VETERANS LAW JOURNAL

A QUARTERLY PUBLICATION OF THE COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

SUMMER 2011

Vacancies on the CAVC Attract National Attention . . . and Some Nominees

To those within the world of veterans law, it is no secret that the CAVC has been running short handed while facing one of the heaviest caseloads of any federal appellate court. In 2008, the Court was authorized to expand — at least temporarily — to nine judges as of January 2010. Not only have those two vacancies never been filled, the Court's active membership was reduced to six at the end of 2010 by the retirement of former-Chief Judge William P. Greene, Jr. In the meantime, the Court's caseload has roughly doubled since the late 1990s to roughly 4,600 cases per year. As a result, the CAVC has one of the highest, if not *the* highest, caseloads per active judge of any federal appellate court in the country.

The enormous challenges caused by a doubling of the caseload while the number of active judges actually decreased finally received national attention late this spring. On April 22, 2011, the *Washington Post* published a front page article entitled "'Veterans Court' Faces a Backlog that Continues to Grow." The article noted the efforts of Bar Association President Glenn Bergmann to raise the issue with the White House, and quoted him as being "hugely disappointed" in the inaction on the vacancies. The largely sympathetic article also examined the problems faced by the entire veterans benefits system as the number of claims continues to rise. The *Post*'s report was picked up by the *Seattle Times* in May.

The *New York Times* followed up with an editorial on May 2. It again quoted Bar Association President Bergmann, and declared that "[t]he White House should delay no longer" in filling the CAVC's vacancies.

Margaret "Meg" Bartley and Gloria Wilson Shelton
Nominees for two of the three CAVC vacancies

The White House responded on June 22 with the nominations of Margaret "Meg" Bartley and Gloria Wilson Shelton for two of the three vacancies. According to the official press release:

"Meg Bartley is currently senior staff attorney at the National Veterans Legal Services Program (NVLSP) and also Director of Outreach and Education for the Veterans Consortium Pro Bono Program, where she

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COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Message from the President

I hope everyone is enjoying their summer. If you are like me, you may be looking for that window of opportunity when the work slows enough to allow for a brief respite from the daily routine.

Since my last message in March, there has been a fair amount of exciting news coming from the Court. As many of you know, in the fall of 2008, Congress amended 38 U.S.C. § 7253 to authorize an increase of two active judges to serve on the Court. In the nearly three years since then, many of us have become increasingly frustrated at the seeming lack of progress with the nomination process. The case for nominations was further underlined when former-Chief Judge William P. Greene, Jr. retired in December 2010, thus creating a third vacancy. In April of this year, after consultation with the Court's Clerk, I (and I am sure several others) prepared a letter to President Barack Obama citing the significant rise in the number of appeals filed at the CAVC, and encouraging him to take prompt action in filling the vacancies. The cause seemed to have been helped when, in May 2010, the *Washington Post* featured a front-page article highlighting the surge in veterans' cases at the Court, as well as the frustration among practitioners regarding the unsubmitted nominations. This is the first time that the Court was featured on the front page of a major newspaper. The *New York Times* even picked up the piece a week later. As it turns out, we did not have long to wait, as on June 21, 2011, the White House issued a news release announcing President Obama's intent to nominate two individuals to the CAVC. The Bar Association is proud to have played a role, even if a small one, in these recent developments. We look forward to a speedy confirmation process in the coming months.

The Bar Association has also been busy with our program offerings. Following the successful panel discussion featuring VA's Regulation Rewrite Project on April 27, the Bar Association hosted a Happy Hour social which was held on June 8 at Gordon Biersch in Washington DC. The event was well attended by the Association's constituents, including members from the Court's front office, attorneys from the Board, and litigators from VA's Group VII and the private bar. Those who attended enjoyed a pleasant evening making acquaintances and catching up with friends and colleagues.

In August, we hope to host a program featuring the Court's Clerk, Greg Block. Mr. Block will be offering his perspectives as he celebrates his one-year anniversary as Clerk of the Court. Be on the lookout for more information regarding this event.

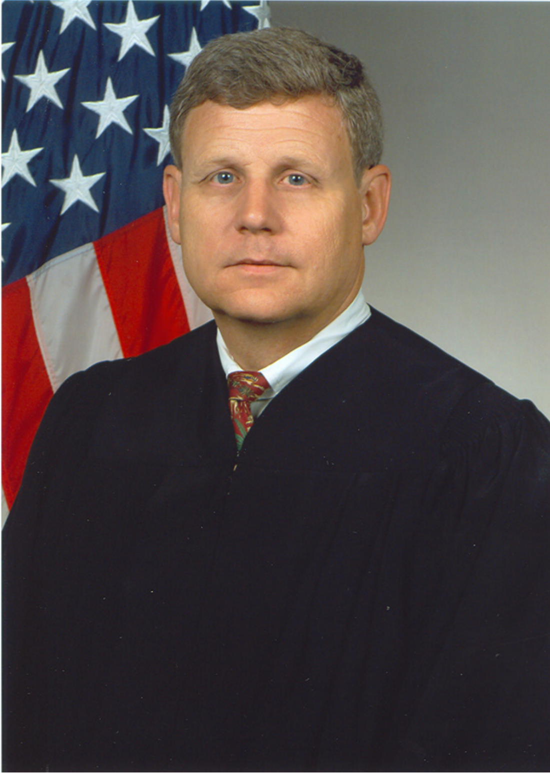
Finally, although we have been talking about this for some time, a date has finally been set to officially honor Judge William P. Greene, Jr. with the unveiling of his portrait. The ceremony is scheduled for Tuesday, September 27, and will coincide with the Bar Association's Annual Meeting. Additional information, to include the event's location and time, will be forthcoming as planning is finalized. We look forward to Judge Greene's portrait taking its rightful place in the courtroom. If you have not yet had a chance to donate to the Bar Association's portrait fund, you may find details on our website at <www.cavcbar.net>.

On behalf of the Board of Governors, I thank you for your continued support of your Bar Association. As always, should you have comments, complaints, or fresh ideas on how to further engage and educate our membership, please do not hesitate to contact me.

I wish everyone a safe and enjoyable summer. ■

Glenn R. Bergmann
President, CAVC Bar Association

A Message from Chief Judge Kasold



Dear Bar Association Members,

Next week marks the one-year anniversary of the date that I received the ceremonial gavel from then-Chief Judge Greene and became the Court's sixth chief judge. Time has flown and, in a word, this last year has been: Busy.

It's not news to anyone that the Court continues to face a formidable caseload and that we are eagerly anticipating having our three current judicial vacancies filled. Less well known are some of the efforts we are making to prepare for the arrival of new judges and improve case processing.

To prepare for new Judges, we are about to begin construction on two chambers in space currently occupied by our Central Legal Staff (CLS). CLS attorneys, who will eventually occupy new offices on the sixth floor of our current building, are being temporarily displaced. Most of the CLS attorneys will telework for the next few months, four days a week, and work in temporary office space the fifth day, while CLS support staff will relocate to share space in our Public Office. Although we are "under construction" and appreciate your patience and support, we are confident our Clerk's Office will continue to provide seamless support to the Court and Bar.

You may also have noticed a change in how the Court now treats motions for panel review following issuance of a single-judge decision. Specifically, because each of these requests for panel is in fact reviewed by a panel of judges, the standard wording on our panel orders now reflects that the request for a panel decision has been granted. On review, the panel will then either hold that the single-judge decision remains the decision of the Court, or substitute a new opinion in place of the single-judge decision. We believe this change better documents the actual review performed by the judges of the Court.

Finally, two ambitious rule and procedure revision projects have been ongoing at the Court. I am pleased to report that both undertakings, the revisions to the Rules of Practice and Procedure (Rules) and to the Internal Operating Procedures (IOPs), are nearly complete and those documents will be presented in final form in the very near future.

