

VETERANS LAW JOURNAL

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Fall 2010

A CHANGING OF THE GUARD AT THE CAVC



Incoming Chief Judge Bruce E. Kasold (left) and outgoing Chief Judge William P. Greene, Jr. (right)



Outgoing Clerk of the Court Norman Y. Herring

Passing the Gavel: Remembering Chief Judge William P. Greene, Jr.'s Five Years at the Helm

by Glenn Bergmann

On Friday, August 6, 2010, the U.S. Court of Appeals for Veterans Claims convened in ceremonial session to mark the passing of the gavel from Chief Judge William P. Greene, Jr., to Judge Bruce E. Kasold. The courtroom was filled with family and distinguished guests from Congress and the Department of Veterans Affairs, as well as a number of the Court's practitioners and Court staff. Remote video viewing was available for guests who could not find seating. Chief Judge Greene opened the event with comments reflecting his appreciation to everyone involved with

(Passing the Gavel, continued on page 6.)



COURT OF APPEALS
FOR VETERANS CLAIMS
BAR ASSOCIATION

Norm Herring Retires After 10 Years of Distinguished Service as Clerk of the Court

by Glenn Bergmann

On Thursday, August 26, 2010, The U.S. Court of Appeals for Veterans Claims held a retirement luncheon for Norman Y. Herring, Clerk of the Court, at the Washington Navy Yard Catering and Conference Center. The luncheon was well attended and featured distinguished guests, including personnel from the Court (including many of the Judges), Mr. Herring's family members, practitioners, and friends. Following the buffet luncheon, several individuals paid tribute to Mr. Herring's achievements throughout his career. Mr. Herring was honored with many gifts, including a selection of fine wines from the Court's Bar Association.

The Court's judges recognized Mr. Herring's ten years of distinctive service as the Court's Executive Officer and Clerk, from December 11, 2000 until his retirement on August 31, 2010, with the issuance of

(Norm Herring, continued on page 7.)

Report from the Bar Association's Annual Meeting

On Thursday, September 30, 2010, the Bar Association held its Annual Meeting in the CAVC Courtroom. Louis George, the outgoing President, briefly reflected on his nearly two years as President and announced the election results for the Board of Governors. Newly elected officers include Gayle Strommen, President-Elect; Sandy Wischow, Secretary; and Alice Kerns, Treasurer (commencing her second term). The Board of Governors also welcomed two new members: Andrew P. Reynolds, from the Court's Central Legal Staff, and Virginia A. Girard-Brady, a private attorney practicing in Lawrence, Kansas.

Lou George also announced the successful passage of two bar association constitutional amendments: (1) A proposal to amend Article IV, section 4.4 of the Constitution, which would allow the term limits for officers of the Bar Association to be set by provision of the Bylaws, rather than specified in the Constitution; and, (2) A proposal to amend Article IX, Section 9.1(c) of the Constitution, to allow voting on amendments to the Constitution by email, as well as in person, by mail and by fax. The Board of Governors recommended the initial change to Article IV, section 4.4 so as to permit it to change terms of officer of the Board of Governors. By allowing it to be governed by the Bylaws, the Board would be permitted to amend the Bylaws to meet the future needs of the Association by providing continuity of leadership. Specifically, the Board has discussed amending the Bylaws to permit officers to serve for a two-year term. This change is particularly important, as it allows for greater retention of institutional knowledge among the officers and would ensure against off-year terms (where no Judicial Conference is planned). The Amendment to Article IX, Section 9.1(c) is basically self-explanatory. Other voting provisions in the Constitution allow voting by email as well as in person, by mail and by fax, and this amendment will standardize the various voting provisions of the Constitution. Furthermore, this amendment recognizes that email has become a common and efficient way of conducting business, and allows the Bar Association to use this method.

The program was then turned over to Glenn R. Bergmann, the incoming Bar Association president for 2010-2011. Initially, Glenn honored Lou George and past-President Brian Robertson for their distinguished service to the Bar Association. Both were separately presented with gavel plaques

commemorating their service.

Committee reports were next on the agenda. Alice Kerns gave the treasurer's report, indicating the overall good health and growth of the organization. Glenn Bergmann then presented the remaining committee reports, reflecting back on what the Bar Association had accomplished in each committee in the past year. He also provided highlights of what the membership can expect in the coming year. Excerpts of those reports are noted below:

Programs Committee

The Programs Committee is perhaps the most visual aspect of the association. Some of the planned events in the coming year (some of which are as yet unconfirmed) include the following:

- Spring and fall social/happy hours;
- Meet the BVA members — We have received an oral confirmation that three Board members from the BVA will give a presentation and take questions about their official duties at the Board;
- Update on VA's regulation rewrite — Bill Russo of that group has been invited to give us some of the highlights of VA's massive undertaking to rewrite 38 C.F.R. part III.
- Meet the new CAVC Clerk — Mr. Greg Block. As many have already heard, Mr. Block has replaced Norman Herring, who recently retired. We hope to get to know Mr. Block during a brief presentation from him.
- Meet VA's General Counsel — Will A. Gunn. Some members have expressed an interest in hearing from Mr. Gunn and his mission for VA's OGC in the future.
- Portrait ceremony for Judge Greene. Judge Greene's unveiling of his portrait, commissioned by the Bar Association, is slated to take place in the early part of next year.

Publications Committee

The *Veterans Law Journal* is back in regular quarterly publication and is better than ever. James Ridgway

(Annual Meeting, continued on page 3.)

