VETERANS LAW JOURNAL
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# Law School Outreach in the Pacific Northwest

by Timothy R. Franklin and Jenny J. Tang

The Court of Appeals for Veterans Claims Bar Association co-sponsored a Pacific Northwest Veterans Law Panel with Phi Alpha Delta Law Fraternity chapters and the Military Law Association from the University of Washington School of Law, as well as Seattle University School of Law. The panel was held at the UW School of Law on February 9, 2018, in Seattle, Washington.

The panelists, Jenny J. Tang, Charles DiNunzio, and Timothy R. Franklin, each serve on the CAVC Bar Association Board of Governors and were able to present from the various perspectives of the constituencies of the Association, VA (Board), Court, and private bar. They answered questions on topics ranging from how the veterans claims process works to how to get involved with the veterans law community. The attendees were provided the opportunity to ask questions after the panel, and the panelists were impressed by the law students' insightful questions, given that this was many students' first introduction to veterans law.

The panel was moderated by Captain Efrain J. Hudnell (U.S. Army Reserve) and Kyle Berti (U.S. Navy Veteran), and approximately 40 law students attended. A UW School of Law dean, a Seattle area lawyer, and veteran seeking help on her VA compensation claim were also present. The law students received information about veterans law and different aspects of veterans law practice, as well as information about the 10th annual National Veterans Law Moot Court Competition. The attendees were provided informative programs, and a public relations officer took photographs. A reception followed the program, during which the panelists answered further questions about veterans law, careers in this field, and opportunities for pro bono work

Based on this event, it is clear that there is a high level of interest in the practice of veterans law from law students in the Pacific Northwest. One person mentioned that his interest was bolstered by the large veteran community in the Seattle area, which is in part due to its proximity to Joint Base Lewis-McChord, one of the largest military installations in the country. The panel also ignited interest in establishing veterans law clinics as well as moot court teams at these law schools. It was a pleasure working with the law student organizations at UW School of Law and Seattle U School of Law to promote veterans law education in the Pacific Northwest, and the CAVC Bar Association looks forward to future opportunities to do so in other areas of the country.

*Pictured from left to right: Mr. Hudnell, Ms. Tang, Mr. DiNunzio, Mr. Franklin, Mr. Berti*

## CAVC Declines to Review VA's Determination Obesity is Not a Disability

By Dana Weiner

Reporting on *Marcelino v. Shulkin,* No. 16-2149, -- Vet.App. --, 2018 WL 509084 (January 23, 2018).

In *Marcelino,* the Veteran sought service connection and compensation for his obesity. The Board denied his claim because it determined that obesity was not a disability for which compensation could be granted. The Board relied on VA's rating schedule, which does not explicitly contemplate a separate disability rating for obesity. The Veteran appealed to the CAVC, arguing that the Board erred because the Veterans Health Administration and other government agencies have defined obesity as a disease.

The CAVC relied on 38 U.S.C. § 7252(b), which prevents review of the rating schedule "for disabilities adopted" under section 1155. It held that, because it was precluded from reviewing the content of the rating schedule, it could not direct VA to "interpret the term 'disease' to include obesity [a]s there is currently no provision in the rating schedule to compensate for obesity." Slip Op. at 4. It reasoned that such a holding would constitute a review of the rating schedule. *Id*.

The Court further declined to address the issue as a two-part inquiry. The Veteran argued that the Court must first make the legal determination that obesity is a disease and then, subsequently, VA must adequately consider whether it would compensate veteran for that disease. Slip Op. at 3. Appellant contended that only this second prong involves a policy determination and thus invokes the rating schedule. *Id.* The Court rejected this argument, determining that this approach ultimately led to a "substantive challenge to the content of the rating schedule." *Id* at 4.

Relatedly, on January 6, 2017, while the Veteran's appeal was pending, the Acting General Counsel issued a precedential opinion (VAGOPREC 1-2017) holding that obesity is not a disease or injury for purposes of 38 U.S.C. §§ 1110 and 1131 and therefore may not be service connected on a direct basis.

Therefore, although obesity cannot be service connected on a direct basis after *Marcelino,* VAGOPREC 1-2017 provides guidance regarding when VA may consider an extraschedular rating under 38 C.F.R. § 3.321(b)(1) based on the impairment caused by obesity that resulted from a service-connected disease or injury. The opinion also clarifies that obesity may also serve as an "intermediate step" between a service-connected disability and a current disability for purposes of secondary service connection under 38 C.F.R. § 3.310(a).

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## Defining "Received" Under 38 C.F.R. § 3.156(b)

by Ray Kim

Reporting on *Turner v. Shulkin*, No. 16-1171, _ Vet. App. _, 2018 U.S. App. Vet. Claims LEXIS 143 (Feb. 8, 2018).

In *Turner v. Shulkin*, the United States Court of Appeals for Veterans Claims addressed whether VA treatment records can be constructively "received" for purposes of 38 C.F.R. § 3.156(b). The Court held that VA treatment records may be constructively received" and if they are "received" within the one-year appeal period after a regional office ("RO") decision, section 3.156(b)requires the RO to consider those records as submitted with the original claim and reconsider the previously denied claim.

