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VETERAN'S LAW UPDATE: March 2014

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,
issued January and February 2014

1. ***Pacheco v. Shinseki***, 26 Vet.App. 413 (Jan. 16, 2014)
38 C.F.R. § 3.157(b) – MEDICAL EVIDENCE AS INFORMAL CLAIM
"[A]s long as a pension claim previously has been allowed as required in [38 C.F.R.] § 3.157(b), a VA examination report will constitute the requisite informal claim for increase or reopening for service connection *disability compensation* benefits under § 3.157(b)(1), irrespective of whether any disability identified in the original pension claim relates to the same condition as the more recent examination report." 26 Vet.App. at 417 (emphasis added).

   World War II veteran applied for VA disability compensation and pension benefits in 1974. Because the veteran's service records had been destroyed, VA was unable to corroborate his allegation of in-service injury and denied disability compensation. VA did, however, award pension benefits. Several years later, the veteran filed a request to reopen. VA was able to locate some service records, but continued to deny his claim, and also denied pension because his income was now too high. The veteran continued to submit requests to reopen, and was eventually awarded disability compensation benefits in 2002, effective as of the date he submitted his most recent request. He appealed the assignment of the effective date under 38 C.F.R. §§ 3.157(b) and 3.156(c).

   The Court held that because his *pension* claim had been previously allowed, he met the threshold requirement of § 3.157(b), which states that "[o]nce a formal claim for pension . . . has been allowed . . . , receipt of [VA medical report] will be accepted as an informal claim for increased benefits or an informal claim to reopen." 26 Vet.App. at 416. The Court also noted that the regulation does not "explicitly require that an original pension claim relate to the same condition as the recent VA examination report," although in this case the veteran's claims and VA medical report were for the same disabilities. *Id*. at 417. The Court reversed the Board's decision, finding that the veteran was entitled to a May 2001 effective date, the date of the VA medical report. The Court also remanded the case to the Board to consider, in the first instance, the applicability of § 3.156(c), based on VA's receipt of service records.

2. ***Middleton v. Shinseki***, 743 F.3d 1356 (Feb. 3, 2014)
38 C.F.R. § 4.7, ENTITLEMENT TO HIGHER DISABILITY RATING
The Federal Circuit denied the appellant's petition for panel and en banc rehearing of its opinion that held that where a veteran's disability meets *all* the criteria of a lower disability rating, but only meets *some* of the criteria of a higher rating, the veteran is only entitled to the lower rating. This decision contains two strongly worded dissents.

3. ***Dixon v. Shinseki***, 741 F.3d 1367 (Feb. 4, 2014)
NEW EVIDENCE ON MOTION FOR RECONSIDERATION, EQUITABLE TOLLING
Under certain circumstances, the introduction of new, clarifying evidence on motion for reconsideration may be necessary to allow the Court to fully evaluate the facts of a veteran's equitable tolling claim.

Pro se veteran filed his Notice of Appeal to the CAVC 60 days beyond the 120-day filing deadline, and the Court thus dismissed the appeal. Following the Supreme Court's decision in *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203-06 (2011), which held that the 120-day filing deadline is not a jurisdictional requirement, the CAVC issued orders to veterans whose appeals had been dismissed to file motions to recall mandate. Still acting pro se, Mr. Dixon filed a motion seeking equitable tolling, explaining the disabilities that prevented him from timely filing his notice of appeal. He subsequently submitted a supplemental motion along with a letter from his doctor to support his claim. The CAVC denied the motion and dismissed the appeal because it determined that Mr. Dixon failed to establish that the untimely filing was "the direct result of his illnesses." 741 F.3d at 1371. Mr. Dixon secured pro bono representation, and his attorneys moved for an extension of time to file a motion for reconsideration, which the CAVC granted.

