



VETERANS LAW SUMMARY: 2015
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Holdings 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

Swain v. McDonald, 27 Vet.App. 219 (Jan. 8, 2015)

HEARING LOSS EFFECTIVE DATES; 38 C.F.R. § 4.85

Held: 38 C.F.R. § 4.85 does not govern the assignment of effective dates for hearing loss ratings and does not require a Maryland CNC test to establish entitlement to an earlier effective date. Instead, the effective date is the earliest date that it is ascertainable that the claimant had a compensable hearing loss disability.

Leavey v. McDonald, 27 Vet.App. 226 (per curiam order) (Jan. 12, 2015)

NO SUBSTITUTE, NO "CASE OR CONTROVERSY"

Held: When veteran dies during the pendency of an appeal and there is no eligible substitute, the appeal does not survive the veteran and the Court must dismiss the case because there is no longer a "case or controversy" to decide.

Moffitt v. McDonald, 776 F.3d 1359 (Fed. Cir. Jan. 21, 2015)

HYPOTHETICAL ENTITLEMENT TO ENHANCED DIC; 38 C.F.R. § 1311

Held: Retroactive application of regulations that bar entitlement to enhanced Dependency and Indemnity Compensation is permissible.

Wages v. McDonald, 27 Vet.App. 233 (Jan. 23, 2015)

38 C.F.R. § 4.16(b), *C&P DIRECTOR'S EXTRASCHEDULAR TDIU DECISION*

Held: Extraschedular TDIU determinations made by the Director of VA Compensation & Pension are decisions that are reviewable by the Board – and the Board's review is not limited to only ensuring that the Director's determination was based on the full facts.

Fountain v. McDonald, 27 Vet.App. 258 (Feb. 9, 2015)

38 C.F.R. § 3.309(a); *TINNITUS*; *LAY STATEMENTS*

Held: Tinnitus can be characterized as an "organic disease of the nervous system" – and thus qualify as a "chronic" condition under 38 C.F.R. § 3.309(a) – where there is evidence of acoustic trauma. In assessing a veteran's lay statements regarding in-service symptoms, the Board must consider whether those symptoms were severe enough to expect that the veteran would have sought treatment. Not *reporting* symptoms during an examination is NOT the same as *denying* the existence of those symptoms.

[**Pederson v. McDonald**](#), 27 Vet.App. 276 (en banc) (Feb. 13, 2015)

CAVC JURISDICTION TO REVIEW ABANDONED ISSUES; TDIU

Held: “[T]he Court retains jurisdiction over all finally decided issues [in a Board decision], regardless of whether the [Notice of Appeal] itself or the subsequent briefing narrows the issues on appeal.” However, the Court “will generally decline to exercise its *authority* to address an issue not raised by an appellant in his or her opening brief.” For purposes of a subsequent CUE challenge, the body of the Court’s decision must be reviewed to determine “whether the issue was reviewed by the Court on the merits.” With respect to TDIU, the burden is on the claimant to show that his/her education and experience would preclude substantially gainful sedentary employment, and the Board must consider all relevant evidence, including the effect of the claimant’s nonservice-connected conditions on employability. NOTE: This case was appealed to the Federal Circuit April 30, 2015.

[**Dixon v. McDonald**](#), 778 F.3d 1339 (Feb. 20, 2015)

GARNISHMENT OF VA BENEFITS FOR CHILD/SPOUSAL SUPPORT

Held: In order for VA to garnish a veteran’s benefits in fulfillment of a support order, a garnishment order or similar legal process must be served on VA, pursuant to 42 U.S.C. § 659(i)(5).

[**Wingard v. McDonald**](#), 779 F.3d 1354 (Fed. Cir. Mar. 10, 2015)

38 U.S.C. § 7252(b); REVIEW OF VA’S RATING SCHEDULE

Held: 38 U.S.C. § 7252(b) precludes CAVC review of challenges to the content of VA’s rating schedule. The Federal Circuit, in turn, is precluded from reviewing the CAVC’s refusal to review a challenge to the rating schedule.

[**Rickett v. McDonald**](#), 27 Vet.App. 240 (en banc order) (Mar. 10, 2015)

TREATMENT OF APPEAL WHEN APPELLANT DIES PRIOR TO DECISION

Held: When an appellant dies during the pendency of an appeal and no one seeks to substitute for the deceased appellant, “the Court will withdraw its orders disposing of substantive matters in the case that were issued after the appellant’s death.”

