



VETERANS CASE LAW 2014

Holdings 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

[**Pacheco v. Shinseki**](#), 26 Vet.App. 413 (Jan. 16, 2014)

38 C.F.R. § 3.157(b), *MEDICAL EVIDENCE AS INFORMAL CLAIM*

“[A]s long as a pension claim previously has been allowed as required in [38 C.F.R.] § 3.157(b), a VA examination report will constitute the requisite informal claim for increase or reopening for service connection *disability compensation* benefits under § 3.157(b)(1), irrespective of whether any disability identified in the original pension claim relates to the same condition as the more recent examination report.” 26 Vet.App. at 417 (emphasis added). (Note: this holding was subsequently reversed in *Pacheco v. Gibson*, 27 Vet.App. 21 (2014) (en banc)).

[**Middleton v. Shinseki**](#), 743 F.3d 1356 (Feb. 3, 2014)

38 C.F.R. § 4.7, *ENTITLEMENT TO HIGHER DISABILITY RATING*

The Federal Circuit denied the appellant’s petition for panel and en banc rehearing of its opinion that held that where a veteran’s disability meets *all* the criteria of a lower disability rating, but only meets *some* of the criteria of a higher rating, the veteran is only entitled to the lower rating.

[**Dixon v. Shinseki**](#), 741 F.3d 1367 (Feb. 4, 2014)

NEW EVIDENCE ON MOTION FOR RECONSIDERATION, EQUITABLE TOLLING

Under certain circumstances, the introduction of new, clarifying evidence on motion for reconsideration may be necessary to allow the Court to fully evaluate the facts of a veteran’s equitable tolling claim.

[**Stallworth v. Shinseki**](#), 742 F.3d 980 (Feb. 10, 2014)

38 C.F.R. § 3.105(d), *SEVERING SERVICE CONNECTION*

The regulation that provides for the severance of service connection does not require medical examiners to use specific language.

[**Moffitt v. Shinseki**](#), 26 Vet.App. 424 (Feb. 14, 2014)

HYPOTHETICAL ENTITLEMENT, RETROACTIVITY

Retroactive application of the VA rule prohibiting hypothetical entitlement to Dependency and Indemnity Compensation (DIC) benefits is not prohibited, even in cases where the claim for DIC under this theory was filed *before* VA took steps to prohibit hypothetical entitlement.

[Mason v. Shinseki](#), 743 F.3d 1370 (Feb. 21, 2014)

TIME TO APPEAL ATTORNEY DIRECT-FEE DECISION

RO denials of direct-fee requests are treated as simultaneously contested claims, and thus subject to the 60-day appeal period under 38 U.S.C. § 7105A.

[Tatum v. Shinseki](#), 26 Vet.App. 443 (Vet.App. Feb. 26, 2014)

38 C.F.R. § 4.115b, DIAGNOSTIC CODE (DC) 7528

A 100% disability rating for prostate cancer is warranted for six months “[f]ollowing the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure...” 38 C.F.R. § 4.115b, DC 7528. The date of “cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure” refers to the date of final treatment for *cancer* – and *not* for treatment of residuals of cancer or residuals of cancer treatment.

[King v. Shinseki](#), 26 Vet.App. 433 (Feb. 26, 2014)

CLEAR AND UNMISTAKABLE ERROR (CUE)

The RO’s failure to mention favorable evidence in a pre-1990 rating decision cannot be CUE because there was no reasons-or-bases requirement prior to 1990, and a finding of CUE would require that the RO actually *denied the existence* of the favorable evidence, not just that it failed to mention the evidence. 26 Vet.App. at 440 (citing *Bouton v. Peake*, 23 Vet.App. 70, 71 (2008)). A “manifest change in the outcome of the determination means that, absent the clear and unmistakable error, the benefit sought would have been granted at the outset” – and not that the RO would have been required to send a medical opinion back for clarification. *Id.* at 441.