Mr. Turner filed a claim for service connection for epilepsy in September 2005. VA denied the claim in February 2006, explaining that his condition had pre-existed service and that the evidence did not reflect a current diagnosis. In July 2006, Mr. Turner submitted a statement indicating that he wished to file claims for service connection for post-traumatic stress disorder ("PTSD") and epilepsy. He reported that he received medication for depression through the Little Rock, Arkansas, VA facility. In August 2006, VA sent Mr. Turner a letter informing him that, because his claim for epilepsy had previously been denied in February 2006, he needed to submit new and material evidence to reopen that claim.

VA treatment records regarding PTSD were added to Mr. Turner's claims file in October 2007. Included in this evidence was a June 2006 record documenting a finding that Mr. Turner's PTSD and depression were "intertwined" with his epilepsy.

Mr. Turner submitted a claim for epilepsy again in June 2010. In an October 2010 rating decision, VA reopened the claim and denied it. In its decision, the RO noted that the evidence before the agency included VA treatment records from June 2006 to April 2007. Mr. Turner perfected an appeal to the Board of Veterans' Appeals. In the decision appealed to the Court, the Board declined to reopen Mr. Turner's claim, explaining that the new evidence of record did not relate to a fact previously unestablished at the time of the original February 2006 denial.

In its decision the Court first noted that, generally, "when an RO renders a decision on a claim and the claimant does not timely appeal, the decision becomes final." Slip op. at 2 (citing 38 U.S.C. § 7105(c); 38 C.F.R. § 20.302). Of relevance to the instant appeal, the Court further noted that 38 C.F.R. § 3.156(b) provides an exception to this rule, stating that "[n]ew and material evidence received prior to the expiration of the appeal period . . . will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period." *Id.* (quoting 38 C.F.R. § 3.156(b)). The Court further explained that, under section 3.156(b), "if an RO renders a decision but receives new and material evidence within the time the claimant has to appeal, the RO decision does not become final until the RO acts on the new evidence." *Id*. (citing *Beraud v. McDonald*, 766 F.3d at 1402, 1407 (Fed. Cir. 2014)).

The Court then focused on the term "received" as used in 38 C.F.R. § 3.156(b) and determined that it is ambiguous. Slip op. 3-6. In this regard, the Court declined to defer to the Secretary's interpretation of "received" as requiring actual receipt. *Id.* at 5 (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). Looking instead at "where constructive possession began in the VA context," the Court explained that its prior decision in *Bell v. Derwinski*, 2 Vet. App. 611 (1992), as well as a 1995 General Counsel opinion, VA Gen. Coun. Prec. Op. 12-95 (May 10, 1995), make "clear . . . that constructive receipt applies in the context of § 3.156(b). *Id.* at 6.

The Court cautioned, however, that "it is not absolute that every document created by different parts of VA are constructively possessed by all parts of VA in the context of § 3.156(b)." *Id.* The Court explained that to "trigger the constructive receipt of VA treatment records under § 3.156(b)" requires more than the "mere creation" of those records. Instead, "constructive receipt in the context of 38 C.F.R. § 3.156(b), dealing exclusively with VA treatment records, requires knowledge by VA adjudicators at the VBA [Veterans Benefits Administration] of the existence of those VA treatment records within the one-year appeal period." *Id.* at 7. The Court explained that these records "must have been generated by a VA medical facility, and VA adjudicators at the VBA must have sufficient knowledge that such records exist." *Id.* With respect to what constitutes "sufficient knowledge," the Court concluded that "this is a factual determination that the Board must address," and pointed to VA's duty to assist, including claimants' obligation to provide the agency with information sufficient to identify and locate outstanding records, as "useful guideposts" for the Board's analysis. *Id.* at 7-8 (citing 38 U.S.C. § 5103A(c)(1)(B); 38 C.F.R. § 3.159(c).

The Court noted that Mr. Turner had informed VA of his treatment for depression at a Little Rock VA facility in July 2006. The Court found that this

information was "sufficient to provide VA adjudicators at the VBA with knowledge of the existence of the appellant's VA treatment records to trigger constructive receipt." Slip op. at 8. The Court acknowledged that, although there is no bright line rule as to what constitutes sufficient knowledge of the existence of VA treatment records, "identification of a time, place, and nature of activity . . . are factors to be considered." *Id*. (citing *Gagne v. McDonald*, 27 Vet. ap. 397, 402 (2015)). The Court therefore concluded that remand was required for the Board to address "whether the VA treatment records constructively before VA during the one-year appeal period constitute new and material evidence sufficient to vitiate the finality of the February 2006 rating decision." *Id*. at 9. If so, the Court instructed that the Board was required "to include that new evidence with the evidence of record at the time of the February 2006 decision to decide the appellant's claim." *Id.* at 8.

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## Fed. Cir. Addresses Whether Appeal Seeking Hearing From Board Is Moot After Hearing Takes Place

By Morgan McEwen

Reporting on *Ebanks v. Shulkin*, 877 F.3d 1037 (Fed. Cir. 2017).