(Annual Meeting, continued from page 2.)

now chairs this committee and has spent considerable time adding new features, which include:

- "Peek Inside" articles, which recently looked at the workings of offices such as Group II, NVLSP, and the VETERANS LAW REVIEW;
- "Second Look" articles — which are case write-ups that consider the deeper implications of recent cases from the CAVC and the Federal Circuit;
- Book reviews; and
- Educational feature articles containing practice tips.

This committee continues to report on major news and cases and is always looking for new contributors and new ideas. If you are interested in contributing, please contact James Ridgway at JRidgway@uscourts.cavc.gov.

Law School Education Committee

Last October the Bar Association and the Court partnered to hold the first ever Veterans Law Appellate Advocacy Competition (VLAAC). This year's competition was held on October 16-17, 2010. Twelve teams of law students participated, and after submitting their written appellate briefs, traveled to Washington, DC, to face each other in the oral competition. The George Washington University Law School graciously partnered with the Court and the Bar Association, and hosted the preliminary rounds of the competition on Saturday, October 16, 2010. The semi-final and final rounds were held at the Court on Sunday, October 17, 2010. Look for full coverage soon.

In the future, the VLAAC will offer numerous opportunities for Bar Association members to get involved. By serving as a judge for either the written or the oral competition, or volunteering in another capacity during the weekend, Bar Association members can reap rewards by interacting with students, practitioners, and Court staff, with the common goal of sharing awareness and understanding of veterans law. Please visit www.vlaac.org for more information.

Also, in conjunction with Court law clerks, the Bar Association developed an hour-long PowerPoint presentation to introduce law students to veterans

law. The presentation has been given in conjunction with CAVC oral arguments at law schools across the country, and has also been given as a stand-alone event at law schools. Currently, the Law School Education Committee is in the process of developing a script for the presentation so that volunteers may learn the program and then take it to their local law schools. This is exciting for us because lawyers and law schools have shown great interest in this presentation.

Portrait Committee

As Judge William P. Greene, Jr., prepares to retire from the Court at the end of this year, the Portrait Committee is gearing up for an event to commemorate his distinguished service on the Court. Portrait artist Lindy Bruggink has been commissioned to paint Judge Greene's portrait, and the Bar Association is soliciting contributions from its membership toward this effort. In early 2011, Judge Greene's portrait will be formally and ceremonially presented to the Court for display in the courtroom. Please consider giving to this worthy cause. The easiest way to give is via our website www.cavcbar.net. Simply click on the "Portrait Fund" tab on our main page and follow the prompts.

Membership Committee

During the 2009-2010 membership year, the membership committee worked diligently to improve existing systems for tracking membership information. This included the creation of comprehensive spreadsheets to catalogue membership information in a central location. In prior membership years, the Bar Association lacked a consolidated listing of members in good standing with relevant contact information. As a result, multiple resources had to be consulted to accurately track membership data, update key information, and communicate with membership by mass mailings or otherwise.

The Committee, chaired by Donnie Hachey, also went to great lengths to make improvements to the Bar Association's email listservs to ensure that contact information is better organized and can be more efficiently accessed. The email listservs were also updated so that only members in good standing receive messages from the Bar Association — something that unfortunately has not happened for some time.

(Annual Meeting, continued on page 4.)

(Annual Meeting, continued from page 3.)

It is expected that the improvements made to membership tracking systems over the past year should decrease the time required to perform administrative duties, thereby freeing up more time for the Committee to concentrate on strategies for growing the Bar Association's membership and improving outreach. In the upcoming membership year, the Committee is looking to tap new sources of potential members, such as law students participating in the growing number of Veterans' law programs. We also plan to more actively solicit new members from traditional sources, such as the National Organization of Veterans' Advocates (NOVA) and similar associations of veterans' representatives. Additionally, a plan is in place to contact former members who have not renewed their membership to encourage them to rejoin, especially given the increase in the quantity and quality of programs offered.

Finally, the Committee is interested in taking steps to better communicate with the current membership, including sending more frequent updates to members regarding Bar Association programs and activities (we promise to not overdo this), sending timely reminders regarding membership renewal, and sending thank you letters to each new (or renewing) member after receiving their application and payment — something that unfortunately we have let slip.

As always, the Membership Committee encourages greater member participation in the work of each of the Bar Association's committees. Please reach out to us if you would like to get involved.

Upon completion of the committee reports, the organizational part of the meeting adjourned, and Chief Judge Bruce Kasold gave a short State of the Court address and answered general questions that had previously been submitted by the membership. The new Chief indicated that the Court was extremely interested in finalizing the newly proposed Court rules and in reviewing and revising its internal operating procedures. To that end, the Chief indicated that the judges will be holding a retreat in early November to discuss these issues. The Bar Association's President has been invited to address administrative issues that are of concern to practitioners and matters that practitioners believe could make the Court more efficient.

The meeting concluded with a reception where members were able to interact with the Court's judges and staff. ■

Message from the Incoming President

This is my first message to the membership as President of the CAVC Bar Association. I am excited to get started on advancing the mission of the Bar Association through educational and social events designed to enhance the practice of our diverse membership. We have a great Board of Governors team assembled and I am eager to meet with them as we plot our programs and outreach in the coming months. At the same time, I want to again express my thanks to the outgoing President, Louis George, for his competent leadership of the association over the past 1½ years. Lou left the Bar Association well positioned to continue its work.