[Martin v. Shinseki](#), 26 Vet.App. 451 (Feb. 28, 2014)

SERVICE DISABLED VETERANS’ INSURANCE (S-DVI)

The grant of S-DVI under 38 U.S.C. § 1922(b) is treated, by operation of law, as an award under § 1922(a). However, in order to be eligible for Supplemental S-DVI under 38 U.S.C. § 1922A, a veteran must qualify for a waiver of premiums under 38 U.S.C. § 1912.

[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.]

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

CLEAR AND UNMISTAKABLE ERROR (CUE)

An 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.

[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.

[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.

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

38 C.F.R. § 3.203, PROCEDURES TO DETERMINE QUALIFYING SERVICE

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.

[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. The Board's mischaracterization of the issue constituted a rating reduction that was accomplished without the appropriate regulatory process.

[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.

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

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

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.

[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.

[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).

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

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

“[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).”

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

JOINT MOTION FOR REMAND LIMITS SCOPE OF BOARD REVIEW

“[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.”

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

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

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.

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

REDUCTION OF COMPENSATION DURING INCARCERATION

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.

[Golden v. Gibson](#), 27 Vet.App. 1 (June 25, 2014)

EAJA, ATTORNEY TRAVEL TIME

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.

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

DC 5055 ONLY APPLIES TO TOTAL KNEE REPLACEMENTS

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.

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

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

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.

[Pacheco v. Gibson](#), 27 Vet.App. 21 (July 17, 2014) (en banc)

38 C.F.R. § 3.157(b), *INFORMAL CLAIM*

“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.”

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

CLEMENCY DISCHARGE & VA BENEFITS

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.

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

ABANDONED ISSUE AT CAVC, SUBSEQUENT CUE MOTION BELOW

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.

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

CUE, DIC, ACCRUED BENEFITS

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.

[Martin v. Gibson](#), 761 F.3d 1366 (Aug. 5, 2014)

38 U.S.C. § 3011, *ALCOHOL ABUSE, “WILLFUL MISCONDUCT”*

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.

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

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

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.

[Johnson v. McDonald](#), 762 F.3d 1362 (Aug. 6, 2014)
38 C.F.R. § 3.321(b)(1), *REFERRAL FOR EXTRASCHEDULAR CONSIDERATION*
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.

[Tagupa v. McDonald](#), 27 Vet.App. 95 (Aug. 26, 2014)
38 C.F.R. § 3.203(c), *VERIFICATION OF SERVICE*
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).

[Checo v. McDonald](#), 27 Vet.App. 105 (Aug. 29, 2014) (per curiam order)
EQUITABLE TOLLING, DUE DILIGENCE
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.

[Todd v. McDonald](#), 27 Vet.App. 79 (Sept. 3, 2014)
TDIU, EXTRASCHEDULAR CONSIDERATION
TDIU requires an individualized assessment. VA can rely on a medical opinion that discusses the individual’s disability, as well as generalizations about that disability, as long as it does not rely solely on the generalizations.

[Young v. McDonald](#), 766 F.3d 1348 (Sept. 8, 2014)
38 C.F.R. §§ 3.156(c), 3.304(f); *PTSD, EFFECTIVE DATE*
In order to determine the date entitlement to service connection for PTSD arose, within the meaning of 38 C.F.R. § 3.156(c), it is necessary to look at § 3.304(f), which requires a medical diagnosis. 766 F.3d at 1352.