In *Ebanks v. Shulkin*, the U.S. Court of Appeals for the Federal Circuit addressed whether a petition for a writ of mandamus claiming unreasonable delay and seeking the court to compel the Board of Veterans' Appeals (Board) to schedule a hearing was moot when the veteran received his requested hearing before the writ action was decided. Finding that the veteran's case did not fall within the exception to mootness, the Federal Circuit vacated, finding the matter moot and thus leaving the courts without jurisdiction.

Mr. Ebanks filed a claim for veterans benefits for an increase in disability rating for service-connected posttraumatic stress disorder, hearing loss, tinnitus, and arthritis. His claim was denied by the Regional Office (RO) and in December of 2014 he sought review by the Board. Mr. Ebanks simultaneously requested a videoconference hearing before the Board pursuant to 38 U.S.C. § 7107.

Nearly two years later, in September of 2016, the Board had not scheduled Mr. Ebanks for a hearing and he sought a writ of mandamus from the Court of Appeals for Veterans Claims (CAVC), claiming unreasonable delay and seeking to compel the Board to schedule a hearing. The CAVC denied Mr. Ebanks relief, and he appealed to the Federal Circuit. While his appeal was pending, the Board held Mr. Ebanks's hearing in October of 2017 – nearly three years after it was requested.

The Government conceded that the three-year delay Mr. Ebanks experienced was typical. However, with the hearing having already taken place, the Government argued that Mr. Ebanks's appeal was moot. Mr. Ebanks argued that his case fell within the exception to mootness for cases that are capable of repetition yet evading review. This principle "applies 'only in exceptional situations,' where (1) 'the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *King- domware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (alterations in original) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

Mr. Ebanks argued that there was a reasonable expectation that he would be subject to the same action again because, even if he prevailed before the Board, the relief awarded is typically remand to the RO and further adjudication. Mr. Ebanks expected to have to appeal the RO's further determination to the Board and request another hearing, and again be subjected to unreasonable delay.

The Federal Circuit determined, however, that Mr. Ebanks did not show a sufficiently reasonable expectation that he would be subject to the same action. First, the court noted that any Board hearings on remand are subject to expedited treatment under 38 U.S.C. § 7112. Further, Congress recently overhauled the review process for RO decisions so that veterans may choose to pursue one of three tracks for further review, comprising higher-level review at the RO, filing a supplemental claim, and appealing to the Board. *See* 131 Stat. at 1108. Additionally, appeals to the Board are now divided into at least two dockets, separating out claims in which a veteran has requested a hearing. 131 Stat. at 1112-13. Any future appeal by Mr. Ebanks would be subject to these new rules.

The court reasoned that the possibility of Mr. Ebanks seeking a future hearing at the Board and the hearing being delayed depends upon a chain of hypothesized actions by the Board, the RO, the courts, and Mr. Ebanks himself. As a result, these future actions were too speculative to trigger the exception to mootness. The court found the dispute to be moot, dismissed the appeal for lack of jurisdiction, and remanded to the CAVC with the instruction to dismiss the petition as moot.

The Court noted that an issue such as this would have been better addressed in the class-action context, where the court would have the opportunity to consider class-wide relief. Even if this dispute had not been moot, the Court would have questioned the effectiveness of providing individual relief to a veteran claiming unreasonable delay in the VA's first-come-first-served queue. The Court feared that granting a mandamus petition in such circumstances would not solve the underlying problem of overall delay and simply result in line-jumping.

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**CONTRIBUTORS WANTED**

The publications committee is looking for contributions to upcoming editions of the Veterans Law Journal. Participants do not need to be located in the Washington, DC area.

Please contact Megan Kral at: Megan.Kral@va.gov for more information.

## Court Addresses Reconsideration of Claim Based on Service Record in the Context of CUE

By Kelly Rondinelli

Reporting on *George v. Shulkin*, No. 16-1221 (February 5, 2018).

In *George v. Shulkin*, the Court of Appeals for Veterans Claims (CAVC) addressed the intersection of 38 C.F.R. § 3.156(c), concerning reopening of a claim, and allegation of clear and unmistakable error (CUE) under 38 U.S.C. § 7111. After a complicated analysis, the CAVC ultimately affirmed the Board's decision.

Mr. George served honorably in the U.S. Army from August 1967 to August 1969. His service included active duty in Vietnam. In September 1997, he filed a claim for service-connection of his PTSD, a claim the Regional Office (RO) in Muskogee, Oklahoma denied in February 1998. After reopening the claim six years later, the RO denied Mr. George for the second time.

Mr. George appealed this denial in June 2004. In December 2005 the Board confirmed the reopening of the claim, remanding for further development.

After several remands, the VA obtained additional service records pertinent to Mr. George's service in Vietnam. These records confirmed Mr. George's in-service stressor and, following a VA examination that concluded in a PTSD diagnosis, the RO granted service-connection.

The RO assigned an effective date of September 19, 2003, the date upon which Mr. George had asked the VA to reopen his claim. He subsequently filed a Notice of Disagreement concerning the effective date, arguing that a reconsideration of the February 1998 denial was required under 38 C.F.R. § 3.156(c) because the claim was granted based on discovery of a service record.

The Board denied an earlier effective date in May 2011, leading Mr. George to appeal to the CAVC. The CAVC granted a joint motion for partial remand requiring the Board to consider § 3.156(c), which it had erroneously held did not apply. In February 2013, the Board remanded Mr. George's claim to the RO to obtain a medical opinion concerning when his PTSD first manifested.