Although processes at the Court have continued to evolve, particularly to embrace technology, the last major revision of our Rules and IOPs was in 2004. For that reason, the time seemed right to tackle a comprehensive update of both of these documents. With regard to the Rules, many thanks to all who contributed to the intense review of the Rules conducted at our Judicial Retreat last fall, the spring Bar program on the Court's rules, and the public comment opportunity. You sparked ideas and discussion that immeasurably enhanced the review and revision process.

We are busy at the Court, and I know that means that you, our practitioners, are also very busy. I noticed recently that the percentage of appeals filed pro se has dropped below 50% in the last few months - it appears outreach efforts of the Bar have been successful. Keep up the great work! I look forward to addressing you at your Annual Meeting this September. ■

Sincerely,

Chief Judge Bruce E. Kasold

Bar Association Event Recap

As most of you are well aware, the Bar Association hosts events approximately every month. These events provide our members with the opportunity to learn more about important topics and events that affect our work. Our events are available to attend either in person or by phone.

On January 20, 2011, and again on April 27, 2011, the CAVC Bar Association hosted two programs featuring VA's Regulation Rewrite Project in the Court of Appeals for Veterans Claims courtroom on the 11th floor of 625 Indiana Avenue, NW, Washington, DC.

Following the well-attended January program, and at the request of numerous attendees, the second program was added to address specifics of several of the more notable revisions to the Part 3 regulations of Title 38 C.F.R. The programs consisted of a panel presentation moderated by William F. Russo, VA's Deputy Director of the Office of Regulation Policy and Management, as well as two of his associates, Bill Pine and Andy McKevitt. Whereas the initial program provided members with the why and how, as well as some of the expectations of the revised regulations, the second program discussed certain specifics, such as how the new Part 5 regulations would: (1) clearly state the standards of proof for proving a claim and for rebutting a presumption; (2) explain the relationship between the presumption of soundness and the presumption of aggravation; (3) make it easy to find and understand the rules on effective dates for awards of VA benefits; and (4) limit veterans to one hearing at the VA Regional Office, unless good cause were shown.

In both programs, the program participants were given ample opportunity to ask questions. Attendees also received a distribution table and a derivation table providing a cross reference (both forward and backward) of the current Part 3 regulations and their newly revised counterparts in Part 5.

For those who were unable to attend the programs, following is a brief write-up discussing some of the rewrite process, written by Bill Russo. Additional information is available in the PowerPoint slides used by the presenters in January, which can be found at under the "Recent Events" tab at <www.cavcbar.net>.

Why We (Re)Write: Making VA Regulations Clear

by William F. Russo

> "The extent to which the administrative law of the national government is to be found in executive regulations is not ordinarily appreciated."
>
> FRANK J. GOODNOW,
> THE PRINCIPLES OF ADMINISTRATIVE LAW
> IN THE UNITED STATES 87 (1905)

As practitioners in veterans law, we know that Professor Goodnow's statement still holds true. The statutes in 38 U.S.C. often provide only general guidance on the benefits and services that the U.S. Department of Veterans Affairs (VA) provides to our veterans. It is VA regulations that provide the statutory interpretation and "gap filling" that allow the VA system to function on a daily basis. Regulations do this by informing veterans, their representatives, and VA's own employees of the substantive and procedural aspects of veterans benefits.

Because they are so central to the practice of veterans law, it is important that VA regulations be accessible and clear. Practitioners are aware of the difficulty in locating particular regulations within Part 3 due to its sometimes confusing organizational structure. Likewise, they are aware that some individual VA regulations are unclear. The courts have noted these problems in their published opinions. Fortunately, VA is working to improve its regulations to better serve our nation's veterans.

Executive Order 13563, "Improving Regulation and Regulatory Review": VA Already on the Case

President Obama's January 18, 2011, Executive Order 13563, "Improving Regulation and Regulatory Review," emphasizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch of the federal government. Federal agencies with responsibilities for regulating the activities of state, local, or tribal governments, or public and private entities, often find that before a rule is tested, it is difficult to be certain of its consequences, including its costs and benefits. VA is different from those agencies in that VA

Rewrite Project, continued on page 5.

Rewrite Project, continued from page 4.

generally does not regulate the activities of other entities. VA's mission is to administer benefit programs, provide health care, and perform mortuary services for America's veterans. Consequently, in complying with this executive order, VA's focus is on sustaining an ongoing method for identifying, updating, or simplifying significant rules that are obsolete, outdated, confusing, or that place unnecessary burdens on veterans or their beneficiaries. VA has engaged in several major regulation rewrite projects in the past to accomplish those goals and it continues to do so.

Since 2004, VA has completed major regulation rewrite projects for its acquisition programs, Vocational Rehabilitation and Employment benefits, and Freedom of Information Act procedures. In addition, VA currently is conducting the most comprehensive regulation rewrite effort in the federal government. For the past nine years VA has been reorganizing and rewriting all of its compensation and pension regulations and making improvements on a major scale. This massive project was designed to address and correct what the courts found to be VA's "confusing tapestry" of compensation and pension regulations. *Hattlestad v. Derwinski*, 1 Vet. App. 164, 167 (1991). Through this project, VA will replace its current regulations (38 CFR Part 3) with a new Part 5.

The Rewrite Project consists of a thorough retrospective analysis of VA rules that are:

1. outmoded because they relate to laws that have been repealed or to veteran populations that no longer exist;
2. ineffective due to poor organizational structure or ambiguities; or
3. insufficient because they fail to incorporate court holdings and binding VA General Counsel interpretations.

To remedy these defects, VA has proposed to modify, streamline, expand, or repeal hundreds of its regulations. This lengthy process has been exceptionally transparent. Before redrafting any regulations, VA asked the Veterans Service Organizations which current regulations were the most problematic and how they should be revised.

Bill Pine, Andy McKevitt, and William F. Russo (L-R) from VA's Office of Regulation Policy

VA then provided them with informal drafts and received over 200 suggested revisions. VA ultimately issued twenty Notices of Proposed Rulemaking (NPRMs) and received sixty-six public comments. VA met personally with the Veterans Service Organizations that commented, to ensure that VA properly understood their comments.

This fall, VA will combine all twenty rulemaking packages, and respond to the comments received so far, in one massive NPRM, and publish it for public comment.

Expected Improvements Resulting from VA's Compensation and Pension Rewrite Project

When you were taught the basic principles of service connection, did your teacher use 38 CFR 3.303, Principles Relating to Service Connection, as an instructional tool? Probably not, because the structure and wording of that regulation is complex and challenging for someone new to veterans law. For example, paragraph (a) of § 3.303 states:

> (a) *General.* Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions . . .

Rewrite Project, continued on page 19.

Significant Transitions at the U.S. Court of Appeals for the Federal Circuit

by Victoria Moshiashwili, Esq.

Substantial changes have been occurring in the composition of the U.S. Court of Appeals for the Federal Circuit, and more changes may be on the way.

On May 30, 2010, Chief Judge Paul Michel retired from the Court. Chief Judge Michel, a Reagan nominee, had served as a circuit judge since 1988 and as chief judge since 2004. Before his nomination, he worked as, inter alia, an Assistant District Attorney, an Assistant Special Prosecutor, the Associate Deputy U.S. Attorney General, and as Counsel and Administrative Assistant to U.S. Senator Arlen Specter. In 2003, Chief Judge Michel co-authored a book entitled Patent Litigation and Strategy. In his November 2009 remarks at the Federal Circuit Bar Association Dinner, he stated that he had chosen to retire rather than assume senior status in order to devote his time to advocating "on behalf of the court system generally . . . speak[ing] on public matters, even controversial matters, even political matters that affect the administration of justice in this country[, which] we who serve in the active judiciary are not permitted to do . . . because of restrictions in the code of conduct."