For those who participated at our Annual meeting on Thursday, September 30, you may have heard Chief Judge Bruce Kasold mention that the Court will be having a Judges' retreat in early November. As President of the Court's Bar Association I have been invited to attend as a guest of the Court and to address the Judges regarding administrative issues that are of concern to practitioners and matters that practitioners believe could make the Court more efficient. This is not a Bench and Bar function, rather it represents the Court's reaching out to us relative to issues of general concern facing members of the bar.

I am soliciting your comments and suggestions as I prepare my comments to the Judges. I invite you to consider the above topics and email me your thoughts and concerns. You may contact me directly via email at bergmannlaw@msn.com. This is a great opportunity for us to dialogue in an informal setting with the Court.

Thank you for your continued support of the Bar Association. I look forward to giving a report to the membership upon my return from the retreat.

Sincerely,

Glenn R. Bergmann

President, U.S. CAVC Bar Association

Message from the Outgoing President

This is my final "Message from the President" as the President of the Court of Appeals for Veterans Claims Bar Association. On September 30, at the Annual Meeting of the Association, I handed over the reins of the Association to President-Elect Glenn Bergmann. It was a bittersweet day, as I have truly enjoyed my time as President; however, I have the greatest of confidence that the Bar Association is in very capable hands.

As you may recall, I assumed the Presidency of the Association earlier than anticipated, in January 2009, when Brian Robertson (who had served our Association so well as a founding member, officer and ultimately President) stepped down as President. In that first year (the 2008-2009 membership year), as well as in the current 2009-2010 membership year, I endeavored to make the Bar Association more open and accessible and to work at keeping our website updated and keep the membership informed of upcoming events by increased use of e-mail. Throughout it all, I have been very lucky to have the help and support of a very capable Board of Governors, as well as the unwavering support of the Court, in particular former Chief Judge William P. Greene, Jr., and new Chief Judge Bruce E. Kasold.

As I reflect back on the years that I served as President, I am very pleased by our many accomplishments. We have continued with our "Meet the Judge" programs, and have extended these programs to include other educational programs. In May 2010, James Ridgway, Bar Association Board of Governor and Senior Law Clerk and Chief of Staff to Judge Alan G. Lance, Sr., presented "Techniques for Effective Oral Advocacy." In addition, at the end of July, the Bar Association hosted a Question and Answer program with members of the VA's Compensation and Pension service. Toll-free teleconferencing was available for both presentations, so we were able to include participants from across the country. We have also added purely social events, such as the Post-Blizzard Happy Hour held earlier this year in Washington.

I am very pleased that the Bar Association was able to participate in the Court's 20th Anniversary Commemoration in October 2009. Also in October

2009, the Bar Association and the Court co-sponsored the first annual Veterans Law Appellate Advocacy Competition (VLAAC). The second annual VLAAC was just held on October 16-17. (Check out our website, www.cavcbar.net, as well as the VLAAC's website at www.vlaac.org.)

The Bar Association again was able to have a strong presence at the Court's Eleventh Judicial Conference in Washington, DC, held in March. We were very pleased to host two programs following the Court's conference. Professor Michael P. Allen of Stetson University College of Law, a frequent speaker on veterans law, gave a lively and informative presentation entitled "Due Process and the Veteran: What is and What Ought to Be." Immediately following, we were honored to welcome Secretary of Veterans Affairs Eric K. Shinseki. Secretary Shinseki shared well-received remarks about his vision for the Department, and took several questions from the audience. Attendance at this program was quite strong, with many new members participating. And, of course, I would be remiss not to mention the quarterly publication of the new and improved *The Veterans Law Journal*. The Board of Governors as well as many of your fellow Bar Association members have contributed stories and ideas that have deeply enriched this periodical. I am very proud of our publication.

As I close this message, I wish to thank you — the members of the CAVC Bar Association — for your support. I will still be participating in the activities of the Association, but now more as an active member and as a participant. In the meantime, I wish you all the very best.

Sincerely yours,

Lou George

President, CAVC Bar Association

Do not forget! If you have not renewed your membership for 2010-11, now is the time to do so. Go to www.cavcbar.net/html/membership.html for more details.

Greetings from Your New Clerk of the Court, Greg Block



After a brief but invaluable transition period with Norm Herring, I was sworn in as Clerk of the Court by Chief Judge Bruce E. Kasold in a ceremonial session of the U.S. Court of Appeals for Veterans Claims on September first.

Although the learning curve is unquestionably steep, I have been the beneficiary of thoughtful advice and information from the Court's judges and staff and members of its bar. Clearly, I am working with a team of professionals with exceptional talent and experience! As I continue to get settled, please share your ideas and suggestions regarding the Court's operations and procedures with me.

For those of you who are not familiar with my background, I recently completed my 30th year in uniform as an Army Judge Advocate General's Corps (JAGC) officer. The bulk of my assignments were overseas, although my final assignment was in Charlottesville, Virginia, where I served as Dean of the Army JAG School.

I come to the Court both awed and excited—awed by the Court's impressive record of accomplishments over the last 20 years, and excited to be part of the continuing evolution of America's youngest and busiest federal appellate court.

I appreciate the warm welcome I have received and look forward to meeting and working with all of you. ■

(Norm Herring, continued from front page.)

