



VETERANS LAW UPDATE: April 2015
Amy B. Kretkowski, Veterans Law Attorney

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

[*Prokarym v. McDonald*](#), 27 Vet.App. 307 (Apr. 14, 2015)

DISABILITY RATINGS, DIAGNOSTIC CODES

Held: A “severe” disability rating under one diagnostic code (DC) is not the same as a “severe” disability rating under another DC.

This appeal represents the veteran’s second appeal to the CAVC on the issue of entitlement to a higher rating for bilateral plantar fasciitis. The Court previously remanded the matter for the Board to explain why it rated his condition under the DC for “acquired flatfoot” (38 C.F.R. § 4.71a, DC 5276), and to consider whether other DCs were applicable to his condition.

On remand, the Board obtained a medical opinion and, based on that opinion, assigned a 50% disability rating for Mr. Prokarym’s “bilateral plantar fasciitis with pes planus.” The Board rated the condition under DC 5276 for “acquired flatfoot.” The Board discussed the applicability of other DCs and stated that both DC 5276 and DC 5284 (for “foot injuries, other”) were potentially applicable. The Board noted that Mr. Prokarym was receiving the highest rating under DC 5276, and that his condition was not “severe” enough to warrant a higher rating under the other DC.

On appeal to the Court again, Mr. Prokarym argued that the Board could not reconcile its finding that he was not entitled to a “severe” rating of 30% for each foot under DC 5284 with its determination that he *is* entitled to a single 50% rating for “pronounced” bilateral flatfoot under DC 5276. He noted that the Board had granted him separate 10% ratings for each foot under DC 5284 for the period prior to July 2013. He argued that “[i]t is incongruous to conclude that [his] service-connected bilateral foot disability is ‘pronounced’ [under DC 5276], which is considered a more severe degree of symptomatology than ‘severe,’ but does not amount to ‘severe’ [under DC 5284].”

The issue before the Court was whether a “severe” disability under DC 5276 is the same as a “severe” disability under DC 5284. The Court concluded that it is not. The Court considered the plain language of the regulation and found that the term “severe” is used throughout the rating schedule and “is a degree descriptor specific to the listed disability, and disabilities designated as ‘severe’ in different DCs are not necessarily equally disabling.” The Court assessed the structure of both DCs and noted that the different structure reflected “the Secretary’s judgment that a severe foot injury under DC

5284 represents a more disabling condition than severe flatfoot under DC 5276.” The Court held that “a ‘severe’ disability under DC 5276 is not equivalent to a ‘severe’ disability under DC 5284.”

The Court added that it is “prohibited by statute from reviewing the secretary’s rationale for assigning different disability ratings” to different conditions; nor can it review VA’s “assignment of particular disability percentage ratings to varying degrees of disability within a specific DC.”

[Toomer v. McDonald](#), 783 F.3d 1229 (Fed. Cir. Apr. 21, 2015)

EQUITABLE TOLLING, PRESUMPTION OF ADMINISTRATIVE REGULARITY

Held: In order to warrant equitable tolling of the 120-day deadline to file an appeal with the Veterans Court, a claimant must show (1) that extraordinary circumstances prevented him/her from filing a timely appeal; (2) due diligence in his/her attempts to exercise appellate rights; and (3) that the extraordinary circumstances caused him/her to miss the deadline. VA officials are presumed to “properly discharge their duties” – and this “presumption of regularity” can only be overcome with “clear evidence to the contrary.” Where a veteran asserts that VA did not mail him/her a copy of the decision and that the deadline was missed as a result of that failure, he/she must rebut the presumption of regularity with clear evidence that VA did not act “regularly.”