One month after Chief Judge Michel's retirement, on June 30, 2010, Judge Haldane Robert Mayer assumed senior status. He had been appointed to what is now the United States Court of Federal Claims in 1982, and to the United States Court of Appeals for the Federal Circuit in 1987. He served as Chief Judge from 1997 to 2004. Prior to his judicial appointments, he served in the U.S. Army from 1963 to 1975, in the Infantry and the Judge Advocate General's Corps, and then in the Army Reserves, retiring in 1985 as a lieutenant colonel. He practiced law in Charlottesville, Virginia, and Washington, D.C., and specialized in customs and trade law issues. He also served as Special Assistant to Chief Justice Warren E. Burger, and as Deputy and Acting Special Counsel (by designation of the President).

Chief Judge Michel commented on the composition of the Court during both his November 2009 remarks at the Federal Circuit Bar Association Dinner and during his May 2010 State of the Court address. In terms of subject-matter expertise, he noted that, "[d]espite the tremendous quality of the judges on the Court now, there are some identifiable gaps . . . we [currently] have no judge who has presided over jury trials on an extensive basis, no former district judge on our Court." He suggested that "maybe the Court would benefit from a patent litigator who spent his life . . . trying commercial cases in front of juries, particularly patent cases." Chief Judge Michel also noted that the Court did not include any judges with "any appreciable expertise in contract law, international trade law, or veterans benefits laws—huge chunks of our jurisdiction." In terms of personal backgrounds, he observed that the Court "lacks anyone from West of the Allegheny Mountains, [or] any Asian-American or African-American [judges]" and that although three of the Court's judges are women, that still represents less than a quarter of the Court's total membership of sixteen.

In March 2010, Judge Kathleen M. O'Malley was nominated to the Court by President Obama and she was sworn in on December 27, 2010. She previously served as adistrict court judge for the Northern District of Ohio since 1994, and thus brought extensive trial court experience to the Federal Circuit. Before her district court appointment, she worked in the Ohio Attorney General's office and was a litigator at several law firms, including Jones Day. Judge O'Malley has been a frequent lecturer on topics involving patent litigation, the use of technology in the courtroom, multi-district litigation, and mass torts. She is a regular faculty member at the Intellectual Property Seminar for Federal Judges and the Berkeley Center for Law and Technology. On June 1, 2011, the Federal Circuit issued the first veterans law opinion authored by Judge O'Malley, *Roberts v. Shinseki*, __ F.3d __ 2010-7104 (Fed. Cir. June 1, 2011). In this decision, Judges O'Malley, Gajarsa, and Prost affirmed *Roberts v. Shinseki*, 23 Vet.App. 416 (2010), in which the en banc CAVC upheld the severance of a veteran's service-connected disability compensation benefits for post-traumatic stress disorder based on a finding of fraud. The decision makes a point of noting that the issues on appeal are narrow. Although Judge O'Malley notes at several points that the CAVC's analysis was correct, most of her discussion is devoted to a substantive analysis of the veteran's arguments on appeal.

Federal Circuit, continued on page 7.

Federal Circuit, continued from page 6.

The newest members of the Federal Circuit
Kathleen M. O'Malley & Jimmie V. Reyna

On September 29, 2011, Judge Jimmie V. Reyna was nominated to the court by President Obama and was sworn in on April 7, 2011, becoming the first Hispanic judge to serve on the court. Prior to his appointment, Judge Reyna was a shareholder at Williams Mullen, where he specialized in international trade and customs issues and, from 1998 to 2001, directed the firm's Trade and Customs Practice Group and its Latin America Task Force. Judge Reyna also served on the U.S. roster of dispute settlement panelists for trade disputes under Chapter 19 of the North American Free Trade Agreement, and the U.S. Indicative List of Non-Governmental Panelists for the World Trade Organization Dispute Settlement Mechanism.

On April 14, 2010, Edward C. DuMont was nominated to fill the remaining vacant seat on the court. A former clerk for Judge Richard Posner of the Seventh Circuit Court of Appeals, DuMont is currently a partner at the law firm of WilmerHale and has a background in legal issues related to computer crime, e-commerce, and privacy. On May 31, 2011, over a year after DuMont's initial nomination, USNewswire referred to Senate Republicans' "obstruction [of] long-pending nominees who would contribute significant diversity to our nation's federal courts if confirmed, including . . . Edward Dumont, who would be the first [openly] gay male federal appeals court judge." Despite receiving an American Bar Association rating of "unanimously well qualified," DuMont's nomination remains pending before the U.S. Senate Committee on the Judiciary. The Committee has yet to even schedule a hearing, despite the fact that Dumont was initially nominated over 15 months ago, and was re-nominated at the start of the 2011 congressional session. On May 25, when Goodwin Liu withdrew his nomination for the U.S. Court of Appeals for the Ninth Circuit, Dumont became the candidate whose nomination had been pending the longest, and the only re-nominated appeals court candidate whose hearing still has not been scheduled.

On July 6, 2011, Judge Daniel M. Friedman passed away. Judge Friedman was a Carter nominee to the U.S. Court of Claims, where he served as Chief Justice from May 1978 to October 1982, when he continued in office as a judge of the U.S. Court of Appeals for the Federal Circuit. He assumed senior status in 1989. A graduate of Columbia College and Columbia Law School, Judge Friedman served in the U.S. Army from 1942 to 1946, and worked for the Securities and Exchange Commission in 1942 and from 1946 to 1951. He served in the Appellate Section of the Department of Justice's Antitrust Division from 1951 to 1959, and in the Solicitor General's Office from 1959 to 1978, when he was nominated to the Court.

On July 27, 2011, Judge Glenn L. Archer, Jr., passed away. Judge Archer, a Reagan nominee, served on the Court from 1985, and as Chief Judge from March 1994 to December 1997, after which he assumed senior status until his passing. A graduate of Yale University and George Washington University Law School, Judge Archer served in the Judge Advocate General's Office of the U.S. Air Force from 1954 to 1956. From 1956 to 1981, he worked at the Washington, D.C. law firm of Hamel, Park, McCabe and Saunders. Judge Archer also was a former Assistant Attorney General in the U.S. Department of Justice's Tax Division from 1982 to 1984.

These changes to the court have been substantial. Since 2009, three of the court's judges have retired or assumed senior status, two new judges have been appointed, and two judges in senior status have recently passed away. Of the judges in the remaining nine seats, five are currently eligible to retire or take senior status, although none of them have announced their intention to do so. ■

Victoria Moshiashwili is a law clerk for the Hon. Alan G. Lance, Sr. of the CAVC.

Ninth Circuit Finds that Delays by VA in Providing Mental Health Care Services and the Processing of Disability Claims Violates Constitutional Due Process

by Virginia A. Girard-Brady

Reporting on *Veterans for Common Sense, et al., v. Shinseki*, ___ F.3d ___, 2011 WL 1770944 Case No. 08-18728, (9th Cir. May 10, 2011).

Two non-profit organizations, Veterans for Common Sense and Veterans United for Truth, brought suit against VA in the Federal District Court of Northern California. They sought injunctive relief from critical delays experienced by recent veterans suffering from post-traumatic stress disorder (PTSD) in obtaining timely mental health care services at VA facilities, particularly outpatient facilities, and in the adjudication of their claims for VA disability benefits.

The Ninth Circuit Court of Appeals reversed the district court's decision denying petitioners' request for relief, in a lengthy decision that included disturbing statistics pertaining to the high suicide rate among veterans returning from the recent conflict in Iraq and Afghanistan who do not receive the VA mental health care or VA disability compensation necessary to save their lives before it is too late. At least one in three returning soldiers from Iraq seek mental health care from VA, with PTSD being the most prevalent diagnosis. Of those veterans receiving treatment from VA, four or five of them commit suicide every day. For those veterans who apply for VA disability compensation, most must wait as long as 182 days for an initial decision. If they were denied and appeal this decision, they would often wait more than three years for a decision from the Board of Veterans' Appeals.

