



VETERAN'S LAW UPDATE: September 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 July and August 2014

[Mulder v. Gibson](#), 27 Vet.App. 10 (July 8, 2014)

38 C.F.R. § 3.665(a), *REDUCTION OF BENEFITS, INCARCERATED VETERAN*

Held: The proper effective date for the reduction of benefits for veterans incarcerated for the conviction of a felony is the date of conviction, not the date of sentencing.

Veterans who are incarcerated for more than 60 days for the conviction of a felony will have their VA benefits reduced on the 61st day of incarceration. The veteran in this case pled “no contest” to a felony charge in May 2006 and was sentenced in July 2006. VA notified him of the proposed rating reduction in July 2007. The veteran submitted a statement to VA indicating that his “sentence was VACATED.” However, according to the veteran’s social worker, he was still incarcerated in September 2007 and there was no ruling about overturning the guilty plea. VA issued a decision implementing the proposed rating reduction, and the veteran filed a Notice of Disagreement. The Board determined that the reduction was proper, noting that while the veteran’s sentence “had been vacated and modified,” the conviction had “not been overturned or vacated” and the veteran remained incarcerated.

On appeal to the Court, the veteran relied on a state statute to argue that “he was not incarcerated for the conviction of a felony until his judgment of conviction and pronouncement of sentence was entered.” 27 Vet.App. at 13. The Court disagreed, relying on the plain language of 38 U.S.C. § 5313(a)(1) to determine that “the 60-day calculation begins on the 1st day of incarceration for *conviction* of a felony.” *Id.* at 15. To the extent that the language was deemed “ambiguous,” the Court found that VA’s regulation “mirrors exactly the language” of the statute, but that the Secretary’s interpretation of the regulation was entitled to “respect from this Court insofar as it has the ‘power to persuade.’” *Id.* at 17-18. The Court added that neither the statute nor the regulation mentions state law and that the Secretary’s interpretation is consistent with Congress’s stated objective of avoiding “duplicative Government expenditures that would result in a windfall for those convicted of felonies.” *Id.* at 18.

[Pacheco v. Gibson](#), 27 Vet.App. 21 (July 17, 2014) (en banc)
38 C.F.R. § 3.157(b), *INFORMAL CLAIM*

Held: “A previous allowance of pension can result in an earlier effective date for claims for increased benefits, but not for claims to reopen – which require a previous disallowance for the service-connected disability not being compensable in degree.”

Veteran was awarded nonservice-connected pension benefits in 1974. He continued to apply for service-connected benefits throughout the 1970s. In 1978, he was notified that he was no longer eligible for VA pension benefits because his income was too high. He continued to attempt to reopen his claims for service-connected disability benefits, and was finally awarded benefits in 2005, with an effective date of January 2002, the date VA received his most recent request to reopen.

Mr. Pacheco appealed for an earlier effective date, and submitted additional evidence, including service records and a 2001 VA medical record. The Board denied the appeal. In February 2011, on appeal to the CAVC, the Secretary argued that remand was necessary for the Board to address whether a 2001 medical record was an informal claim to reopen under 38 C.F.R. § 3.157(b). The Court remanded on that basis.

On remand, the Board determined that the 2001 VA medical record was not a claim under § 3.157(b), finding that (1) a formal pension or compensation claim had not been allowed – or had not been disallowed because the condition was noncompensable – and (2) Mr. Pacheco was not service connected for the conditions at the time of the 2001 examination. The Board denied an earlier effective date.

