



VETERANS LAW UPDATE: October 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

[Gagne v. McDonald](#), 27 Vet.App. 397 (October 19, 2015)

DUTY TO ASSIST; REQUESTS TO JSRRC FOR STRESSOR VERIFICATION

Held: The duty to assist a veteran in obtaining service records to corroborate the occurrence of a stressor event requires VA to make as many requests as necessary – each encompassing a different 60-day period – unless/until it becomes futile to do so.

Veteran filed a claim for service connection for PTSD based on an incident in service where he saw his sergeant crushed between two vehicles “sometime in 1967 or 1968” when he was operating a dump truck. The VA Regional Office (RO) asked the veteran to provide “the approximate time (a 2-month specific date range) of the stressful event(s) in question.” The veteran responded by informing the RO that all the evidence had been submitted and asked for a decision to be issued soon. In a subsequent letter, the veteran could not provide a specific month and year, but his service records showed that he was a dump truck driver from August 1967 to August 1968.

The RO again requested a 60-day timeframe from the veteran. He did not respond, and the RO issued a formal finding that it was unable to verify his in-service stressor because the information provided was insufficient. The RO then denied the claim because “the available evidence is insufficient to corroborate any of the events you described.”

The veteran submitted a statement to the RO, stating that he had requested records from the National Personnel Records Center and was waiting for a response. He appealed the denial and requested review by a Decision Review Officer (DRO). The RO never sought additional information from the veteran to allow for a search for records. The RO continued to deny his claim based, in part, on the lack of “credible evidence that the claimed stressors occurred.”

The veteran appealed and the Board affirmed the denial, noting the RO’s formal finding that the information provided was insufficient to send to the Joint Services Records Research Center (JSRRC).

On appeal to the CAVC, the veteran argued that VA did not satisfy its statutory duty to assist because it did not submit “multiple 60-day searches for records, each search covering a different 60-day period” and did not search for documents on VA’s

Compensation Service Intranet Site, as required by its policy manual. At oral argument, the Secretary conceded that remand was warranted so that VA could “ask the JSRRC to conduct multiple searches of the [veteran’s] chronological records in enough 60-day increments to cover the entire relevant service period.”

The Court discussed the relevant duty-to-assist statutes and regulations, and held that “VA’s duty to search for records that would assist a veteran in the development of his claim, and for which the veteran has provided the Secretary information sufficient to locate such records, includes making as many requests as are necessary and ends only when such a search would become ‘futile.’” Drawing on Federal Circuit precedent, a dictionary definition, and the legislative history of the Veterans Claims Assistance Act of 2000 (VCAA), the Court defined a “futile” search as one “where it is apparent that the sought-after records are either not in existence or not in the possession of the record’s custodian.” The Court agreed with both parties that, in this context, “the duty to assist required VA to submit multiple 60-day record searches.” The Court did not question the requirement of a 2-month timeframe for JSRRC searches, but found that the 13-month period in this case was not “unreasonably long.” The Court remanded for VA to submit multiple request for records to the JSRRC – each encompassing a different 60-day period to cover the veteran’s service period from August 1967 to August 1968.

[Ollis v. McDonald](#), 27 Vet.App. 405 (October 28, 2015)
38 U.S.C. § 1151; *NON-VA CARE*

HELD: 38 U.S.C. § 1151 does not cover procedures performed by non-VA physicians, even if a VA doctor referred the veteran to the physician and recommended the procedure. There is also no due process right to be informed of losing section 1151 eligibility by getting non-VA treatment.

Veteran received both VA and private treatment for his heart condition. When the veteran asked his VA nurse practitioner about a “MAZE” procedure for his atrial fibrillation, he was told that VA did not do the procedure, but that she would ask a VA doctor to review his records and make a recommendation. The doctor reviewed the veteran’s medical records and stated in the progress notes that MAZE was one option and that “epicardial MAZE would be the current preference.” The doctor noted that this was not available at the VA facility, but that recommendations would be provided.

The veteran next visited his private physician to discuss his options. The private doctor’s notes do not mention a VA referral, but did mention referral to another private doctor. Three weeks later, the veteran saw the second private doctor, who subsequently performed the surgery that supposedly resulted in damage to his right phrenic nerve.

Nearly one year later, the veteran filed a claim for service-connected disability benefits under 38 U.S.C. § 1151, asserting that VA should be liable for the treatment he received as a result of VA’s referral or recommendation. The Board denied service connection under section 1151, finding that the surgery was performed at a non-VA facility by a non-VA employee and that VA did not require the private doctor to act on its behalf, nor did VA supervise or have a contract with that doctor.

On appeal to the CAVC, the veteran argued that the recommendations from the VA doctor constituted VA care and was causally related to his current disabilities; that the record was not fully developed on issues of proximate cause (i.e., whether VA personnel advised the veteran of potential risks or investigated the credentials of the recommended doctors); and that VA had a constitutional duty to inform a veteran that non-VA procedures might jeopardize eligibility for section 1151 benefits.