The medical examiner opined that the first onset of Mr. George's PTSD occurred in October 2003. As a result, in September 2014 the Board denied his claim for an effective date earlier than September 2003. He did not appeal this decision, but in August 2015 he filed a motion to revise based on CUE.

In 2015, the Board ruled that the 2014 decision did not contain CUE and that it had correctly applied § 3.156(c). Mr. George again appealed to the Court.

Mr. George argued that the Board had erred in finding no CUE in its 2014 decision . He contended that the Board had not reconsidered his PTSD claim in light of the new service department records, as required by section 3.156(c), but had only reviewed the assigned effective date. As the RO had not readjudicated his claim either, the Board's 2014 decision contained CUE. Mr. George argued that the Board's action was only a "partial readjudication" and did not put him into the position he would have been in had the service department records been considered with his original 1997 claim.

In response, the Secretary asserted that the Board did reconsider Mr. George's claim, as evidenced by its obtaining a medical opinion to pinpoint the exact date of the onset of his PTSD. Furthermore, the Secretary argued that, even if the 2014 decision was incorrect, Mr. George had only pointed to the "possibility" that the new evidence would have led to service-connection from 1997. Mr. George had not, therefore, satisfied the CUE standard of showing an "undisputed, outcome-determinative error."

The CAVC began its opinion by reviewing the "legal landscape" of the case. It explained that normally, if a Board's decision is not appealed to the CAVC within the statutory period, the decision is final. A claimant can reopen a final decision if he submits new and material evidence (§ 3.156(a)), but the effective date will be no earlier than the date of the reopened claim. Subsection (c) provides an exception to this, stating that if an award is granted because of the submission of "relevant official service department records," the award's effective date is either "the date entitlement arose or the date the VA received the previously decided claim, whichever is later." The Court then discussed another avenue to vitiate the finality of a decision: revision for CUE. The Court then provided a brief synopsis of what was required to show CUE.

In addressing the case before it, the Court first examined the Board's 2015 decision to determine whether the Board had correctly understood and applied § 3.156(c). The Court concluded that the Board had applied the basic principles of § 3.156(c). Drawing on the sparse existing law in this area, the Court cited to *Blubaugh v. McDonald,* 773 F.3d 1310 (Fed. Cir. 2014), as explaining that the veteran is to be put in the same position as he would have been had the service department record been considered initially, and that subsection (c)(1) of § 3.156 imposes separate and distinct obligations from those of subsections (c)(3) and (c)(4). The Court noted that in *Vigil v. Peake*, 22 Vet. App. 63 (2008), it had recognized that section (c)(1) required that a veteran's claim be reconsidered when service department records are received after a claim has been denied. The Court observed that it was not entirely clear what is meant by "reconsider," but it determined that § 3.156 proves to be about more

than just the effective date, but also requires some development of the claim.

Having concluded that the Board had applied the correct legal principles, looking at subsection (c)(1) as well as (c)(3), the Court then considered whether the Board properly concluded that the 2014 decision did not contain CUE. In considering this, the Court's decision was limited to whether the Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Court detailed the history of Mr. George's claim, including the RO's readjudication in October 2007 and VA's obtaining a medical opinion in April 2013. The Court went on to hold that, although the contours of the term "reconsideration" were imprecise and uncertain, it could not say that the Board's determination was improper under the deferential CUE standard. The CAVC, therefore, affirmed the Board's decision.

Judge Greenberg issued a short dissent, asserting that this case deserved a "more equitable result." He believes that the medical examiner's opinion would have been different if he had reviewed the service department records that led to the granting of the service connection. For this reason alone, Judge Greenberg disagreed with the majority.

*Kelly Rondinelli is a student at William & Mary Law School and is a member of the Lewis B. Puller Jr. Veterans Clinic.*

## The Court Revisits Extraschedular Ratings

by Jamie Tunis

Reporting on *King v. Shulkin*, No. 16-2959 (Dec. 21, 2017).

In *King v. Shulkin*, the Court of Appeals for Veterans Claims reviewed the Board of Veterans' Appeals' decision to deny an initial compensable disability rating for bilateral hearing loss. The Court addressed the issue of what role, if any, the possibility of a higher schedular rating has in an extraschedular analysis, and if there is anything in particular about bilateral hearing loss that alters this analysis. The Court determined the matter principally as a general matter under 38 C.F.R. § 3.321(b)(1) and under the Court's decision in *Thun v. Peake*, 22 Vet.App. 111 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009).

Mr. King served in the U.S. Army from 1969 to 1971, including in the Republic of Vietnam. The current appeal stems from a 2009 VA Regional Office (RO) rating decision, which granted service connection for hearing loss at a noncompensable rating. The Veteran timely appealed, seeking a compensable initial evaluation for the disability.

The Veteran underwent a VA audiological examination in 2009. The examiner reported significant impact on the Veteran's occupation, with poor social interactions and hearing difficulty. The RO issued a Statement of the Case continuing the Veteran's noncompensable disability rating, and the Veteran perfected his appeal to the Board.

