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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

Swain v. McDonald, 27 Vet.App. 219 (Jan. 8, 2015)
HEARING LOSS EFFECTIVE DATES; 38 C.F.R. § 4.85
Held: 38 C.F.R. § 4.85 does not govern the assignment of effective dates for hearing loss ratings and does not require a Maryland CNC test to establish entitlement to an earlier effective date. Instead, the effective date is the earliest date that it is ascertainable that the claimant had a compensable hearing loss disability.

Veteran applied for and was awarded service connection for bilateral hearing loss, rated noncompensable, effective the day after his 1955 discharge from service. In 2007, he applied for an increased rating, but was denied a compensable rating because a VA examination using the Maryland CNC test did not show compensable hearing loss. Mr. Swain appealed and submitted two private audiometric examinations from 2009 and 2010, which both showed significant hearing loss but did not identify the tests used to obtain the results. The Board remanded for another VA audiometric examination and asked the examiner to interpret the two private medical reports. The VA examiner used the Maryland CNC test and the examiner stated that the results were consistent with the private examination results. The RO awarded a 10% disability rating with an effective date as of the date of the recent VA medical examination.

The veteran appealed the effective date of this decision, and the Board stated that disability ratings for hearing loss must be based on Maryland CNC test results and, therefore, effective dates for ratings must be related to the date of that test. On appeal to the CAVC, the veteran acknowledged that Maryland CNC tests are required to determine the disability rating, but argued that the effective date should be based on all the "facts found." He asserted that the private medical reports from 2009 and 2010, which were consistent with the 2013 VA medical examination, were sufficient to establish entitlement to an earlier effective date for the assignment of a 10% rating.

The Court agreed. It framed the issue as whether the requirement of 38 C.F.R. § 4.85(a) that a hearing examination include a Maryland CNC test means that the effective date cannot be earlier than the date of that test – and concluded that it does not. The Court examined the plain language of the regulation and found that it says nothing about effective dates and, therefore, does not control the effective date assigned in this case. The Court discussed the statute and regulation pertaining to effective dates, as well as case law on the assignment of effective dates and reiterated its prior holding that an "effective date should not be assigned mechanically based on the date of a diagnosis. Rather, all of the facts should be examined to determine the dated that [the veteran's disability] first manifested." (citing *DeLisio v. Shinseki*, 25 Vet.App. 45, 58 (2011). The Court reversed the Board's decision, and remanded the case for the Board to assign a 10% disability rating effective November 2009, the date of the veteran's first private examination report.

Leavey v. McDonald, 27 Vet.App. 226 (per curiam order) (Jan. 12, 2015)
NO SUBSTITUTE, NO "CASE OR CONTROVERSY"
Held: When veteran dies during the pendency of an appeal and there is no eligible substitute, the appeal does not survive the veteran and the Court must dismiss the case because there is no longer a "case or controversy" to decide.

The Court issued an en banc decision affirming a Board denial of benefits on November 14, 2014. Counsel for the veteran notified the Court that the veteran passed away on November 6, 2014. The veteran's widow did not wish to substitute as a potential accrued benefits recipient in the veteran's appeal – and the Court thus withdrew its November 14, 2014 decision, vacated the underlying Board decision, and dismissed the appeal.

Two judges filed separate dissents in this opinion asserting that there was no proper basis for the Court's action in the absence of a motion by either party to do so and that the issues addressed in the en banc decision were significant to all veterans. In his dissent, Judge Greenberg also noted the veteran's history in this case – as a member of the Marine Corps in the Pacific during World War II – who died at age 89 after asking the Board to expedite his claim based on his "age and frailty." *See* Greenberg, J., dissent. Judge Greenberg stated: "This Court must not lose sight of this veteran's reality of the reality of all veterans who continue to suffer harmful delays as a result of VA error." *Id*.

Moffitt v. McDonald, 776 F.3d 1359 (Fed. Cir. Jan. 21, 2015)
HYPOTHETICAL ENTITLEMENT TO ENHANCED DIC; 38 C.F.R. § 1311
Held: Retroactive application of regulations that bar entitlement to enhanced Dependency and Indemnity Compensation is permissible.

In 1946, veteran Douglas Moffitt was awarded 100% disability for injuries sustained during service. VA reduced the rating to 60% in 1953, and Mr. Moffitt continued to receive that rating (with the exception of a brief, temporary 100% rating in 1958) until his death in 1982.

After his death, his surviving spouse applied for and was awarded DIC benefits under 38 U.S.C. § 1151. VA also awarded Mr. Moffitt's pending claim for a total disability rating based on individual unemployability (TDIU), effective 1979. Mrs. Moffitt later applied for enhanced DIC benefits under 38 C.F.R. § 1311, which is awarded "where the veteran 'was entitled to receive' compensation" based on TDIU for at least eight years prior to death. The RO deferred consideration of this claim, pending the Veterans Court's decision in *Hix v. West*, 12 Vet.App. 138 (1999). The issue in *Hix* was whether the "entitled to receive" language in § 1311 allows an award of enhanced DIC based on a theory of "hypothetical entitlement." This theory would allow the Board to adjudicate a claim for enhanced DIC "without regard to claim filing or claim dispositions during the veteran's lifetime."