In this case, the Board denied the veteran’s claims for service connection for a back condition in a June 2009 decision. In July 2009, Mr. Toomer informed VA via telephone that he had not received a copy of the decision. On August 4, 2009, VA mailed him another copy of the decision with the date stamp of “AUG 04 2009.” The cover letter stated that the Board’s June 2, 2009 decision was enclosed. VA also enclosed a copy of original cover letter, hand-dated “06/02/09.” The Board decision was also hand-dated “06/02/09.” Included with the decision was VA Form 4597 (Notice of Appellate Rights), which stated that the veteran has 120 days from the date the decision was mailed (“as shown on the first page of this decision”) to appeal to the CAVC. Mr. Toomer filed his Notice of Appeal with the CAVC on October 28, 2009 – more than 120 days after June 2, 2009, but within 120 days of the August 4, 2009 letter.

The CAVC dismissed the appeal as untimely and Mr. Toomer appealed to the Federal Circuit, which stayed the case pending the outcome in *Henderson v. Shinseki*, 562 U.S. 428 (2011). In *Henderson*, the Supreme Court held that the 120-day appeal deadline was not jurisdictional and was subject to equitable tolling. The Federal Circuit subsequently granted Mr. Toomer’s motion to remand his appeal back to the CAVC to consider whether equitable tolling applied in his case.

On remand, the CAVC again dismissed the appeal as untimely, and Mr. Toomer again appealed to the Federal Circuit. The Federal Circuit remanded the case back to the CAVC again. This time, the Court noted that the second mailing of the Board’s decision was “at least some evidence that [the] first mailing was irregular,” and directed the CAVC to determine if the evidence as a whole was sufficient to rebut the presumption of administrative regularity.

The CAVC again dismissed the appeal as untimely, explaining that Mr. Toomer had not submitted clear evidence of irregularity in VA's mailing procedures that would be sufficient to rebut the presumption that VA's mailing of the June 2, 2009 decision was "regular." The Court held that Mr. Toomer's assertion that he did not receive the Board decision is not, in and of itself, clear evidence to rebut the presumption. The Court also noted the Federal Circuit's statement that equitable tolling could not be shown if Mr. Toomer could not rebut the presumption of regularity – and stated that that should not be viewed as barring equitable tolling in cases involving the presumption of regularity.

The CAVC rejected Mr. Toomer's argument that the language of the Form 4597 was misleading and added that he failed to identify any reason preventing him from filing a timely appeal that would warrant equitable tolling.

On appeal, again, the Federal Circuit determined that the CAVC properly found that Mr. Toomer failed to overcome the presumption of regularity. Even though the CAVC acknowledged that the unsigned and hand-dated Board decision might be "some evidence" that the original decision "might not have been finalized or mailed on June 2," the Federal Circuit determined that the CAVC did not commit legal error by finding that this, alone, did "not rise to the level of clear evidence of irregularity."

The Federal Circuit also considered Mr. Toomer's argument that VA breached its duty to provide him with evidence to rebut the presumption, as required by *Barrett v. Nicholson*, 466 F.3d 1038 (Fed. Cir. 2006). The Court found that the duty under *Barrett* concerns developing the record before the CAVC; that VA provided him with the evidence he had requested; and that the CAVC's failure to address this issue was not legally erroneous.

Finally, the Court determined that the CAVC's equitable tolling analysis was also not legally erroneous. The Court noted that in order to benefit from equitable tolling, a claimant must show (1) extraordinary circumstance; (2) due diligence; and (3) causation. The Court rejected Mr. Toomer's argument that there was no requirement that the "circumstances" preventing timely filing must be "extraordinary," citing *Checo v. Shinseki*, 748 F.3d 1373, 1378 (Fed. Cir. 2014). The Court agreed with Mr. Toomer that equitable tolling is not limited to a specific set of fact patterns. However, the Court found that the CAVC did not limit equitable tolling to a specific set of facts patterns, but instead provided examples of extraordinary circumstances.

