VETERANS LAW UPDATE: July 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

Herbert v. McDonald, 791 F.3d 1364 (Fed. Cir. July 2, 2015)
38 U.S.C. § 5103A
Held: 38 U.S.C. § 5103A imposes no obligation on the Board to expressly determine that the record is insufficient to decide a claim before it can order a new medical opinion.

Veteran sought service connection for PTSD. He submitted favorable medical evidence in support of his claim. The RO obtained a VA medical opinion, which was negative, and denied the claim. The veteran appealed to the Board. During the pendency of that appeal, the veteran submitted additional favorable medical evidence, which was subsequently countered by two additional negative VA medical opinions. The Board continued to deny the claim.

The veteran appealed to the CAVC and the parties entered into a joint motion to remand. On remand, the Board determined that another medical examination was necessary and remanded to the RO for additional development. The veteran underwent a VA examination in November 2011 in which the examiner determined that he did not have PTSD. Prior to that examination, the veteran had obtained an additional private medical opinion in support of his claim in May 2011. This opinion was not of record at the time of the November 2011 examination, but it was in the record when the appeal was returned to the Board.

The Board continued to deny the claim – and the veteran again appealed to the CAVC. The CAVC affirmed the Board's decision and the veteran appealed to the Federal Circuit.

The only argument on appeal over which the Federal Circuit had jurisdiction was the argument that 38 U.S.C. § 5103A required the Board to explain its determination that the pre-November 2011 record was insufficient before it could order the additional medical opinion. The Federal Circuit held that § 5103A "contains no such requirement."

The Court noted that § 5103A imposes an affirmative requirement on VA to provide medical examinations in certain circumstances – but the statute does not restrict VA's discretion to gather evidence. The Court cited *Douglas v. Shinseki*, 23 Vet.App. 19, 22-26 (2009), to support VA's authority to develop the record, and noted that the veteran

did not identify "any constraints on such authority." The Court stated that 38 C.F.R. § 3.304(c) does not limit VA's discretion to develop evidence, explaining that this regulation "gives VA the discretion to determine how much development is necessary for a determination of service connection to be made." (citing *Shoffner v. Principi*, 16 Vet.App. 208, 213 (2002)). Because the Court found no legal error in the CAVC's interpretation of 38 U.S.C. § 5103A, it affirmed the decision.

***Dent v. McDonald*,** 27 Vet.App. 362 (July 15, 2015)
OVERPAYMENT, VALIDITY OF DEBT; 38 U.S.C. § 5112(b), 38 C.F.R. § 3.600
Held: "[I]n determining whether an erroneous payment resulted in a valid debt in circumstances involving a running award, VA must consider, when the issue is raised, whether the continued payment of the running award was based on VA 'administrative error or error in judgment.'"

Veteran was awarded nonservice-connected pension benefits and was provided information about the circumstances that would affect his continued receipt of these benefits – specifically, a change in income. The veteran was subsequently awarded Supplemental Security Income (SSI) and he informed VA of this. He also returned his VA pension check for that month, which he had voided, explaining that he had been told by his local VA office to send it back. VA did not respond to the veteran's submission – and continued to send him VA pension checks, which he subsequently cashed.

Five months later, his RO notified the VA Pension Management Center (PMC) in Milwaukee that the veteran had been awarded Social Security benefits and had been improperly receiving VA pension benefits based on having "no income" since March 2008.

In September 2009, the PMC informed the veteran that his Social Security benefits were considered countable income for VA pension purposes. The PMC explained that this had created an overpayment and that his pension payments would stop. The PMC told him he had 60 days to dispute this. The veteran did not respond, and the PMC discontinued pension payments and informed the veteran that the overpayment had created a debt.

The following month, the veteran sent the PMC a letter disputing the debt. He explained that he had informed VA of his receipt of Social Security benefits and returned his voided VA pension check – and that when VA continued to pay him monthly pension benefits, he assumed that he was supposed to receive both benefits. That same month, the PMC sent him a letter stating that he owed VA $11,538.

He continued to appeal the debt up to the CAVC. At the Court, he argued that the Board erred in finding that the debt was valid because the overpayments were the result of VA's administrative error. The Secretary argued that an assessment of whether an overpayment is based on administrative error applies only during the *initial* award of pension benefits or in determining the *initial* pension rate. The Secretary asserted that because the veteran had a "change in income," the effective-date provisions in 38

U.S.C. § 5112(b)(4)(A) and 38 C.F.R. § 3.500(c) and § 3.600 apply – not section 5112(b)(10). Alternatively, the Secretary argued that the veteran had not shown that the overpayment resulted solely from VA administrative error because he had actual knowledge of his duty to report a change in income.