On appeal to the Court, Mr. Pacheco argued that the Board should have awarded an earlier effective under § 3.157(b) because he was previously awarded *pension* benefits and he filed a claim to reopen his previously denied claim for compensation benefits within one year of the 2001 examination. The Secretary argued that the plain language of the regulation should be read as “pairing” certain sentences with other sentences in the regulation, which would only allow a previous pension award to result in an earlier effective date for an increased-rating claim, but not for a claim to reopen. Thus, the 2001 medical record could not serve as an informal claim to reopen “because his claim was not previously disallowed for being not compensable in degree.” 27 Vet.App. at 25. Alternatively, the Secretary argued that the language was ambiguous and that deference to VA’s interpretation was warranted. *Id.*

In an en banc decision, the Court determined that the language was ambiguous, and afforded deference to the Secretary’s interpretation. The Court found that the Secretary’s interpretation was “not plainly erroneous or inconsistent with the regulation” when viewed within the context of the regulation’s history and VA’s purportedly “consistent” practice in interpreting this regulation. *Id.* at 26-29. The Court held that Mr. Pacheco did not meet the criteria of § 3.157(b) that would allow the 2001 VA medical record to serve as an informal claim because at that time he did not have a claim that had been disallowed because it was noncompensable. *Id.* at 29-30. However, the Court

remanded the matter for the Board to consider whether Mr. Pacheco would be entitled to an earlier effective date under 38 C.F.R. § 3.156(c), based on his 2008 submission of military service records. *Id.* at 30-31.

In a partial dissent, joined by three other judges, Judge Davis disagreed with the majority's deference to VA. *Id.* at 36. In a separate dissent, Judge Greenberg questioned the ongoing validity of *Auer* deference (*Auer v. Robbins*, 519 U.S. 452, 462 (1997)), stating that he "would not reward the Secretary for writing an ambiguous, and unintelligible, regulation." *Id.* at 43. Judge Greenberg questioned the CAVC's jurisdictional powers to grant equitable relief, concluding: "We must provide equitable remedies to deserving veterans and harmonize our jurisprudence with the veterans canon, applying the full extent of our powers when appropriate." *Id.* at 44-45.

[**Robertson v. Gibson**](#), 759 F.3d 1351 (July 21, 2014)

CLEMENCY DISCHARGE & VA BENEFITS

Held: The language of a clemency discharge must be read in the context of the program through which it was issued, and, when read in that context, such "pardon does not preclude the VA from considering the conduct underlying [a] less than honorable discharge" when assessing entitlement to VA benefits. 759 F.3d at 1357.

This case affirms the CAVC's holding in *Robertson v. Shinseki*, 26 Vet.App. 169 (2013). The veteran in this case received an other-than-honorable discharge after two periods of AWOL, the last one for over 300 days. He received a presidential pardon and clemency discharge under President Ford's clemency program and applied for VA benefits. He was repeatedly denied based on VA's review of the circumstances surrounding his discharge. The CAVC affirmed the Board's denial, and the veteran appealed to the Federal Circuit. The Federal Circuit framed the issue as "whether the clemency discharge and presidential pardon received by Mr. Robertson removed any potential bar to benefits caused by the misconduct that led to his discharge under other than honorable conditions." *Id.* at 1356. The Court found that the "pardon was intended to have limited effect with respect to his entitlement to veterans' benefits" and held that while pardoned individuals can apply for and appeal denials of VA benefits, the pardon itself does not prevent VA from considering the conduct that resulted in the other-than-honorable discharge when determining entitlement to VA benefits. *Id.* at 1358.

[**Cacciola v. Gibson**](#), 27 Vet.App. 45 (July 22, 2014)

ABANDONED ISSUE AT CAVC, SUBSEQUENT CUE MOTION BELOW

Held: An issue that an appellant abandons on appeal to the Court can still be collaterally attacked later on the basis of clear and unmistakable error (CUE) because that abandoned issue was never "decided" by the Court.

Veteran appealed the issue of an earlier effective date in a 2006 Board decision to the Court. The Court remanded the matter in 2011, noting that it "deemed abandoned" the issue of an initial compensable rating because the appellant did not raise any arguments regarding that issue. In a 2012 decision, the Board dismissed the veteran's

CUE motion regarding the effective date in the 2006 decision, but adjudicated the merits of the CUE motion as to the issue of an initial compensable rating.