Miscellaneous Order No. 11-10. Therein Mr. Herring is officially recognized for his active role in guiding the Court through a period of unprecedented growth and change, with significant and countless contributions to both the Court and the veterans law community. On his watch as the Court's Clerk, the number of appeals filed annually more than doubled, from approximately 2,300 appeals in 2001, to over 4,700 in 2009. He oversaw numerous innovations that ensured that the Court operated smoothly and efficiently during this period of growth.

Mr. Herring is acknowledged to have introduced several innovative changes to the practice. He developed the appellate court "best practices" to improve the way business was conducted at the Court, and helped the Court transition into the electronic age. He was heavily involved in the adoption of a Case Management/Electronic Case Filing system, the creation of the Court's first electronic Chambers' Case Management System, a restructured and more user-friendly website, and the inception of the Court's intranet. Additionally, he was noted to have been influential in bringing about extensive changes to the Court's pre-briefing conference process conducted by the Court's Central Legal Staff, resulting in the disposition of many cases before briefing and submission on the merits. His insightful planning for renovations to the Court's physical space allowed us to comfortably and professionally accommodate a growing staff. Mr. Herring was also recognized for his close and responsive coordination with members of congressional staff to ensure that the Court's needs were fully understood by Congress. This effort helped develop and maintain support for the Court's annual appropriations and several Court legislative initiatives, including the efforts to secure a permanent courthouse. Further, he often served as the public face and voice of the Court at outreach programs and training seminars conducted throughout the country.

The Court and its Bar Association will remember Mr. Herring's competence, loyalty, and dedication not only to the Court, but to his community through his active involvement in Rotary International and numerous humanitarian projects both locally and throughout the world.

Mr. Herring and his wife are building a home in Mexico, where they plan to retire to this fall. ■

(Passing the Gavel, continued from front page.)

making his tenure as chief judge successful and enjoyable. He thanked his colleagues on the bench, the Court's Bar, and the Court staff for their enthusiasm in providing justice to veterans as fairly and efficiently as possible. Chief Judge Kasold graciously accepted the ceremonial gavel, and in his remarks he highlighted some of Chief Judge Greene's many accomplishments over the previous five years. He reflected on the ceremonial gavel passing in August 2005 when Chief Judge Green was himself passed the gavel and became the "bridge" between the old and the "new" Court - in the sense of relative newly appointed judges. At that time, Chief Judge Greene's court included six colleagues, four of whom had been on the bench less than a year, and the other two who had been on the bench fewer than two years. In the ensuing five years, Chief Judge Greene achieved numerous noteworthy accomplishments.

One month after the gavel passing ceremony, Chief Judge Greene assembled the Court's judges, active and retired, for a judicial retreat in Williamsburg, Virginia. Certain members of the Court's Bar and staff also participated in that multi-day meeting. The intent was to further educate the new judges on all aspects of the Court's practice, to capture some of the experience of the retiring judges, to discuss improvement strategies for the way the Court does business, and to promote collegiality among the "new" bench. This became critical as the Court, in the ensuing years, faced a growing number of annual appeals, resulting in a caseload that doubled from what the previous Court had encountered.

Chief Judge Greene oversaw the near doubling of scheduled oral arguments. In response to the Bar's request for more oral arguments, that number has risen from an average of 13.5 per year from FY2002-2005, to an average of 24.5 per year from FY 2006-2009.

He expanded education and outreach. The Court now schedules approximately four arguments per year at law schools across the country, and as part of those trips, interacts with faculty and students to discuss facets of veterans law.

Alternative resolution has reached an all-time high. In response to the Bar's desire for more meaningful briefing conferences, CLS attorneys received extensive mediation training in 2007, and in 2008 new procedural requirements for Rule 33 Staff Conferences

were established. The result has been an overwhelming increase in both the number of pre-briefing conferences and the number of pre-briefing resolutions.

He strengthened relationships with the Bar. With Chief Judge Greene's blessing, the judges have participated in several Bar Association programs each year. In particular, in 2007, the Court joined with the Bar Association to sponsor a two-day Bench and Bar Conference in Leesburg, Virginia. Additionally, he encouraged and supported the creation of the first Veterans Law Appellate Advocacy Competition (Moot Court) in 2009 in Washington, DC. Many ideas discussed at the Bench and Bar developed into the practice at the Court. The moot court was declared an overwhelming success, the experience of which is being built on in anticipation of a second, larger competition this October.

In response to Congress's growing interest in the Court's caseload and the measures being taken by the Court to decide appeals in a timely and fair manner, Chief Judge Greene (pursuant to authority established in 38 U.S.C. § 7257(b)(1)) recalled eligible, retired Judges who returned to perform substantial service to the Court beginning in 2006 — some have now completed four "tours." The number of full-time employees at the Court has increased over the past five years, and the Chief has successfully shepherded the budgets through Congress to permit that growth, so that the Court could rise to meet the challenges of an increase in the number of appeals filed.

Chief Judge Greene recognized that information technology is of utmost importance, and he directed resources to ensure that the Court stays ahead of the curve in this regard. His five-year legacy in this area includes a new Case Management / Electronic Case Filing system, major website revisions, and a paperless internal draft circulation. Significant rules revisions have also occurred over the past five years pertaining to the designation of the Record before the Agency, the Record of Proceedings, the Clerk's authority, and the comprehensive revision proposed in 2010. Finally, Chief Judge Greene preserved and promoted the initiative to build a new courthouse.

