

# VETERANS LAW JOURNAL

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

FALL/WINTER 2015

## Seventh Annual National Veterans Law Moot Court Competition a Resounding Success

by Jon Gaffney

A few weeks ago, I had the privilege of seeing months of work by nearly 100 volunteers come to fruition. On November 14 and 15, 26 teams representing 19 law schools from around the country competed in National Veterans Law Moot Court Competition (NVL MCC). The competition is a joint venture between the CAVC Bar Association, the Court, and the George Washington University Law School, and—now in its seventh year—is bigger and better than ever.

Over the two days of competition, the two-person teams argued the fictional Supreme Court case *Nicholas v. McDonald*, which asked them to address the following questions:

1. Should *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), be overturned, either generally or as applied to regulations promulgated by the Department of Veterans Affairs?
2. Does a finding by the Board of Veterans' Appeals (Board) that a veteran's actions were not "willful misconduct" for the purposes of entitlement to benefits under 38 U.S.C. § 1110 preclude the Board from finding in a later decision that the same actions "intentionally and wrongfully caused" the death of another veteran under 38 C.F.R. § 3.11?

Correy Karbiener and Taylor Ryan of Stetson University College of Law won Best Team, beating

Erin Brennan and Giovanni Giarratana, also of Stetson, in the final round of the competition. The teams argued before Chief Judge Lawrence Hagel and Judges Margaret Bartley and William Greene.



Correy Karbiener and Taylor Ryan of Stetson University College of Law accept the award for Best Team.

In the semifinal rounds, the Stetson teams faced off against Bethany Rishell and Crystal Weeks of the Georgetown University Law Center and Lindsay Johnson and William Kellogg of the Pepperdine University School of Law. The semifinalists argued before a panel consisting of Cynthia Brandon-Arnold, Chief Staff Attorney of the Court's Central Legal Staff; Mary Ann Flynn, Chief Counsel for VA's Veterans Court Litigation Group; and Zachary Stolz, president of the Bar Association and a partner at Chisholm, Chisholm & Kilpatrick.

7<sup>th</sup> Annual NVLMCC, *continued on page 4.*



COURT OF APPEALS  
FOR VETERANS CLAIMS  
BAR ASSOCIATION

## Message from the President



It is an honor to serve as the U.S. Court of Appeals for Veterans Claims Bar Association President for the upcoming year. Our goals for this year include further strengthening our existing membership and continuing to develop engaging and informative ways for our members to participate in and strengthen the practice of veterans law.

I have had the great fortune to spend my decade-long career as an advocate for veterans and their dependents—first with Disabled American Veterans and now with Chisholm, Chisholm & Kilpatrick. Over these years, I have grown in understanding and appreciation for the work of all members of the veterans law community. I look forward to serving and working with our diverse membership from the Court, the Department of Veterans Affairs, veterans service organizations, and the private bar.

I am particularly excited to serve as your president during a year in which there is a CAVC Judicial Conference. The Court's Thirteenth Judicial Conference will be held April 14-15, 2016 at the Newseum in Washington, DC. This will be a wonderful opportunity for members of the Bar Association to step away from their daily routines and to consider the problems and issues of both VA and veterans' advocates in serving our nation's veterans. The Bar Association has traditionally assisted the Court in ensuring that this is a success and looks forward to working with the Court again this year.

While this conference will surely be a highlight of our year, I also look forward to seeing many of you at our other events, including panels, presentations, and social events. If you ever have any suggestions for programs or events, please feel free to e-mail us at [cavcbarassoc@cavcbar.net](mailto:cavcbarassoc@cavcbar.net). We value your input greatly and are always looking for fresh ideas!

I look forward to working with each of you over the next year and to continuing the great work that my predecessor, Aniela Szymanski, accomplished last year.

Zachary M. Stolz  
President, CAVC Bar Association

### IN THIS ISSUE:

**This special edition of the Veterans Law Journal focuses on law schools and their impact on the area of veterans law. It includes student-written articles. From the record number of participants at the NVLMCC, to the expansion of legal clinics across the country, the importance of growth in this area cannot be overemphasized.**

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## Message from the Chief Judge



Dear "Fellow Travelers",

I am pleased to introduce this edition of the Veterans Law Journal. The focus of this issue is the intersection of veterans law and our nation's law schools. This junction is near and dear to me for many reasons. On a personal note, when I returned from service in Viet Nam, I was very reliably informed that one of the law schools to which I intended to apply would not look favorably upon my application because the school did not want to gain a reputation of enrolling too many veterans. Oh how far we have come!