VA officials obstructed every attempt made by the attorneys to obtain a copy of the claims file, review the file, have copies of pages from the file sent before their deadline, and have Mr. Dixon's doctor sign a statement regarding his condition. Because of this, the attorneys subsequently filed a second motion for an extension of time, which the CAVC denied. The Court then entered judgment against Mr. Dixon, stating that he had "no right to 'augment[] the record' on motion for reconsideration because such a motion 'must be based on the record at the time of the decision upon which reconsideration or panel review is sought.'" *Id*. at 1373.

The Federal Circuit reversed, stating that "[w]here a litigant is unjustifiably denied timely access to pertinent evidence in the possession of the opposing party, fairness dictates that he be granted an extension of time sufficient to allow him to obtain and review such evidence." *Id*. at 1374. The Court held that the CAVC "erred to the

extent that it concluded that Rule 35(e) imposes an absolute prohibition on the submission of clarifying evidence in support of an equitable tolling decision," and that "under certain circumstances, introduction of clarifying evidence is necessary for 'a full and fair consideration of [a veteran's] equitable tolling request, including assessment of all relevant facts.'" *Id*. at 1375.

4. ***Stallworth v. Shinseki*****,** 742 F.3d 980 (Feb. 10, 2014)
SEVERING SERVICE CONNECTION – 38 C.F.R. § 3.105(d)
The regulation that provides for the severance of service connection does not require medical examiners to use specific language.

Service connection may be severed "if a medical professional certifies that his or her review of all accumulated evidence indicates that the prior diagnosis is clearly erroneous." 742 F.3d at 983 (quoting 38 C.F.R. § 3.105(d)). The veteran in this case had been service connected for a mental condition. Following multiple psychiatric hospitalizations, four VA staff physicians concluded that the veteran did not have a mental illness and was "successfully manipulating transfer to various hospitals through 'deceptive practices.'" *Id*. at 981-82. The four doctors opined that service connection had been awarded in error, and VA subsequently severed service connection based on clear and unmistakable error (CUE).

Following years of adjudication, the veteran appealed to the CAVC, arguing that the Board misapplied § 3.105(d) because the report from the four VA doctors did not meet the standard required for severing service connection. The CAVC affirmed the Board's decision, and the veteran appealed to the Federal Circuit. The veteran argued that the CAVC misinterpreted § 3.105(d) by affirming a Board decision that relied on "a medical opinion that failed to certify that 'in light of all accumulated evidence, the diagnosis upon which service connection was predicated is clearly erroneous." *Id*. at 983. The Federal Circuit distinguished this case from *Andino v. Nicholson*, 498 F.3d 1370 (Fed. Cir. 2007), where the Court "held that service connection could not be severed based on a medical opinion that did not consider all accumulated evidence." *Id*. Unlike that case, the CAVC found no error in the Board's determination that severance was based on a medical opinion that considered all the accumulated evidence and that certified that the prior award of service connection was clear error – even though the doctors did not recite the exact language of the regulation. The Court stated that neither the regulation nor the case law requires the use of "magic words" to sever service connection, and that any such requirement "would elevate form over substance." *Id*. at 983-84.

5. ***Moffitt v. Shinseki***, 26 Vet.App. 424 (Feb. 14, 2014)
HYPOTHETICAL ENTITLEMENT, RETROACTIVITY
Retroactive application of the VA rule prohibiting hypothetical entitlement to Dependency and Indemnity Compensation (DIC) benefits is not prohibited, even in cases where the claim for DIC under this theory was filed *before* VA took steps to prohibit hypothetical entitlement.

   In 1946, the veteran was awarded a combined 100% disability rating for residuals of injuries sustained during World War II. In 1956, VA reduced his rating to 60%.In 1979, the veteran sought a total disability rating based on individual unemployability. The veteran died while that claim was pending. His surviving spouse was subsequently awarded DIC in 1983. In 1999, she applied for enhanced DIC, asserting that her husband should have been rated 100% for 10 or more years prior to his death. The CAVC discussed the history of hypothetical entitlement, and assessed the question of whether retroactive application of the rule prohibiting hypothetical entitlement was impermissible. The Court conducted the three-prong analysis required by *Princess Cruises v. United States*, 397 F.3d 1358 (Fed. Cir. 2005), and determined that retroactive application of the rule would not be impermissible in this case. Although this case continues to hammer the nail in the coffin of hypothetical entitlement, the Court's review suggests that a case-by-case analysis of the *Princess Cruises* factors will be warranted in situations that are not precisely on point with the existing hypothetical entitlement cases.