On behalf of the Court, Judge Kasold thanked Chief Judge Greene for his sound and steady leadership. Personally, he thanked him for being a mentor and guide during his tenure on the bench, and particularly during the transition. The event concluded with a celebratory reception. ■

Chandler v. Shinseki: Pension Benefits Revisited

by Kim Sheffield, Esq.

Reporting on *Chandler v. Shinseki*, 24 Vet.App. 23 (2010) (en banc).

At age 57, Korean War veteran Howard Chandler was granted a non-service-connected disability pension pursuant to 38 U.S.C. § 1521(a). He had a combined disability rating of 80%, including one disability rated at 60 percent. His disabilities rendered him incapable of employment and, thus, permanently and totally disabled. At age 71, Mr. Chandler sought to obtain an increased pension under the special monthly compensation provisions of 38 U.S.C. § 1521(e) on the basis of being housebound. This section requires that the veteran has a "disability rated as permanent and total" (a single disability rated at 100%). Mr. Chandler reasoned that because he was over the age of 65, the provisions of 38 U.S.C. 1513(a) eliminated the requirement for him to have a disability rated as permanent and total to qualify for special monthly compensation.

Mr. Chandler's reasoning was consistent with the Court's holding in *Hartness v. Nicholson*, 20 Vet. App. 216 (2006). In *Hartness*, the Court addressed the interplay of 38 U.S.C. § 1513(a) and 38 U.S.C. § 1521. Section 1521(a) establishes non-service-connected pensions for wartime veterans who are "permanently and totally disabled" regardless of their age. Section 1513(a) provides that a veteran over 65 who meets the service requirements of section 1521 will be paid a pension at the rates and under the conditions prescribed by section 1521 "other than the permanent and total disability requirement." Thus, section 1513(a) extends the pension benefit of section 1521(a) to wartime veterans over 65 who are not permanently and totally disabled. The *Hartness* Court held that this 1513(a) exception also extended to the total disability requirement of section 1521(e) dealing with special monthly compensation.

In the case on appeal, the Secretary argued that *Hartness* was inapplicable because, unlike Mr. Hartness, Mr. Chandler had already been receiving benefits under section 1521. The Secretary interpreted section 1513(a) as permitting veterans over the age of 65 to receive benefits under section 1521 without regard to the permanent and total disability

requirement, but found it did not permit veterans already receiving benefits under section 1521 to receive increased benefits under section (e) once they reached the age of 65. The Secretary pointed to section 1513(b), which provides that if a veteran were eligible for pension under both under section 1513 and section 1521, pension shall be paid to the veteran only under section 1521. The Court found this interpretation of the statute would produce an absurd result — some totally disabled veterans over the age of 65 would receive a smaller pension than others over 65 who were not totally disabled. The Court found that section 1513(b) only precluded a veteran from receiving benefits under both sections 1513 and 1521 at the same time.

The Court concluded that *Hartness* was rightly decided in the first instance. They found that decision was consistent with the legislative history of the statutes involved and Congress' intent to provide pensions to veterans over 65 years of age regardless of disability. The Court further found that overruling *Hartness* would not serve to clarify the meaning of section 1513(b), and that the doctrine of stare decisis was applicable. Judge Davis concurred with the majority opinion. He found that Congress' intent in 38 U.S.C. § 1513(a) was ambiguous and stressed that ambiguity must be resolved in favor of the veteran. Chief Judge Kasold and Judge Greene dissented, believing that *Hartness* failed to adequately address the difference between a veteran being "permanently and totally disabled" and having a "disability rated as permanent and total." They found the language of the section 1513(a) was not ambiguous, and was only intended to apply to the threshold requirement for a pension under section 1521(a) and not to increased benefits under section 1521(e). ■

Kim Sheffield is an Associate with Bergmann & Moore, LLC, Bethesda, MD.

CONTRIBUTORS WANTED

The publications committee is looking for new members to contribute to upcoming installments of the *Veterans Law Journal*. Participants do not need to be located in the Washington, D.C. area. Contact James Ridgway at jridgway@uscourts.cavc.gov or Glenn Bergman at BergmannLaw@msn.com.

Breedlove v. Shinseki: Substitution Upon the Death of the Veteran

by Gayle E. Strommen

Reporting on *Breedlove v. Shinseki*, 24 Vet.App. 7 (2010) (per curium order)

The Appellant, Charles L. Breedlove, appealed a September 2008 Board of Veterans' Appeals (Board) decision, but died in May 2009, prior to briefing in the appeal. Appellant's widow (Movant) filed a motion for substitution of party under 38 U.S.C. § 5121A, which allows accrued benefits eligible persons to move within one year of the death of the veteran, to be substituted for the deceased veteran, without filing a new accrued benefits claim. In response to a request by the Court, the Secretary asserted that VA had determined that Movant was a person eligible to receive accrued benefits under 38 U.S.C. § 5121(a). At oral argument, the Secretary asserted that 38 U.S.C. § 5121A did not apply to appeals pending before the Court and that substitution under the Court's case law, i.e. *Pekular v. Mansfield*, 21 Vet.App. 495 (2007), was not warranted because the case had not been "submitted for decision."

