**VETERAN'S LAW UPDATE: February 2015**
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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

***Fountain v. McDonald***, 27 Vet.App. 258 (Feb. 9, 2015)
*38 C.F.R. § 3.309(a); TINNITUS; LAY STATEMENTS*
Held: Tinnitus can be characterized as an "organic disease of the nervous system" – and thus qualify as a "chronic" condition under 38 C.F.R. § 3.309(a) – where there is evidence of acoustic trauma.

Veteran served as a motor transport operator in the U.S. Army from 1977 to 1980. He was diagnosed with bilateral hearing loss upon separation and awarded VA benefits at a noncompensable level in 1980. In 2009, he filed a claim for service connection for tinnitus, stating that both his hearing loss and tinnitus were due to noise exposure while in service. A May 2009 VA C&P examiner assessed the veteran's complaints of tinnitus and concluded that it was less likely that the tinnitus was related to service based on the absence of complaints of tinnitus in his service treatment records and VA examinations conducted shortly after separation. The examiner noted the veteran's in-service noise exposure, post-service occupational noise exposure, and the veteran's statement that his tinnitus began in service. The examiner diagnosed "normal sloping to mild sensorineural hearing loss bilaterally" and recurrent tinnitus. The RO relied on this examination report to deny the veteran's claim.

In November 2010, the veteran filed a request to reopen his claim, stating that he did not recall being asked about tinnitus while in service and that he did not know that it was a disability until recently. The RO continued to deny the claim, and the veteran appealed to the Board. The Board found that his statements were new and material because they related to "chronicity of symptoms in service and continuity of tinnitus after service," and that they explained why he did not mention tinnitus in service. The Board found his statements of noise exposure credible, but rejected his assertions that his tinnitus started in service based on the absence of complaints of tinnitus for many years following service. The Board determined that the weight of the "competent" evidence was against the claim, affording the May 2009 C&P opinion "great probative weight. "

On appeal to the Court, the veteran argued that "a 'common sense reading' of § 3.309(a) requires that tinnitus be included under '[o]ther organic diseases of the nervous system.'" As support, the veteran pointed to VA Training Letter 10-02 that includes sensorineural hearing loss in this provision of § 3.309(a) and "recognizes a potential

association between hearing loss and tinnitus." The Secretary argued that the Training Letter distinguishes between hearing loss and tinnitus "because tinnitus is a symptom and not a disease."

The Court first determined that the language of § 3.309(a) mirrored the statutory language (38 U.S.C. § 1101(3)), and that the Secretary's interpretation of the regulation was only entitled to deference if it was persuasive. The Court found the Secretary's argument unpersuasive and inconsistent with VA's rating schedule, "which identifies tinnitus as a disability subject to compensation . . . without requiring that the tinnitus occur in conjunction with any other condition or disease." The Court also found the Training letter to be internally inconsistent, as well as inconsistent with VA's description of tinnitus in other "agency pronouncements" as an "organic disease of the nervous system" under 38 U.S.C. § 1101(3). The Court also pointed to Board decisions that found tinnitus to be an "organic disease of the nervous system" as evidence that undermined the Secretary's argument. This last point deserves highlighting. The Court acknowledged that Board decisions are not precedential and that the Board itself is not bound by other Board decisions. However, the Court took "judicial notice" of the Board decisions as further evidence of the "lack of persuasiveness" of the Secretary's position. The Court thus held that "§ 3.309(a) includes tinnitus, at a minimum where there is evidence of acoustic trauma, as an 'organic disease[ ] of the nervous system.'"

The Court also found error in the Board's treatment of the veteran's lay statements, finding that the Board "failed to discuss whether the tinnitus symptoms the appellant was experiencing during service were of such severity that it would have been reasonable to expect that he would have sought treatment or complained of tinnitus during service." The Court rejected the Board's adverse credibility determination, which was based on the fact that the veteran did not file a claim for many years after service, finding that the Board erred by not explaining its determination in light of the veteran's statements "that he was unaware that tinnitus was a disability for which he could receive service connection and VA benefits."