The Veteran underwent another VA examination in 2011, and the examiner reported balance problems and dizziness associated with a separate condition of residuals of perforated eardrums. The examiner also stated that the effect of his hearing loss on his daily life and occupation was "difficulty hearing."

At a hearing before the Board in 2012, the Veteran testified that his bilateral hearing loss disability prevents him from hearing the telephone ring, causes him to turn the volume of his television up, which drives his wife to leave the room, causes him to face a speaker in order to hear it, prevents him from hearing bird sounds, and makes him angry because he has to ask others to repeat words to him.

In 2014, the Board remanded the matter for another medical examination due to the Veteran's possibly worsening symptoms. The examiner found that his hearing loss did not impact his ordinary conditions of daily life or ability to work.

In 2016, the Board issued the decision on appeal, which denied entitlement to a compensable schedular rating for the Veteran's bilateral hearing loss and denied extraschedular referral, finding that "the rating criteria reasonably describe [the appellant's] disability levels and symptomatology, and provide[] for higher ratings for more severe symptoms." The Board also denied extraschedular referral on a collective basis. The Veteran appealed the matter to the Court.

On appeal, the Veteran argued that: (1) the Board erred by declining extraschedular referral, as all of the functional effects of his hearing loss were not contemplated by the rating criteria; (2) the Board failed to consider his entire disability picture when deciding not to refer the claim for extraschedular; and (3) the Board failed to provide adequate reasons or bases for its decision to not consider combined effects of his other service-connected disabilities in deciding not to refer the claim for extraschedular consideration.

The Secretary argued that: (1) the functional effects of the Veteran's bilateral hearing loss are contemplated by the rating schedule; (2) the Board was not required to consider the Veteran's entire disability picture because the other functional effects the Veteran notes are already attributed to nonservice-connected disabilities; and (3) the Veteran was not entitled to extrashedular referral based on the combined effects of his service-connected disabilities because there is no evidence that his bilateral hearing loss interacts with his post-traumatic stress disorder (PTSD) to create functional effects not already contemplated by the rating criteria.

After considering the arguments before it, the Court found that the Board's decision raised two central issues: (1) whether the rating criteria adequately contemplated the functional effects of the Veteran's bilateral hearing loss disability such that extraschedular referral was not warranted, and (2) whether the availability of higher schedular ratings has any role in an extraschedular analysis by the Board.

The Court began its analysis with the statutory and regulatory framework for extraschedular ratings under 38 C.F.R. § 3.321(b)(1) and *Thun v. Peake*, 22 Vet.App. at 115. It noted that under 38 C.F.R. § 3.321(b)(1), VA has provided for assignment of extraschedular ratings for exceptional cases in order to ensure that veterans are provided with compensation appropriate to make up for the earning-related impact of a service-connected disability. The Court reviewed the three-part inquiry set out in *Thun v. Peake*, 22 Vet.App. at 115, for assessing extraschedular consideration.

The first inquiry under *Thun* asks whether the evidence presents such an exceptional disability picture that the available schedular evaluations are not adequate. *Id.* In this step, the Court stated, the impact or absence of such impact on a veteran's employment is irrelevant, as symptoms and their severity are relevant in this step and an impact on employment is not a symptom.

The second inquiry asks whether the claimant's exceptional disability picture exhibits "other related factors," such as marked interference with employment or frequent periods of hospitalization. *Id.* Presence of these 'other related factors,' is essential to warrant extraschedular referral.

The third inquiry directs the Board to refer the claim to the Under Secretary for Benefits or the Director of the Compensation Service for a determination about whether an extraschedular rating is warranted. *Id.*

Applying this analysis to the current appeal and the parties' arguments, the Court first addressed the Veteran's argument that the rating criteria for bilateral hearing loss do not contemplate the functional effects of his disability, namely social isolation stemming from his inability to hear bird sounds or the telephone ring, turning up the TV volume, etc. The Court noted that the Veteran's argument relied in part on a portion of the Court's holding in *Doucette v. Shulkin*, 28 Vet.App. 366 (2017), which observed that the rating criteria do not contemplate all functional impairment due to a claimant's hearing loss. *Id*. at 369. The Court in *Doucette* stated that "a hearing loss claimant could provide evidence of numerous symptoms,

including—for purposes of example only—ear pain, dizziness, recurrent loss of balance, or social isolation due to difficulties communicating, and the Board would be required to explain whether the rating criteria contemplate those functional effects." *Id*. at 371.

The Secretary had contended that the section of *Doucette* noted above is "dicta because it was not necessary to the disposition of the case." But the Court disagreed: "[t]o the extent that the Secretary challenges that portion of *Doucette* stating that there is a class of functional effects that are outside the rating schedule as 'dicta,' we affirmatively hold now that it was not." Instead, the Court found that the idea of a class of functional effects existing outside the rating schedule was integral to the Court's holding in *Doucette*.

