 289 (July 10, 2013)

EVIDENCE OF RECENT (PRE-CLAIM) DIAGNOSIS MUST BE ADDRESSED

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 consider and address in determining whether a current disability existed when the claim was filed or during its pendency. In this case, the Board relied on *McClain v. Nicholson*, 21 Vet.App. 319 (2007), to determine that a May 2008 diagnosis (made just prior to the veteran’s discharge from service, and thus prior to the filing of his claim) fell 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 the disability existed at the time the veteran filed the claim, even if the disability resolved prior to adjudication.

Burden v. Shinseki, 727 F.3d 1161 (July 16, 2013)

COMMON-LAW MARRIAGE

State law, including state evidentiary standards, must be applied in determining the validity of a common-law marriage.

Massie v. Shinseki, 724 F.3d 1325 (July 29, 2013)

MEDICAL EVIDENCE AS INFORMAL CLAIM FOR INCREASED RATING

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.

Kernea v. Shinseki, 724 F.3d 1374 (Aug. 1, 2013)

RETROACTIVITY, HYPOTHETICAL ENTITLEMENT TO ENHANCED DIC

VA’s regulation that bars claims for enhanced dependency and indemnity compensation (DIC) benefits based on hypothetical entitlement can be applied retroactively. The Court assessed the regulation under the retroactivity analysis in *Princess Cruises, Inc. v. United States*, 397 F.3d 1358 (Fed. Cir. 2005), which identifies 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.

Middleton v. Shinseki, 727 F.3d 1127 (Aug. 15, 2013)

DISABILITY RATING: DIABETES

Assignment of a 40% disability rating for diabetes under 38 C.F.R. § 4.119, DC 7913, requires that all three criteria in the diagnostic code are met – insulin, restricted diet, and regulation of activities. This rating is not available to a claimant who uses another drug that causes the body to secrete insulin.

Wingard v. Shinseki, 26 Vet.App. 334 (Aug. 16, 2013)

0% DISABILITY RATING IS VALID

VA’s assignment of 0% disability ratings is valid and not inconsistent with the veterans’ benefits statutory scheme. In order to obtain VA nonservice-connected burial benefits, a veteran must be “in receipt of” VA compensation at the time of death. The veteran in this case was service connected for a hernia, rated 0%. He died from nonservice-connected conditions. VA denied burial benefits because his service-connected condition was rated 0% – and, therefore, he was not “in receipt of” compensation. On appeal, the veteran’s daughter argued that the statutes did not provide for a 0% rating.

The Veterans Court found that the assignment of a 0% rating was valid and in line with the statutory scheme.

Garson v. Shinseki, 26 Vet.App. 348 (Aug. 30, 2013)

EQUAL ACCESS TO JUSTICE ACT (EAJA)

In this 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.

Cline v. Shinseki, 26 Vet.App. 325 (Aug. 30, 2013)

EQUAL ACCESS TO JUSTICE ACT (EAJA)

In this 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.

Ratliff v. Shinseki, 26 Vet.App. 356 (Sept. 11, 2013) (order)

FINALITY, NOTICE OF APPEAL (NOA) TO CAVC

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 an 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.

Schertz v. Shinseki, 26 Vet.App. 362 (Sept. 26, 2013)

38 U.S.C. § 1151 – "EVENT NOT REASONABLY FORESEEABLE"

Under 38 U.S.C. § 1151, an "event not reasonably foreseeable" is an objective standard based on what a reasonable medical provider would have foreseen. Actual foreseeability by the patient's provider is not dispositive, but rather is evidence to be weighed in determining whether an event was reasonably foreseeable such that a reasonable provider would have disclosed the risk. 38 C.F.R. §§ 3.361(d)(2), 17.32.

AZ v. Shinseki, 731 F.3d 1303 (Sept. 30, 2013)

ABSENCE OF SERVICE RECORDS IS NOT NEGATIVE EVIDENCE

In evaluating PTSD cases based on military sexual assault, the Federal Circuit held 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." 731 F.3d 1318. The Court stated 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.” *Id.* at 1306.

