



VETERANS LAW UPDATE: November 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

| **Mulder v. McDonald**, 805 F.3d 1342 (November 12, 2015)
38 U.S.C. § 5313(a)(1); *REDUCTION OF BENEFITS, INCARCERATION*
HELD: This case affirms the CAVC's opinion in *Mulder v. Gibson*, 27 Vet.App. 10 (2014), holding that the proper effective date for the reduction of benefits for veterans incarcerated for the conviction of a felony is the date of conviction, not the date of sentencing.

Incarcerated veteran argued that his VA benefits should not have been reduced until after sentencing because, up until that point, he was being held only because he could not post bail. The Federal Circuit agreed with the CAVC that his conviction started on the date that he pleaded no contest, was found guilty, and the judgment of conviction was entered on the record; and that VA was correct to reduce benefits based on the 61st day of incarceration following that plea/conviction. The Federal Circuit relied on its prior holding in *Wilson v. Gibson*, 753 F.3d 1363 (Fed. Cir. 2014), the Supreme Court's equation of a guilty plea with conviction, the plain language of the statute, and its legislative history to support its determination.

| **Mitchell v. McDonald**, 27 Vet.App. 431 (November 18, 2015)
38 C.F.R. § 3.156(b); *FAILURE TO DETERMINE WHETHER EVIDENCE SUBMITTED WITHIN THE ONE-YEAR APPEAL PERIOD IS NEW & MATERIAL RENDERS UNDERLYING CLAIM NONFINAL*.
HELD: "Under § 3.156(b), when a claimant submits evidence within the appeal period, the claim remains open until VA provides a determination that explicitly addresses this new submission." This regulation "is an exception to the rule of finality" that "suspends finality in the decision to which it applies until VA takes the action required."

Veteran applied for service connection for hearing loss in 1972, within a year of his separation from service. In October 1973, the VA Regional Office (RO) denied the claim, finding that he did not currently have hearing loss.

He did not appeal the decision, but two months later, he submitted a private audiogram from 1973, which showed current hearing loss. The RO never responded to that submission.

In December 1999, the veteran requested to reopen his claim, and the RO denied this request. The 1973 audiogram was not included on the list of evidence considered in making this decision. Again, the veteran did not appeal the denial and it became final.

In February 2007, the veteran again asked the RO to reopen his claim, and the RO again denied the request. Again, the list of evidence did not include the 1973 audiogram.

In July 2008, the RO received medical opinions linking the veteran's hearing loss to his service. The RO reopened the claim and awarded service connection for hearing loss, rated 100% disabling, from February 2007, the date of the most recent request to reopen. This time, the veteran appealed the effective date assigned. The RO denied an earlier effective date and the veteran appealed to the Board.

At a Board hearing, the veteran argued that the effective date should be August 16, 1973, the date of his initial claim, because the RO never addressed the 1973 audiogram. The Board rejected the veteran's argument, finding that the October 1973 decision became final when the RO denied the substance of the hearing loss claim in 2003 and the veteran failed to appeal that decision.

The veteran appealed to the CAVC. Relying on the Federal Circuit's holding in *Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir. 2014), the Court determined that under 38 C.F.R. § 3.156(b), the October 1973 decision did not become final because the RO never responded to the veteran's submission of the 1973 audiogram. The Court discussed the relevant case law that interprets § 3.156(b) to require VA to expressly consider any new evidence submitted within the one-year appeal period following a final rating decision. Citing *Charles v. Shinseki*, 587 F.3d 1318, 1323 (Fed. Cir. 2009) and *Bond v. Shinseki*, 659 F.3d 1362, 1367 (Fed. Cir. 2011).

The Court found that this case was factually and procedurally similar to the situation in *Beraud*, in which the Federal Circuit held that VA's failure to determine whether Mr. Beraud's submission was "new and material," as required by § 3.156(b), his 1985 claim remained pending – even though the RO had subsequently denied the same claim in later decisions. The reason those decisions did not extinguish the pending status of the 1985 claim was because none of those decisions addressed Mr. Beraud's submission. The Court in *Beraud* distinguished its decision in *Williams v. Peake*, 521 F.3d 1348 (Fed. Cir. 2008), which held that a later final decision on a claim that is identical to a pending claim will terminate the pending status of that claim, "by noting that *Williams* did not involve VA's obligations under § 3.156(b) or the submission of new evidence within the one-year appeal period following an RO decision."

The Court thus held that because "VA never issued a decision 'directly responsive' to Mr. Mitchell's December 1973 submission [the audiogram]," his 1972 claim remained pending. The Court stated that § 3.156(b) "suspends finality in the decision to which it applies until VA takes the action required" and that "the right created by § 3.156(b) does not evaporate when the agency issues an intervening decision that resolves the claim in

question without addressing the evidence that gave rise to the agency's § 3.156(b) responsibilities."