The dissent argued that the facts of the case are not in dispute and that Mr. Toomer filed his appeal within 120 days of the August 2009 mailing. The dissent argued that Mr. Toomer was diligent in attempting to get a copy of his Board decision; that VA's communication with him was confusing; and that misleading statements from the government support equitable tolling – even if the government does not intend to be misleading. The dissent found that the government's misleading communications and

the lapse “of more than half the filing period before the veteran received the Board’s decision” constituted extraordinary circumstances sufficient to warrant equitable tolling.

ADVOCACY NOTE: WARNING! VA’s centralized mail system has resulted in countless mailing errors, particularly with copies of correspondence NOT being sent to veterans’ representatives. In light of the reality of VA’s “regularity” in its mailing practices, this case may have significantly adverse effects on veterans who do not receive decisions from VA and are then time-barred from filing appeals.

Gray v. McDonald, 27 Vet.App. 313 (Apr. 23, 2015)

AGENT ORANGE, “INLAND WATERWAY,” DA NANG HARBOR

Held: VA’s interpretation of 38 C.F.R. § 3.307(a)(6)(iii), designating Da Nang Harbor as an offshore waterway, is irrational and inconsistent with the regulation’s purpose.

Mr. Gray served aboard the U.S.S. *Roark* during the Vietnam War and the ship’s deck logs show that the *Roark* was anchored in Da Nang Harbor and operated “off the Cua Viet River mouth.” He filed claims for several conditions secondary to herbicide exposure and was denied service connection on a presumptive basis because the evidence did not show that he served “on the ground” in Vietnam. On appeal to the Board, he submitted another veteran’s Board decision from 2009 in which the Board found that Da Nang Harbor was an inland waterway and awarded benefits based on the “credible evidence that the [v]eteran set foot on land in Vietnam.”

The Board denied Mr. Gray’s appeal, finding that his argument that Da Nang Harbor is an inland waterway “contradicted ‘VA’s official position on this matter,’” citing VA policy and training statements. The Board rejected Mr. Gray’s equal protection argument, which was based on the 2009 Board decision, because Board decisions are not “precedential.”

On appeal to the Court, Mr. Gray argued that there is no legal authority or rationale to support VA’s “arbitrary and capricious” classification of Da Nang Harbor as “blue water.” The only justification provided is “an opinion that ‘Da Nang Harbor is easy to enter due to being open to the sea.’”

The Court began its decision with a discussion of the legal and legislative framework underlying the “blue-versus-brown-water distinction,” and framed the issue in this case as “whether VA’s definition of inland waterways – which does not include Da Nang Harbor – is entitled to deference.”

The Court determined that “with respect to Da Nang Harbor, the manner in which VA defines inland waterways is both inconsistent with the regulatory purpose and irrational,” and therefore, not “reasonable or worthy of deference.” The Court noted that the purpose of 38 U.S.C. § 1116(a) and 38 C.F.R. § 3.307(a)(6)(iii) is to provide “compensation to veterans based on the likelihood of exposure to herbicides.” However, the evidence cited by the Secretary to support its policy regarding Da Nang Harbor does “not reveal any insights specifically pertaining to the likelihood” of such exposure and

does not address “the murky area where inland waterways open to the ocean and the brown water mixes with the blue,” which would apply to Da Nang Harbor. The evidence cited by the Secretary appears to demonstrate that VA characterized Da Nang Harbor as “blue water” simply because it is “easy to enter due to being open to the sea” – as opposed to the probability of herbicide exposure for ships anchored there. The Court stated: “Absent a connection to the probability of exposure based on spraying, the Court finds the rationale supporting VA’s designation of Da Nang Harbor is inconsistent with the regulation’s purpose of compensation based on the probability of exposure.”

