



VETERAN'S LAW UPDATE: May 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 March and April 2014

[Jackson v. Shinseki](#), 26 Vet.App. 460 (Mar. 6, 2014)

ATTORNEY FEE, ACCRUED BENEFITS

An attorney is not entitled to a fee where the veteran/client died before the Regional Office implemented a favorable Board decision and where the veteran's surviving spouse was subsequently awarded accrued benefits without signing a fee agreement and without having filed an appeal (i.e., the spouse was awarded accrued benefits on the initial application). [Note: this is a pre-2008 accrued benefits claim – so the veteran's surviving spouse was not able to substitute for the veteran.]

The attorney in this case successfully represented the veteran in an appeal to the Board. The Board awarded service connection, but the veteran died before the RO implemented the decision. The RO denied the attorney fee because no award had been paid. The attorney submitted the surviving spouse's accrued benefits application – and the RO awarded the claim. The Board upheld the denial of the attorney's fee because the prior Board award "did not result in any cash payment to the Veteran." *Jackson*, 26 Vet.App. at 461-62. The CAVC affirmed, finding that "a determination of service connection is not an 'award of past-due benefits' as contemplated by 38 U.S.C. § 5904(d), and no award was thus made in connection with [the veteran's] claim." *Id.* at 467. In a footnote, the Court recognized that its holding did not apply to post-2008 cases involving substitution. *Id.* n. 2.

In her dissent, Judge Schoelen pointed out the "absurd result" of an accrued benefits claimant collecting more cash benefits than what was actually "due and unpaid" to the veteran at the time of death.

[Larson v. Shinseki](#), 744 F.3d 1317 (Mar. 10, 2014)

CLEAR & UNMISTAKABLE ERROR (CUE)

Appellant has only one opportunity to raise CUE arguments with each claim in a Board decision, but can raise new CUE arguments with an RO decision at any time.

Veteran was awarded benefits in 1969 and raised a CUE argument with that decision in 2007, asserting that the Board misapplied the diagnostic codes. The RO denied the CUE claim and the Board affirmed. The Board identified two CUE claims, both relating

to the application of diagnostic codes. The Board concluded that the veteran had not shown that the law was misapplied or that the correct facts were not before the adjudicator. On appeal to the CAVC, the veteran filed a motion to modify the Board's decision by removing the reference to a factual argument, which he had not raised at the Board or the RO. The CAVC dismissed the motion as moot, stating that he had exhausted his opportunity to raise further CUE arguments, and affirmed the Board's decision.

The Federal Circuit reversed, finding that the CAVC erred in dismissing Mr. Larson's motion. The Federal Circuit noted that the CAVC based its determination on the belief that *Hillyard v. Shinseki*, 24 Vet.App. 343 (2011), *aff'd* 695 F.3d 1257 (Fed. Cir. 2012), "limits a claimant to only one opportunity to raise any and all CUE allegations." *Larsen*, 744 F.3d at 1318. However, *Hillyard* only dealt with 38 C.F.R. § 20.1409(c), which relates to the number of CUE arguments that can be raised with a *Board* decision. A different regulation, 38 C.F.R. § 3.105(a), allows a veteran to raise new CUE arguments with an *RO* decision at any time. The Federal Circuit held that because Mr. Larsen only challenged the legal basis for the RO's decision, he was free to raise a "correct facts" argument in the future at the RO. Therefore, the motion to modify the Board decision with regards to its "correct facts" language was not moot – as that language could preclude Mr. Larsen from raising a "correct facts" argument at the RO in the future. The Federal Circuit did not disturb the portion of the CAVC's decision that affirmed the two legal CUE claims.

[Cardona v. Shinseki](#), 26 Vet.App. 472 (per curiam order) (Mar. 11, 2014)

CONSTITUTIONAL CHALLENGE TO DOMA; MOOTNESS DOCTRINE

Constitutional challenge to the Defense of Marriage Act is mooted when the Secretary actually pays benefits. The voluntary cessation exception to a finding of mootness is refuted by the Secretary's showing of a genuine policy change. Mere speculation that the policy may change back in the future will not preclude a finding of mootness.

The Board denied spousal benefits because the appellant's spouse (same sex, legally married in the state of Connecticut) was not a "spouse" for VA benefits purposes. The appellant challenged both VA's definition of "spouse" and the definition under the DOMA as unconstitutional. The CAVC stayed the case pending the Supreme Court's decision on the constitutionality of the DOMA. In *U.S. v. Windsor*, 133 S. Ct. 2675, 2695 (2013), the Supreme Court held that the definition of spouse in the DOMA was unconstitutional. Shortly thereafter, the Secretary informed the CAVC that it would cease enforcing VA's definition of spouse. The Secretary paid spousal benefits to the appellant and filed a motion to dismiss the case. The appellant opposed the motion, arguing that the voluntary cessation exception to the mootness doctrine applied to her case.