The court noted that, while it was reluctant to involve itself in a situation which more appropriately remedied by the executive and legislative branches, the failure of either branch to resolve the problem, and the parties' inability to reach a mutually agreeable solution or to engage in meaningful mediation, made judicial intervention unavoidable. As a means of foreshadowing, the Court stated that, "[a]bsent constitutionally sufficient procedural protections, the promise we make to our veterans becomes worthless." *Veterans for Common Sense*, 2011 WL 1770944 at *2.

With respect to the delays in obtaining health care, the petitioners specifically complained about the excessive waiting periods for veterans to receive critical mental health treatment, and the lack of a meaningful process for appealing the placement of veterans needing more immediate treatment onto a waiting list. In support of their request for redress, petitioners presented grave statistics pertaining to the high rates of suicide in veterans forced to wait for extended periods of time for necessary, and possibly life saving, treatment. In particular, petitioners sought to require VA to implement the 2004 Mental Health Strategic Plan (MHSP), an initiative intended to guarantee timely mental health treatment for returning veterans. The MHSP provided that veterans seeking mental health treatment at a VA facility for the first time should be evaluated within twenty-four hours, and scheduled for a follow-up appointment within fourteen days.

With respect to the delays in the adjudication of claims for VA disability compensation, petitioners sought recourse from extensive and unjustified delays in the processing of claims, and to enjoin VA from, among other things, destroying, altering, or doctoring records in a veteran's claims file, and prematurely denying claims. Petitioners presented evidence which reflected that it took, on average, 4.4 years for an initial claim to progress to a decision by the Board of Veterans' Appeals, and even longer in those cases in which the Board remanded the claim back to the VA Regional Office for further development and compliance with VA's duty to assist.

The district court had initially denied petitioners' request for relief based upon a finding that such action could not be brought under the Administrative Procedures Act (APA), and further, that VA's failure to provide timely health care or to timely adjudicate veterans' claims did not constitute a violation of constitutional due process. On appeal, the Ninth Circuit agreed that petitioners could not challenge VA's failure to act under the APA, in light of the fact that VA's was not obligated to "'take a *discrete* agency action that it was *required to take*.'" *Veterans for Common Sense* ,2011 WL 1770944 at *17 (emphasis in original). Rather, VA's failure to act in a timely manner in response to veterans' attempts to obtain much-needed mental health care and VA disability compensation, constituted insufficient action, rather than a lack of action altogether.

Veterans for Common Sense*, continued on page 9.*

Veterans for Common Sense*, continued from page 8.*

However, the Ninth Circuit concluded that 38 U.S.C. § 1710, which generally requires VA to provide free medical care to all veterans who served in any conflict after November 1, 1998, for up to five years from the date of separation, created a property interest protected by the Due Process Clause. The court thus found that the insufficient procedural safeguards available to veterans who are placed on health care waiting lists and subjected to unreasonable—and in some instances fatal—delays, served to deprive veterans of this right. The Ninth Circuit reversed the district court's finding in this respect, and remanded the matter for hearings to determine the additional procedures necessary to remedy the due process violations and ensure that: (1) veterans placed on waiting lists for mental health care have the opportunity to timely and effectively appeal for more expedient treatment; (2) veterans who need mental health care receive the necessary treatment in a timely manner; and (3) veterans who are in urgent need of care or at imminent risk of suicide will receive immediate mental health care.

Likewise, the court found that veterans' entitlement to a service-connected death and disability compensation is a property interest protected by the Due Process Clause, such that unreasonable delays in the adjudication of such claims also results in a deprivation of such right. The court rejected VA's assertion that the court lacked jurisdiction to consider petitioners' constitutional challenge under the Veterans Judicial Review Act (VJRA), based upon a finding that petitioners were not challenging VA's rules and regulations (the exclusive province of the Federal Circuit), nor were petitioners challenging a specific decision by the Secretary (the exclusive province of VA and the CAVC). The court found thus that, upon remand, the district court needed to "explore what procedural protections are most appropriate to permit the appeals of veterans to be expedited in the most efficient manner, and with a particular emphasis on the procedural protections necessary for veterans suffering the most financial hardship during the adjudication of their claims." *Veterans for Common Sense*, 2011 WL 1770944 at *34.

In this respect, the court, after earlier noting the lack of deadlines imposed upon VA in the claims adjudication process, suggested that the district court consider maximum time periods for making determinations at various stages of the process. The court further suggested that the district court utilize a magistrate judge or special master in its efforts to mediate and ultimately approve a remedial plan.

The court also addressed petitioners' assertions that the inability to hire paid counsel to assist them in the initial development and submission of their claims constituted a violation of the Due Process Clause. The court disagreed, and found that Congress had imposed upon VA the duty to assist veterans in the substantiation of their claims as a means of mitigating the prohibition on hiring paid attorneys during the initial stages of a claim, and preserving the non-adversarial nature of the veterans' benefits system. ■

Virginia A. Girard-Brady is with ABS Legal Advocates, P.A., in Lawrence, KS.

Volunteers Needed for the 2011 National Veterans Law Moot Court Competition

The NVLMCC (formerly the Veterans Law Appellate Advocacy Competition) will be held this year on the weekend of October 15-16, 2011. The event is co-sponsored by the CAVC, the Bar Association, and the George Washington University Law School. We need volunteers for a variety of tasks, including:

- Coordinating volunteers
- Judging briefs (6 people)
- Judging oral arguments on Oct. 15 (24 people)
- Planning, hospitality, & other logistics
- Registration, scoring, & hospitality on Oct. 15

If you are interested in helping, please contact James Ridgway at <Jridgway@uscourts.cavc.gov>.

P.S. We still have space for 3 or 4 more teams. If you have contacts with a law school that might be interested, more information is available at <www.nvlmcc.org>. The problem will be released on August 26, 2011. Briefs are due September 27, 2011.

Court Holds that Appointment of a Fiduciary is Within its Jurisdiction and the Proper Subject of a Writ

by Louis George

Reporting on *Freeman v. Shinseki*, 24 Vet.App. 404 (2011).

In *Freeman v. Shinseki*, the CAVC granted a petition for extraordinary relief in the nature of a writ of mandamus, holding that the VA's determination regarding the appointment of a fiduciary is within its jurisdiction and, thus, the proper subject of a writ.

The facts of *Freeman* involved the petitioner Veteran's request that the VA Regional Office (RO) accept his Notice of Disagreement regarding the appointment of a federal fiduciary by the RO's Veterans Service Center Manager (VSCM), rather than appointing his sister as fiduciary to manage his VA benefits. After the RO advised him that it was not possible for him to appeal the appointment of said fiduciary, he filed with the CAVC a petition for extraordinary relief in the nature of a writ of mandamus. 24 Vet.App. at 404-406. The proceedings included briefing and oral argument, as well as participation by amicus curiae, the National Organization of Veterans' Advocates,

Both the petitioner and the amicus argued that the appointment of a federal fiduciary is a matter that affects the provision of benefits under 38 U.S.C. § 511(a), and is therefore subject to review by the Board and, consequently, subject to appeal to the Court. 24 Vet.App. at 406-408. The Secretary argued that the appointment of a fiduciary was not subject to review by the CAVC (or any court). The Secretary also argued that this case was controlled by *Willis v. Brown*, 6 Vet.App. 433 (1994), which had been applied so as to hold that the Court is without jurisdiction to review the Secretary's appointment of a fiduciary for an incompetent veteran-beneficiary. The Secretary argued that *Willis* was not affected by the Federal Circuit's decision in *Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005). Finally, the Secretary argued that even if judicial review were not precluded, there could no review if the statute in question had no meaningful standard against which to judge the agency's exercise of discretion. 24 Vet.App. at 408.

