



VETERAN'S LAW UPDATE: July 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 May and June 2014

[Stowers v. Shinseki](#), 26 Vet.App. 550 (May 16, 2014)

38 C.F.R. § 3.156(c) & *EARLIER EFFECTIVE DATE*

Held: “[W]here VA grants service connection based, in part, on a medical nexus opinion that relies on SMRs that were not associated with the claims file at the time VA first decided the claim, *and have not been associated with the claims file when VA assigns an effective date for the award of benefits*, the Board is obligated to consider VA’s duty to attempt to obtain such records and the potential applicability of § 3.156(c).”

The veteran was denied service connection for a back condition in 1993. He did not appeal and the decision became final. In 2008, he sought to reopen his claim and submitted a letter from his private doctor. The doctor identified the records he relied on in making his opinion – including service medical records (SMRs) that were not of record at the time of the 1993 rating decision. The veteran also identified additional SMRs that were not of record at the time of the 1993 denial.

In December 2008, based on the private medical opinion, as well as a VA medical opinion, the regional office (RO) awarded service connection for the veteran’s back condition, effective February 2008, the date of his request to reopen. The veteran appealed for an earlier effective date, which the RO and the Board denied.

At the CAVC, the veteran argued that the Board erred in finding that VA satisfied its duty to assist because VA failed to obtain all his SMRs. He argued that the newly obtained SMRs, along with the medical opinions, could form the basis for an earlier effective date under 38 C.F.R. § 3.156(c). This regulation allows for an earlier effective date based on newly submitted service records where the claim was previously denied and those records were not in the veteran’s claims file at the time of the prior denial.

Relying on VA’s own published explanation of revisions to § 3.156(c), the CAVC held that when an award of service connection is based, in part, on a medical opinion that relies on SMRs that were not of record at the time of the original decision, and were not in the claims file when VA made its effective date determination, VA must consider its duty to obtain those records and the potential applicability of § 3.156(c). The Court remanded the case to the Board to consider whether VA satisfied its duty to assist.

[Carter v. Shinseki](#), 26 Vet.App. 534 (May 20, 2014)

JOINT MOTION FOR REMAND LIMITS SCOPE OF BOARD REVIEW

Held: “[W]hen an attorney agrees to a joint motion for remand based on specific issues and raises no additional issues on remand, the Board is required to focus on the arguments specifically advanced by the attorney in the motion . . . and those terms will serve as a factor for consideration as to whether or to what extent other issues raised by the record need to be addressed.”

In the course of an appeal at the CAVC, the attorney-represented veteran entered into a joint motion for remand (JMR), which identified errors for the Board to review. After the case was sent back to the Board, the attorney did not submit additional argument or evidence. The Board denied the veteran’s claims again – and the veteran, through his attorney, appealed to the Court again. At the Court, the appellant raised new arguments that he asserted were reasonably raised by the record. However, these arguments were not included in the JMR – and were not raised to the Board on remand. The Court held that a JMR that is entered into by an attorney-represented appellant can limit the Board’s review to the issues specified in the JMR. However, the Court held that, in this case, the JMR included language that would require the Board to address issues that were reasonably raised by the record. [Advocacy note: Incorporate the language from *Fletcher v. Derwinski*, 1 Vet.App. 394 (1994), that requires the Board to re-examine the record and address any issues that are reasonably raised, into your JMR.]

[Spicer v. Shinseki](#), 752 F.3d 1367 (May 30, 2014)

DC 5003, 38 C.F.R. § 4.45(f), MINOR JOINT GROUP DEFINED

Held: For the purpose of rating disabilities from arthritis, a minor joint group is affected only when two or more joints suffer from limitation of motion.

Veteran was service connected for degenerative arthritis of the DIP joint of his little finger, and rated 0%. VA denied a compensable rating. Veteran appealed to the CAVC and on to the Federal Circuit, arguing that “degenerative arthritis in a single DIP joint results in a ‘group of minor joints affected by limitation of motion’ and can entitle a veteran to 10% rating under DC 5003.” The veteran argued that a minor joint group is affected when one member of that joint group is affected – just as when two or more members of the joint group are affected. The Federal Circuit held that under the plain language of DC 5003, read in the context of 38 C.F.R. § 4.45(f), the CAVC “did not err in interpreting DC 5003 to require limitation of motion in more than one minor joint.”

[Wilson v. Gibson](#), 753 F.3d 1363 (June 10, 2014)

REDUCTION OF COMPENSATION DURING INCARCERATION

Held: Reduction of compensation under 38 U.S.C. § 5313(a)(1) begins on the 61st day of incarceration for a felony conviction – regardless of whether post-conviction review is sought.