[Joyner v. McDonald](#), 766 F.3d 1393 (Sept. 12, 2014)
38 U.S.C. § 1117; *PAIN CAN ESTABLISH UNDIAGNOSED ILLNESS*
“[T]he plain language of [38 U.S.C.] § 1117 makes clear that pain, such as muscle pain or joint pain, may establish an undiagnosed illness that causes a qualifying disability.” 766 F.3d at 1395. The statute does not require the veteran to provide evidence showing that a medical professional has eliminated all possible diagnoses. *Id.*

[Beraud v. McDonald](#), 766 F.3d 1402 (Sept. 12, 2014)
38 C.F.R. § 3.156(b); *PENDING CLAIM*
VA is required, under 38 C.F.R. § 3.156(b), to expressly determine whether evidence submitted during the one-year appeal period is new and material – and its failure to do so renders the underlying claim nonfinal, despite a subsequent final decision on the same issue. 766 F.3d at 1407. VA is not entitled to the presumption that the records were considered when there is no evidence that the records were even obtained. *Id.*

[Carroll v. McDonald](#), 767 F.3d 1368 (Sept. 24, 2014)
DIC, REMARRIAGE AFTER AGE 57

The 2003 statutory amendment that authorized Dependency and Indemnity Compensation (DIC) benefits for surviving spouses who remarry after age 57 included a provision that created a temporary window of eligibility for those who had been previously ineligible for these benefits. 767 F.3d at 1372.

[Roberts v. McDonald](#), 27 Vet.App. 108 (Oct. 7, 2014)
OFFSET OF ANNUITY AGAINST DIC BENEFITS

Offsets of Survival Benefits Plan (SBP) annuity payments against DIC payments are not covered by 38 C.F.R. § 3.658. VA's express reliance on the wrong regulation is not harmless error – even if there are other potentially applicable regulations – because the claimant will not have received proper notice of the laws VA relied on in making its decision.

[Suguitan v. McDonald](#), 27 Vet.App. 114 (Oct. 29, 2014) (per curiam order)
STANDING, SUBSTITUTION, NUNC PRO TUNC RELIEF

Surviving spouse's claim to payment under the Filipino Veterans Equity Compensation Fund (FVECF) does not survive her death. Where a surviving spouse would not be entitled to such payment, an asserted beneficiary of the spouse's estate (i.e., her son) cannot demonstrate that he would benefit from a favorable nunc pro tunc order from the Court, and thus lacks standing to be substituted in her appeal.

[Nohr v. McDonald](#), docket no. 13-1321 (Oct. 30, 2014)
CHALLENGE TO VA MEDICAL OPINION, DUTY TO ASSIST

Veteran's submission of "interrogatories" in response to a VA medical opinion reasonably raised issues of the examiner's competency, the adequacy of her opinion, and VA's duty to assist – and the Board's failure to respond to the submission rendered its reasons or bases inadequate. *2

[Leavey v. McDonald](#), docket no. 12-1883 (Nov. 14, 2014)

38 C.F.R. § 3.103, BOARD MEMBER'S DUTY TO EXPLAIN ISSUES AT HEARING

Where the issue is the appropriate disability rating to assign to a condition, 38 C.F.R. § 3.103(c)(2) generally requires a Board members to explain (1) that a rating is based on symptoms, severity, and effect on employment and (2) why the RO did not assign a higher rating. If referral for extraschedular consideration is also at issue, the Board member should also explain when such referral is warranted under 38 C.F.R. § 3.321(b)(1). *8. At the hearing, the Board member is not required to preadjudicate the claim, assess the credibility or probative value of the evidence, or search the record for all "latent issues," potentially relevant regulations, or "all possible routes to benefits." *9. And while a Board member can turn over the questioning to the veteran's representative, the hearing transcript must reflect that "(1) the issues on appeal were fully explained, (2) the submission of overlooked evidence was suggested, and (3) the claimant understood the outstanding issues material to substantiating his claim." *9-10. However, the Court held that a Board member's failure to fully explain the issues is not

prejudicial if this duty is “ultimately fulfilled after the fact by the conveying of additional information, evidentiary development, or the submission of additional evidence.” *10.