After addressing the standard for issuance of a writ, the Court discussed the statutory and regulatory framework for appointment of a fiduciary, including 38 U.S.C. § 5502, which concerns the general authority for the appointment of fiduciaries. The Court addressed the other statutory provision (38 U.S.C. § 5507) and regulations (38 C.F.R. §§ 13.55 and 13.58), which provide guidance for appointment of fiduciaries, as well as VA Adjudication Procedure Manual provisions governing fiduciary appointment. 24 Vet.App. 408-411.

Turning to the Secretary's arguments, the Court concluded that *Willis*, cited for the proposition that appointment of a fiduciary was not reviewable by the Court, did not deal with the Secretary's appointment of a fiduciary, but rather dealt with a claim by a state-appointed conservator for expenses previously incurred for the care of a deceased veteran. Significantly, the Court concluded that *Willis* did not reach the issue of whether the selection of a fiduciary was subject to Board review if it were properly appealed. 24 Vet.App. at 411-413.

Furthermore, the Court concluded that the Federal Circuit decision in *Bates* provided precedential guidance, in that the Federal Circuit provided a broad definition of the term "law," which in that case involved the termination of an attorney's VA accreditation. The Court noted that "[t]he Federal Circuit determined that the word 'law' in section 511(a) refers to any 'single statutory enactment that bears a Public Law number in the Statutes at Large." 24 Vet.App. at 413 (citing *Bates*, 398 F.3d at 1361). Accordingly, the Court concluded that, "under the holding of *Bates*, the Secretary is compelled to recognize an NOD concerning a VSCM selection of a VA fiduciary." 24 Vet.App. at 413. The Court concluded that "the statutory framework confirms this Court's ultimate jurisdiction over a decision made by the Secretary pursuant to section 5502." 24 Vet.App. at 414.

Furthermore, the Court rejected the Secretary's argument that the appointment of fiduciaries was committed to the sole discretion of the Secretary, and thus that there were no judicially reviewable standards. The Court held that, there was no exception here to the presumption of judicial review over agency decisions. Namely, the Court concluded that there was no language in the applicable statutes that precluded judicial review, and no congressional

Freeman, *continued on page 11.*

Freeman, *continued from page 10.*

intent to exclude decisions under section 5502 from being reviewed by the Court. As for judicially reviewable standards, the Court distinguished this case from the facts of *Heckler v. Chaney*, 470 U.S. 821 (1985), as the latter case involved an effort to compel an agency to act, whereas here the facts involved the review of an agency action, once undertaken. 24 Vet.App. at 414-417.

In view of the above, the Court concluded that "the petitioner is clearly and indisputably entitled to appeal to the Board the decision of the VSCM to appoint a paid federal fiduciary." 24 Vet.App. at 417. In addition, the Court concluded that, because "without the Court's intervention in the form of extraordinary relief, the petitioner will not be allowed to pursue his claim to the Board, the Court is left with the clear understanding that the issuance of a writ of mandamus is necessary to protect its potential jurisdiction over this matter." *Id.* The Court added that, because the statutory and regulatory framework for the appointment of fiduciaries "provide[s] legally meaningful standards by which to evaluate the appointment of a fiduciary, the petitioner would then be entitled to further appeal any final adverse Board decision on this matter to the Court." *Id.*

In a concurring opinion, Judge Lance stated that, while he fully agreed with the Court's decision, "the majority of VA regulations concerning fiduciary appointments are from 1975 and the Secretary may wish to update these regulations to provide better guidance to regional offices and to the Board on review of their decisions." Judge Lance referred to the Uniform Probate Act and the more sophisticated structure for fiduciary appointment within the Social Security system, and said that "[r]egardless of what the Secretary decides to do, it would benefit the system for VA to explicitly address the relationships that are recognized elsewhere, thereby saving the veteran up to 4% of his or her benefits that is customarily charged by the VA-appointed fiduciary." 24 Vet.App. at 418-419 (Lance, J., concurring). ■

Louis George is a senior staff attorney with the National Veterans Legal Services Program, in Washington, DC.

Upcoming Bar Association Event

Perspectives from the CAVC's Front Office

featuring

Gregory O. Block,
Clerk of the CAVC

Cynthia Brandon-Arnold,
Senior Staff Attorney

Anne P. Stygles,
Chief Deputy Clerk of Operations

Thursday, August 25, 2011, at **2 P.M.** in the Court of Appeals for Veterans Claims courtroom on the 11th floor of 625 Indiana Avenue, NW, Washington, DC.

To participate by telephone, please RSVP to <BergmannLaw@msn.com> by Monday, August 22.

Have You Renewed Your Membership for 2011-12?

It's almost that time again. The new membership year starts on October 1, 2011. Don't wait until the last minute to renew your membership! The membership form is printed on the last page of this issue. Send yours in today and you won't miss an issue of the *Veterans Law Journal* or a notice about any of the Bar Association's many informational and social events. For more information visit:
<www.cavcbar.net/html/membership>.

Members enjoy the Bar Associations's June 8 Happy Hour at Gordon Bierch.

CAVC Discusses Motions to Revise Board Decision Based on CUE

by Bradley Hennings

Reporting on *Hillyard v. Shinseki*, __ Vet.App. __, No. No. 08-1733 (Mar. 29, 2011).

In *Hillyard v. Shinseki*, decided on March 29, 2011, the court held that a motion to revise a Board decision adjudicating a particular *claim* bars all future *motion*s to revise regarding that same claim, even if the theory advanced to support revision in the second motion were different from the theory advanced in the first motion.

Hillyard involved the appeal of veteran Joseph C. Hillyard. In a February 2008 decision, the Board dismissed, with prejudice, the veteran's January 2006 motion for revision of a February 1987 Board decision that denied entitlement to service connection for a psychiatric disorder based on clear and unmistakable error (CUE). The Board determined that it did not have jurisdiction to consider the motion because in a July 2001 decision the Board had denied Mr. Hillyard's motion to revise the February 1987 decision based on CUE. The Board reasoned that, once there is a final decision on a motion to revise based on CUE in a prior Board decision on a particular issue, the issue can no longer be challenged on the grounds of clear and unmistakable error, even where the arguments submitted in connection with the subsequent motion are different than those considered at the time of the prior denial.

On appeal of the February 2008 dismissal, Mr. Hillyard argued that a motion to revise a Board decision based on CUE is defined by the specific averment of CUE made, and because such a motion must be pled with specificity, a claimant remains free to make a new motion for revision based on any theory not previously presented. He further argued that there are no limitations other than the requirement that such allegations be specifically pled and that an appellant is entitled to submit an unlimited number of motions to revise based on CUE, if each motion were based on a different theory or allegation of CUE.

The Secretary argued that Mr. Hillyard was precluded by 38 C.F.R. § 20.1409(c) from filing another motion for revision of the February 1987 Board decision on the grounds of CUE. The Secretary explained that § 20.1409(c) prevents more than one challenge to a Board decision addressing a specific appealable matter, and the regulation and the statute defined the terms "issue" and "matter," respectively, pointing to 38 U.S.C. § 7111 and 38 C.F.R. § 20.1401(a). The Secretary also argued that this interpretation of VA's CUE regulations was upheld by the U.S. Court of Appeals for the Federal Circuit in *Disabled American Veterans (DAV) v. Gober*, 234 F.3d 682, 702 (Fed. Cir. 2000). The Secretary distinguished Mr. Hillyard's case from the situation in *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005), in that Mr. Hillyard's appeal pertains to CUE in a Board decision, whereas the *Andrews* appeal pertained to CUE in a regional office decision.

The Court, in affirming the Board decision, noted that, with respect to CUE in VA decisions, there was a clear difference in the treatment of regional office and Board decisions. The Court contrasted the procedure available under 38 C.F.R. § 3.105(a) to challenge final Regional Office decisions on the basis of CUE, with the more limited procedure available under 38 C.F.R. § 20.1409(c) to challenge final BVA decisions for CUE. Although a claimant may repeatedly raise CUE challenges to a claim finally decided in a regional office decision, pursuant to the Federal Circuit's decision in *DAV*, 234 F.3d 682 at 702, 38 C.F.R. § 20.1409(c) validly limits a claimant to one opportunity to raise an allegation of CUE for each claim decided in a Board decision.

