VETERANS LAW UPDATE: June 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

Smith v. McDonald, 789 F.3d 1331 (Fed. Cir. June 17, 2015)
38 C.F.R. § 3.103, COURT NOT REQUIRED TO GRANT JMR
Held: The Court is not required to automatically grant a joint motion for remand (JMR) – and its failure to do so does not conflict with the ruling in *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 725 F.3d 1312 (Fed. Cir. 2013), that required VA "to identify and rectify harms caused by its wrongful application of a former version of 38 C.F.R. § 3.103."

In 2010, the CAVC held that hearing officers at the Board of Veterans' Appeals had the same obligations as hearing officers at the VA regional offices to provide claimants with information that would help support their appeals. *Bryant v. Shinseki*, 23 Vet.App. 488 (2010). In 2011, VA issued a rule eliminating the due process and appellate rights that had been the subject of *Bryant*. The rule was issued without the appropriate notice-and-comment rulemaking procedure, in violation of the Administrative Procedures Act (APA).

The National Organization of Veterans' Advocates (NOVA) challenged the rule at the Federal Circuit, and VA admitted that it had violated the APA in promulgating it. However, VA continued to apply the 2011 rule even after assuring the Court that it would not do so. The Court then approved a "Plan" "to identify and rectify harms caused by the VA's wrongful misconduct" that required VA to provide notice to every claimant who had a Board hearing and received a final Board decision that did not grant full relief during the relevant period. VA would identify the cases using search terms that included any reference to § 3.103 or *Bryant*. In situations where the Board decision had already been appealed, the plan required VA to offer a JMR. In cases that had been appealed and decided, the plan required VA to offer a joint motion to recall mandate and a JMR.

In Mr. Smith's case, he received a Board denial during the relevant period. The Board did not apply the invalid 2011 rule in its decision, but it did cite § 3.103 and *Bryant*. On appeal to the CAVC, Mr. Smith argued that the Board erred by failing to apply 38 C.F.R. § 3.156(c) – a regulation that was not at issue in the *NOVA* case and not implicated by the Plan. However, because the Board mentioned § 3.103 and *Bryant*, its decision fit the search terms and triggered VA's obligation to offer a joint motion to recall the CAVC's judgment and a JMR.

In the JMR, the parties recognized that the Board did not apply the invalid rule – and actually applied the correct rule as stated in *Bryant*. Nevertheless, the parties agreed to the JMR to further the Federal Circuit's "goal" of assuring that veterans are not denied benefits as a result of procedural or due process violations – "regardless of whether actual prejudice is apparent."

The CAVC denied both joint motions, stating that the parties had not demonstrated good cause as it was "clear on the face of the Board's decision that the Board cited and applied the correct law and not the invalid 2011 Rule" – and the parties admitted as much in their JMR.

On appeal to the Federal Circuit, Mr. Smith characterized the Plan as a "settlement agreement," and argued that the CAVC failed to "enforce" it. The Federal Circuit disagreed, holding:

> The Plan does not require that the Veterans Court grant every single joint motion filed pursuant to the Plan merely because such a motion is proffered pursuant to the search terms used in the Plan. Neither the Plan nor our prior *NOVA* decisions purport to remove the Veterans Court's ability to consider the merits of such motions or its discretion to grant or deny them.

Because Mr. Smith did not "identify any breached provision of the Plan that the Veterans Court somehow failed to enforce," the Federal Circuit found no error in the CAVC's decision. The Plan required VA to offer a joint motion "when the conditions specified in the Plan were met." There was nothing in the Plan or the prior litigation that required the CAVC to automatically grant every joint motion "simply because such a motion was proffered."

Delisle v. McDonald, 789 F.3d 1372 (Fed. Cir. June 18, 2015)
JURISDICTION; RATING KNEE CONDITIONS
Held: The Federal Circuit cannot review the CAVC's application of law to fact. In dicta, the Court found that the plain language of Diagnostic Code 5257 is not a "catch-all," but rather that it provides compensation for knee conditions that are not listed in other DCs and that cause recurrent subluxation or lateral instability.

The veteran appealed the denial of a disability rating in excess of 10% for his service-connected knee condition. The RO and the Board denied a higher rating and the CAVC affirmed the denial. On appeal to the Federal Circuit, Mr. Delisle argued that (1) Diagnostic Code (DC) 5257 is a "catch-all" meant to compensate veterans for knee disabilities that are not adequately addressed in other DCs; (2) his symptoms fell outside the scope of the other DCs relating to knee conditions; and (3) the CAVC erred by limiting DC 5257 to subluxation and lateral instability of the knee.