Tyrues v. Shinseki, 732 F.3d 1351 (Oct. 10, 2013)

FINALITY IN MIXED DECISIONS (i.e., where one or more issue is denied and one or more issue is remanded)

“When the Board renders a clear definitive denial of benefits as part of a mixed decision ... the veteran not only *can* appeal immediately, but *must* bring any appeal from the denial portion within the 120-day period allowed by statute.” 732 F.3d at 1357 (emphasis added). Equitable tolling does not allow a veteran “the discretion to file an appeal immediately or to wait until completion of all remand proceedings.” *Id.*

Sprinkle v. Shinseki, 733 F.3d 1180 (Oct. 24, 2013)

FAIR PROCESS DOCTRINE

The fair process doctrine requires the Board to notify a claimant of any evidence that it relies on that was obtained *after* the issuance of the most recent Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC). The Court in this case held that the fair process doctrine is not implicated when a *regional office* considers and summarizes new evidence in an SSOC. The fair process doctrine is only triggered when the *Board* obtains evidence *after* the SOC or SSOC has been issued.

Wagner v. Shinseki, 733 F.3d 1343 (Oct. 24, 2013)

EQUAL ACCESS TO JUSTICE ACT (EAJA)

Filing a supplemental 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.

Gill v. Shinseki, 26 Vet.App. 386 (Oct. 28, 2013)

DISABILITY RATING: HYPERTENSION

The diagnostic code for hypertension (38 C.F.R. § 4.104, DC 7101) requires multiple blood pressure readings over multiple days to confirm the diagnosis of the condition. This requirement only applies to the confirmation of the diagnosis – and not to the assignment of a disability rating. See 38 C.F.R. § 4.104, DC 7101, Note 1.

Geib v. Shinseki, 733 F.3d 1350 (Oct. 29, 2013)

TDIU, DUTY TO ASSIST

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. However, the ultimate TDIU determination rests with VA and not a medical examiner – and VA is “expected to give full consideration to ‘the effect of combinations of

disability.” *Id.* at 1354 (citing 38 C.F.R. §§ 4.15, 4.16(a)). The Court stated 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.*

Floore v. Shinseki, 26 Vet.App. 376 (Nov. 5, 2013)
TDIU, DUTY TO ASSIST

As in *Geib*, the issue here was 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. Although the CAVC recognized that a combined-effects examination was not required, it held that the need for any such examination or opinion “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.” 26 Vet.App. at 381.

Prinkey v. Shinseki, 735 F.3d 1375 (Nov. 19, 2013)
FEDERAL CIRCUIT’S JURISDICTION

The question of whether a medical opinion is adequate is a question of fact and, therefore, beyond the Federal Circuit’s jurisdiction.

Sneed v. Shinseki, 737 F.3d 719 (Dec. 9, 2013)
EQUITABLE TOLLING

The 120-day period to appeal an adverse Board decision to the CAVC is subject to equitable tolling that “is not ‘limited to a small and closed set of factual patterns,’ but rather is decided on a “case-by-case basis.” 737 F.3d at 726. In this case, the claimant contacted an attorney to represent her in her appeal. She received the attorney’s letter declining to represent her one day before the Notice of Appeal (NOA) was due, and missed the deadline to file the NOA herself. Six days later, she filed the NOA, explaining the circumstances. The CAVC held that these circumstances did not “fit within the ‘parameters’ of equitable tolling” and dismissed the appeal. Ms. Sneed appealed to the Federal Circuit, which held that the CAVC “focused too narrowly” on a limited set of factual circumstances to determine that equitable tolling did not apply – and “failed to consider whether attorney misconduct ... may constitute a basis for equitable tolling.” *Id.*

Ausmer v. Shinseki, 26 Vet.App. 392 (Dec. 19, 2013) (order)
SERVICEMEMBERS CIVIL RELIEF ACT, TIME TO FILE NOTICE OF APPEAL
The Servicemembers Civil Relief Act (SCRA) applies to proceedings at the CAVC, and automatically tolls the 120-day deadline to appeal an adverse Board decision to the Court. Under the specific circumstances of this case – which involved physical disabilities as well as PTSD and difficulty readjusting to civilian life – the Court determined that the appellant was entitled to an additional 90-day stay after his active service ended before the appeal period commenced.