We now have law schools not only taking pride in, but I dare say boasting about their veteran student population. And law schools not only want veterans

as students, but are adopting programs and practices to enable their students to learn veterans law, and to reach out to the veteran populations in their communities. Veterans law clinics and courses are popping up at law schools across the country, responding to the desire of students both with and without military background, to learn practical skills while assisting their community members in need. The Court receives numerous invitations to conduct away oral arguments, and we are committed to bringing veterans law to the nation's law schools. Our Judges find it mutually beneficial to hold sessions of the Court outside the confines of Washington, DC, before law students, their professors, and interested members of the local community. Several Judges of the Court have and continue to teach courses on veterans law. And this year the National Veterans Law Moot Court Competition literally doubled both the number of teams (26) and number of schools represented (17) from its start seven years ago. What marvelous testaments all of these are to the growing interest in this practice area at our legal ground floor - our law schools.

It has been exciting for me to not only watch, but to participate in this growth during my 25 years in the field. Margaret Mead said: "Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has." It has been inspirational to see the work that has been done by all of you who have been part of the movement to bring veterans law to America's law schools and spread the word about this honorable and fulfilling field.

The efforts of advocates for both veterans and VA, as well as the law professors and adjunct faculty, are due a large measure of gratitude for your service to our nation's veterans by ensuring that the rule of law is applied evenly and fairly to those seeking benefits flowing from their military service. From me and the other Judges on the Court, thank you all.

A handwritten signature in blue ink that reads "Laurence B. Hazel". The signature is written in a cursive, flowing style.

Chief Judge Hazel



**7<sup>th</sup> Annual NVLMCC, continued from Cover Page.**

In my three years as director of the competition, I have heard time and time again from the competitors and coaches how special it is, and the competition prides itself on the authenticity of its materials and on the high quality of judging by actual veterans law practitioners. This year, one student commented:

I signed up for this competition on an impulse, because my school needed someone . . . and because my boyfriend is in the Marines. However, I ended up enjoying it more than I've enjoyed any other competition I've done during my time [in law school], and I think it has given me a new passion for veterans law.

The NVLMCC's success is entirely because of the hard work of its volunteers. It simply would not take place—let alone thrive—without the support of the Bar Association and you, its members. Thank you for helping to make this year's competition a success!

*Jon Gaffney is Law Clerk to Hon. Alan G. Lance, Sr. of the U.S. Court of Appeals for Veterans Claims and is the Director of the NVLMCC.*



Best Oral Advocate Erin Brennan competes in the final round of the competition

## Full Competition Results and Participating Schools

### *Best Team*

Correy Karbiener & Taylor Ryan  
Stetson University College of Law

### *Best Oral Advocate*

Erin Brennan  
Stetson University College of Law

### *Best Petitioner's Brief*

Andrea Sherman & Timothy Joseph  
Penn State Law

### *Best Respondent's Brief*

Correy Karbiener & Taylor Ryan  
Stetson University College of Law

### *Participating Schools*

Sandra Day O'Connor College of Law, Arizona State University  
Baylor Law School  
Charleston School of Law  
Chicago-Kent College of Law  
Emory University School of Law  
Florida Coastal School of Law  
The George Washington University Law School  
Georgetown University Law Center  
Golden Gate University School of Law  
The John Marshall Law School (Chicago)  
New York Law School  
Penn State Law  
Pepperdine University School of Law  
Stetson University College of Law  
University of Detroit Mercy School of Law  
University of Missouri School of Law  
University of Washington School of Law  
Widener University Delaware Law School  
William & Mary Law School

***For more information about this year's competition and the NVLMCC in general, please visit the competition's web site at [www.nvlmcc.org](http://www.nvlmcc.org).***

## Veterans Clinics and Medical Schools: A Partnership to Serve those Who Served Us

by Stacey-Rae Simcox and Michael P. Allen

This November, General Counsel of the Department of Veterans Affairs (VA) Leigh Bradley, spoke at the “Second Annual National Conference on Law Clinics Serving Veterans.” Her presence at this conference emphasizes the growing importance of the *pro bono* representation offered by law schools across the country to our nation’s veterans.