The Court further determined that VA’s interpretation is irrational because the evidence cited by the Secretary is “devoid of any indication that VA made a fact-based assessment of the probability of exposure in Da Nang Harbor from aerial spraying.” Instead, the designation appears to be based on “geographical characteristics – depth and ease of entry – and not on spraying.” The Court stated that “VA’s policy is like a ship without an anchor: aimless and adrift from the regulation.” Without any documentation related to herbicide use, the Court could not understand “VA’s determination that Quy Nhon Bay and Ganh Rai Bay are brown water but Vung Tau Harbor – which appears to be *inside* Ganh Rai Bay – Da Nang Harbor, and Cam Ranh Bay are blue water.” The Court thus held that “VA’s interpretation of its regulation is both inconsistent with the regulatory purpose and irrational” and, thus, appears to “not reflect the agency’s fair and considered judgment on the matter in question.”

The Court declined to accept Mr. Gray’s suggestion of adopting a definition of inland waterways from the U.N. Convention on the Territorial and Contiguous Zone, as it found that the Supreme Court had previously adopted that definition only as it was used in the Submerged Lands Act, and not as a broad definition of the term. Instead, the Court recognized that “VA retains its discretionary authority to define the scope of the presumption,” and remanded “for VA to reevaluate its definition of inland waterways – particularly as it applies to Da Nang Harbor – and exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation’s emphasis on the probability of exposure.”

With respect to Mr. Gray’s equal protection argument, the Court noted that the 2009 Board decision found that the veteran in that case had actually “set foot on land in Vietnam” and served aboard a ship that “appears on VA’s list of ships with inland waterway service.” Accordingly, the Court could not “determine whether Mr. Gray is similarly situated” to the veteran in the 2009 decision and concluded that that decision could not support an equal protection challenge.

[Haynes v. McDonald](#), 785 F.3d 614 (Fed. Cir. Apr. 29, 2015)

DIC, “SURVIVING SPOUSE” DEFINITION, “ABUSED SPOUSE” EXCEPTION

Held: In order to qualify for DIC benefits, there must be a valid marriage at the time of the veteran’s death and continuous cohabitation. The “abused spouse” exception to the continuous cohabitation requirement does not eliminate the requirement of a valid marriage at the time of death.

The claimant was divorced from the veteran in 1995. In 2000, the veteran died, and the claimant submitted a claim for DIC benefits under 38 U.S.C. § 1310. The statutory definition of “surviving spouse” requires (1) a valid marriage at the time of the veteran’s death and (2) continuous cohabitation from the date of marriage to the date of death, subject to certain exceptions. Because she was not married to the veteran when he died, the RO denied the claim.

She later submitted a request to reopen with new evidence showing that the Army Board for the Correction of Military Records had awarded her an annuity as a “former spouse,” under 10 U.S.C. § 1447(10). The RO and the Board continued to deny her claim. The RO had acknowledged her argument that the basis for the divorce was her ex-husband’s physical abuse and that she was entitled to benefits based on the exception for abused spouses, 38 C.F.R. § 3.50(b)(1). The Board stated that recognition as a “former spouse” by the ABCMR does not change the fact that she was not married to the veteran at the time of his death.

The relevant regulation, § 3.50(b)(1), eases the “continuous cohabitation” requirement “where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse.” 38 C.F.R. § 3.50(b)(1). On appeal to the Veterans Court, the Court held that even though the physical abuse was well documented, the law still required a valid marriage at the time of the veteran’s death.

The Federal Circuit agreed, finding no error in the CAVC’s interpretation of § 3.50(b)(1) “as providing no exception to the requirement that the surviving spouse and veteran be married at the time of the veteran’s death.”

[Westfall v. McDonald](#), docket no. 13-0575(E) (Apr. 28, 2015)

JUDGMENT, MANDATE, EQUAL ACCESS TO JUSTICE ACT (EAJA)

Held: A CAVC order granting “a motion to expedite the issuance of mandate does not, on its own, operate to shorten the time to appeal to the Federal Circuit . . . unless the parties have articulated in the motion, a clear and unequivocal waiver of their right to appeal.” The Secretary’s mere lack of opposition to the motion is not a clear and unequivocal waiver of that right. The lack of a clear and unequivocal waiver meant that the Secretary could still appeal and, therefore, the appellant’s EAJA application was timely.