The Court first discussed the history of 38 U.S.C. § 1151, noting the Supreme Court's decision in *Brown v. Gardner*, 513 U.S. 115, 119 (1994), which held that there was no fault requirement in the statute at that time. The *Gardner* case resulted in Congress adding a fault element to the statute in 1996. More recently, the Federal Circuit held that section 1151 only requires a "causal connection" between the disability and VA treatment – not that the disability be "directly caused by" the treatment – and does not extend to "remote consequences" of VA treatment.

The Court noted that other "federal courts have recognized that conduct is not a 'cause' of an injury in the legal sense if the injury would have occurred regardless of the conduct, or if there is an intervening exercise of independent judgment, or if the injury is simply too attenuated from the conduct." The Court found that the veteran's "disability was, at best, a remote consequence of – and not caused by – VA's conduct," particularly since it was the veteran's long-time private physician who actually referred him to the doctor who performed the surgery. The Court added that even if the VA doctor's advice constituted VA medical treatment under section 1151, "this 'treatment' did not *cause* Mr. Ollis to have the surgery" with the private doctor.

The Court similarly rejected the veteran's argument regarding negligent referral, finding that he "failed to identify any evidence" showing that the doctor was not qualified to perform the procedure or that VA personnel were negligent in any recommendations.

Regarding VA's duty to inform claimants about the risk of losing entitlement to service connection under section 1151, the Court noted the veteran's statutory and due process arguments, and rejected them both. The statute that requires VA to inform veterans of all benefits to which they may be entitled, 38 U.S.C. § 6303(c), had been previously reviewed by the Federal Circuit and found to not be "an enforceable legal obligation."

The due process argument – that the veteran has a constitutionally protected property interest in his application for benefits that cannot be taken away without notice and an opportunity to be heard – was also rejected by the Court. The veteran cited *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), to support this argument. The Court noted that the Federal Circuit in *Cushman* held that the veteran in that case had "a protected property interest in a given disability benefit 'upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations.'" 576 F.3d at 1298. If the veteran is not eligible for that benefit, "he does not have a protected property interest in it."

In this case, the Court stated, “at the time Mr. Ollis was told that VA could not perform his surgery, he had not shown his eligibility for section 1151 benefits.” The Court thus held that the lack of notice that the veteran might jeopardize entitlement to section 1151 benefits if the private medical care was negligently provided was not a constitutional due process violation.

Judge Greenberg dissented, arguing that the majority’s application of section 1151 was “unduly narrow and withdraws necessary protections from a rapidly growing class of veterans.” Judge Greenberg asserted that when a “doctor recommends a course of treatment, it is not a remote consequence of that recommendation for the veteran to pursue it.” He further asserted, “it is inequitable for the appellant to be induced, through a VA doctor’s medical recommendation, to waive his eligibility for section 1151 benefits without informed consent as to that waiver.” He would have at least held that “a veteran cannot lose section 1151 eligibility when he or she has followed a VA medical recommendation and was never properly informed of the possible consequences.” He found this remedy to be especially necessary in light of the recent expansion of health care to veterans by non-VA providers through the Choice Act.

NOTE: This case was appealed to the Federal Circuit in December 2015. Stay tuned.

[**Petitti v. McDonald**](#), 27 Vet.App. 415 (October 28, 2015)

PAINFUL JOINT, 38 C.F.R. § 4.59, DC 5002

HELD: Under 38 C.F.R. § 4.59, “the trigger for a minimum disability rating is an actually painful, unstable, or malaligned joint.” Evidence of an “actually painful” joint *is* evidence of painful motion of that joint, and this evidence satisfies the requirement of limited motion under DC 5002 for arthritis. The DC’s requirement of “objective” confirmation of pain does not have to come from a doctor; lay statements/evidence can qualify as objective evidence of pain and, thus, painful motion.

Veteran was diagnosed with seronegative rheumatoid arthritis (RA) in service and was discharged in 1995. He filed a claim for VA disability benefits for RA the same month he was discharged. His medical records showed complaints of stiffness that improved with medication. On examination, he had full range of motion in all joints.

In 1996, the RO granted service connection, rated 20% disabling under DC 5002. He did not appeal that decision and it became final.

In 2007, he filed a request for an increased rating. VA treatment notes showed that the main joints involved were his shoulders, elbows, wrists, hands, feet, and ankles. He underwent a C&P examination and reported morning stiffness that lasted one to two hours, and flare-ups lasting a day. The flare-ups affected his energy level and he could not work for more than 20 consecutive minutes without resting. He had increased pain in his hands if he wrote for more than five minutes. On examination, he had full range of motion in the hands, feet, and ankles, which did not decrease after repetition. However, he reported stiffness in his hands after repetitive motion. The examiner stated that he was employed full time and had not lost any time from his work, but that he recently left

his job as a delivery driver because he was afraid his joint pain would increase while driving. The examiner concluded that his RA had “significant effects” on his occupational ability due to “decreased mobility, manual dexterity[,] lack of stamina,” and tardiness. The examiner also concluded that his RA affected his daily activities.