The RO denied the claim and Mrs. Moffitt appealed to the Board. The Board denied the claim, "finding that VA's regulations, which were amended while Mrs. Moffitt's claim was pending, precluded her hypothetical entitlement theory." The Board pointed to Federal Circuit decisions – issued while her claim was pending – that "upheld VA regulations barring use of the hypothetical entitlement theory to establish entitlement to DIC benefits under either § 1311 or § 1318."

Mrs. Moffitt appealed to the Veterans Court. Because VA had amended and added pertinent regulations while the claim was pending, the parties agreed that remand was necessary to allow the Board to consider whether these rules could be retroactively applied to Mrs. Moffitt's case. On remand, the Board determined that applying the amended regulations "did not create an unlawful retroactive effect," and that because her claim was based on hypothetical entitlement, she was not entitled to enhanced DIC benefits.

Mrs. Moffitt again appealed to the CAVC. The Court stayed proceedings pending the Federal Circuit's decision in *Kernea v. Shinseki*, 724 F.3d 1374 (Fed. Cir. 2013). In that case, the Federal Circuit held that "§ 3.10(f)(3) can apply retroactively to prohibit § 1311 claims based on a theory of hypothetical entitlement." The CAVC lifted the stay and Mrs. Moffitt argued that her situation was different from *Kernea* because she filed her claim in August 1999 – before VA changed its regulations that would prohibit the use of hypothetical entitlement. The CAVC disagreed, finding that the new and amended regulations "could be applied retroactively to bar Mrs. Moffitt's theory of entitlement."

The Federal Circuit agreed with the CAVC. Applying the three-prong test that courts use to determine whether a regulation should be given retroactive effect, the Court held that all three factors weighed in favor of applying the new and amended regulations retroactively to Mrs. Moffitt's claim. The three factors to be considered 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 relevant past event'; and (3) 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" (citing *Princess Cruises, Inc. v. U.S.*, 387 F.3d 1358 (Fed. Cir. 2005).

With respect to the first prong, the Court discussed the history of the regulations and surrounding case law, and stated that "we have consistently held that the VA's amended regulations barring hypothetical entitlement claims can be applied retroactively to claims filed before the regulatory amendments took effect." With respect to the second prong, the Court noted that this determination requires an assessment of whether the rule in question affects "the conduct that gave rise to the suit or claim at issue." The Court found that Mr. Moffitt filed his claims well before Congress enacted § 1311(a)(2) and before VA promulgated the new regulation. Because of this, the Court determined that "Mr. Moffitt's 'failure to conform his conduct to the requirements' of amended rules 20.1106 and 3.10(f)(3) 'cannot be attributed ot the change in the law occasioned by' those rules."

With respect to the third factor, Mrs. Moffitt argued that because she filed her claim before VA amended its rules, she did not have fair notice of the change and did not know that hypothetical entitlement was no longer a viable option. The Court stated that VA "has disfavored hypothetical entitlement since at least the 1990 VA General Counsel Opinion." The Court thus concluded that the third factor weighed in favor of retroactively applying the new and amended rules to bar Mrs. Moffitt's hypothetical entitlement claim.

Wages v. McDonald, 27 Vet.App. 233 (Jan. 23, 2015)
38 C.F.R. § 4.16(b), C&P DIRECTOR'S EXTRASCHEDULAR TDIU DECISION
Held: Extraschedular TDIU determinations made by the Director of VA Compensation & Pension are decisions that are reviewable by the Board – and the Board's review is not limited to only ensuring that the Director's determination was based on the full facts.

Veteran was awarded a total rating based on individual unemployability (TDIU), effective December 2009, the date he became eligible on a schedular basis. The Board found that the evidence suggested that he was unable to work prior to this date and remanded for referral to the Director of C&P for extraschedular consideration. On remand, the Director determined that the veteran was capable of performing sedentary work and that there was no evidence that he was unable to secure and follow substantially gainful occupation prior to December 2009. The Board denied entitlement to extraschedular TDIU prior to December 2009, relying in part on the C&P Director's decision.

On appeal to the Court, the veteran argued that the Board owes no deference to the C&P Director's decision and must review that decision de novo. The Secretary argued that the Director's decision was not evidence and that "although the Board may review the factual basis of the Director's decision to ensure that it is accurate and complete, § 4.16(b) operates to divest the Board of the authority to overturn a Director's decision because determinations under § 4.16(b) are policy decisions committed to the Director's sole discretion."

The Court disagreed with the Secretary, finding that limiting the Board's review in that way "creates a direct conflict with the statutory mandate that the Board render the final decision . . . on all questions arising under 38 U.S.C. § 511(a), which . . . indisputably includes an award of TDIU." The Court discussed this statute's requirement that final decisions on benefits appeals "shall be made by the Board" and determined that a decision under § 4.16(b) obviously "affects the provision of benefits" and therefore is "a section 511(a) issue that is subject to the Board's jurisdiction." The Court rejected the Secretary's attempt to frame the Director's decision as a "policy" decision, stating that “the Director did not deny an extraschedular TDIU rating based on some cryptic policy determination or a review of extra-record statistics; the decision reflects that he merely reviewed the record medical evidence and made a determination regarding whether the veteran is unemployable.” The Court stated that “the Director’s decision is no different than an RO’s decision in terms of its effect on the Board’s statutory jurisdiction and the Board’s standard of review,” and held that such decisions are fully reviewable by the Board.