[**Palomer v. McDonald**](#), 27 Vet.App. 245 (order) (Mar. 18, 2015)

EQUITABLE TOLLING

Held: The finality of a Board decision may be abated even when an appellant files a motion for Board reconsideration after the expiration of the 120-day appeal period – as long as the circumstances warrant equitable tolling. **ADVOCACY NOTE:** The burden is on the appellant to demonstrate – with specific evidence and not “vague assertions” – that equitable tolling is warranted. Instead of simply asserting that deteriorating health prevented timely filing, advocates should explain *how* the deteriorating health impacted the ability to timely appeal.

[**Reliford v. McDonald**](#), 27 Vet.App. 297 (Mar. 20, 2015)

SUBSTITUTION, ACCRUED BENEFITS

Held: VA is required to notify an accrued benefits claimant of the right to waive substitution.

Prokarym v. McDonald, 27 Vet.App. 307 (Apr. 14, 2015)

DISABILITY RATINGS, DIAGNOSTIC CODES

Held: A “severe” disability rating under one diagnostic code (DC) is not the same as a “severe” disability rating under another DC.

Toomer v. McDonald, 783 F.3d 1229 (Fed. Cir. Apr. 21, 2015)

EQUITABLE TOLLING, PRESUMPTION OF ADMINISTRATIVE REGULARITY

Held: In order to warrant equitable tolling of the 120-day deadline to file an appeal with the Veterans Court, a claimant must show (1) that extraordinary circumstances prevented him/her from filing a timely appeal; (2) due diligence in his/her attempts to exercise appellate rights; and (3) that the extraordinary circumstances caused him/her to miss the deadline. VA officials are presumed to “properly discharge their duties” – and this “presumption of regularity” can only be overcome with “clear evidence to the contrary.” Where a veteran asserts that VA did not mail him/her a copy of the decision and that the deadline was missed as a result of that failure, he/she must rebut the presumption of regularity with clear evidence that VA did not act “regularly.”

Gray v. McDonald, 27 Vet.App. 313 (Apr. 23, 2015)

AGENT ORANGE, “INLAND WATERWAY,” DA NANG HARBOR

Held: VA’s interpretation of 38 C.F.R. § 3.307(a)(6)(iii), designating Da Nang Harbor as an offshore waterway, is irrational and inconsistent with the regulation’s purpose.

Haynes v. McDonald, 785 F.3d 614 (Fed. Cir. Apr. 29, 2015)

DIC, “SURVIVING SPOUSE” DEFINITION, “ABUSED SPOUSE” EXCEPTION

Held: In order to qualify for DIC benefits, there must be a valid marriage at the time of the veteran’s death and continuous cohabitation. The “abused spouse” exception to the continuous cohabitation requirement does not eliminate the requirement of a valid marriage at the time of death.

Westfall v. McDonald, docket no. 13-0575(E) (Apr. 28, 2015)

JUDGMENT, MANDATE, EQUAL ACCESS TO JUSTICE ACT (EAJA)

Held: A CAVC order granting “a motion to expedite the issuance of mandate does not, on its own, operate to shorten the time to appeal to the Federal Circuit . . . unless the parties have articulated in the motion, a clear and unequivocal waiver of their right to appeal.” The Secretary’s mere lack of opposition to the motion is not a clear and unequivocal waiver of that right. The lack of a clear and unequivocal waiver meant that the Secretary could still appeal and, therefore, the appellant’s EAJA application was timely.

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.

[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."

[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."

[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 DC 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.

[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."

[Copeland v. McDonald](#), 27 Vet.App. 333 (June 25, 2015)

RATINGS; 38 C.F.R. § 4.71a, DC 5284

Held: "[W]hen a condition is specifically listed in the [Rating] Schedule, it may not be rated by analogy." DC 5284 ("Foot injuries, other") does not apply to foot conditions that are expressly listed in 38 C.F.R. § 4.71a.

[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.

[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.'"

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.

Aldridge v. McDonald, 27 Vet.App. 392 (August 7, 2015)

EQUITABLE TOLLING

Held: Equitable tolling was not warranted, even where the appellant asserted that his grief over the deaths of three family members prevented him from timely filing his Notice of Appeal.

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.

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.

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.

Mulder v. McDonald, 800 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.

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.”

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.

Kuppamala v. McDonald, 27 Vet.App. 447 (December 30, 2015)

38 C.F.R. § 3.321; *BOARD’S REVIEW OF EXTRASCHEDULAR DETERMINATION*

HELD: The Board has the authority to review the Director’s entire extraschedular determination de novo, and is authorized to assign an extraschedular rating when appropriate.