Consequently, the Court held that Mr. Hillyard could not seek revision of the claim decided in the February 1987 Board decision based on CUE as a matter of law under any theory. The Court noted it had previously determined in an October 2003 affirmance of the July 2001 Board decision that CUE did not exist on the only claim in the February 1987 decision. Therefore, the Court affirmed the February 2008 Board decision. The Court found in closing that it is important to clarify the use of several terms used in the decision, in the hope that the definitions would bring some uniformity to the use of the terms in future adjudications and Court decisions. Specifically, the Court defined the terms "issue," "claim," "theory," "matter," and "element."

A "claim" is a formal or informal communication in writing requesting a determination of entitlement or

Hillyard, continued on page 13.

SAVE THE DATE:
Tuesday, September 27, 2011

The CAVC Bar Association's Annual Meeting

&

the Presentation of the Portrait of The Hon. William P. Greene, Jr.

Both events will be held at the Howard T. Markey National Courts Building on historic Lafayette Square in Washington, DC.

The annual meeting begins at **2:30 P.M.** Judge Greene's portrait presentation begins at **3:30 P.M.** and will be followed by a reception. Look for details soon on how to RSVP for the portrait presentation and the reception

* * *

The Bar Association's annual meeting will feature remarks from Chief Judge Bruce E. Kasold and incoming-president Gayle Strommen, a brief business session, and results of the election for officers and the Board of Governors for 2011-12. The proposed slate of nominees for the election is:

President-Elect — James D. Ridgway (CAVC)
Treasurer — Bradley Hennings (BVA)
Secretary — Sandra Wischow (practitioner)

Board of Governors

At-large member, three-year term
Virginia L. Carron (practitioner)

At-large member, two-year term
Virginia A. Girard-Brady (practitioner)

At-large member, one-year term
Louis George (NVLSP)
Alice Kerns (CAVC)

Look for additional details soon on nominations and voting.

Hillyard, continued from page 12.

evidencing a belief in entitlement to a benefit. An "informal claim" is any communication or action indicating an intent to apply for one or more benefits; the communication must identify the benefit sought. An "issue", unless otherwise specified, is a matter upon which the Board made a final decision. A "theory" is a means of establishing entitlement to a benefit for a disability, and if the theories all pertain to the same benefit for the same disability, they would constitute the same claim. The "matter" is the entire subject matter before the Court, the Board, or the regional office. The scope of the matter may be different at each stage of the adjudication and before the Court. An "element" of a claim is constituent part of a claim that must be proved for the claim to succeed.

The Court also noted, for clarification purposes, that an assertion of CUE was a motion or a request, rather than a claim, citing *Rice v. Shinseki*, 22 Vet. App. 447, 451 (2009) ("Motions alleging clear and unmistakable error . . . in a prior decision have also often been referred to as 'claims.'"). ■

Bradley Hennings is an Associate Counsel at the Board of Veterans' Appeals.

A Peek Inside . . .
CAVC's Public Office

by Anne P. Stygles

The Public Office is one of six offices within the Office of the Clerk of the CAVC. The other five offices are the Administrative Section, the Budget and Finance Office; the Central Legal Staff, the Counsel to the Court, and the Office of Information Technology. The Public Office is responsible for the filing of papers from self-represented appellants/petitioners and for the quality assurance of the filings by represented appellants/petitioners. Currently, the Public Office has 18 employees: myself, the Chief Deputy Clerk of Operations; the Deputy Operations Manager; the Case Management-Electronic Case Filing (CM-ECF) Administrative Manager, two Lead Processing Clerks; ten Appeals Processing Clerks; and three Records Management Clerks. In addition to the Public Office staff, the two Legal Editors report to me.

A Court of Appeals for Veterans Claims case starts in the Public Office by an appellant or petitioner:
(1) filing a Notice of Appeal to the esubmission@uscourts.cavc.gov email address,
(2) faxing the notice to the court, or (3) mailing the notice to the court. Most attorneys or non-attorney representatives submit the appeal to the esubmission email address: (The court's system sends an automatic reply that the court has received the submission.)

Rufus Stevenson, Romulo Antiporda, and David Jackson are the court's Records Management Clerks. They receive and distribute the mail and faxes to staff. They are also in charge of retrieving all permanent files that are stored at the National Records Center. Currently, as part of the court's effort to reduce its paper files, they are scanning all the attorney applications received since the day the court opened. However, one of the most important aspects of their job is to scan in all Notices of Appeal and filing fees or declarations of financial hardship received by mail or fax. Once these notices and filing fees or declarations have been scanned, the Deputy Operations Manager, Paquette (Tyrone) DeShazier, is notified.

After the Deputy Operations Manager reviews the Notices of Appeal from the self-represented appellant/petitioner, the case is forwarded to the Opening Appeals Processing Clerk, Arnita Gaskins-Rich. Arnita opens the cases submitted both through the esubmission email address as well as those mailed or faxed to the court. She issues a Notice of Docketing to the parties when the case is opened, which notifies the parties as to the next due date. Once the filing fee or declaration of financial hardship is filed, the Appeals Processing Clerks take over the case.

Prior to the implementation of CM-ECF, each case was assigned to one of ten Appeals Processing Clerks by the last digit of the case. However, with the implementation of CM-ECF, Appeals Processing Clerks can be responsible for more than one digit at a time. Currently, we have six Appeals Processing Clerks—Abie Ngala, Anita Fulwood, Robyn Willis, Sharon Marshall, Suzanne Byrnes, and Juanita Coghill—who handle the processing of pleadings, orders, and notices up until the time that any dispute of the record of proceeding has passed. A major part of the Appeals Processing Clerks' job is to provide quality assurance of pleadings filed by attorneys and non-attorney representatives, as well as to scan and docket pleadings from self-represented appellants and petitioners.

Joan Sayers, Willette Cash, and Anthony Wilson are the Closing Appeals Processing Clerks. These three clerks handle the issuance of all dispositive orders, judgments, and mandates, and the filing of any motions for reconsideration, notices of appeal to the U.S. Court of Appeals for the Federal Circuit, and EAJA applications.

Karen Meyers and Barbara Colvin are our Lead Processing Clerks. They review the work of the Appeals Processing Clerks, and assign cases to the judges once the screening process has been completed. Karen and Barbara also review all cases before they go to the Clerk, and they are the voices behind the Court's information telephone number ((202) 501-5970 x 1010), where they assist callers with information ranging from the status of cases to "what do I do next".

The CM-ECF Administrative Manager reviews and responds to all incoming emails to the efiling@uscourts.cavc.gov email address. This email address is mostly used by new attorneys to submit their registration as an CM-ECF user or to file pleadings when attorneys or non-attorney

Peek Inside, continued on page 15.

Peek Inside, continued from page14.

representatives are having computer problems. Once the registration is approved, the CM-ECF Administrative Manager sends the user a password and login name, allowing access to the CM-ECF system. It is also the CM-ECF Administrative Manager who is the voice behind the Efiling HelpLine ((202) 501-5970 x3453).

Laura Medinas and Pat Scully are the Court's two Legal Editors. Both are lawyers who also have experience as writers and editors, and they review the court's dispositive single-judge and panel decisions that are published electronically, as well as all single-judge and panel decisions that are published in *West's Veterans Appeals Reporter*. Because the Court's judges issue many single-judge decisions, the editors review the decisions for uniformity of style and consistency of citation format and conformity with the court's style manual, *The Bluebook, United States Government Printing Office Style Manual,* and *The Chicago Manual of Style*.

As mentioned above, Tyrone DeShazier is the Deputy Operations Manager and supervises the Appeals Processing and the Records Management Clerks. He is the Acting Chief Deputy in my absence. On a day-to-day basis, Tyrone reviews all the self-represented Notices of Appeal before forwarding them to the Opening Appeals Processing Clerk, and he forwards (through CM-ECF) all cases that need to go to the Central Legal Staff (CLS). He also conducts training for new staff.