In April 2014, the Court issued a memorandum decision, remanding the veteran’s claim for a higher rating for PTSD. On May 19, 2014, judgment entered, and the veteran’s attorney filed an unopposed motion to expedite the issuance of mandate due to the veteran’s age and poor health. The Court granted the motion and mandate issued on May 29, 2014. The veteran’s attorney filed his EAJA application on July 1, 2014 – 33 days after mandate issued. The Secretary opposed the application because it was filed more than 30 days after mandate issued.

The Court first clarified the definitions of the relevant terms in this case. “Judgment” (or “entry of judgment”) “is when the Court issues a decision and the 60-day period to

appeal to the Federal Circuit begins.” “Final judgment” is when the appeal period ends. This is represented by “mandate.” Final judgment and mandate occur at the same time – and is generally 60 days after the entry of judgment. The “entry of mandate” is when the Court enters mandate on the docket. This is an administrative act that has no effect on appeal periods.

The EAJA requires an application to be submitted within 30 days of “final judgment.” 28 U.S.C. § 2412(d)(1)(B). As noted above, “mandate” is when judgment becomes final – and begins the 30-day period to file an EAJA application.

The Court first held that “mandate is when the Court’s judgment becomes final” and “generally issues 60 days after the entry of judgment, unless (1) a timely notice of appeal to the Federal Circuit is filed, (2) an order on consent was issued, or (3) if the Court directs otherwise.” (citing U.S. Vet. App, R. 41(b)). In this case, the Court “directed otherwise” with its May 29, 2014 order granting the unopposed motion to expedite the issuance of mandate – but that did not resolve the issue because the Court still needed to determine whether the Secretary’s lack of opposition to the motion acted as a waiver of his right to appeal to the Federal Circuit.

The Court held that it did not. The Court discussed the case law involving similar issues, noting the goal expressed in those cases of adopting “uniform” and “clear” approaches for EAJA applications. The Court acknowledged, however, that none of those cases involved an order from one court (in this case, the CAVC) that would prohibit an appeal to a higher court (i.e., the Federal Circuit). The Court found that while the Federal Circuit could issue an order prohibiting an appeal to the Federal Circuit, it is “something entirely different for this Court to decide an issue involving the Federal Circuit’s jurisdiction by reducing the amount of time that a party has to appeal to the Federal Circuit.”

The Court also noted its own special subject-matter jurisdiction, stating that “our cases deal with the rights of a special group whose claims are to be looked at with some degree of solicitude” and that the Court encourages “qualified professionals to represent veterans in their appeals.” Keeping these themes in mind, the Court held that the Secretary’s lack of opposition to the motion to expedite is not a “clear and unmistakable waiver sufficient to reduce his time period to appeal” and that the Court cannot prohibit parties from appealing to the Federal Circuit within the 60-day period “without the parties’ express waiver of that right.” Therefore, the Court determined that the time to file the EAJA application in this case was not until 30 days after the appeal period ended. Therefore, the EAJA application was timely. (Actually, the application was “premature,” but in those cases, the standard practice is for the Court to treat a premature EAJA application as though it had been filed on the first day of the EAJA application period.)

The Court recognized that because of this holding, “*any* action in the case cannot be taken by VA until a waiver is filed by the Secretary prompting an expedited final judgment or the expiration of the time the Secretary has to appeal” – and that this holding “places in the hands of the Secretary the exclusive power to delay the finality of

judgment in a case.” Nevertheless, the Court found that its holding – that an order granting a motion to expedite the issuance of mandate does not shorten the appeal period unless the parties expressly waive the right to appeal – provided both parties “with the certainty necessary to determine the date of final judgment and, consequently, the time period to appeal the decision and to file an EAJA application.”