The number of law schools across the country offering a clinical experience to law students while helping veterans is growing rapidly. Ten years ago, the number of veterans clinics could be counted on one hand. Today there are over 40 law school veterans clinic programs and counting. Each clinic offers different services to veterans and different experiences for law students. Some focus on civil legal matters that veterans face while others work in the veterans treatment court arena. There are still other clinics that specialize in veterans disability benefits cases. Stetson University’s College of Law is one unique example of a veterans clinical program thinking outside the box to help veterans and the VA evaluate claims more effectively and efficiently. While Stetson is certainly not alone in this endeavor, it is the situation with which we are most familiar. In an effort to advance the development of these important activities, we provide a description of an important innovation we have undertaken to assist those who served the nation.

In order to provide more thorough representation to veterans, Stetson University College of Law’s Veterans Advocacy Clinic has recently forged a unique alliance with a medical school, the University of South Florida (USF) Morsani College of Medicine. In the initial stages of this partnership, Stetson Law’s students and USF medical faculty and students from several disciplines collaborate together, training one another in each other’s respective profession, and assisting veterans in the disability compensation process. The memorandum

of understanding for this collaboration agreement between Stetson University and USF recognizes that “[t]here are two primary purposes of this relationship. The first is to serve Florida’s veteran population by delivering services in order for them to seek benefits they have earned from the Department of Veterans Affairs (VA). The second is to offer an inter-disciplinary environment in which to train and educate Florida’s law students, medical students, and other students studying to serve in a variety of professions by allowing them to work collaboratively to assist Florida’s veteran population.”

These types of collaboration between law and medicine on behalf of veterans help veterans, professional students, and the VA. Veterans receive holistic care in their medical and legal matters and have a better chance of providing the VA with the medical evidence necessary to obtain benefits. Medical and law students learn about issues specific to veterans and also learn that the work each professional does is not done in a vacuum but is rather part of the larger picture of a veteran’s well-being. Finally, the VA benefits from these partnerships in a number of ways. First, having appropriate and thorough medical examinations done helps the VA to obtain a good overview of the veteran’s health and medical conditions. Second, having the veteran’s claims file thoroughly reviewed by law students who flag pertinent evidence and regulations for rating officers at the Regional Offices aids the Regional Office in more quickly and efficiently assessing a veteran’s claim. In short, these partnerships are “wins” for all involved.

**Veterans Clinics and Medical Schools, *continued*  
on page 6.**

### **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](mailto:Megan.Kral@va.gov) for more information.

**Veterans Clinics and Medical Schools, *continued*  
from page 5.**

Everyone involved in the process of assisting veterans in obtaining the benefits to which they are entitled knows that the current claims system is operating under incredible strains. With nearly 1.4 million applications coming in the door combined with the burgeoning number of appeals, the VA finds itself in a difficult position. There likely is no silver bullet to address this situation. But that does not mean that we are powerless to take action. What is needed at all levels is bold, innovative thinking.

Law schools as a group and Stetson in particular are trying to be a part of such innovative problem-solving. By getting law students interested in this area of the law and providing the means for a partnership between law and medicine, we hope to continue Lincoln's work to care for those who have borne the battle.

*Stacey-Rae Simcox is an Associate Professor of Legal Skills and Director of the Veterans Advocacy Clinic at Stetson University College of Law. Michael Allen is Stetson's Associate Dean for Academic Affairs and a Professor of Law. He also serves as the Director of Stetson's Veterans Law Institute.*

***Did you know?***

You may now apply for bar association membership or renew your membership and make payment online. [Click here](#) to complete the on-line membership application/ or renew your membership today!

***Student Memberships Available!!***

**Law Schools Serving Veterans  
Establish Coalition and Hold  
Conference**

by Patty Roberts

There has been extraordinary growth in the number of law school clinics serving veterans and service members in recent years. More than 30 such programs are part of the newly created National Law School Veterans Clinic Coalition, which celebrates its one year anniversary this month. Although each clinic may have a different focus, issue expertise, and geographic coverage, they all operate with one goal--to address veterans' legal needs, largely at no expense to the veteran, and to train law students.