As Chief Deputy Clerk of Operations, I am the manager of the Public Office and run the day-to-day operations of the department. I issue notices of non-conforming papers and occasionally issue orders. I work on many special projects—from the Rules and IOP revisions, to speaking at conferences, to writing articles. In addition, I answer correspondence received from veterans and their families.

The Public Office and the Legal Editors are a very dedicated and diverse group of people who love to talk sports, raise families, do volunteer work, ride motorcycles, make quilts, and play musical instruments. We are proud of the work that we do, and we feel privileged to work for the court. ■

Anne P. Stygles is the Chief Deputy Clerk of Operations in the CAVC's Public Office.

Nominees, continued from the front page.

has served since 2005. Additionally, Ms. Bartley is the Editor of The Veterans Advocate® where she previously worked as Assistant Editor and contributing writer. Ms. Bartley has represented veterans and their dependents and survivors before the United States Court of Appeals for Veterans Claims (CAVC) and the Board of Veterans' Appeals since 1995. Following law school, Ms. Bartley served as a judicial law clerk for the Honorable Jonathan R. Steinberg , formerly of the CAVC. Ms. Bartley holds a B.A. from Pennsylvania State University and a J.D. from American University Washington College of Law."

"Gloria Wilson Shelton is currently a staff attorney at the Department of Veterans Affairs (VA). Prior to joining the VA, she was a Bureau Chief in the Office of the Attorney General of Maryland from 2007 to 2010. From 2003 to 2007, Ms. Shelton served as Principal Counsel in the Office of the Attorney General of Maryland Courts and Judicial Affairs Division. Ms. Shelton's previous positions include Maryland State Assistant Attorney General, Deputy Legal Counsel for the Baltimore Police Department, Assistant Solicitor for the Baltimore City Housing Authority, and a judicial clerkship for the Court of Appeals of Maryland. Ms. Shelton has also served as an Adjunct Professor at the University of Maryland School of Law. Ms. Shelton holds a B.S. from Morgan State University, an M.S. from Coppin State College, and a J.D. from the University of Baltimore School of Law."

As of press time, the Senate Veterans Affairs Committee has yet to schedule a hearing on the nominations, even though the committee has previously written to the White House urging nominations to fill these vacancies. However, preparations are already underway at the CAVC to have chambers available, so that the nominees can hit the ground running if they were confirmed. ■

CONTRIBUTORS WANTED

The Publications Committee is looking for new members to contribute to upcoming installments of the *Veterans Law Journal*. If you have an idea for a feature article, case summary, book review, or other pieces, contact James Ridgway at <jridgway@uscourts.cavc.gov> or Glenn Bergmann at <BergmannLaw@msn.com>. Participants do not need to be located in the Washington, D.C. area

Expected Documentation for an In-Service Injury and *Colvin*

by Bradley Hennings

Reporting on *Kahana v. Shinseki*, __ Vet.App. __,No. 09-3525 (June 15, 2011).

In *Kahana v. Shinseki*, decided on June 15, 2011, the Court held that the Board erred in making a medical determination concerning the severity of an anterior cruciate ligament (ACL), in violation of *Colvin v. Derwinski,* 1 Vet.App. 171 (1991).

Kahana involved the appeal of veteran Rick K. Kahana. In an August 2009 decision, the Board denied the veteran's claim for entitlement to service connection for a right knee disability, including as secondary to a service-connected left knee disability. Mr. Kahana provided testimony at a hearing before the Board in September 2007, and testified that that he injured his right knee in service. He stated that his original left knee injury was not fixed properly, and that led him to put too much pressure on his right leg, so that when he was in a kickboxing competition in 1978 in Korea he suffered an ACL injury.

The Board remanded the matter for additional development, which included providing Mr. Kahana with a VA medical examination to determine the likely etiology of his current right knee disability. In a December 2008 VA examination report, the examiner concluded that the appellant injured his right knee while in service in 1979, and that the appellant's right knee injury resulted from his habit of putting more weight on his right knee after numerous left knee injuries. VA requested that the claims folder be returned to the examiner, who completed the December 2008 examination for an addendum. Further instructions to the examiner on the request indicated that the examination report stated that the SMRs were *not* reviewed and that Social Security Administration records showed Mr. Kahana sustained injuries in 1994 secondary to work as a stuntman. The request also specifically indicated to the examiner that there was "[n]o right knee injury in service."

Subsequently, in a March 2009 VA examination report, the same examiner who had performed the 2008 examination noted that the Mr. Kahana reported an in-service injury to his right knee, but that there was no documentation in his SMRs of a right knee injury. The examiner concluded that Mr. Kahana's right knee injury was not related to his military service. As a rationale for her decision, the examiner indicated there was no documentation of a right knee injury in Mr. Kahana's SMRs to support his claim.

The Board, in its August 10, 2009, decision on appeal, denied Mr. Kahana entitlement to service connection for a right knee disability, including as secondary to a service-connected left knee disability. The Board noted that Mr. Kahana's SMRs showed that he injured his left knee while in service, but did not show that he injured his right knee. The Board then found that Mr. Kahana's assertion that he tore his right ACL during service was not credible, noting in its analysis that, "[g]iven that a right ACL tear is quite a significant injury, one would expect to see at least some documentation of it in the [SMR's]." The Board also found that Mr. Kahana was not competent to provide an opinion regarding medical nexus.

The CAVC vacated and remanded the Board's decision, holding that the Board violated the Court's holding in *Colvin* and clearly erred when it found Mr. Kahana not to be credible based on its determination that a particular injury, which was alleged to have occurred in service, was of the type that should have been documented in the service records and was not. The court found that the Board made a medical determination as to the relative severity, common symptomatology, and usual treatment of an ACL injury without citing to any independent medical evidence to corroborate its finding, and noted that the record did not contain any medical evidence establishing the relative severity, common symptomatology, and usual treatment of an ACL injury. Additionally, the court concluded that the Board erred in categorically rejecting the competency of Mr. Kahana's lay assertions of medical nexus, citing to the various cases that have clarified the evaluation of lay evidence, including *Barr v. Nicholson*, 21 Vet.App. 303, (2007), *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007), *Charles v. Principi*, 16 Vet.App. 370 (2002), and *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009).

The Court also found that VA's request for an addendum to a December 2008 medical opinion, which specifically noted, "[n]o right knee injury in service," violated "the Board's duty to procure

Kahana, continued on page 17.

Kahana, continued from page 16.

evidence in an 'impartial, unbiased, and neutral manner,'" pursuant to the court's holding in *Austin v. Brown*, 6 Vet.App. 547, 552 (1994), and a related line of cases. *Austin* held that a Board decision that relies upon a Board medical adviser's opinion obtained by a process that does not ensure an impartial opinion violates *Thurber v. Brown*, 5 Vet.App. 119 (1993)-type fair process. The court specifically noted that, at the time of the second examination request, there was no adverse credibility determination concerning the appellant's lay assertions that he injured his right knee in service.

The court instructed the Board to procure an impartial opinion on remand, and noted that the Board was not precluded from asking the physician: (1) whether there were any medical reason to accept or reject the proposition that had the appellant had a right knee injury in service, and that such injury could have lead to his current condition, (2) what types of symptoms would have been caused by the type of ACL injury at issue, and (3) whether a right knee injury as described in the SMRs could have been mistaken for a sprain, but could have been a precursor to the current condition.

Judge Lance, in a lengthy concurring opinion, addressed how the Board should approach competency and credibility issues, as well as the proper relationship between the Board and VA medical experts. Judge Lance noted that the question of whether a particular medical issue were beyond the competence of a layperson—including both claimants and Board members—must be determined on a case-by-case basis. He also observed that any given medical issue is either simple enough to be within the realm of common knowledge for lay claimants and adjudicators, or complex enough to require an expert opinion.