On appeal to the Court, the parties agreed that the law does “not preclude a claimant from seeking to reverse or revise on the basis of CUE a Board decision on an issue that was abandoned on appeal” since that issue was not *decided by* the Court. 27 Vet.App. at 50. The Court agreed with the parties, finding that, although a Notice of Appeal puts the entire Board decision on appeal, “an appellant’s abandonment of the right to a decision by the Court on a direct appeal of an issue in a Board decision does not otherwise preclude him from collaterally attacking the Board decision on that issue on the basis of CUE.” *Id.* at 58.

The appellant argued that the Board provided inadequate reasons or bases for its determination that the 2006 decision was not CUE. The Court determined that the appellant failed to show that the Board decision was CUE and thus affirmed the Board’s 2012 decision. *Id.* at 59-61.

[Rusick v. Gibson](#), 760 F.3d 1342 (July 23, 2014)

CUE, DIC, ACCRUED BENEFITS

Held: A CUE determination that results in an award of dependency and indemnity compensation (DIC) benefits cannot be used to receive accrued benefits where the veteran did not have a claim (CUE or otherwise) pending at the time of death.

Veteran was service connected for anxiety disorder and his disability rating was continued at 30% in 1983. In 1996, he was rated 100%. He passed away in 2000. At the time of his death he had no claims or appeals pending. His widow filed a claim for DIC benefits and was denied. Several years later, she filed another claim for DIC, asserting CUE in the 1983 decision. She argued that her husband should have been rated 100% based on evidence showing he was unemployable. The Board agreed and determined that she was entitled to DIC benefits under 38 U.S.C. § 1318, which allows for DIC benefits for a surviving spouse of a veteran who was “entitled to receive . . . compensation at the time of death for a service-connected disability rated totally disabling if . . . the disability was continuously rated totally disabling for a period of 10 or more years immediately preceding death.” 760 F.3d at 1344 (quoting 38 U.S.C. § 1318). The RO implemented the Board’s decision, but denied her claim for accrued benefits under 38 U.S.C. § 5121, which, if granted, would have entitled her to the benefits Mr. Rusick would have received (i.e., 100% disability compensation) between 1983 and 1996. The Board affirmed the RO’s denial – and the CAVC affirmed the Board’s decision, holding that because the Board’s CUE determination was made after Mr. Rusick’s death, there was no rating decision when he died on which to base an accrued benefits claim. The Court rejected the argument that the corrected 1983 decision became an “existing decision” for purposes of section 5121, and held that a claimant cannot use the CUE statute to “override the specific provisions of section 5121.” *Id.*

The Federal Circuit agreed, noting that a surviving spouse can only be entitled to accrued benefits if the veteran had a claim pending at the time of death and that a veteran's interest in a CUE claim dies with him/her. *Id.* at 1345-46. The Court added that the statute allowing for substitution, 38 U.S.C. § 5121A, was not applicable in this case because the veteran died in 2000, and section 5121A only applies to veterans who died on or after October 2008. *Id.* at 1346. The Court stated that even though section 5121A might allow a survivor to substitute on a *pending* CUE claim, the survivor cannot *initiate* a CUE claim. *Id.* The Court distinguished this case from its holdings in *Pirkle v. Shinseki*, 718 F.3d 1379 (Fed. Cir. 2013), and *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007), because the veterans in those cases had claims pending when they died. *Id.* at 1347. The Court held that a veteran's survivor cannot use a CUE determination made for DIC purposes to also receive accrued benefits where the veteran did not have a CUE claim pending at the time of death. *Id.*

[*Martin v. McDonald*](#), 761 F.3d 1366 (August 5, 2014)
38 U.S.C. § 3011, ALCOHOL ABUSE, "WILLFUL MISCONDUCT"

Held: Alcohol abuse cannot always be characterized as willful misconduct, and "it is legal error to rule that willful misconduct is present without an inquiry into and findings about the particular conduct." 761 F.3d at 1369.

Veteran received an honorable discharge, but the basis of the discharge was "alcohol rehabilitation failure." He was denied VA education benefits, and the Board upheld the denial "as a matter of law." *Id.* at 1368. The CAVC affirmed.