In the Court's decision, Chief Judge Kasold and Judges Moorman and Lance agreed that 38 U.S.C. § 5121A did not apply to appeals pending before the Court. However, the Court then discussed current case law governing substitution at the Court and concluded that its precedent in *Pekular*, which held that substitution depended initially on whether the case had been "submitted for decision" before the veteran's death, created a "zone of no substitution" for veterans who died after the Board decision but prior to the case being "submitted". The Court went on to address *Landicho v. Brown*, 7 Vet.App. 42 (1994), and *Zevalkink v. Brown*, 103 F.3d 1236 (Fed.Cir. 1996), which held that a claim for disability compensation pursuant to Chapter 11 of Title 38 did not survive the death of the veteran, and determined that these decisions were based on the legal premise that "a claim for accrued benefits was a claim separate from the claim for disability compensation benefits." Thus, the Court determined that there were two routes for the Court to follow, (1) to vacate the Board decision and dismiss the appeal, and allow the accrued-benefits claim on the merits to begin anew at VA, or (2) allow substitution at the Court. The majority, Judges Moorman and Lance, concluded

that Congress had "altered the previously legislated distinction between a veteran's disability-benefits claim and an accrued benefits claim . . . [and] decided to change the distinction that had been gleaned from the statutory schemes of chapter 11 and chapter 51." The Court then held that "a veteran's chapter 11 disability benefits claim survives the death of the veteran, not for the purposes of providing VA benefits to a veteran, but for the purpose of furthering the claim of an eligible accrued-benefits claimant." The Court then asserted that an accrued-benefits claimant had two options before the Court, either to request substitution and carry on the appeal of a deceased veteran through the judicial process, or not to request substitution and permit the Board decision on a deceased veteran's claim to be vacated, and to pursue the accrued-benefits claim anew before the agency.

In discussing substitution before the Court, the majority asserted that the Court could not make a determination as to whether a movant was an eligible accrued benefits claimant in the first instance, but could (1) remand the question of whether a person qualifies as an accrued benefits claimant, (2) stay the appeal until a determination by VA is made, or (3) "direct the Secretary to inform the Court of his determination within a set period of time." The Court asserted that if accrued-benefits status were established, substitution could be permitted subject to a "judicial decision that it is the appropriate course of action in that particular case."

Chief Judge Kasold concurred in the decision, and agreed that the "zone of no substitution" warranted the "dismantling of rigid and limiting substitution criteria" before the Court, but did not agree with much of the majority's discussion of "Substitution in Appeals Before the Court." The Chief Judge specifically disagreed with the majority's finding that 38 U.S.C. 5121A altered the statutory distinction between the veteran's disability compensation claim and an accrued benefits claim, and concluded that Congress was addressing an "unwarranted delay in the adjudication of many accrued-benefits claims" and no more. ■

Gayle E. Strommen is a Deputy Assistant General Counsel in VA's PSG VII.

A Peek Inside . . . the VETERANS LAW REVIEW

by Bradley Hennings

The VETERANS LAW REVIEW (VLR) is published on an annual basis by the U.S. Department of Veterans Affairs (VA), Board of Veterans' Appeals (Board), and is designed to encourage frank discussion of relevant legislative, administrative, and judicial developments in veterans law. Its mission is to stimulate ideas for improving the benefit system for our nation's veterans and their families.

The VLR has been described as part of VA's outreach to all veterans and their families, highlighting legal issues and legal policy concerns that are currently faced by VA's Office of General Counsel, the Veteran's Health Administration, the Veterans Benefits Administration, the Board of Veterans' Appeals, and the U.S. Court of Appeals for Veterans Claims (CAVC) in their service to the men and women who have served this nation in uniform. The VLR is willing to publish articles, notes, or comments that are critical of VA, provided the critique, like any submission received, is well written and includes a thoughtful analysis that will stimulate discussion. Views expressed in published submissions are considered solely those of individual authors and do not purport to voice the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or any other agency or department of the United States.

The VLR's goal is to encourage authors from both in and outside the Board to provide different viewpoints on veterans law. The idea is to bring awareness to the complexity of certain legal issues, and to demonstrate the Board's knowledge of the law. The VLR is always looking for pieces that discuss a topic relevant to veterans law, but also raise a problem or propose a solution. The piece should be opinion-based and not merely a treatise on a topic of the law. The VLR does not solicit for a particular topic but prefers to receive submissions on a topic about which an author is passionate. That passion comes through in their submission and makes for a more interesting read.

The VLR is run and managed by attorneys and Veterans Law Judges at the Board of Veterans' Appeals. The current editorial board through 2012 includes Editor-in-Chief Matthew Tenner, Executive Editor Steven Reiss, and Managing Editor Michael

Pappas. In addition to Board personnel who submit articles, notes, and book reviews to the VLR, there are between 75 and 100 attorneys and Veterans Law Judges who work on the VLR. The effort is voluntary, and time is not taken away from working on case files. Volunteers are expected to complete assignments on their own time. The vast majority of volunteers come to the VLR with past journal experience.

The VLR was created in 2007 and the first volume was published in 2009. The second volume was published in 2010. The Board's Chairman, James P. Terry, believed that a forum was needed to discuss veterans law. He realized that while there were numerous specialized journals addressing public policy issues, none was focused on the needs of the American veteran. The Chairman also recognized the talent that existed at the Board. He noticed that many of the attorneys that join the Board come with prior law school experience working on law reviews and specialized legal journals. The Chairman asked Veterans Law Judge John Crowley to assemble a team to create and edit the first volume of the VLR. Mr. Crowley took the lead as far as soliciting authors and looking into publication methods. The current Articles Editor, Shereen Marcus, referenced her own journal experience as both a journal editor and published author, and researched how other journals operate, including their style guidelines. Ms. Marcus put together a sheet of VLR style guidelines and an editing process based on her research and experience.

