VETERANS LAW UPDATE: May 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

Wingard v. McDonald, 27 Vet.App. 329 (May 8, 2015)
0% RATING; COURT CANNOT REVIEW CONTENT OF RATING SCHEDULE
Held: The CAVC is bound by the Federal Circuit's determination that the Court is statutorily precluded from determining whether the inclusion of a 0% rating in the schedule "substantially violates statutory constraints."

The decision stems from a remand from the Federal Circuit. In the underlying appeal the appellant (daughter of deceased veteran) was denied VA burial benefits because her father was rated 0% for his service-connected condition and was deemed by VA to not be "in receipt" of VA compensation or pension. On appeal to the CAVC, the appellant argued that VA acted outside its statutory authority be creating a 0% disability rating, when the statute calls for ten ratings between 10% and 100%. The Secretary argued that the Court lacked jurisdiction to consider this argument because the Court is prevented, by statute, from reviewing the content of VA's rating schedule.

The CAVC held, in *Wingard I*, that "the statutory prohibition on judicial review of the content of the rating schedule did not preclude the Court from addressing the appellant's argument," and that VA's interpretation of the relevant statutes as allowing for noncompensable ratings was reasonable.

The Federal Circuit disagreed – and held that 38 U.S.C. § 7252(b) precludes the Court from reviewing the rating schedule "or any action of the Secretary in adopting or revising that schedule," and thus precludes the Federal Circuit from determining whether the inclusion of a 0% rating in the rating schedule "substantively violates statutory constraints."

On remand, the CAVC attempted to make sense of the Federal Circuit's decision. The Court noted how it had distinguished its analysis in *Wingard I* from prior cases in which the appellants had "sought review of what should be a disability or the appropriate rating to be assigned a particular disability." The Court stated that "it is perplexing how it might be that Congress, in removing the splendid isolation in which VA regulations existed until the passage of the Veterans' Judicial Review Act (VJRA) of 1988, intended to preclude judicial review by this Court of whether actions taken by the Secretary exceed

statutory authority." In this case, the appellant was not challenging the substance of the regulations regarding a particular disability. The Court questioned how it could *not* have jurisdiction over "a blatant violation of the clear wording of a statute." Having expressed its concerns with the Federal Circuit's broad holding regarding the Court's jurisdiction to review such issues, the CAVC again affirmed the Board's denial of nonservice-connected burial benefits.

NOTE: This case demonstrates the lengths to which VA will go to protect the public fisc. The burial benefits sought by the appellant? No more than $300. The amount of money paid to the countless VA and Department of Justice attorneys on this case? *Priceless*.

Froio v. McDonald, 27 Vet.App. 352 (May 29, 2015)
EAJA FEES FOR LAW STUDENTS
Held: EAJA fees are allowed for work performed by law students as part of a legal clinic setting.

The appellant in this case was represented by a private attorney and the Legal Services Center of Harvard Law School. The appellant signed a fee agreement that allowed the students to serve as co-counsel. Upon winning the case, the appellant filed an application for fees and expenses under the Equal Access to Justice Act (EAJA). Included in the fees was work performed by the Harvard law students.

The Secretary objected to the EAJA application, arguing that work performed in an academic setting should not be reimbursed under the EAJA. The Court disagreed. The Court discussed the purpose of the EAJA and its applicability to veterans, and cited cases in which it has "consistently held that fees should be awarded pursuant to EAJA … for work performed by legal services organizations and counsel appearing pro bono." The Court rejected the Secretary's attempt to seek "a categorical exclusion from the award of EAJA fees for pro bono work performed by law students" in an "educational setting," as opposed to a "marketplace setting." The Court held that "the mere fact that the law students' work also benefitted their legal education" did not preclude the inclusion of their hours in the EAJA application.

The Court noted that the EAJA does not limit awards to only "attorney fees," but also allows applicants to bill for paralegal hours. The Court added that the cases cited by the Secretary to support his position actually provided for EAJA fees for clinic students. The Court declined to discourage such representation by limiting the award of EAJA fees.

The Court also rejected the Secretary's argument that awarding EAJA fees in this case would "result in a financial windfall to Harvard Law School." The Secretary had emphasized that Harvard is one of the wealthiest universities in the world. The Court found these facts irrelevant, noting that "it is the client's financial status that is relevant to the EAJA, not the attorney's." The Court stated: "EAJA does not seek to compensate only those who oppose unjustified Government action by enlisting the aid of understaffed and underfunded pro bono programs and EAJA does not seek to punish

profitable law firms for their generosity in assisting those who possess little power to assert their rights against the Federal bureaucracy."