On appeal, the Federal Circuit noted that neither the Board nor the CAVC discussed "any specific acts by Mr. Martin" when they concluded that his discharge was based on "willful misconduct." *Id.* at 1369. The Court framed the issue as whether it was legal error for the CAVC to affirm "the Board's conclusion that Mr. Martin's discharge rested on 'willful misconduct' under 38 U.S.C. § 3011(a)(1)(A)(ii), without specific inquiry into or findings about Mr. Martin's individual conduct relating to his 'alcohol rehabilitation failure.'" *Id.* The Court agreed with Mr. Martin that it was legal error to make such a conclusion "without an inquiry into and findings about the particular conduct." *Id.*

The Court discussed the phrase "willful misconduct," and stated that it required the Board to (1) identify *conduct*, (2) find that the conduct is *misconduct*, and (3) find that the misconduct is *willful*. *Id.* The Court found that "alcohol rehabilitation failure" cannot *always* constitute or result from willful misconduct. *Id.* ("People fail at many things despite their best efforts."). The Court stated that "[w]ithout more, a finding of an unsuccessful attempt at rehabilitation addresses only a mental state, not misconduct, or willful misconduct." *Id.*

The Court noted that three other veterans' law statutes deny compensation for any condition that is the result of the veteran's "own willful misconduct or abuse of alcohol or drugs." *Id.* at 1371 (citing 38 U.S.C. §§ 105(a), 1110, and 1131). The Court stated that Congress added the phrase "or abuse of alcohol or drugs" to the preexisting willful

misconduct language in those three statutes on the same day that it introduced the “willful misconduct” phrase into 38 U.S.C. § 3011. *Id.* at 1371-72. The Court added that this “underscores that alcohol abuse does not always constitute willful misconduct for purposes of denying basic education-assistance benefits.” *Id.* at 1372. The Court held that “‘alcohol rehabilitation failure,’ and even alcohol dependence and acts resulting from alcohol dependence, cannot be characterized as being or resulting from willful misconduct in every case,” and remanded for the Board to make factual findings pertinent to this issue.

[Boyd v. McDonald](#), 27 Vet.App. 63 (August 5, 2014)

SCOPE OF NOA, PRESUMPTION OF REGULARITY, BOARD’S AUTHORITY TO ADJUDICATE MATTERS SEPARATELY

Held: Unless the court expressly states otherwise – and even when the Court has previously viewed matters as being “inextricably intertwined” – the Board has the authority to adjudicate matters separately. This decision also held that in determining the scope of a pro se appellant’s Notice of Appeal, the Court must construe the NOA liberally and consider the circumstances surrounding its filing. In addition, the Court held that once the presumption of regularity with respect to VA’s mailing has been rebutted, the burden shifts to the Secretary to show actual receipt of the document in question.

This case involves multiple decisions and claim streams in a veteran’s decades-long attempt to obtain an earlier effective date for the award of a 30% disability rating for a skin condition.

VA denied the veteran’s initial claim for benefits in 1982. The veteran filed a request to reopen in 1990, and the RO awarded service connection for a skin condition, rated 10% disabling, in 1997. He appealed that decision and the RO issued a Statement of the Case in March 1999. Mr. Boyd filed his Substantive Appeal in February 2000, which the RO rejected as untimely. Instead, the RO treated his appeal as a claim for an increased rating. Thus, this case involves two claim streams arising from (1) the 1990 claim to reopen and (2) the 2000 claim for an increased rating. 27 Vet.App. at 65-66.

Mr. Boyd appealed the RO’s decision that his appeal was not timely, asserting that he had been misinformed by the RO as to the time to file his appeal. He also continued to submit evidence to support the increased-rating claim. The RO awarded a 30% rating, effective May 1999, the date of the private medical records he had submitted. *Id.* at 66.