Member clinics of the Coalition represent every geographic region in the continental U.S. and 16 separate states, with the majority of the clinics handling over 50 cases per year. The majority of the Coalition's clinics provide free training to educate attorneys who then accept pro bono cases, and most clinics are not limited to handling veterans' benefits claims but also include assistance relative to veteran treatment courts, correction of military records, civil matters, and family law. The Coalition's mission includes increasing collaboration with the U.S. Department of Veterans Affairs, U.S. Congress, non-profit groups working with veterans, and other federal entities in order to benefit veterans throughout the country.

To execute this mission, the Coalition recently held a national conference in the nation's capital where 150 legal professionals shared best practices and explored synergies that aid veterans nationwide. Attendees and speakers included veteran clinic professionals from more than 40 major academic institutions, individuals from federal and state courts and agencies who regularly work with veterans, and other professionals who deliver pro bono legal services to military service members and veterans. The conference provided guidance for

**Law Schools Serving Veterans, *continued on*  
page 7.**

### **Law Schools Serving Veterans, *continued from page 6.***

those wanting to learn how to provide such services, as well as an advanced track for those already part of a pro bono program for veterans. Most of the Coalition's 30 members were represented on panels, and the conference planning committee included faculty from Vermont Law School, John Marshall Law School, the University of Missouri, the University of Arizona, and William & Mary Law School, and attorneys from Duane Morris, Holland & Knight, and Nixon Peabody.

Conference topics included starting a pro bono clinic; how such clinics support veterans and their communities; community and professional partnerships; working with federal and state agencies; and representing veterans before federal boards and courts. There were more than 25 panelists from law schools, non-profits, the VA, and the courts, including the Honorable Margaret Bartley of the U.S. Court of Appeals for Veterans Claims, and the Honorable Vito Clementi and the Honorable James Ridgway, both of the Board of Veterans' Appeals. Featured speakers included The Honorable Leigh A. Bradley, General Counsel, U.S. Department of Veterans Affairs, who provided keynote remarks; Senator Mark R. Warner (VA); and U.S. Representative Gus Bilirakis (FL-12). U.S. Representative Dina Titus (NV-1) sponsored the Coalition's beautiful Capitol Visitor Center location. Admiral (ret.) John C. Harvey, Jr., Virginia Secretary of Veterans and Defense Affairs, provided opening remarks applauding the work of the law school clinics and encouraging their proliferation to meet the growing need among veterans.

Attendees were consistent in their high praise for the conference, expressing interest in a similar conference being held annually and suggesting more time to allow even greater exploration of topics. One attendee noted, "[t]his was an incredible conference - it is impossible to pick which sessions were most useful. They all were extremely helpful and inspiring," while another wrote, "[t]errific conference - it made getting up to speed so efficient. Fantastic place to develop key contacts and

support." The conference also accomplished its goal of aiding in the development of new clinics, as evidenced by one attendee's comment that she was now "able to conceptualize a roadmap towards the creation of a veterans' support clinic."

The Coalition is aided by the pro bono government relations services of Christopher DeLacy of Holland & Knight, LLP, Douglas Dziak of Nixon Peabody LLP, and Michael Barnicle of Duane Morris LLP, each of whom provide countless pro bono hours in the creation and advising of the Coalition. Their efforts have already resulted in significant benefit to the members of the Coalition and the veterans they serve, and they encourage additional law school veterans' clinics to join the Coalition to aid in leveraging services and creating systemic change.

The National Law School Veterans Clinic Coalition is grateful to the sponsors of the November 2015 conference: Ferguson Enterprises, Dominion Virginia Power, Holland & Knight LLP, Nixon Peabody LLP, Duane Morris LLP, Honeywell, The Coca-Cola Company, McGuireWoods LLP, Virginia Natural Gas, the Veterans Consortium Pro Bono Program, LexisNexis, National Veterans Legal Services Program, Douglas J. Rosinski, Esquire, William & Mary Law School, the University of Arizona James E. Rogers College of Law, and other friends of the member clinics.

*Patty Roberts is a Clinical Professor of Law and Director of Clinical Programs and the Lewis B. Puller, Jr. Veterans Benefits Clinic at William & Mary Law School.*

### **CONTRIBUTION IDEAS?**

Please contact Megan Kral at [Megan.Kral@VA.gov](mailto:Megan.Kral@VA.gov) for more information.