The CAVC discussed the case law surrounding the voluntary cessation exception to the mootness doctrine, which is “based on the concern that a party voluntarily ceasing its conduct might be attempting to manipulate court proceedings and evade judicial review.” 26 Vet.App. at 476. The Court found that the Secretary’s voluntary cessation of enforcing VA’s definition of “spouse” reflected a genuine policy change brought about by a Presidential directive following a Supreme Court decision. The Court rejected the appellant’s argument that this or some future administration could resume enforcement of the definition of spouse at any time, noting that “the standard for voluntary cessation is whether recurrence ‘could . . . reasonably be expected,’ not whether recurrence is possible under a hypothetical future scenario.” *Id.* at 482. The Court thus determined that the Secretary met his burden to refute the voluntary cessation exception and dismissed the case as moot.

[Morris v. Shinseki](#), 26 Vet.App. 494 (Mar. 20, 2014)

ACCRUED BENEFITS UNDER 38 U.S.C. § 5121(a) & STATE LAW

38 U.S.C. § 5121 limits the classes of individuals qualified to receive a deceased veteran’s accrued VA benefits to surviving spouses, dependent children, or dependent parents. This federal law preempts state law that would allow siblings to inherit.

Prior to the veteran’s death, VA determined that he was incompetent to handle his VA benefits. VA recognized his brother as legal custodian and fiduciary, but withheld \$75,000 in unpaid benefits until the brother obtained an \$85,000 surety bond. The veteran passed away before the brother secured the bond. The brother sought to obtain the \$75,000 in unpaid “accrued benefits” from VA, and VA denied the claim, noting that he had never obtained the surety bond and that he was not an eligible accrued-benefits claimant under 38 U.S.C. § 5121. The brother appealed, arguing that section 5121 does not preempt state laws of descent, specifically Georgia law that would have allowed him to inherit his late brother’s estate. The CAVC assessed this argument under three circumstances in which federal law supersedes state law – express preemption, field preemption, and conflict preemption. The Court determined that section 5121 conflicted with state law in this case, and, therefore, preempted it.

[King \(Clarence\) v. Shinseki](#), 26 Vet.App. 484 (Mar. 21, 2014)

PROCEDURES TO DETERMINE QUALIFYING OR CREDITABLE SERVICE; 38 C.F.R. § 3.203

VA regulation describes the procedures and evidence necessary to verify a veteran’s service that is required prior to determining whether the veteran meets the 90-day active service requirement for pension. Failure to follow the regulatory procedure is error.

Veteran was absent without leave for several months during his active service due to his wife’s ongoing recovery from surgery. When he finally surrendered, he was

convicted in a court martial and sentenced to confinement and labor. He served his sentence and was discharged “under conditions other than honorable.” He requested a discharge upgrade and was granted a “general” discharge by the Army Discharge Review Board. The Board issued a new DD Form 214, showing one month and days of active service.

The veteran was subsequently awarded nonservice-connected pension benefits, but VA later severed the benefits because it determined that he did not have 90 days of creditable wartime service to qualify for pension. The veteran appealed, arguing that VA was required to follow procedures outlined in 38 C.F.R. § 3.203(c) to obtain a statement from the Army regarding the nature of his service.

The CAVC reversed, finding that this regulation allows VA to accept a DD 214 if it establishes, on its face, the requisite period of service. However, if the DD 214 does not show the requisite period of service, VA must seek verification from the service department and, in cases where the veteran’s service is at issue, VA must obtain “a complete statement of service” from the service department. Because VA did not obtain a complete statement of service from the Army, the Court held that the Board erred by failing to follow the procedures required by 38 C.F.R. § 3.203. The Court thus voided the decision and remanded for reinstatement of the veteran’s pension.

[Murphy v. Shinseki](#), 26 Vet.App. 510 (Apr. 4, 2014)

SCOPE OF BVA REVIEW FOLLOWING AMC RATING DECISION & SSOC

The Board mischaracterized the issue on appeal when it ignored an AMC rating decision that had awarded an increased rating. When the Board issued its decision, the AMC decision had already been implemented – and the veteran was receiving benefits at the higher rate. Thus the Board’s mischaracterization of the issue constituted a rating reduction that was accomplished without the appropriate process required by regulation.