In 2002, the Board addressed both claim streams, and determined that (1) the February 2000 Substantive Appeal was not timely and (2) he was not entitled to an effective date earlier than May 1999 for the 30% rating. The Board did not address his contentions regarding being misinformed by the RO as to the time to file his appeal. *Id.*

In 2007, the CAVC vacated the Board’s 2002 decision with respect to both matters and directed the Board to discuss equitable tolling regarding the timeliness of the Substantive Appeal. Because the Board’s decision on the Substantive Appeal issue

could have a significant impact on the earlier-effective-date issue, the Court stated that the two issues were “inextricably intertwined.” *Id.*

In April 2008, Mr. Boyd provided the RO with a new mailing address. Two weeks later, he provided the RO with a different mailing address. In June 2008, the Board issued a decision holding that the Substantive Appeal was not timely and that equitable tolling was not warranted, but remanding the effective date issue to the RO. The Board mailed the decision to the wrong address. *Id.* at 67.

In February 2009, the RO received a statement from Mr. Boyd that he disagreed with the Board’s 2008 decision, and addressed both claim streams. The RO did not act on this statement. *Id.*

In an August 2009 decision, the Board determined that its June 2008 decision was final with respect to the timeliness issue, and continued to deny an earlier effective date for the 30% rating. The Board did not respond to Mr. Boyd’s February 2009 statement regarding error in its June 2008 decision. *Id.* at 67-68.

Mr. Boyd appealed to the CAVC in February 2010, but the Court dismissed the appeal as untimely. Two years later, Mr. Boyd filed a pro se motion to recall mandate in the Court’s 2010 dismissal order. In his motion, he addressed the Board’s June 2008 and August 2009 decisions. The Secretary informed the Court that Mr. Boyd had filed a timely motion for reconsideration of the August 2009 decision – but that the Board mailed its denial of that motion to the wrong address. Therefore, the Secretary did not oppose Mr. Boyd’s motion to recall mandate. *Id.* at 68.

On appeal to the Court, Mr. Boyd first argued that the Board’s 2008 decision did not become final until the earlier effective date issue was decided because the Court had previously deemed the matters inextricably intertwined and, therefore, the Board had no authority to adjudicate those matters separately. In the alternative, he argued that he was entitled to notice that the Board was going to adjudicate the matters separately. He next argued that the Board’s 2008 decision did not become final because the decision was mailed to the wrong address and the 120-day appeal period did not begin until he received notice of the 2008 decision. He also challenged the Board’s 2009 decision with respect to the earlier effective date issue because the Board failed to address medical evidence. *Id.* at 68-69.

The Secretary argued that the Court lacked jurisdiction to review the 2008 decision because Mr. Boyd did not file a timely appeal. The Secretary conceded that the 2008 decision was mailed to the wrong address, but asserted that Mr. Boyd had actual notice of it. The Secretary also argued that the Board is not required to provide notice of its intent to separate issues that the Court previously deemed inextricably intertwined and that the Board has the authority to adjudicate such issues separately. The Secretary asserted that the effective date for the 30% rating cannot be earlier than one year prior to the date of the claim, which was February 2000. *Id.* at 69.

The Court first determined that through a liberal reading of the pro se NOA, and consideration of the surrounding circumstances, Mr. Boyd was attempting to appeal both the 2008 and 2009 Board decisions. The Court thus found that it had jurisdiction to (1) consider whether the 2008 decision was final, for purposes of review by the Court, and (2) review the 2009 decision. *Id.* at 69-70.

With respect to the first issue, the Court found that the appeal of the 2008 decision was premature – and was still premature – because the Secretary did not show that Mr. Boyd had actual notice of that decision prior to February 2009, when the RO received his statement. *Id.* at 71. The Court found that the Board’s mailing of the decision to the wrong address was clear evidence to rebut the presumption of regularity, and that the Secretary had not shown that the decision was ever mailed to the correct address or that Mr. Boyd actually received it prior to his February 2009 statement. *Id.* at 71-72. The Court reminded the Secretary that once the presumption of regularity has been rebutted – as it had been by showing that the decision was never mailed to the correct address – the burden shifts to the Secretary to show actual receipt. *Id.* at 72-73. The Court further held that the 120-day appeal period did not begin until February 27, 2009, the date of Mr. Boyd’s statement. *Id.* at 74.