The Court then turned to the question of what role, if any, the availability of higher schedular ratings should play in an extraschedular analysis. The Veteran argued that the Board misinterpreted the law by using the availability of higher schedular ratings as a basis for denying extraschedular referral. Although the Board had asserted that "[i]t would be improper for the [Board] to base its extraschedular analysis on the availability of higher schedular ratings," the Court declared that the Board's apparent use of the fact that the rating criteria "provided for higher ratings for more severe symptoms" as a reason to deny the Veteran referral for extraschedular consideration was incorrect as a matter of law. The Court relied on the plain language of § 3.321(b)(1) stating that extraschedular consideration should be considered "where the schedular evaluations are found to be inadequate."

The Court also agreed with the Veteran's argument that "[u]sing the possibility of a higher schedular rating to deny extraschedular consideration also reads out the 'severity' portion of the first *Thun* element." The first element of *Thun* requires the Board to compare both the symptomatology and severity of a disability when determining if schedular ratings adequately contemplate a veteran's symptoms.

The Secretary had argued that any error in the Board's decision was harmless because the Board's reference to the availability of higher schedular ratings was "superfluous." But the Court disagreed, noting that the Board's discussion of extraschedular referral unmistakably cited the higher schedular ratings when declining to refer the matter.

Last, the Court considered whether there is something special about hearing loss that suggests that the principles discussed in the decision are limited to that type of claim. The Court concluded that there is not, as § 3.321 is applicable to all claims. Accordingly, the Court held that the Court's interpretation of § 3.321(b) as set forth by the Court herein applies regardless of the type of disability at issue.

*Jamie Tunis is an Associate Counsel at the Board of Veterans Appeals.*

## The Rapid Appeals Modernization Program (RAMP): An Overview

by Jenny J. Tang

RAMP is a pilot program that allows participants early access to some aspects of the Veterans Appeals Improvement and Modernization Act of 2017 (Act).[1] RAMP runs from November 2017 to February 2019, and the Act becomes effective in February 2019. RAMP provides veterans the opportunity for early participation in two of the three appeals processing lanes that are established under the Act: the Supplemental Claim and Higher-Level Review lanes. **The Supplemental Claim lane** allows for the submission of new and relevant evidence, and VA has a duty to assist in gathering such evidence. **The Higher-Level Review lane** allows a new review by

1 For an overview of the Act, see the last volume of the *Veterans Law Journal* (September 2017). RAMP was developed, launched, and is being managed by VA in collaboration with some veteran service organizations and Congress.

a senior claims adjudicator. Veterans may select this option if they have no additional evidence to submit but believe that there was an error in the initial decision. Veterans may not add new evidence in this lane; but if the Higher-Level Adjudicator discovers an error in the duty to assist in the prior decision, the claim will return to the initial decision makers to correct that error.[2]

Veterans who decline to participate in RAMP will remain in the legacy appeals process. Regardless, the same substantive law will continue to govern the adjudication of all veterans' claims.

Veterans who participate in RAMP will still have their legacy claims' effective dates protected. The Act's goal is to provide faster, fair decisions in veterans' appeals, and RAMP allows veterans with eligible legacy appeals to participate early in the Act's modified appeals processing system. VA's goal is to process RAMP claims within 125 days in each processing lane.

A veteran is eligible for RAMP if he or she has a disability compensation appeal pending in one of the following legacy appeal stages:

- Notice of Disagreement (NOD);
- Form 9, appeal to the Board;
- Certified to the Board but not yet activated for a Board decision;
- Remand from the Board to the Veterans Benefits Administration (VBA).

The VBA is sending an invitation letter to eligible veterans, starting with those who have been waiting the longest in the above stages and proceeding in order. Veterans have 60 days to opt-in. The VBA plans to invite almost 350,000 veterans to participate.

2 The veteran and the attorney/ representative can request an optional one time telephonic informal conference with the Higher-Level Adjudicator to identify specific errors in the case. This may, however, cause some delay in processing.

RAMP is voluntary. Veterans should talk with their attorneys/ representatives to determine whether RAMP is the right choice for them.

RAMP allows for potentially faster decisions and early resolutions of disagreements, given the faster processing times discussed above. RAMP also allows veterans to have early access to the Act's multiple review options, which are designed to be more efficient.

RAMP poses no prejudice to the effective date of a claim, because it is protected as long the claimant requests another review/appeal within one year of the last decision.

More information can be found at https://benefits.va.gov/benefits/appeals-ramp.asp.

*Jenny J. Tang is Associate Counsel at the Department of Veterans Affairs, Board of Veterans' Appeals. She also serves as Secretary for the CAVC Bar Association. Any views expressed in this article are Ms. Tang's own and do not reflect those of the Department of Veterans Affairs.*

## Whether a Veteran's Brief, Written by His Attorney-Cum-Physician Representative, Constitutes a Medical Opinion

by Melinda Bonish

Reporting on *Harvey v. Shulkin*, No. 16-1515, 2018 WL 736003 at*1 (Vet. App. Feb. 7, 2018)

In *Harvey*, the Veteran appealed a January 14, 2016 Board of Veterans' Appeals (Board) decision denying, in pertinent part, entitlement to service connection for sleep apnea, which the Veteran claimed was related to his service-connected mental health disability. The primary question before the Court of Appeals for Veterans Claims (Court) was whether part of a brief submitted to the Board by the Veteran's attorney, who also happened to be a

medical doctor, was medical opinion evidence that the Board was required to address as such in determining service connection. Slip opinion at 1-2.