The Federal Circuit determined that it lacked jurisdiction to review the CAVC's application of law to the facts, and dismissed the appeal. However, the Court proceeded

to address the merits of the appeal – even though it said that lacked jurisdiction to do so. Therefore, the remaining portion of the Court's decision is, arguably, dicta.

The Court characterized the parties' dispute as one involving competing canons of interpretation – but stated that it "need not engage in a lengthy analysis of the parties' competing canons of construction" because it found that DC 5257 is unambiguous and consistent with other relevant regulations. It is not clear why the Court spent time on the merits of the case, since it dismissed the appeal for lack of jurisdiction.

Scott v. McDonald, 789 F.3d 1375 (Fed. Cir. June 18, 2015)
ISSUE EXHAUSTION; PROCEDURAL ISSUES
Held: "[T]he Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board."

Incarcerated veteran appealed denial of service connection for hepatitis C to the Board and requested a hearing. He was still incarcerated at the time of the scheduled hearing and asked that it be rescheduled. The Board denied the request, finding that he had not shown good cause for failing to appear.

On appeal to the Veterans Court, the veteran's counsel did not raise the hearing issue. The Court remanded the appeal on other grounds. Following the remand, the Board mentioned the hearing issue, but stated that the veteran had not renewed his request for a hearing. The RO continued to deny service connection and the veteran again appealed to the Board. He did not raise the hearing issue to the Board.

On his second appeal to the Veterans Court, the veteran raised the hearing issue for the first time. The Court affirmed the Board's denial, holding that he did not raise the hearing issue in either proceeding before the Board or the Court.

The veteran appealed to the Federal Circuit, arguing that the doctrine of issue exhaustion is precluded in the context of veterans' benefits because those proceedings are non-adversarial.

The Federal Circuit discussed the relevant law regarding issue exhaustion in the context of administrative appeals, noting that it had previously addressed this issue in *Maggitt v. West*, 202 F.3d 1370 (Fed. Circ. 2000). In *Maggitt*, the Federal Circuit laid out a "balancing test" for issue exhaustion in the VA system: "The test is whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." The Federal Circuit identified the three specific contexts in which it had previously held that issue exhaustion is required in the veterans benefits context: (1) in an appeal from the RO to the Board, 38 C.F.R. § 20.202 requires the claimant to identify the errors made by the RO; (2) where the error was made by the Board, 38 U.S.C. § 7252(a) requires issue exhaustion at the Board in appropriate circumstances, although *Maggitt* allows the Veterans Court the discretion to hear arguments presented to it in the

first instance; and (3) in an appeal from the Veterans Court to the Federal Circuit, 38 U.S.C. § 7292(a) requires issue exhaustion at the Veterans Court level.

While the Federal Circuit noted that issue exhaustion "is relatively strict in proceedings before the Veterans Court," it "concluded that the non-adversarial nature of proceedings before the VA mandates a less strict requirement." In support of this, the Federal Circuit discussed the major cases surrounding the "liberal construction" requirement in VA benefits claims.

In *Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009), the Court held that the requirement to liberally construe a pro se claimant's filings extended to cases where the veteran was represented by counsel at the Board.

In *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001), the Court held that VA must fully and sympathetically develop a veteran's "clear-and-unmistakable error" (CUE) claim, and that requires VA to consider entitlement to a total disability rating based on individual unemployability (TDIU) whenever a veteran requests the highest rating possible and submits evidence of unemployability.

In *Comer v. Peake*, 552 F.3d 1362 (Fed. Cir. 2009), the Court held that where a veteran requests service connection and the record contains evidence to support TDIU, the Board is required to consider that evidence as a TDIU claim even if the veteran does not expressly raise it.

The Court summarized these cases as requiring "the Veterans Court to look at all of the evidence in the record to determine whether it supports related claims for service-connected disability even though the specific claim was not raised by the veteran." Nevertheless, the Court found that these cases did not extend to procedural arguments that were not raised below – even under a liberal construction of the veteran's pleadings.

The Court thus held that "absent extraordinary circumstances not apparent here, . . . it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran," and that the liberal construction rule does not require the Board or the Court to address procedural arguments that were not raised below. Because the veteran in this case failed to raise the hearing issue to the Board – even though he had multiple opportunities to do so – the Federal Circuit determined that VA's regulations did not require the Board or the Court to address the hearing argument.