Regarding making credibility determinations, Judge Lance noted that, in non-combat cases, the Board may use silence in the SMRs as contradictory evidence if the alleged injury, disease, or related symptoms ordinarily would have been recorded in the SMRs, citing to *Buczynski v. Shinseki*, 24 Vet.App. 221, 225-26 (2011). However, to rely on this inference, the Board must make two findings. First, the Board has to find, at least in relevant part, that the SMRs appear to be complete. If the SMRs were complete, then the Board must find that the injury, disease, or related symptoms would ordinarily have been recorded had they occurred. Judge Lance further noted that, in making this determination, the Board may be required to consider the limits of its own competence on medical issues.

Judge Lance also went on to note that fact-finding is a responsibility that is ultimately committed to the Board and not the VA medical examiner. He indicated that, in many cases, it may make sense for the Board to make specific findings before remanding a matter and to require a medical opinion to accept those findings as true. In other cases, it may be better for the Board to note that it needs to resolve a component factual question, and then to ask the physician to include in the report an opinion as to whether there were any medical reason to accept or reject the veteran's testimony as to what occurred in the past.

In closing, Judge Lance noted that at the outset of the claim, it is sometimes difficult to identify all potential theories of entitlement that have been raised or all the facts that must be determined to adequately resolve each theory. VA's system for obtaining medical opinions through regional offices means that developing evidence in a complex case can be a piecemeal process. Judge Lance observed that the understanding of both the medical expert and the Board evolves through multiple cycles of requests and opinions, which may or may not be accompanied by additional development of other evidence. ■

Bradley Hennings is an Associate Counsel at the Board of Veterans' Appeals.

Save the Date!

The Federal Circuit will hold its biannual Judicial Conference on Thursday, **May 17, 2012**, at the Grand Hyatt Hotel in Washington, DC. More details and registration information will be made available later this year from the court's website: www.cafc.uscourts.gov/announcements.

The Librarian's Corner: A Trip to the Motherland, or an Inside View of Westlaw

by Allison Fentress

As I have nothing on the front burner for this column, I thought I would share my adventures "in the belly of the beast" of Westlaw.

In mid-May, I was making a trip to Minneapolis for a family gathering. I said to myself, "You know, Westlaw is somewhere in that area." So I looked up Eagan, Minnasota, and found that it was actually not too far from the airport. I contacted them about a visit and they enthusiastically said, "Sure, come on in." So we agreed on a day and they put together an agenda for me.

First of all, the building was easy to spot because it rises out of very flat land in a wooded, and, as yet, undeveloped, area. The interior is very nice, and the first order of business was to grab lunch in their cafeteria, which is huge. They also have what they call Main Street, with some shops even a dry cleaners.

My main goal with this visit was to put faces with names. I have become increasingly involved in the publication of our opinions and handle a lot of the corrections, so I email quite a few people there on a regular basis. I also wanted to know if there were things we could do to make the process smoother.

First up was the Cases Receiving/Data Entry/Support-Monitoring group. This was my main target because these are the people who load our opinions and handle corrections. I recieved a very detailed look at the process, which I will not try to spell out here. The bottom line for me was finding out that they like us: our opinions are so uniform in format and spacing, that they load consistently. We have our legal editors, Laura Medinas and Pat Scully, to thank for this as they keep us on the straight-and-narrow with our Court style manual. It is nice to know the attention to detail pays off.

From there, I went to KeyCite, Headnoting, and Classification. These processes are quite intricate, and part of it reminded me of cataloging library materials. One thing that really impressed me was the fact that most of these people have been doing this for years. The collective expertise is amazing. I will be doing more keynumber and headnote searching from now on!

The last item on my agenda was a tour of the manufacturing/printing facility. This was the most fun for me because I have always been interested in the printing process, and my tour guides' enthusiasm was infectious. They have some amazing machinery, including some multi-million dollar printing presses. The facility is huge and it took us about 1.5 hours to walk through all of it. I was impressed with how clean it all is. At the end of the tour one of my guides said, "And here is the long-term storage." I turned around and it was like that scene in the Indiana Jones movie *Raiders of the Lost Ark* where they are pushing the crate to the back of a gigantic warehouse. It went on seemingly forever.

The visit was definitely worth an afternoon of my time. I think the main thing I took away from this was how much of the human touch is still needed in this process of putting legal opinions in an electronic database. It would be interesting to know the average number of man-hours spent processing each published opinion. I bet they know.

I hope you enjoyed this recap of my visit. I greatly appreciated their hospitality, and enjoyed meeting the people with whom I correspond.

Now, to be fair, I should probably give Lexis a call . . . ■

Allison Fentress is the Librarian for U.S. Court of Appeals for Veterans Claims.

On May 6, 2011, eleven attorneys from the Army Judge Advocate General's School in Charlottesville visited the Court. Seven attorneys in the group, including six members of the 59th Graduate Course and one spouse, were sworn into the Court's Bar by Chief Judge Kasold.

Rewrite Project, continued from page 5.

In contrast, the new VA regulation will list each method of service connection separately:

§ 5.241 Service-connected disability.

A *service-connected disability* is a current disability as to which any of the following is true:

(a) The disability was caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service. *See* §§ 5.260 through 5.269 (concerning presumptions of service connection).

(b) The disability was caused by a preservice injury or disease aggravated, or presumed to have been aggravated, in the line of duty during active military service. *See* § 5.245, Service connection based on aggravation of preservice injury or disease.

(c) The disability is secondary to a service-connected disability, pursuant to §§ 5.246–5.248 (governing awards of secondary service connection).

There are three basic elements that must be proven in any service connection claim (other than secondary claims). The elements are implied in part 3, and have been identified by the courts over the years, but have never been expressed in VA's regulations. Part 5 will list them clearly and concisely:

§ 5.243 Establishing service connection.

(a) Requirements. Except as provided in §§ 5.246, Secondary service connection—disability that is due to or the result of service-connected disability, and 5.247, Secondary service connection—nonservice-connected disability aggravated by service-connected disability, and paragraph (c) of this section, proof of the following elements is required to establish service connection:

(1) A current disability;

(2) Incurrence or aggravation of an injury or disease in active military service; and

(3) A causal link between the injury or disease incurred in, or aggravated by, active military service and the current disability.

VA continues to struggle with an increased caseload of disability claims. In testimony to the House Committee on Veterans Affairs on March 17, 2011, VA's Acting Under Secretary for Benefits Mike Walcoff stated, "VBA's workload continues to dramatically increase due to the unprecedented volume of disability claims being filed. In 2009, for the first time, we received over one million disability claims during the course of a single year. In 2010, we received approximately 1.2 million disability claims, a 17.6% increase over the previous year."

And VA continues to struggle with a lower than desired accuracy rate in claims processing. In a May 18, 2011, report entitled, "Systemic Issues Reported During Inspections at VA Regional Offices," VA's Office Inspector General found a 23% error rate in the 45,000 claims reviewed.

By itself, Part 5 will not solve VA's timeliness and accuracy challenges when the Final Rule is published in 2012. However, we believe that it will make it much easier for users to find, read, understand, and apply the regulations. In turn, veterans and their representatives will be able to better understand eligibility requirements, enabling them to submit more complete claims and supporting evidence. VA adjudicators will not have to search through court cases and General Counsel Opinions, because they have been incorporated into Part 5.

The new veterans law practitioner trying to learn the important concepts of service connection and many other topics will have a clear roadmap. Because they are clearer, Part 5 regulations should be subject to significantly less litigation.

VA claims processing, and the resolution of appeals up through the courts, are rules-based tasks. Better organized and more clearly stated regulations can only help all of us who perform these tasks. ■

William F. Russo is Deputy Director of VA's Office of Regulation Policy & Management, Office of the General Counsel, U.S. Department of Veterans Affairs

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