The Court observed that, although its case law contained numerous standards for determining the adequacy of a medical opinion, neither that case law nor any applicable statutes or regulations explicitly addressed how an adjudicator is to determine whether a document constitutes a medical opinion in the first place. *Id*. at 6. The Court acknowledged this lack of distinction between argument and evidence and announced standards in *Harvey* in an attempt clarify. Though the Court declined to "prescribe absolute requirements necessary for a submission to be considered a medical opinion," it identified several attributes that may be assessed when making this determination, and stressed that such an assessment must be undertaken individually. *Id*. at 6.

The Board in this case denied the Veteran's claim for service connection, finding that the weight of the evidence was against the claim and that "no contrary opinions of record" existed. The veteran's representative, an attorney and a physician, had submitted a brief to the Board. On appeal to the Court, the Veteran, represented by the same attorney-physician , argued that the Board did not provide adequate rationale for denying his claim because it failed to properly address the attorney-physician's brief as a medical nexus opinion. In particular, the Veteran argued that his attorney (1) was a board-certified surgeon, (2) clearly identified himself as such in the brief, and (3) clearly "opined that there [was] a medical nexus for sleep apnea." *Id*. at 5.

The Court disagreed. It first looked to whether the attorney clearly identified that he was acting in the role of a medical professional when presenting his arguments to the Board, and found that he did not. Slip op. at 6. The Court next looked to his brief for any identifying language that would have signaled the attorney's intent to provide an expert medical opinion and found that the brief "lacked indicia" that it was provided as the professional opinion of a medical expert. *Id*. at 7. Lastly, the Court found that the language that the Veteran pointed to as an alleged medical nexus opinion was "not independent of or clearly discernible from" the legal arguments which his attorney presented. *Id*. After considering these attributes of the attorney's submission, the Court concluded that it did not contain a "discernable medical opinion." *Id*. Therefore, the Court found no clear error and affirmed the Board's conclusion that there was no evidence demonstrating a relationship between the Veteran's sleep apnea and active service or a service-connected disability. *Id*. at 8.

The Court also took the opportunity to address how and whether Model Rule of Professional Conduct 3.7 governed the issue here, where an attorney attempted to serve as both advocate and expert witness in the same matter. Because the Court found that the attorney's submission did not include a medical opinion, it also found that the attorney did not violate Rule 3.7, which provides that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness. *Id*. at 10. But, given that the attorney argued to the Court that he had intended to submit a medical opinion, the Court found that the submission "blurred the line" between making legal argument and providing medical opinion evidence, something Rule 3.7 was intended to prevent so as to not confuse or mislead tribunals. *Id*. Furthermore, it held that Rule 3.7 applied to tribunals "acting in an adjudicative capacity" rather than just courts. *Id*. It cautioned that the very fact that the Veteran's attorney-physician representative would even attempt to submit his own medical opinion in the text of an appeal brief was "emblematic of the confusion that the advocate-witness rule was intended to prevent." *Id*.

Finally, the Court addressed the Board's interpretation of a medical article that the Veteran's representative submitted to the Board in support of the Veteran. The Board had held that, although the article in question supported a correlation between mental health disorders and sleep apnea, it did not support a causal relationship or a finding that psychiatric disorders cause sleep apnea. *Id*. 12. The Court held that "[i]nterpretation of a medical treatise's meaning and assessment of its probative value as evidence in support of the claim being

adjudicated are within the purview of the Board as factfinder." *Id*. Thus, it affirmed the Board's rejection of the Veteran's argument that showing mere correlation between a service-connected disability and a secondary condition was sufficient evidence to establish a secondary service connection. *Id*. The Court also affirmed the Board's holding that a causation or aggravation relationship, which the Veteran failed to establish, was required to satisfy the applicable legal standard under 38 C.F.R. § 3.310 for establishing entitlement to service connection on a secondary basis. *Id*. at 13.

*Melinda Bonish is a second year law student at the University of Pittsburgh. She is completing an externship this semester at the National Courts Section of the Civil Division of the Department of Justice.*

## Effective Dates for PTSD and 38 C.F.R. § 3.304(f): Liberalizing or Procedural?

by Sarah E. Wolf

Reporting on *Foreman v. Shulkin*, No. 15-3463, 2018 U.S. App. Vet. Claims LEXIS 45 (Jan. 22, 2018).

In *Foreman*, the Court of Appeals for Veterans Claims (Court) addressed the effect of a July 13, 2010, amendment to 38 C.F.R. § 3.304(f) on the effective date of an award of service connection for PTSD. The Court held that the July 2010 amendment to § 3.304(f) is not a liberalizing rule and therefore 38 C.F.R. § 3.114 does not prevent Mr. Foreman from receiving an effective date prior to July 13, 2010.

Mr. Foreman appealed from a Board decision denying entitlement to an effective date earlier than July 13, 2010, for service connection for PTSD. Upon his separation from active duty in August 1972, Mr. Foreman filed a claim for "fungus or skin disease" and back pain. He included with his claim certain service medical records (SMRs), including those documenting mental health concerns and a right finger fracture. In March 1973, the regional office (RO) granted service connection for a skin condition, lumbosacral strain with degenerative disc disease, and residuals of a metacarpal right ring finger fracture.