The RO denied the increased rating. The veteran appealed and submitted a statement from his treating VA rheumatologist that his RA had worsened. The RO continued to deny the claim and the veteran appealed to the Board.

In 2011, the Board remanded the claim for an additional medical examination and for the RO to obtain current medical records. The records showed increased morning joint stiffness, fatigue, pain, and several side effects caused by his medications, including skin rash, infections, rapid heartbeat, vertigo, dizziness, headaches, and blurred vision. His most recent medication resulted in incapacitating flare-ups that lasted two to three days, causing him to miss work.

A C&P examiner noted that the veteran had pain and stiffness in his joints, but full range of motion. The examiner stated that there was “no objective evidence of painful motion during the range-of-motion testing or following repetitive testing.”

The RO increased the veteran’s disability rating to 40%, effective October 11, 2011, the date of the C&P examination. In January 2013, the Board determined that he was entitled to the 40% rating for the entire appeal period, since 2007, but denied a rating higher than 40%.

The veteran appealed to the Court and the parties entered into a joint motion for remand because the Board did not discuss entitlement to an additional separate rating under 38 C.F.R. § 4.59.

He subsequently submitted a statement regarding his increased symptoms and pain. He also submitted a statement from his daughter regarding her father’s difficulties in functioning due to his pain.

The Board accepted the veteran’s statements as “credible and competent,” but continued to deny a rating greater than 40% under DC 5002. The Board also denied a 10% rating for each affected joint under § 4.59 because the C&P examination did not show limited motion or objective evidence of pain on movement.

On appeal to the CAVC, the Court looked at the “interplay” between DC 5002 and 38 C.F.R. § 4.59. At oral argument, the parties agreed that “§ 4.59 and, in this case DC 5002, work in tandem to authorize a minimum compensable rating of 10% per joint, to be combined but not added, for painful motion even though there is no actual limitation of motion.” The parties disagreed on what constitutes “painful motion.”

The veteran argued that the Board must consider *all* lay and medical evidence regarding pain. But the Secretary argued that, under § 4.59, the “mere presence of joint

pain is not sufficient,” and that the Board is only required to consider “objective” evidence of pain. Because the C&P examination did not show painful motion during range-of-motion testing, the Secretary urged the Court to affirm the Board’s decision.

The Court disagreed with the Secretary, and reversed the Board’s decision.

First, the Court discussed the language of DC 5002 and § 4.59, and concluded that the plain language of each provides for potential entitlement to a minimum disability rating. Under DC 5002, that minimum rating is warranted “where there is limitation of motion, which is manifested by ‘satisfactory evidence of pain.’” The Court noted that the last sentence of § 4.59 “ensures that a veteran experiencing an ‘actually’ painful joint is entitled to at least the minimum compensable rating for that joint under the appropriate DC to the joint involved.” Under § 4.59, a minimum rating is warranted where there is an “‘actually painful, unstable, or malaligned joint’” – this regulation does not require painful motion.

In addition to the plain language of the regulation, the Court looked to its prior case law for guidance on the meaning of the terms “limitation of motion” and “painful motion.”

In *Lichtenfels v. Derwinski*, 1 Vet.App. 484 (1991), the Court examined the interplay between § 4.59 and DC 5003 (for degenerative arthritis), which is similar to DC 5002. The *Lichtenfels* court held that painful motion of a major joint or groups of minor joints, “‘where the arthritis is established by x-ray, is deemed to be limited motion and entitled to a minimum 10[%] rating, per joint, . . . even though there is no actual limitation of motion.’” 1 Vet.App. at 488. The Court stated that “*Lichtenfels* held that § 4.59 serves as a bridge linking painful motion and limitation of motion, with the result that a claimant who has painful motion is considered to have limited motion under DC 5003 *even though actual motion is not limited.*” (emphasis added).

The Court found that “*Lichtenfels*’s interpretation of the effect of § 4.59 on DC 5003 also applies to DC 5002,” and concluded that “DC 5002, when read in light of § 4.59, authorizes the minimum disability rating per joint where there is painful, albeit nonlimited, motion.”

The Court next addressed the issue of what constitutes painful motion and what type of evidence is sufficient to verify such painful motion. The plain language of § 4.59 says nothing about the type of evidence required when assessing painful motion – and, therefore, does not require “objective” evidence of painful motion.

DC 5002 requires that “limitation of motion” be “objectively confirmed.” The Court found this to mean that “DC 5002 requires that limitation of motion must be corroborated by a person other than the veteran based upon that person’s observations.”

DC 5002 provides examples of evidence that can “objectively confirm” limitation of motion: “swelling, muscle spasm, or satisfactory evidence of painful motion.” The Court held that the third item, “satisfactory evidence of painful motion,” includes BOTH a

doctor's observations AND a lay person's observations. The Court thus held:
"Observations from a lay person who witnesses a veteran's painful motion satisfies the requirement of objective and independent verification of a veteran's painful motion."

In this case, the Court found the record replete with medical and lay evidence of the veteran's painful joints, and thus reversed the Board's finding that there was no "objective evidence of painful motion," and remanded for the Board to determine the proper disability rating for the veteran's RA.