The VLR's editing process starts when the editors create teams to review each submission. One team is assigned per writing piece. There is a managing editor or co-managing editors who are the "leads" of the team (the VLR often now uses two managing editors per team), and six to eight associate articles editors. Half of the team does an initial source gathering and editing, and the other half of the team engages in edits that are more substantial. These edits are submitted to the managing editors of each team (who include their own edits). All the pieces are returned to senior editors after the teams finish editing them. The senior editors and the forms and citation managers perform the final review and get approval from the authors before the VLR publishes. Although the VLR generally conforms to Bluebook citation format, the VLR has some stylistic differences, such as a list of commonly used abbreviations within veterans law.

(VETERANS LAW REVIEW, continued on page 12.)

As You Were: To War and Back With the Black Hawk Battalion of the Virginia National Guard,
by Christian Davenport (Wiley 2009),
272 pages

Review by Glenn R. Bergmann

Christian Davenport, a 10-year Brooklyn-born reporter at the *Washington Post*, has written his fair share of pieces on the military and veterans' issues. A search of his on-line *Post* articles reveals that he has been quite busy reporting on a variety of issues, ranging from the more recent identity issues swirling around Arlington Cemetery, the rise in the number of amputees among the returning wounded, to coverage of the Abu Ghraib prison scandal. For this book, Davenport, who in his own words in a recent NPR interview wanted to be the first reporter to embed with a combat unit in Iraq, does just that. For three weeks he moved with the Virginia Army National Guard's 2nd Battalion, 224th Aviation Regiment (the 2-224th), while deployed in Iraq.

The result is a smallish book, just over 250 pages, which chronicles the lives of five citizen soldiers (three men and two women) over a period of several years. The book is broken up into three parts, 17 chapters, documenting the before, during, and after of deployment to Iraq. In what follows, the author attempts to offer a sense of the experience of five Americans (and to some extent their families) whose lives are disrupted by orders to go to Iraq, provides a collection of experiences while they are there, and finally examines their return and reintegration back to the lives they left behind.

Entitled "Mobilization," part one picks up with a girl named Miranda, a 22 year-old senior history major at the College of William and Mary who sneaks off campus to fulfill her one weekend per month Guard duty. When she signs up for the Guard, during the summer following the 9/11 terrorist attacks, she believes that there is "no way" that she would be activated. This belief is shattered during formation one weekend when she is handed piece of paper ordering her to active duty as a member of her reserve component unit "period of active duty: Not to exceed 545 days. Purpose OPERATION IRAQI FREEDOM."

Ray Johnson is a Vietnam veteran who repeatedly tells

his wife that, notwithstanding the increased gossip, he would not be called up for Iraq — he had not been called up for the first Persian Gulf war, nor for Bosnia, Haiti, Kosovo or any other missions in which the National Guard had participated since Vietnam. Ray, a grey-haired 58 year-old grandfather of seven, had been a 100-plus mission helicopter pilot in Vietnam. Following his Vietnam service, he had returned to work as a police officer and hospital medevac pilot.

Kate Broome signed up for the Guard because she thought her life was "stalled" after dropping out of a community college after just two months of attendance so that she could "party" when she was not delivering pizza in her 11 year-old Ford Tempo. Her recruiter coached her to "stay clean" for three weeks before taking the obligatory drug test. Kate decided to become a medic, and several months after basic training was awakened by a 6:30 A.M. phone call from her sergeant admonishing that she had "better have [he]r shit together" because she was being deployed. In the midst of her hurried preparation, she impulsively married her live-in boyfriend in a rundown chapel they found in the phone book.

Mark Baush, a wild kid who enjoyed playing reckless games such as roof-top surfing — which apparently involves clinging to a car roof while speeding down country roads — decided to bridle his energy by attending Virginia Military Institute. Several years later, after leading a relatively successful career in business, he decided to run a marathon on a whim, soon thereafter enlisted in the Virginia Army National Guard, and later successfully completed flight school.

In part II, entitled "Iraq," Davenport maintains the same order of introduction, except that he inexplicably also introduces Craig Lewis, a rookie helicopter pilot who earned 96 percent on his class work but who struggled in his field exercises. Miranda, who is initially depicted as a rear-echelon supply clerk, volunteers and is chosen to be a helicopter door gunner. Her deployment in Iraq notwithstanding, she persuades several of her professors to allow her to complete her studies with them online. While on a two-week leave, she returns to Virginia to graduate with her class. Davenport also follows Kate, who as a medic employs lifesaving skills to treat a 19 year-old Marine who loses both legs in a

(As You Were, continued on page 12.)

(As You Were, continued from page 11).

road-side bomb explosion. Two weeks later she learns that her husband is leaving her for another woman. What follows are tormenting dreams and unsuccessful attempts to hide the "shakes" that she develops. She commences mental health counseling and is diagnosed with PTSD while still in service.