The Court also held that because VA never responded to Mr. Boyd’s February 2009 statement with respect to the June 2008 decision, that statement abated the finality of the June 2008 decision for purposes of appealing to the Court. *Id.* The Court added that the February 2009 statement was also a potential motion for reconsideration as to *both* claim streams. *Id.* at 75. However, the Court determined that the NOA was still effective as to the issues in the Board’s 2009 decision – since those matters are separately appealable to the Court. *Id.* at 76.

The Court reviewed the language of its prior remand order, and determined that the “inextricably intertwined” language “did not require the Board to adjudicate the matters together.” *Id.* at 77. The Court held that the Board did not have to provide notice that it would be adjudicating issues separately, and that the Board’s 2009 decision was properly on appeal, “even though the issues of an initial rating in excess of 10% and an earlier effective date for service connection” were not yet final because finality of those issues in the June 2008 decision was abated. *Id.* at 77-78.

Regarding the 2009 decision, the Court held that the appellant provided no basis for an earlier effective date for the 30% rating, and thus affirmed the Board’s 2009 decision. *Id.* at 78. However, the Court made it clear that this affirmance did not prevent the appellant from obtaining an initial rating higher than 10% prior to May 1999 and an effective date earlier than March 1990, based on his claim to reopen and the timeliness of his Substantive Appeal. *Id.* To this end, the Court modified the Board’s 2009 decision “to remove findings that might preclude the veteran from obtaining relief on the matters at issue in the first claim stream.” *Id.* at 78-79.

[Johnson v. McDonald](#), 762 F.3d 1362 (August 6, 2014)

38 C.F.R. § 3.321(b)(1), *REFERRAL FOR EXTRASCHEDULAR CONSIDERATION*

Held: The plain language of 38 C.F.R. § 3.321(b)(1) entitles a veteran to referral for extraschedular consideration based on the combined effect of multiple service-connected disabilities.

This case reverses an en banc opinion of the CAVC that found the language of 38 C.F.R. § 3.321(b)(1) ambiguous and thus deferred to the Secretary's interpretation. The Federal Circuit determined that the language was not ambiguous and that deference to the agency's interpretation was not warranted. The veteran had sought increased ratings for his service-connected heart disease and bilateral knee condition. The RO denied his claims and the Board affirmed, also denying referral for extraschedular consideration.

On appeal to the CAVC, a majority affirmed, finding that the language of the regulation was ambiguous and deferring to the Secretary's interpretation. The Federal Circuit reversed, finding that the plain language of the regulation was clear, consistent with its authorizing statute (38 U.S.C. § 1155), and that it specifically refers to "schedular evaluations" (plural) and "disability or disabilities." 762 F.3d at 1365. The Court rejected the Secretary's argument that the term "disability picture" in the regulation limits consideration "to the impact of a single disability rather than multiple disabilities," finding that the clear language "refers to the collective impact of a veteran's 'service-connected disability or disabilities.'" *Id.* at 1365-66. The Court also rejected the Secretary's argument that VA's interpretation of 38 C.F.R. § 3.321(b)(1) would be duplicative of 38 C.F.R. § 4.16, which allows for a total rating based on unemployability. *Id.* at 1366. The Court held that § 3.321(b)(1) "performs a gap-filling function" in that "[i]t accounts for situations in which a veteran's overall disability picture establishes something less than total unemployability, but where the collective impact of a veteran's disabilities are nonetheless inadequately represented." *Id.* In assessing the policy justification for its interpretation, the Court stated that "[i]t is not difficult to imagine that, in many cases, the collective impact of all of a veteran's disabilities could be greater than the sum of each individual disability's impact." *Id.*

[Tagupa v. McDonald](#), docket no. 11-3575 (August 26, 2014)

38 C.F.R. § 3.203(c), *VERIFICATION OF SERVICE*

Held: The plain meaning of 38 C.F.R. § 3.203(c) requires verification of service from the service department – not from the National Personnel Records Center (NPRC).