6. ***Mason v. Shinseki***, 743 F.3d 1370 (Feb. 21, 2014)
TIME TO APPEAL ATTORNEY DIRECT-FEE DECISION
RO denials of direct-fee requests are treated as simultaneously contested claims, and thus subject to the 60-day appeal period under 38 U.S.C. § 7105A.

   The attorney in this case had a direct-pay fee agreement with the veteran that entitled him to a fee of 20% of the retroactive award of benefits to be paid directly by VA. The RO determined that the attorney was not entitled to a fee, and the attorney appealed this decision 90 days after it was issued. The Court found that the denial of an attorney-fee request should be treated as a simultaneously contested claim. The Court found that the statutory language was ambiguous, and that deference was due to VA's reasonable interpretation found in 38 C.F.R. § 20.3(p) and its Adjudication and Procedures Manual. The Court also noted that any interpretive doubt should be construed in the veteran's favor – and that this interpretation, which would result in the veteran keeping the entire retroactive award, was more favorable to the veteran. 743 F.3d 1376, n. 5.

7. ***Tatum v. Shinseki*****,** docket no. 12-1682 (Vet.App. Feb. 26, 2014)
38 C.F.R. § 4.115b, DIAGNOSTIC CODE (DC) 7528
A 100% disability rating for prostate cancer is warranted for six months "[f]ollowing the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure…" 38 C.F.R. § 4.115b, DC 7528. The date of "cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure" refers to the date of final treatment for *cancer* – and *not* for treatment of residuals of cancer *or* residuals of cancer treatment.

   The veteran underwent treatment for prostate cancer in October and November 2001. A year later, he underwent subsequent procedures to insert a Foley catheter. The Board distinguished between the treatment for cancer that ended in November 2001 and the treatment for residuals (Foley catheter) that ended in December 2002 – and found that, for purposes of the regulation, his treatment ceased in November 2001. The Court agreed, but also determined that the six-month period of entitlement to a 100% disability rating went through May 2002, as opposed to April 2002, which is what had been awarded.

   Because the Court remanded this last issue, the Court declined to address the appellant's remaining arguments regarding VA's failure to comply with its duty to assist. However, the Court noted that during oral argument, the Secretary asserted that notice of missing records did *not* trigger VA's duty to assist. The Court cautioned VA that "when a claimant informs the Secretary that records appear to be missing, the Secretary should, at a minimum, respond to the claimant." *11.

8. ***King v. Shinseki***, 26 Vet.App. 433 (Feb. 26, 2014)
CLEAR AND UNMISTAKABLE ERROR (CUE)
The RO's failure to mention favorable evidence in a pre-1990 rating decision cannot be CUE because there was no reasons-or-bases requirement prior to 1990, and a finding of CUE would require that the RO actually *denied the existence* of the favorable evidence, not just that it failed to mention the evidence. 26 Vet.App. at 440 (citing *Bouton v. Peake*, 23 Vet.App. 70, 71 (2008)). A "manifest change in the outcome of the determination means that, absent the clear and unmistakable error, the benefit sought would have been granted at the outset" – and not that the RO would have been required to send a medical opinion back for clarification. *Id*. at 441.

   The veteran was awarded service connection for a mental health condition in 1973, and assigned a 10% disability rating. The veteran did not appeal the decision and it became final. In 2006, the veteran sought to revise the 1973 decision based on CUE by asserting that the RO erred by failing to consider favorable private medical evidence that was in the record at the time of the decision. The RO determined that there was no CUE in the 1973 decision, and the Board agreed. The veteran

appealed to the CAVC, and the parties agreed to a joint motion for remand because the Board applied the incorrect rating criteria. On remand, the Board again determined that there was no CUE in the 1973 decision.