## Veterans Law Clinics Teach Students to be Practice-Ready Litigators

by Aniela Szymanski

The largest departments in law firms and a large percentage of government lawyers are committed to litigation. A recent white paper published by LexisNexis revealed some startling findings including that 95% of hiring partners and associates believed that recently graduated law students lack key practical skills at the time of hiring. "Attorneys particularly noted that new attorneys' lack of understanding of how a litigation or transactional matter actually happens in real life requires them to review this foundational knowledge to increase associates' immediate value."<sup>1</sup> It is no surprise, then, that the American Bar Association has begun requiring that each graduating law student have completed at least six credit hours of experiential learning, which includes clinics.

Veterans law clinics provide two important benefits to students: first, the opportunity to acquire litigation skills that can be translated to almost any other type of litigation, and, second, the chance to assist veterans, something they may never get the opportunity to do again depending upon their future career paths.

The litigation skills that veterans law clinics foster are numerous. One of the most important is how to develop a factual record to position a case for early resolution. Less than 2% of all civil cases in federal court are resolved at trial, and that number falls to below 1% for state courts.<sup>2</sup> This means that a vital litigation practice skill is developing a case with the aim of settlement, which is almost always dependent upon the factual record. Veterans law provides an

excellent opportunity to develop these skills by teaching students how to gather existing evidence (military records, medical records, etc.), how to assess whether the existing evidence does or does not support the desired outcome, and how to develop new evidence that will encourage a favorable resolution (drafting witness affidavits, obtaining new medical opinions, etc.).

Another practice skill veterans law clinics provide students the opportunity to hone is client interaction. Interacting with clients adds an entirely new dynamic to what law students learn in their doctrinal courses. Clients invariably have different priorities depending on personal circumstances, may provide only limited factual background information unless specifically asked about relevant matters, or desire a representative to undertake unsound strategies in their cases. All of these challenges have no doctrinal answer and students must experience them first-hand to form the confidence and interpersonal skills to professionally manage them.

Further, veterans law clinics provide students the opportunity to practice legal writing. Most veterans law clinics require students to perform a variety of legal writing tasks throughout the course of a semester or academic year, including client communication, legal memorandums to supervising attorneys, affidavits, communications to government agencies and opposing counsel, legal briefs to Veterans Law Judges, and appellate briefs in court. This prepares students for a great number of legal writing tasks that they will be required to perform as future litigators.

Finally, in addition to the practical skills students gain, they also gain the rewarding personal experience of helping veterans. Some comments that I have received from my own students at William & Mary Law School's Lewis B. Puller Jr. Veterans Benefits Clinic about their experience in the clinic include: "This is the best experience that I have had in my life" and "This changed my entire outlook on veterans."

**Veterans Law Clinics, continued on page 9.**

1 A 2015 survey commissioned by LexisNexis of 300 hiring partners and senior associates who supervise new attorneys from litigation and transactional practices in small to large U.S. law firms. Available at [www.lexisnexis.com/documents/pdf/20150325064926\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf).

2 "The Disappearance of Civil Trial in the United States" John H. Langbein, 122 Yale L.J. 522 (2012)



### Veterans Law Clinics, *continued from page 8.*

Even if students accept positions in completely unrelated areas of law and never work in the field of veterans law again, they will have at some point in their careers done something that impacted the personal life of a veteran and, at the same time, gained context for the impact of broader policy and regulatory issues affecting this group. If these students move on to become politicians, senior executives, or even members of the military themselves, what they learned will no doubt stay with them in some way and inform their decisions accordingly.

*Aniela Szymanski is the Director of Veteran and Survivor Services for the Military Officers Association of America and Adjunct Prof. of Law in the Puller Clinic at William & Mary Law School.*

## How Far Does the Duty to Assist Extend Regarding Records Searches?

by Peter E. Levrant

Reporting on *Gagne v. McDonald*, 27 Vet.App. 397 (2015).

In *Gagne v. McDonald*, the U.S. Court of Appeals for Veterans Claims (CAVC) looked at the VA's statutory duty to assist in the context of submitting records searches to the Joint Services Records Research Center (JSRRC). The JSRRC completes service-member records searches by hand, and it requests that searches be limited to a 60-day period. A provision of the *VA Adjudication Procedures Manual* allows the Regional Office (RO) to deny a claim for a claimant's failure to provide information sufficient to conduct a JSRRC search. In this case, the CAVC ruled that, where the VA had information narrowing the relevant period to one year, it had sufficient information and should have submitted multiple 60-day searches as required by its statutory duty to assist.