[O'Bryan v. McDonald](#), docket no. 2014-7027 (Nov. 20, 2014)

38 C.F.R. § 3.303(c), *CONGENITAL OR DEVELOPMENTAL DEFECT*

In defining what constitutes a congenital or developmental defect, the Court deferred to a VA General Counsel opinion that interprets “defects” as “static conditions” that are incapable of progression. VA’s interpretation of “defect” in § 3.303(c) excludes “progressive hereditary conditions since the nature of hereditary progressions can be aggravated by service.” The Court held that “a congenital or developmental condition that is progressive in nature—that can worsen over time—is a disease rather than a defect. A progressive congenital or developmental condition does not become a defect simply because it ceases to progress.” *7.

[Groves v. McDonald](#), docket no. 14-269 (per curiam order) (Nov. 25, 2014)

CIVIL CONTEMPT, SANCTIONS AGAINST VA

The Secretary’s failure to expeditiously handle the Court’s remand order and failure to respond to any of the claimant’s multiple written status inquiries showed “gross negligence and a lack of reasonable diligence” – and met the elements necessary for the Court to hold him in civil contempt. The Court ordered sanctions in the form of reasonable expenses associated with the litigation of the matter.

[Evans v. McDonald](#), docket no. 11-2917 (Dec. 2, 2014)

CLEAR AND UNMISTAKABLE ERROR, IMPLICIT DENIAL

Once the Board determines that the RO implicitly denied entitlement to TDIU, the appellant’s argument that the RO committed CUE by failing to consider TDIU errs as a matter of law – because TDIU was considered and implicitly denied. *6. The RO’s reduction of the veteran’s disability rating to 30% “represented a denial of TDIU” and thus put the appellant on notice that TDIU was denied. *7. The Court declined to determine whether referral for extraschedular consideration under § 4.16(b) can constitute a “manifestly different outcome” sufficient to establish CUE because the Court found that the Board’s determination that the evidence of record was not undebatable as to the appellant’s employability was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

[Gazaille v. McDonald](#), docket no. 12-3170 (Dec. 4, 2014)

38 U.S.C. §§ 1304, 1151; *DIC*

The plain language of 38 U.S.C. § 1304 creates a one-year marriage requirement to establish entitlement to DIC, and is a bright-line rule that does not provide for exceptions under any circumstances. *7. There can be no waiver of the one-year requirement and “the Government cannot be equitably estopped from enforcing that restriction.” *9.

[Blubaugh v. McDonald](#), docket no. 2013-7119 (Dec. 9, 2014)

38 C.F.R. § 3.156(c), *EFFECTIVE DATE FOR SERVICE CONNECTION FOR PTSD*

The subsections of 38 C.F.R. § 3.156(c) are “separate and distinct” – and consideration of an earlier effective date under subsections (c)(3) and (c)(4) is only required after “VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1).” *8. If VA’s “reconsideration under subsection (c)(1) did not result in benefits, subsections (c)(3) and (c)(4) do not apply in that case.” A newly submitted service record that does not “remedy the defects” that resulted in any prior denial of benefits cannot serve as the basis for an earlier effective date under 38 C.F.R. § 3.156(c).

[Sanchez-Navarro v. McDonald](#), docket no. 2014-7039 (Dec. 24, 2014)

38 C.F.R. § 3.304(f), *PTSD, VA’S DUTY TO OBTAIN EXAMINATION*

A veteran requesting service connection for PTSD “is only entitled to a VA medical examination if his claimed stressor ‘is consistent with the places, types, and circumstances’ of his service.” *7. VA adjudicators – not doctors – determine whether the stressor is consistent with the veteran’s service. *6-7. The relaxed standard of 38 C.F.R. § 3.304(f)(3) that accepts a veteran’s lay testimony alone regarding the occurrence of the stressor depends on three conditions: (1) a VA mental health doctor’s confirmation that the stressor is adequate to support a PTSD diagnosis and that the veteran’s symptoms are related to that stressor; (2) the VA doctor’s findings are not contradicted by “clear and convincing evidence”; and (3) “the claimed stressor is consistent with the places, types, and circumstances” of the veteran’s service. *7.