The veteran sought an increase of his 10% rating for sinusitis. The Board remanded the claim to the AMC for additional development. The AMC issued a rating decision awarding 30%, and a Supplemental Statement of the Case, denying a rating in excess of 30%. The veteran received these decisions and began receiving benefits at the higher rate. Because the veteran did not withdraw his appeals, the case was returned to the Board. The Board characterized the issue as an appeal for an increase in a 10% rating – instead of an increase in excess of 30% – ignoring the AMC rating decision and the SSOC. The Court determined that the Board improperly considered an issue outside the scope of the appeal. The Court held that because the veteran had already been receiving disability payments at the higher rate, he had a reliance interest in that continued payment and that any rating reduction could only be accomplished by following the regulatory procedures outlined in 38 C.F.R. § 3.105(e).

[Wise v. Shinseki](#), 26 Vet.App. 517 (Apr. 16, 2014)

PRESUMPTION OF REGULARITY, COMPETENCY OF VA MEDICAL EXAMINER

The presumption of regularity with regards to the competency of a VA medical examiner does not attach where the medical opinion itself demonstrates irregularity.

Veteran's surviving spouse appealed BVA denial of DIC benefits, arguing that the Board relied on an inadequate medical opinion. The VA medical examiner had been asked to provide an opinion as to the relationship between the deceased veteran's service-connected PTSD and the heart condition that caused his death. The VA cardiologist stated that she had "no formal training" in psychiatry, had "pre[c]ious little experience treating veterans," and characterized her "perspective of psychiatry" as that of a "relative lay person[]." The VA examiner also complained about the lack of complete records between 2000 and the veteran's death in 2008, but made certain assumptions about his treatment. In light of his age and condition, the examiner stated that there was "no need or logical reason to invoke PTSD as a contributing factor" to his heart condition, and thus opined that it was "'not at all likely' that PTSD aggravated the veteran's heart disease or hastened his death." The Board relied on this opinion to deny benefits, explaining that it favored this opinion over the positive medical evidence submitted by the claimant because the VA opinion was based on "known risk factors for heart disease," whereas the claimant's evidence (medical studies and favorable medical opinion letters) were based on "the not yet accepted notion that PTSD causes heart disease."

On appeal, the CAVC found that the presumption of regularity that would normally attach to VA's selection of a medical profession did not attach in this case, where "VA's process of selecting a medical professional appears irregular," particularly since the examiner herself called her own qualifications into question. The Court noted that the claimant did not challenge the examiner's qualifications when the case was still at the agency level, and that "absent such a challenge, the Board is ordinarily not obligated to discuss an examiner's competence." However, the Court found that because the opinion itself "expressly raised the issue of [the doctor's] competence, [] it would be unreasonable to allow the Board to ignore this explicit denial of expertise." The Court held that where a medical examiner admits that she lacks the required expertise to provide an opinion, "the opinion itself creates the appearance of irregularity" and the Board must therefore address the medical professional's competence before relying on his or her opinion." Failure to do so renders the Board's reasons or bases inadequate.

The Court also found additional inadequacies in the medical opinion. First, the examiner based her negative nexus opinion on medical records that "significantly predated the veteran's death and shows a clean bill of cardiovascular health." Second, the examiner based her conclusion that PTSD is not a widely accepted cardiac risk on a 2000 article that she used "to refute" a 2007 article submitted by the claimant. Neither

the examiner nor the Board discussed the more recent article – or explained why a 2000 article could refute a 2007 article.

The Court also found that the Board's conclusion that VA satisfied its duty to assist was inadequate because VA failed to obtain medical records that had been identified by the VA medical examiner. In addition, the Court found the Board's reasons or bases inadequate for "failing to adequately account for the potentially favorable medical literature of record. The Court found that the Board's rejection of this literature "because it espoused a medical principle that was not yet 'generally accepted' in the scientific community[]" ran afoul of the benefit of the doubt rule."

[Bowers v. Shinseki](#), 748 F.3d 1351 (Apr. 17, 2014)

ALS, VETERAN STATUS, 38 C.F.R. § 3.318

An individual must meet VA's definition of "veteran" before being entitled to the presumption of service connection for ALS under 38 C.F.R. § 3.318.