The Court further rejected the Board's determination that "the Veteran denied tinnitus" at a post-service examination as factually incorrect – noting that the "veteran did not report tinnitus," which is not the same as *denying* tinnitus. The Court also determined that the Board failed to adequately explain its determination that a lay person is not competent to provide etiology evidence for a condition like tinnitus. On remand, the Court directed the Board to "fully consider the nature of tinnitus with its observable subjective symptoms and fully discuss its determination, with an analysis of the most recent caselaw." (citing *Charles v. Principi*, 16 Vet.App. 370, 374 (2002) (noting that "ringing in the ears is capable of lay observation").

Finally, the Court found that the Board erred by failing to consider service connection on a secondary basis, expressly quoting VA Training Letter 10-02, which states "[i]f hearing loss is also present, the audiologist must provide an opinion about the association of tinnitus to hearing loss." Because the theory of service connection for tinnitus as secondary to hearing loss was reasonably raised by the evidence of record, the Court

found that the Board erred by failing to consider this theory and by failing to ensure that the audiology examination complied with VA's directives.

***Pederson v. McDonald***, 27 Vet.App. 276 (en banc) (Feb. 13, 2015)
*CAVC JURISDICTION TO REVIEW ABANDONED ISSUES; TDIU*
Held: "[T]he Court retains jurisdiction over all finally decided issues [in a Board decision], regardless of whether the [Notice of Appeal] itself or the subsequent briefing narrows the issues on appeal." However, the Court "will generally decline to exercise its *authority* to address an issue not raised by an appellant in his or her opening brief." For purposes of a subsequent CUE challenge, the body of the Court's decision must be reviewed to determine "whether the issue was reviewed by the Court on the merits." With respect to TDIU, the burden is on the claimant to show that his/her education and experience would preclude substantially gainful sedentary employment, and the Board must consider all relevant evidence, including the effect of the claimant's nonservice-connected conditions on employability. NOTE: This case was appealed to the Federal Circuit April 30, 2015.

This case clarifies and reaffirms the Court's prior holding in *Cacciola v. Gibson*, 27 Vet.App. 45 (2014), "regarding the effect of the abandonment of a claim or issue appealed to this Court." The Board decision in question denied entitlement to increased ratings for the veteran's bilateral knee condition, and for TDIU. On appeal to the Court, the veteran expressly limited his arguments to the denial of TDIU. The issues before the en banc Court were (1) whether the Court had the authority to affirm the Board's decision with respect to those issues or whether it must decline to review those issues and dismiss the appeal and (2) if the Court has the authority to affirm those issues, under what circumstances should the Court exercise that authority; (3) whether an appellant's statement that he is only appealing the TDIU issue constitutes a waiver of the right to judicial review of the other issues; and (4) whether the Court lacks jurisdiction over the other issues or has the authority to decide them on the merits.

The Court first determined that a Notice of Appeal "from a Board decision constitutes an appeal of all issues finally decided in the Board decision" and that "the Court retains jurisdiction over all finally decided issues, regardless of whether the NOA itself or the subsequent briefing narrows the issues on appeal." However, the Court noted that it "will generally decline to exercise its *authority* to address an issue not raised by an appellant in his or her opening brief." Nevertheless, the Court emphasized that "abandonment of an issue on appeal has *no effect* on the Court's *jurisdiction* or *authority* to address an issue not raised by an appellant in his or her opening brief." The Court thus reaffirmed that its entire on appeal "must be examined in any subsequent CUE challenge" to determined (1) whether the issue was abandoned and (2) whether the Court addressed the issue on the merits, regardless of the abandonment. In this case, because the veteran was represented by counsel and there was no evidence that the abandonment was "not knowing and intentional," the Court declined to address the abandoned issues and dismissed the portion of the appeal relating to the Board's denial of increased ratings for the veteran's bilateral knee conditions.