The Court rejected the Secretary's first argument based on its review of the legislative history of the relevant statute. The Court held that the phrase "erroneous award" applies to "erroneous payments made subsequent to the initial award" and that when such payments are solely the result of VA administrative error, no debt or overpayment is created. The Court also determined that its holding is supported by VA regulations and policy manual provisions.

With respect to the second argument, the Court found that the Board did not err in concluding that the debt was not solely due to VA administrative error because the veteran did have actual knowledge that his pension benefits would change with a change to his income. Even though VA continued to erroneously pay the veteran, he did continue to cash the checks – so the Court determined that the he was at least partially at fault in creating the overpayment.

In a well-crafted dissent, Judge Bartley disagreed with the majority's determination that the debt was valid because the veteran had "fulfilled all legal requirements by notifying VA of his income change." Judge Bartley noted that the relevant statute and regulation only requires a pension recipient to "promptly *notify* the Secretary" of a change in income. Because the veteran did that, Judge Bartley would have held that the debt was invalid.

Carter v. McDonald, 794 F.3d 1342 (Fed. Cir. July 21, 2015)
NOTICE DEFECT, CURE
Held: VA's failure to notify the appellant of the 90-day deadline to submit evidence after appeal had been certified to the Board was not cured by including the 90-day letter in the claims file – and sending the file to the veteran's representative *after* the deadline had already expired. (Doh!)

Veteran requested to reopen a previously denied claim for benefits in 2005. VA reopened and denied the claim in 2006 and the Board affirmed the denial in 2009. While the appeal was pending at the CAVC, the veteran changed representatives. He filed a VA Form 21-22a in March 2010, naming a private attorney as his representative in place of Disabled American Veterans (DAV). The new counsel requested a copy of the veteran's claims file at that time.

In June 2010, the new counsel and the Secretary entered into a joint motion to remand a portion of the Board's decision to address several errors. The JMR stated that the veteran should be able to submit additional evidence and argument in support of his claim. The Board took over the case and issued a "90-day letter," dated August 6, 2010, notifying the veteran that he could submit additional argument or evidence "within 90

days of the date of this letter." The letter was sent to the veteran and his former representative, DAV, but not to his current counsel.

In December 2010, VA sent the new counsel a copy of the veteran's claims file. Although the attorney had requested the file before the 90-day letter had been issued, the file contained a copy of that 90-day letter. The attorney did not review the file immediately upon receipt and did not see the letter.

The Board acted on the JMR and issued a new decision in February 2011, continuing to deny the veteran's claim. As with the 90-day letter, the Board did not send a copy of its decision to the attorney at the time it was issued. She did not receive the decision until December 2011, at which point she appealed to the CAVC.

Before that Court, the veteran argued that had the Board properly provided his attorney with the 90-day letter, he would have submitted new evidence and new argument, specifically, a new theory of entitlement that appeared to have been "reasonably raised" by the evidence of record. The CAVC affirmed the Board's decision, holding that any notice error was cured by counsel's receipt of her client's complete claims file – even though the deadline to submit new evidence had expired by then. The Court also concluded that the parties "may agree to narrow the scope of the Board's obligation to review the record on remand." The veteran appealed to the Federal Circuit.

The Federal Circuit did not disturb the CAVC's holding regarding the parties' ability to narrow the scope of the Board's duties on remand. The only issue before the Federal Circuit was the legal correctness of the CAVC's rationale for finding that the notice error had been cured. The Court held that – as a matter of law – the Board's notice error was not cured when it sent the 90-day letter to the attorney in the veteran's claims file after the deadline to respond had passed.

The Court relied on VA's own regulations (specifically, 38 C.F.R. §§ 1.525(d) and 14.629) that require VA to provide a veteran's "recognized attorney … with a copy of each notice to the claimant respecting the adjudication of the claim." The Court held that this "regulatory requirement of notice can only sensibly be construed to require that the notice to counsel be timely, which requires, at a minimum, notice before the expressly stated deadline has passed." Providing the 90-day letter – buried in a claims file – did not "cure" the notice defect. The Court stated that "a 'cure' of the notice defect must mean some source providing notification of the same opportunity a correct notice would have provided. There was no such cure here."

The Federal Circuit acknowledged the CAVC's citation to *Matthews v. Principi*, 19 Vet.App. 23 (2005), which held that "an attorney's receipt of a Statement of the Case contained in a response to a request for a veteran's claims file . . . constituted the required mailing, which then started the clock for filing an appeal." However, the Federal Circuit determined that the context in *Matthews* was different from the present case.

The Federal Circuit further held that the CAVC's determination that Mr. Carter's counsel was not "'prevented from presenting' evidence does not mean that the Board was obliged to consider the evidence as if timely submitted...". The Court thus concluded that the CAVC "legally erred in finding a cure of the notice defect," and that this error was not harmless, and remanded to the CAVC with directions to remand the case back to the Board so that the veteran could submit new materials in accordance with the prior JMR.