Veteran was found guilty of two felonies (attempted murder and aggravated battery) and sentenced to two concurrent life sentences. He began serving his sentences in October 2001 while he appealed his convictions. He continued to pursue his appeals up to the U.S. Supreme Court, which denied his petition in October 2010.

At the time of his conviction, the veteran was in receipt of a 70% disability rating from VA. Under 38 U.S.C. § 5313(a)(1), veterans with service-connected disabilities rated 20% or more who are incarcerated for a felony conviction will have their benefits reduced to 10% starting on the 61st day of their incarceration. VA notified the veteran in February 2002 that it would begin reducing his benefits to 10%, effective December 20, 2001 – the 61st day of his incarceration. VA then sought to collect an overpayment from Mr. Wilson in excess of \$15,000. Mr. Wilson applied for a waiver and was denied.

He appealed to the CAVC, challenging the validity of the debt on the ground that the felony conviction “should not be deemed to occur until the conviction was absolutely final” – i.e., when he was denied review by the U.S. Supreme Court. The CAVC denied his appeal, holding that the incarceration period referred to in the statute “is calculated without regard to whether the veteran has appealed his conviction.” The Federal Circuit agreed, noting that the implementing regulation, 38 C.F.R. § 3.665(m), “does not contemplate full payment of benefits while post-conviction relief is sought.”

[Golden v. Gibson](#), docket no. 04-1385(E) (June 25, 2014)

EAJA, ATTORNEY TRAVEL TIME

Held: Attorney travel time is compensable at the full hourly rate under the Equal Access to Justice Act (EAJA), as long as the fees are reasonable.

Veteran’s attorney traveled from Montgomery, Alabama to Washington, DC, for oral arguments at the Federal Circuit. The appeal was successful and the attorney submitted an EAJA application, which included travel time billed at the full hourly rate. The Secretary of VA disputed the travel fees, arguing that billing for travel time at the full hourly rate was not reasonable. The CAVC noted that it wanted to encourage attorney representation of veterans and found that because it and the Federal Circuit “are courts of national jurisdiction with the majority of claimants and attorneys living outside of Washington, D.C., travel time may often be required.” The Court held that, in this case, the fees billed for travel time at the full hourly rate was reasonable.

The Court also addressed the reasonableness of other fees and expenses, including the billing for time spent on briefs before it and the Federal Circuit (reasonable); over \$3,000 of photocopying (unreasonable); legal research (reasonable); fee to doctor for medical opinion (reasonable); drafting and reading letters, conference calls, preparing appendices for briefs, reading orders and filings (too vague, reduced fees); reading claims file (duplicative, reduced fees); drafting substantive pleadings (reasonable); preparing EAJA application (reasonable).

[Hudgens v. Gibson](#), 26 Vet.App. 558 (June 27, 2014)

DIAGNOSTIC CODE (DC) 5055 ONLY APPLIES TO TOTAL KNEE REPLACEMENTS

Held: The plain language of DC 5055 does not apply to partial knee replacements.

However, the Board erred by not addressing whether the veteran's partial knee replacement should be rated by analogy under this or another diagnostic code.

The veteran injured his knee in service and, years later, underwent a partial knee replacement. He was service connected for his right knee, rated 10% for degenerative joint disease and 10% for instability. The RO later reduced the instability rating to 0%, and the veteran appealed. He argued that he should be rated by analogy under DC 5055, the DC for "knee replacement." He also argued that the rating reduction was in error because the record contained medical evidence of instability. In addition, he argued for a higher rating under two other DCs.

The CAVC held that the "plain language of DC 5055 does not apply to partial knee replacements." The CAVC acknowledged Mr. Hudgens' argument that 11 Board decisions rated partial knee replacements under DC 5055, but stated that these decisions are not in the record and are not binding on the Board or the Court. Nevertheless, although the Court found that the Board did not err in determining that the plain language of DC 5055 only applied to total knee replacements, the Court agreed that the Board erred by not addressing whether Mr. Hudgens' condition should be rated by analogy under this DC, "which contemplates symptomatology including weakness, pain, and limitation of motion," or whether another DC should have been considered. Because there is no DC for partial knee replacement, the Board should have addressed Mr. Hudgens' analogy argument.

The Court also determined that the rating reduction was in error, as the record contained medical evidence of instability. The Court determined that reversal was the appropriate remedy as "VA's failure to observe applicable law and consider all relevant evidence renders reduction or severance decisions . . . 'void ab initio.'" (quoting *King v. Shinseki*, 26 Vet.App. 484, 492 (2014)).

Finally, the Court agreed with Mr. Hudgens that the Board failed to address whether a higher rating was warranted under DC 5258 or 5252 and remanded for the Board to explain its failure "to address the evidence of right knee dislocation, swelling, and pain or explain why they are not evidence of" symptoms in DC 5259.