Regarding the TDIU issue, the record contained several medical opinions – both by VA and in conjunction with an employment-related disability claim – that noted the effect of his numerous other health conditions on his ability to work. The veteran argued to the Board that his case should be submitted to the Director of Compensation Service for extraschedular TDIU consideration because he had only ever worked "labor-intensive positions at a grocery store and for USPS and only has a high school education" and that he therefore "lacks the requisite educational or occupational experience to qualify for any sedentary employment." Relying on the medical opinions of record, the Board denied TDIU, finding that "while the [v]eteran's education and work experience may limit his employment opportunities, it does not seem that the lack of a college degree would preclude the [v]eteran from *all* sedentary employment."

On appeal to the Court, the veteran argued that the Board failed to adequately consider his education and employment background, and impermissibly considered the effect of his nonservice-connected conditions in assessing whether his service-connected conditions alone preclude substantially gainful employment. The Court found the Board's reasons or bases adequate for its decision.

The Court first noted that the veteran did not argue that he was physically or mentally *unable* to perform sedentary work – only that his education and work background did not *qualify* him for such work. However, the veteran did not point to anything in the record to show that his education or background would preclude sedentary employment. The Court also determined that the Board properly considered "all the relevant medical evidence regarding the appellant's employability" and recognized that much of that evidence showed that all his combined conditions impaired his ability to work. However, the Court determined that any failure on the part of the Board "to specifically identify the degree to which his service-connected disabilities, as opposed to his non-service-connected disabilities, impair his ability to work" was harmless error, since the appellant had not demonstrated how he was prejudiced by any such error. The Court thus affirmed the Board's denial of TDIU.

NOTE: This case is currently on appeal to the Federal Circuit. This decision contains two dissents and one concurring opinion regarding the adequacy of the Board's reasons or bases for its TDIU determination that will likely be of value to the appellant in his appeal. In her concurring opinion, Judge Pietsch found the Board's reasons or bases inadequate because the Board did not address the appellant's specific argument, noting that he did not argue about the lack of a college degree; rather, he argued that he only had a high school degree. Judge Pietsch added that the Board also failed to address the appellant's argument regarding his work experience. Nevertheless, Judge Pietsch concurred in the result because she found that the appellant did not meet his burden of providing how he was prejudiced by this error.

In her dissent, Judge Schoelen found that the Board did not adequately address the appellant's education and work history, noting that "the fact that the appellant may be physically able to perform sedentary employment does not mean that he is educationally and vocationally qualified to perform such employment." Judge Schoelen

characterized the Board's determination regarding the "lack of a college degree" as "superficial" and "devoid of any factual or legal analysis," adding that there is no evidence of record "to support the Board's finding that the appellant can secure and maintain substantially gainful sedentary work" and that the Board failed to consider his work history that consisted solely of manual labor.

In his dissent, Judge Greenberg found that the Board's reliance on medical opinions to determine unemployability was "nothing more than an abdication of VA's responsibility, or at least an impermissible delegation of its authority," noting that 38 C.F.R. § 4.16 places the ultimate unemployability determination with the rating official.

***Dixon v. McDonald***, 778 F.3d 1339 (Feb. 20, 2015)
*GARNISHMENT OF VA BENEFITS FOR CHILD/SPOUSAL SUPPORT*
Held: In order for VA to garnish a veteran's benefits in fulfillment of a support order, a garnishment order or similar legal process must be served on VA, pursuant to 42 U.S.C. § 659(i)(5).

Former spouse of deceased veteran filed a claim for retroactive child and spousal support that she should have received for the 8 years prior to the veteran's death. The Veterans Court found that "VA had never been served with legal process instructing garnishment, as required by 42 U.S.C. § 659(i)(5)" and that VA's prior payments to her were pursuant to 38 C.F.R. § 3.452, which provides for apportionment of benefits if the veteran does not live with the spouse or children and if a claim is filed. The Federal Circuit agreed, finding that "no such legal process had been served on the VA with a request for garnishment."