Mr. Gagne served in the Army from 1966 to 1968. During that period, he was deployed to Thailand as a truck driver where he was involved in a traumatic vehicle incident. His experiences during the Vietnam War eventually led to his 2010 diagnosis of post-traumatic stress disorder (PTSD). As a result, Mr. Gagne filed a claim for VA benefits.

In reviewing his claim, the RO sent Mr. Gagne a request for additional information to substantiate his PTSD stressor event, i.e. the vehicle incident. Specifically, the RO requested the names of those involved and a 60-day timeframe for when it occurred. Although the RO knew that the alleged incident took place during Mr. Gagne's one-year deployment between 1967 and 1968, the claim was ultimately denied when Mr. Gagne failed to respond. In its formal finding, the VA stated that it denied Mr. Gagne's claim for failing to provide a 60-day search period, as well as not providing sufficient information to verify the stressor.

His claim was likewise denied following a review by a decision review officer, after which Mr. Gagne filed for a review by the Board of Veterans' Appeals. The Board denied his claim finding that the VA had satisfied its duty to assist and that the lack of information was insufficient to send to the JSRRC for verification of the incident. Thereafter, Mr. Gagne appealed to the CAVC.

In the appeal, Mr. Gagne argued that the VA failed to satisfy its duty to assist him with developing his claim under 38 U.S.C. § 5103A and 38 C.F.R. § 3.159. In particular, he argued that the *VA Adjudication Procedures Manual* provision, which allowed the RO to deny his claim for failing to provide a 60-day timeframe, violates the duty to assist and should be invalidated. Additionally, Mr. Gagne argued that, in lieu of an exact 60-day period, the VA must submit multiple 60-day inquiries to the JSRRC to search for substantiating records. In his brief, the Secretary argued that the 60-day provision was adopted to reduce the workload of the short-staffed JSRRC and should not be invalidated. However, at oral argument, the Secretary agreed with Mr. Gagne and

*Gagne, continued on page 10.*

*Gagne, continued from page 9.*

conceded that the case should be remanded to allow the JSRRC to conduct multiple 60-day searches.

The Court agreed with Mr. Gagne and held the Board had erred in finding the duty to assist satisfied. In its decision, the Court highlighted that the VA's duty to assist a veteran in obtaining records for a claim extends until "it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile." 38 U.S.C. § 5103A(c)(2). Moreover, the Court explained that the VA must "make as many requests as are necessary" to obtain such records. 38 C.F.R. § 3.159(c)(2) (2015).

The Court held that, because the RO should have submitted multiple 60-day searches, the VA's duty to assist was not satisfied. While submitting multiple searches may burden the JSRRC, it does not follow that such submissions would be "futile." Therefore, the Court found that failing to submit them violates the statutory duty to assist. Yet, the Court cautioned that its ruling does not apply to searches of indefinite periods of time. Furthermore, the Court did not address the validity of the 60-day rule. Instead, it found that because Mr. Gagne's one-year search period was not unreasonably long, remand was necessary for the VA to submit the multiple search requests to comply with its statutory duty.

*Peter Levrant is a third-year law student in the Veterans Legal Clinic at Syracuse University College of Law. He is also a separated Air Force Captain.*

## Rheumatoid Arthritis: Painful Motion is Limited Motion

by Tyler Crowe

Reporting on *Petitti v. McDonald*, No. 13-3469, \_\_\_\_ Vet. App. \_\_\_\_ (October 28, 2015).

In *Petitti v. McDonald*, the Court was asked to clarify what constitutes "painful motion" and what

evidence the Board of Veterans' Appeals must consider when making this determination in light of the interplay between 38 C.F.R. §4.71a, Diagnostic Code 5002 and 38 C.F.R. §4.59.

Title 38 C.F.R. §4.71a, DC 5002 describes how rheumatoid arthritis (RA) is to be evaluated under the disability rating schedule. Section 4.59 is one of several regulations that precede the rating schedule for the musculoskeletal system and explain how to arrive at proper evaluations under the DCs; it specifies that painful motion of a joint is to be recognized as a disability.