In a strongly worded dissent, Judge Kasold characterized the determination required by § 3.156(b) as "interlocutory" and questioned the majority's expansion of the scope of *Beraud* in this case. As the majority pointed out, Judge Kasold presented arguments that the Federal Circuit already rejected in *Beraud*. Judge Kasold proposed that the Federal Circuit should consider overruling *Beraud* en banc. However, as the majority also noted, the Federal Circuit already denied the government's petition for an en banc rehearing in *Beraud*.

| **Gomez v. McDonald**, docket no. 14-2751 (per curiam order) (Nov. 19, 2015)
TIMELINESS OF NOTICE OF APPEAL TO CAVC

HELD: A written expression of disagreement with a Board decision that is submitted to the Board – and that the Board determines is *not* a motion to revise based on clear and unmistakable error (CUE) – will be treated as a potential motion of reconsideration and will abate the finality of the underlying Board decision until VA determines the status of the document and notifies the veteran of that determination.

On June 18, 2013, the Board denied the veteran's claim for an increased rating. Three weeks later, the veteran (pro se at the time) submitted a motion to the Board titled "Motion for Revision of Board June 18, 2013 Decision pursuant to Subpart-O Section 20.1400 Rule 1400 (Rule A&B) Inextricably Intertwined." Over a year later, the veteran filed a Notice of Appeal (NOA) with the Court, explaining that his NOA was not timely because the Board never replied to his "Motion for Reconsideration."

The Court ordered the Secretary to file a preliminary record and explain the status of the veteran's motion. The Secretary responded that the Board received the veteran's motion, but that it had been misdated and incorrectly forwarded to the RO by the Board's mailroom staff. The RO took no action on the submission. The Secretary added that the veteran's submission was a motion to revise based on CUE, and that such motions "may not also be considered motions for reconsideration," citing 38 C.F.R. § 20.1404(e). The Secretary thus asserted that the Board never received a motion for reconsideration.

The Court then ordered the veteran to show cause why the appeal should not be dismissed for lack of timeliness. The veteran asserted that his submission was a motion for reconsideration that the Board failed to act on. The Court submitted this case to a panel to address the issue of whether the veteran's "July 2013 motion abated the finality of the June 2013 Board decision for the purpose of timely filing an NOA."

Both parties asserted that the submission was indeed a "written expression of disagreement" with the Board decision. However, the Secretary argued that the Court should dismiss the present appeal pending the Board's decision on the motion for reconsideration. Alternatively, the Secretary asked the Court to deem the NOA timely "under an equitable tolling analysis."

The veteran, now represented by counsel, urged the Court to deny the Secretary's motion to dismiss, arguing that his July 2013 motion abated the finality of the Board decision and that his "late" NOA became effective when the Board determined that his July 2013 submission was *not* a motion for reconsideration. In the alternative, the veteran argued that if the Court determines that his submission was a motion for reconsideration, the Court should order the Secretary to act on that motion within 30 days or accept his NOA as timely under an equitable tolling analysis.

The Court first discussed its holding in *Ratliff v. Shinseki*, 26 Vet.App. 356 (2013), in which it determined that a written disagreement with a Board decision that is submitted to the RO during the 120-day period to file an NOA will abate the finality of that Board decision until (1) the Secretary determines that the submission is an NOA and returns it to the veteran with information on how to file it with the Court or forwards it to the Court and notifies the veteran of this action; (2) the Board Chairman determines whether or not the document is considered a Motion for Reconsideration and notifies the veteran of its determination; or (3) the veteran files an NOA with the Court, and the Court becomes aware of the prior submission to the Board and determines that the submission was a misfiled NOA.

The Court noted that both parties characterized the veteran's July 2013 submission as a "written expression of disagreement" and found that there was no reason to reject this characterization. The Court pointed out that 38 C.F.R. § 20.1404(e) "provides that a Board motion for reconsideration will not be considered a CUE motion," not the other way around, as the Secretary had asserted. The Court noted that *Ratliff* appears to be limited to submissions to the RO, but also recognized the courts' consistent acknowledgement of "VA as one entity for pleading purposes." Thus, the Court extended the holding of *Ratliff* to "written expressions of disagreement with a Board decision filed at the Board."

The Court further determined that this decision does not conflict with *May v. Nicholson*, 19 Vet.App. 310, 317 (2005), "which requires, assuming a timely NOA to the Court is filed, that a CUE motion received by the Board within the Court's 120-day appeal period be held until judicial proceedings are complete." The Court determined that *May* did not apply in this case because it accepted the parties' characterization of the submission as a "written expression of disagreement" (i.e., "a potential motion for reconsideration as per *Ratliff*"). The Court did not resolve the question of whether a motion to revise based on CUE would abate the finality of the underlying Board decision.

Judge Kasold dissented, asserting that the veteran's submission was clearly a motion for revision and not a motion for reconsideration – and that the question before the Court should be whether a motion for revision filed within the 120-day appeal period abates the finality of the Board decision. Judge Kasold pointed out that *May* implicitly holds that filing a motion for revision does not abate finality and that this holding can only be overturned by the en banc court. Judge Kasold added that *Ratliff* only applies to submissions to the RO and would not extend its holding to submissions to the Board.