On appeal, the veteran first argued that his due process right to a fair hearing was violated because the RO failed to consider the favorable evidence. The Court rejected this argument, finding that there was no indication that the favorable evidence was "impermissibly altered," as was the case in *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), or that the RO "concealed or failed to consider that report or that VA otherwise failed to accord him due process." *Id*. at 437-38.

The veteran next argued that even though the favorable medical report was in the record prior to the decision, it was not before the adjudicator because the rating decision did not mention it. He asserted that "if the missing doctor's report had been considered, a reasonable person's assessment would have been considerably different." *Id*. at 438-39. The Court rejected this argument, noting that the VA did not have a reasons-or-bases requirement prior to 1990, and there was no indication on the face of the 1973 decision that the RO failed to consider that evidence. *Id*. at 439. The Court found the veteran's reliance on *Bouton* unpersuasive because the RO, in that case, denied the existence of the favorable evidence, which was not the case here. *Id*.

The Court discussed the requirement that an alleged error must have resulted in a "manifest change of the outcome" of the decision in order to be CUE. *Id*. at 440-42. The Court found that a manifest change is not whether the RO would have been required to send evidence back for clarification, but rather that the veteran "undoubtedly would have been granted [a higher rating]." *Id*. at 441. The Court also rejected the veteran's "reasonable person" argument, finding that the standard for CUE is that the error must be "undebatable," not whether it would be "reasonable" to conclude that the outcome would be different. *Id*. at 442.

9. ***Martin v. Shinseki***, docket no. 11-3814 (Vet.App. Feb. 28, 2014)
SERVICE DISABLED VETERANS' INSURANCE (S-DVI)
The grant of S-DVI under 38 U.S.C. § 1922(b) is treated, by operation of law, as an award under § 1922(a). However, in order to be eligible for Supplemental S-DVI under 38 U.S.C. § 1922A, a veteran must qualify for a waiver of premiums under 38 U.S.C. § 1912.

S-DVI is life insurance for service-connected veterans who are otherwise in good health. Veterans with service-connected conditions payable at 10% or more are eligible for S-DVI if they apply for the insurance within two years of the date of service connection and pay the required premiums. 38 U.S.C. § 1922(a). Under

§ 1922(b), veterans who would be qualified for insurance under subsection (a), but who were found to be mentally incompetent at the time of death, "shall be deemed to have applied for and to have been granted such insurance, as of the date of death." 38 U.S.C. § 1922(b).

A veteran who is granted S-DVI, and qualifies for a waiver of premiums based on being totally disabled, is eligible for Supplemental S-DVI. 38 U.S.C. § 1922A. Supplemental S-DVI is granted under the same terms and conditions as S-DVI, as long as the veteran applies before age 65. Premium payments may be waived during the continuous total disability of the insured. 38 U.S.C. § 1912(a). If the veteran dies before applying for a waiver, the insured veteran's beneficiary may file an application within a year of the veteran's death. 38 U.S.C. § 1912(c).

The veteran in this case did not apply for S-DVI. He was awarded 100% disability for pancreatic cancer right before he passed away. A hospice nurse stated that the veteran was unable to manage his affairs at the end of his life due to high doses of medication. *3. After the veteran died, his wife applied for S-DVI and Supplemental S-DVI. The RO awarded gratuitous S-DVI under 38 U.S.C. § 1922(b) (awarded where the veteran is unable to apply as a result of mental incapacity). The RO denied Supplemental S-DVI because the veteran never applied for S-DVI while he was alive. *Id*. The wife appealed, arguing that she should be entitled to Supplemental S-DVI as the beneficiary of her totally disabled husband. The Court disagreed, finding that while an award of S-DVI under § 1922(b) is treated, as a matter of law, as an award under § 1922(a), eligibility for Supplemental S-DVI requires the veteran to qualify for a waiver of premiums under § 1912. *8-10; 38 U.S.C. § 1922A. Since the veteran in this case did not meet *all* the requirements for a waiver under § 1912, his wife was not entitled to Supplemental S-DVI. *9-10.