This case affirms the CAVC's decision that determined that the claimant was not a "veteran," as defined by statute, and therefore was not entitled to the presumption of service connection for ALS. The claimant served in the Army National Guard from 1972 to 1978, with a continuous period of active duty for training from August 1972 to February 1973. VA regulation provides for service connection for ALS for individuals with "active military, naval, or air service." The Federal Circuit found that the CAVC's interpretation of the regulation was consistent with the statutory scheme, and that the claimant was not entitled to the presumption of service connection based on his service.

[Checo v. Shinseki](#), 748 F.3d 1373 (Apr. 23, 2014)

EQUITABLE TOLLING, TIMELINESS

The CAVC can *sua sponte* raise the issue of whether a Notice of Appeal is timely. In order to establish entitlement to equitable tolling, a claimant must demonstrate extraordinary circumstances, due diligence, and causation. However, the claimant need only show due diligence and causation during the extraordinary circumstances period – and not during the entire appeal period.

The claimant's appeal for an increased rating was denied by the Board on July 6, 2011. The claimant was homeless unable to receive mail until October 6, 2011, which is when she received a copy of the Board's decision. She filed her Notice of Appeal (NOA) with the CAVC on December 7, 2011 – which was 33 days after the appeal deadline, based on the date of the Board decision. She explained her circumstances to the CAVC, and the Secretary conceded that her homelessness was beyond her control and qualified as extraordinary circumstances. Nevertheless, the Court found that she had not shown

due diligence and causation, the other two elements necessary to warrant equitable tolling, and thus dismissed her appeal.

On appeal to the Federal Circuit, the claimant argued that the CAVC acted outside its authority when it directed the Clerk of the Court to identify late appeals and issue show-cause orders for why the appeal should not be dismissed. The claimant argued that the case on which the CAVC relied for such authority, *Bove v. Shinseki*, 26 Vet.App. 136, 140-43 (2011), should be overruled. The Federal Circuit disagreed, and held that the CAVC did not err by raising the timeliness issue on its own.

With respect to the equitable tolling determination, the Federal Circuit agreed with the parties that the claimant's homelessness constituted extraordinary circumstances. The Federal Circuit also agreed that the "stop-clock" approach should apply, which would "stop" the clock measuring the 120-day appeal period during the extraordinary circumstances period. Under this approach, the appeal period would have been suspended between July 7 and October 6, 2011 – and the claimant would only need to show due diligence during that time period. The 120-day appeal period would begin to run on October 6, 2011 – and her NOA (filed on December 7, 2011) thus would have been timely. The Federal Circuit determined that it did not have sufficient information to determine what diligence standard the CAVC used to determine that the claimant had not shown due diligence – and remanded the case back to the CAVC to clarify and explain the appropriate standard that applied during the relevant due diligence period (July 7-October 6, 2011).

Similarly, the Federal Circuit found that the CAVC "used the wrong test for causation" by requiring that the claimant "prove why her homelessness caused her inability to file the NOA within the 120-day appeal period," instead of during her period of homelessness. The Federal Circuit reversed the CAVC's decision on this point, finding that the claimant's homelessness caused a 91-day delay (July 7-October 6, 2011) in filing her NOA.

[*Gilbert v. Shinseki*](#), 749 F.3d 1370 (Apr. 24, 2014)

PRESUMPTION OF SOUNDNESS, NEXUS ELEMENT

The presumption of soundness does not relieve the claimant of the burden of establishing all three elements of service connection (current condition, in-service injury, nexus between the two).

The veteran was denied service connection for a psychiatric condition. The record contained evidence that he had experienced depression and substance abuse prior to service and that he continued to abuse alcohol while in the Navy. To rebut the presumption of soundness, the government must show with "clear and unmistakable evidence" that the condition both pre-existed service and was not aggravated by

service. The Board determined that the government proved that the veteran's psychiatric condition pre-existed service, but did not show that the condition was not aggravated by service. Nevertheless, the Board affirmed the denial because the veteran failed to prove that his post-service psychiatric condition was related to his military service. The CAVC affirmed.

On appeal to the Federal Circuit, the veteran argued that the CAVC misinterpreted 38 U.S.C. § 1111. He argued that § 1111 relieves him of having to prove a nexus between his current condition and service. The Federal Circuit disagreed and found that “the presumption of soundness relates to the second element required to establish a right to disability compensation—the showing of an in-service incurrence or aggravation of a disease or injury.” (quoting *Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009)). The Federal Circuit found that the “presumption of soundness does not relate to the nexus requirement” and, therefore, “does not relieve the veteran of the obligation to show the presence of a current disability and to demonstrate a nexus between that disability and the in-service injury or disease *or aggravation thereof*.” *Id.*