The issue arose from Mr. Petitti's RA, which presented while he was serving in the Air Force. The Board found Mr. Petitti to be entitled to a 40% disability, but the Board denied a disability rating over 40% for RA despite objective evidence of symptomology affecting multiple joints and a determination that Mr. Petitti's complaints of joint pain were credible. The

Board also determined that Mr. Petitti was not entitled to a 10% disability rating for each joint under §4.59 because the VA examinations showed neither limited motion on range-of-motion testing nor objective evidence of pain on movement. On appeal, the Court first reviewed DC 5002, pointing to specific language in DC 5002 stating that limitation of motion that is noncompensable under the DC for the affected joint may still be compensable on the basis of a minimum disability rating for each major joint or group of minor joints affected. Limitation of motion may be objectively confirmed by satisfactory evidence of painful motion and is a prerequisite for both a compensable disability rating under the DC relevant to the particular joint involved and for a minimum disability rating.

The Court next looked to §4.59, which ensures that a veteran experiencing an "actually" painful joint is entitled to at least the minimum compensable rating for the joint under the DC for the joint involved. Reading §4.59 and DC 5002 together, the Court found the terms "painful motion" and "actually painful joints" to be synonymous. For further

*Petitti, continued on page 11.*

*Petitti, continued from page 10.*

guidance regarding "painful motion," the Court looked to its prior interpretation of the relationship between §4.59 and DC 5003 (for degenerative arthritis) in *Lichtenfels v. Derwinski*, 1 Vet. App. 484 (1991), because of the striking similarities between the language in DCs 5002 and 5003 pertaining to the assignment of a minimum rating for noncompensable limitation of motion.

In *Lichtenfels*, the Court held that, where arthritis is established, painful motion of a major joint or group of minor joints is deemed limited motion and entitled to a minimum 10% rating per joint even though there is no actual limitation of motion. *Lichtenfels* held that § 4.59 links painful motion and limitation of motion, so a claimant with painful motion is considered to have limited motion under DC 5003 even though actual motion is not limited. In the present matter, the Court concluded that the interpretation in *Lichtenfels* of the effect of § 4.59 on DC 5003 also applies to DC 5002. When DC 5002 is read with § 4.59, painful motion of a joint is deemed limited motion of that joint, thus satisfying the requirement for limited motion under DC 5002 and entitling the claimant to the minimum disability rating for that joint under DC 5002 and § 4.59, even though the claimant does not have actual limitation of motion.

The Court then moved to what constitutes painful motion and what type of evidence is sufficient under the regulation to verify painful motion. DC 5002 requires that limitation of motion be corroborated by a person other than the veteran based upon that person's observations. DC 5002 also describes evidence that will "objectively confirm" limitation of motion as "satisfactory evidence of painful motion." The Court stated that "satisfactory evidence of painful motion" is capacious and encompasses not only a doctor's observations but also lay description of a veteran's painful motion. A lay description detailing observations of a veteran's difficulty undertaking various activities falls within "satisfactory evidence of painful motion" that has been "objectively confirmed." The Court

acknowledged that a veteran's own statements may be lay probative evidence when they describe symptoms capable of lay observation, citing *Jandreau v. Nicholson*, 492 F.3d, 1372, 1377 (Fed. Cir. 2007), with the caveat that there must be objective confirmation from a person other than the veteran or claimant of a veteran's joint pain.

When describing Mr. Petitti's disability, the Board had found that "[t]here is no doubt that pain exists that is daily and causes fatigue and stiffness," yet had determined that Appellant had no painful motion of the joints. The Court found that the Board's conclusion was clearly erroneous. The Court reversed the Board's finding and remanded the matter to the Board to determine the specific joints affected by RA and whether Mr. Petitti would receive a higher disability rating for the chronic residuals of his RA.

*Tyler Crowe is a third-year law student at the University of Richmond School of Law.*

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## Narrowing the Scope and Duties of 38 U.S.C. § 1151.

By Erin DeLancey

Reporting on *Ollis v. McDonald*, \_ Vet. App. \_\_, 2015 LEXIS 1449 (Oct. 28, 2015)

In *Ollis v. McDonald*, the United States Court of Appeals for Veterans Claims considered and resolved issues regarding the scope of 38 U.S.C. § 1151.