Mr. Foreman was first diagnosed with PTSD in July and August 2008, and in September 2008, he filed a claim for service connection for PTSD. While his claim was pending, VA amended 38 C.F.R. § 3.304(f) effective July 13, 2010, eliminating the requirement for corroborative evidence of an in-service stressor under certain circumstances. Ultimately, the RO granted service connection for PTSD effective March 2011, the date of Mr. Foreman's most recent VA PTSD examination.

The Board granted an effective date of July 13, 2010, but no earlier, for service connection for PTSD. The Board determined that the July 13, 2010, amendment to § 3.304(f) was a liberalizing rule and that the RO had granted service connection based on this rule. The Board relied on 38 C.F.R. § 3.114, which states that, where compensation is awarded pursuant to a liberalizing law or regulation, the effective date will be fixed based on the facts found, but no earlier than the effective date of the liberalizing law or regulation. Thus, the Board awarded the effective date of July 13, 2010.

Mr. Foreman, appearing pro se, appealed, arguing that he filed an informal claim for service connection for a mental disorder in August 1972 and is entitled to an effective date for service connection for PTSD as of that date. In his pleadings, the Secretary recognized that the amendment to § 3.304(f) was not liberalizing, yet argued that Mr. Foreman was entitled to an effective date of September 2008, the date of his formal claim for service connection.

Despite the Secretary's concession that § 3.304(f) was not liberalizing, Judge Bartley, writing for the Court, took the opportunity to review the rules for determining the effective date for the award of VA benefits. The Court also explained that a "liberalizing law" is substantive and creates a new and different entitlement to a benefit. In contrast, a change in an evidentiary standard is procedural. The Court determined that the amendment to

§ 3.304(f) is not liberalizing because it did not create a new and different entitlement to service connection for PTSD. Therefore, the Court also determined that § 3.114 does not apply and held that the Board prejudicially erred as a matter of law by applying § 3.114 instead of 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400, which allow for an effective date as early as the date VA received Mr. Foreman's claim for service connection.

The Court moved on to address the appropriate effective date of the award of service connection for Mr. Foreman's PTSD benefits. Despite the Secretary's argument that the Court should award an effective date of September 2008, the Court remanded. The Court explained that, because the Board had not considered 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400, the Board must address those sections and Mr. Foreman's arguments and then determine in the first instance the proper effective date for service connection. According to the Court, to do otherwise would require the Court to engage in fact-finding, which is beyond the scope of its review.

Chief Judge Davis wrote separately dissenting in part. He disagreed with the majority's decision to remand the case for the Board to determine the effective date. He contended that Mr. Foreman's arguments did not demonstrate that the Board erred. Rather, he asserted that the only basis for error in the Board's determination of the effective date was the Secretary's concession that September 2008 was the proper effective date. He therefore would have assigned an effective date of September 23, 2008, the date Mr. Foreman filed his PTSD claim, because to remand for the Board to consider whether the submission of certain medical records in August 1972 constituted an informal claim would add unnecessary additional burdens on the Board and VA with no benefit to the Veteran.

*Sarah E. Wolf is an attorney for the Department of Veterans Affairs, Office of General Counsel, Court of Appeals for Veterans Claims Litigation Group*

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# ANNOUNCEMENT

**April Program – VA: Behind the Scenes**

On April 12, representatives from the Department of Veterans Affairs (Office of General Counsel, Board of Veterans' Appeals, Appeals Management Office, and Court of Appeals Litigation Group) will discuss recent and ongoing developments, as well as the upcoming year.

**Date: April 12th**

**Time: 3pm**

**Location: Conference Room 10E**
**Finnegan, Henderson, Farabow, Garrett & Dunner, LLP,**
**901 New York Avenue, NW**
**Washington, DC**

**Call-In Information: To be announced**

**Reception to follow at City Tap House, 901 9th Street NW**

**Department of Veterans Affairs – Office of General Counsel**
**Court of Appeals for Veterans Claims Litigation Group (CAVC LG)**
**Summer 2018 Externship**

**Application Requirements and Deadlines:**

- Cover Letter
- Resume
- Writing Sample
- Transcript (Official or Unofficial)

Application packages should be e-mailed to dustin.elias@va.gov or james.cowden@va.gov

**Application Closing Date: March 28, 2018**

Note: Interviews for selected candidates will be scheduled following receipt of completed applications.

## Highlights of CAVC LG Externship Program

- Writing Intensive Position
- 2-3 Substantive Work Products will be completed during course of Externship
- Work Submitted Under Extern's Name to Federal Court
- Assignment/Management of Multiple Cases and Projects
- Active participation as part of the Office of General Counsel's largest staff group

## Brief Outline of CAVC LG Externship Program

- Orientation to VA Law
- Preparation of Legal Memorandum and Participation in Pre-Briefing Conference
- Tours of Court of Appeals for Veterans Claims, VA facilities
- Research and Writing of Appellate Brief
- Preparation of other pleadings as necessary
- CAVC LG outing to Washington Nationals Game

If you have any questions or require additional information, please contact CAVC LG's Extern Coordinators:


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