The Board denied benefits to a veteran's surviving spouse because it determined that her husband had no service as a member of the Philippines Commonwealth Army to establish veteran status. The surviving spouse provided her husband's identification card from the "Anderson Fil-American Guerrillas" stating that he "actively participated in the anti-Japanese resistance movement in the Philippines" from 1942 to 1945. She also submitted affidavits from her husband's comrades and a certificate thanking him for his service from President Obama.

On appeal to the CAVC, the surviving spouse argued that the Board failed to comply with 38 C.F.R. § 3.203(c) when it sought verification of service from the NPRC instead of the service department. The Secretary argued that the NPRC acts as an agent of the Army, maintains the relevant records, and has the authority to make service verifications. To support these assertions, the Secretary provided a memorandum of agreement (MOA) between the Army and the National Archives (NARA), in which the Army “purported to transfer ‘responsibility for providing reference services on the collection of Philippine Army files and archives holdings’ to NARA indefinitely.” *3-4.

The Court determined that, according to the “the plain language of the regulation and caselaw[,] . . . the entity in the best position to verify service is the appropriate service department and VA’s acceptance of any service department document, without further verification by the service, is limited and discretionary under § 3.203(c).” *6-7. This regulation describes the process required to verify a veteran’s service when a veteran does not submit certain service records, such as a DD Form 214. 38 C.F.R. § 3.203. The regulation states that when a veteran does not submit evidence that meets the requirements of subsection (a) (such as a DD Form 214), VA “shall request verification of service from the service department.” 38 C.F.R. § 3.203(c). The Court took judicial notice of the MOA, but found that it was unclear as to whether it assigned authority to NARA “to make administrative determinations verifying service” or whether it only assigned “duties to act simply as a reference librarian.” *7-8. The Court held that the “plain language clearly states that, when VA has determined that evidence of service does not comply with subsection (a) [of 38 C.F.R. § 3.203], VA ‘shall request verification of service *from the service department*.’” *8 (emphasis in the original). The Court remanded the case to the Board to request verification of the veteran’s service from the Army.

The Court discussed VA’s duty to assist with respect to service records, and noted that VA’s own policy manual requires it to seek verification from alternative sources if its standard means of verification are unsuccessful. *9. The Court also held that the Board provided inadequate reasons or bases for its rejection of the claimant’s submitted evidence and failed to address the possibility that her husband served in an “unrecognized guerrilla unit during World War II.” *11-12. The Court stated that new evidence must “‘be submitted and considered in connection with a [service verification request]’” and that “there is no limit on the number of requests that VA shall make to the service department for service verification when a claimant fails to submit qualifying evidence of service.” *11.

[**Checo v. McDonald**](#), docket no. 11-3683 (Aug. 29, 2014) (per curiam order)
EQUITABLE TOLLING, DUE DILIGENCE

Held: In order to establish entitlement to equitable tolling, a claimant must show extraordinary circumstances, causation, and due diligence. In cases where the period of “extraordinary circumstances” has a definite end date, due diligence must only be

shown during the period of extraordinary circumstances – and not the entire appeal period.

This per curiam order arises from a Federal Circuit opinion that reversed and remanded a prior CAVC opinion. *2. The veteran in this case filed her Notice of Appeal to the CAVC late and asserted that her homelessness was an extraordinary circumstance that caused her late filing because she did not have a mailing address. The Federal Circuit determined that she only needed to show due diligence during the period of homelessness, thus adopting the “‘stop-clock approach,’ so called ‘because the clock measuring the 120-day appeal period is ‘stopped’ during the extraordinary circumstance period and starts ticking again only when the period is over.’” *Id.* (quoting *Checo v. Shinseki*, 748 F.3d 1373, 1379 (2013)). The Federal Circuit reversed the CAVC’s decision, and remanded for the Court to reconsider whether the veteran exercised due diligence during the period of extraordinary circumstances.

The CAVC determined that “due diligence” required “reasonable diligence” and not “maximum feasible diligence.” *Id.* The Court found that the veteran had contacted VA to inquire as to her appeal during the period of extraordinary circumstances – and that this was a “sufficient demonstration of diligence” during that period. The Court thus accepted her Notice of Appeal as timely.