Mr. Ollis was diagnosed with atrial fibrillation in 1997 and received treatment for that condition at the Nashville VA Medical Center (VAMC) in March of 1999. Slip op. at 2. In July of 1999, the veteran received a pacemaker, but this did not resolve the issue and for the next decade the veteran continued to show symptoms. *Id.* at 3. In June 2007, he

*Ollis, continued on page 12.*

*Ollis, continued from page 11.*

revisited the Nashville VAMC to discuss his desire that the VA doctor perform a new surgical procedure called MAZE. *Id.* The veteran was informed that, while surgical MAZE was one available option, the epicardial MAZE would be the current preference. While this was not available at the VA (specialized operators and equipment were required), it could be performed at other local institutions; some recommendations were apparently provided. *Id.* In July 2007, Mr. Ollis visited his long time private physician to discuss this new surgical approach and did not mention any VA recommendation to the private physician. *Id.* The first private physician was unable to perform the surgery and referred the veteran to another private physician who could perform it. *Id.* This second private physician performed the surgery in August 2007; the procedure was paid for by private insurance. *Id.* The surgery was unsuccessful, however, and ultimately damaged a nerve, causing the veteran's cardiac issues to soon resume. *Id.* In July 2008, the veteran filed a claim under 38 U.S.C. § 1151 and was later denied by the Board on appeal, on a determination that the claim was outside the scope 38 U.S.C. § 1151. *Id.* at 4.

The Court explained that, under 38 U.S.C. § 1151, a veteran must meet three requirements to be able to obtain compensation. *Id.* at 5. First, the veteran must show that his current condition was not caused by his own willful misconduct. Second, the condition at issue must have been "caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department Facility." Third, the "proximate cause" of the condition must be negligence "or similar instance of fault on the part of [VA]" or "an event not reasonably foreseeable." *Id.* The Board had determined that the facts of this case did not meet the second requirement and, therefore, Mr. Ollis could ultimately not recover. *Id.*

On appeal, the CAVC addressed several issues regarding the scope of 38 U.S.C. § 1151. The Court noted that, while some issues had not been raised at the Board, it is ultimately up to the Court and the Court may consider any novel issues that it finds worthy. *Ollis*, Slip op. at 6, 9, citing *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

The Court analyzed specifically what the term "caused" meant in 38 U.S.C. § 1151 (a)(1). *Id.* It pointed out that the Federal Circuit has held that section 1151 requires "only a 'causal connection' between the disability and VA treatment." *Id.*, see *Brown v. Gardner* 513 U.S. 115, 119 (1994).

In this particular case, however, the Court held that the VA physician's conduct had not "caused" the veteran's current condition. *Ollis*, Slip op. at 8. The record demonstrated that, a week after the veteran had consulted a VA physician, he went to his long-time private physician, and there was no indication that VA was involved in the discussion of his treatment plan. *Id.* Further, another private physician performed the surgery at a private medical facility and there was no contractual relationship between the VA and that private physician. *Id.* Thus, any link between VA's advice and the veteran's disability was found to be too attenuated to satisfy the causal requirement of section 1151.

The Court also addressed what duties, if any, the VA owes a veteran to inform him about 38 U.S.C. § 1151. Mr. Ollis claimed that because the VA never informed him of any drawbacks that having this procedure done by a private physician would have on his claim for purposes of section 1151, the VA should be found to have failed to fulfill its duties under 38 U.S.C. § 6303(c) to "distribute full information to eligible veterans and eligible dependents regarding all benefits and services to which they may be entitled under laws administered by the Secretary." Slip op. at 9. Moreover, the veteran argued that he had a constitutionally protected property interest in his application

*Ollis, continued on page 13.*



*Ollis, continued from page 12.*

process. *Id.*, see *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

The Court noted that the language of 6303(c) is hortatory, not an enforceable legal obligation and therefore not an issue. Slip op. at 10. The CAVC rejected the veteran's due process argument, that he had a right to be notified before he lost eligibility for potential compensation benefits. Slip op. at 11. It held that a veteran only has a protected property interest when the veteran can show that he has first met "the eligibility requirements set forth in the governing statutes and regulations." *Id.*, see *Cushman, supra*. The Court further noted that the veteran must have "a legitimate claim of entitlement to it." *Id.*, see *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005). Mr. Ollis had not demonstrated that he had, in fact, met the requirements for section 1151 compensation and, therefore, he did not have a constitutionally protected property interest in said benefits. *Id.*

Judge Greenberg dissented, arguing that the majority had construed section 1151 too narrowly and had absolved VA physicians from any duty to advise patients when a medical recommendation would jeopardize a claim under section 1151.

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