Part III, entitled "Home," is perhaps the main emphasis of the book, where Davenport chronicles these same folks in their attempts to transform back from soldier to citizen. The author slows down the pace a bit to more closely document the sometimes painful reintegration of the five — the nostalgia or "pain of returning home." It is here where the larger theme of the book is revealed, where soldiers, who in the not-distant past had risked their lives for a war not of their choosing, realize that most folks back home have either missed or simply ignored the war. Once home, after casting off their uniforms, they blend back into a society that offers neither gratitude nor attention outside of family and close friends. And in Kate's case, Davenport documents how the agency tasked with taking care of the discharged veteran falls utterly short. Even though she carried a documented in-service diagnosis of post-traumatic stress disorder, she is told at a VA hospital south of Richmond that it would be six weeks before she could get an appointment. The appointment ultimately takes

several months, notwithstanding many long phone calls and broken promises. Imagine her surprise (and utter disappointment) when she finally gets the referral, only to find out that it is not for mental health but for smoking cessation. In the end, she obtains the treatment she so desperately desires and even gets an opportunity to vent in person to then-Secretary of the VA, James Peake, who patiently listens and even offers her his direct number.

This book is a must read for those who are either thinking about military service or anyone curious about what National Guard service can mean when the country enters a period of war. Davenport does a good job providing a believable first-hand glimpse of not only the experiences and travails of the before, during, and after of combat deployment, but also successfully translating the raw feelings and emotions of easily relatable people buffeted between environments of extreme danger and relative normalcy.

Although one might be tempted to fault the author for "spinning" these experiences into a kind of anti-war publication, the portraits of the lives of the five soldiers appear first-hand and honest, not sensationalized or somehow politicized. At the end of the day, this book truly honors the citizen-soldiers who made the sacrifice to fight a now-unpopular war. ■

(VETERANS LAW REVIEW, continued from page 10.)

The VLR is registered with the Library of Congress. Westlaw recently added the VLR as database "VETLR." In addition, it is found in electronic format at <http://www.bva.va.gov/VLR.asp>. Current outreach efforts have focused on getting the word out about the publication. The VLR set up a booth at the CAVC's Judicial Conference, for example. There have been internal discussions regarding future outreach efforts to include perhaps conducting a symposium.

Volume three of the VLR is scheduled for publication in mid-January 2011 and contains what the editorial staff thinks is some of the best material published yet. There will be an article discussing the potential ramifications of the *Cushman* decision, in which the U.S. Court of Appeals for the Federal Circuit held that claimants seeking VA benefits have a constitutionally

guaranteed property interest in their application for VA benefits. There is an article addressing *Chevron* deference and how it is applied at the CAVC. In addition, there are two excellent submissions from current CAVC law clerks; one, a fascinating portrayal of the history of veterans' benefits, and the other, a note exploring CAVC's various standards of review.

The VLR encourages potential authors to contact it if interested in submitting a piece for future publication. The VLR can be contacted at BVAVeteransLawReviewEditor@VA.gov. ■

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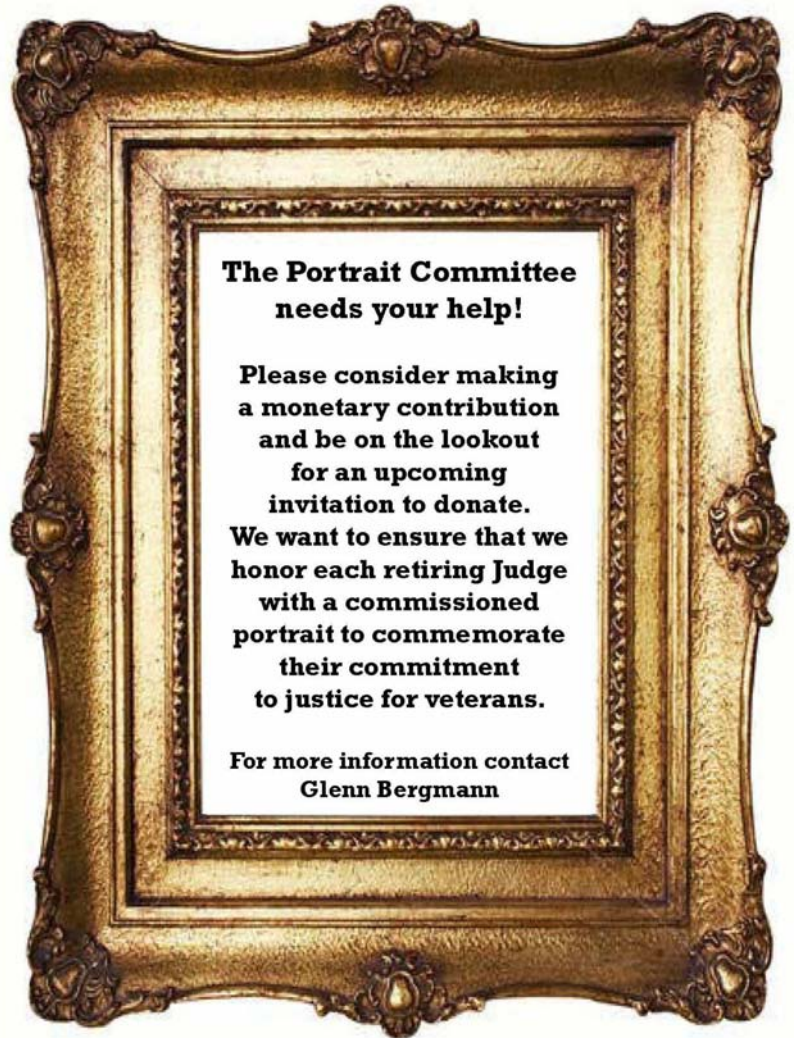
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