Reveille

Published by the Military & Veterans Law Section of the North Carolina Bar Association • Section Vol. 1, No. 2 • March 2017 • www.ncbar.org

The Chair's Comments

Judge Rideout

The Times They Are a-Changin'

"Come gather around people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
And if your breath to you is worth saving
Then you better start swimming or you'll sink like a stone
For the times they are a-changing"
– Bob Dylan

My friends, since we last spoke, the times have clearly changed. As advocates for service members and veterans, we have seen momentous changes at both the state and federal executive branch. For us this will mean two things.

First, there will be a tremendous increase in the pace of changes in our composite field of law. I would anticipate substantial procedural changes within the Veterans Administration that will affect pending cases. Additionally, the division between the state executive branch and the North Carolina General Assembly will mean that we need to be ever more diligent in making certain that the interests of service members and veterans are protected.

The second effect of these changes is a need to rededicate ourselves to the purpose of our work. We are not a political animal. We are an advocacy group, representing the interest of the very best America has to offer. Our goal is not the enrichment of one party or another; it is to protect and provide for our service members, veterans, and their families. That means, regardless of whether you are satisfied with the presidential or gubernatorial results, we must, for the sake of our clients, be willing to engage in a dialogue with whomever is in power. They come first and they will always be first.

Now here's the good news, this section has the team in place to do some real good for our community. I was amazed at how well our most recent MVL Council meeting went. You guys have hit the ground running. The ideas, energy and excitement absolutely warmed my heart and helped me to un-

Continued on page 2

NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

www.ncbar.org
919.677.0561
@NCBAorg

Membership Spotlight: Judge Frank D. Whitney

By Charles R. Raphun

Among our section members we share a unique bond; not only do we cherish the legal profession and strive to improve it, but we are also committed to serve and support our service men and women, veterans and their families. Frank D. Whitney, Chief United States District Judge for the Western District of North Carolina, exemplifies that commitment in both his personal and professional lives. Born in Charlotte, Judge Whitney was raised in a family that instilled in him respect for both the legal profession and service to the nation. In fact, he points to his father, A. Grant Whitney, as his source of inspiration for his career and his mentor for moral and ethical integrity. The elder Whitney was a World War II veteran who served on active duty in the Army from 1940 through 1946, then continued his service with another 24 years in the Army Reserve. He had plans to attend law school, but the demands of wartime unfortunately set those back. Those ambitions and values were passed on to his son, Frank, who not only became an attorney and judge, but also made military service a life's calling.

Judge Whitney is a retired Army Reserve colonel, having rendered 30 years of service – in both active duty and reserve status – first as a Military Intelligence (MI) officer and later as a judge advocate. He was commissioned as an MI second lieutenant and served in the U.S. Army Reserve following graduation from Wake Forest University in 1982 and completion of the R.O.T.C. program

Continued on page 3

Inside this Issue...

4 | Conflict On the Home Front: PTSD, TBI and the Discharge of Heroic Soldiers
7 | The National Defense Authorization Act and Military Discharge Upgrades
8 | Reopening VA Disability Claims After a Final VA Denial
10 | Understanding First Amendment Compromises Made in Defense Of Military Operational Security
12 | With Some Prior VA Claims, Determinations of Finality May Dictate Present Strategies
14 | Arguing for Extraschedular Ratings

Reveille

Published by the Military & Veterans Law Section of the North Carolina Bar Association

Vol. 1, No. 2
March 2017

Editor
Tod Leaven

Chair
Judge Robert W. Rideout Jr.

Vice Chair
Matthew I. Wilcut

Secretary
Darlene G. Chambers

Treasurer
Gene B. Tanner

Section Council
Adam P. Banks
Judge Augustus B. Elkins II
Lt. Thomas O. Murry
Judge Luis "Lou" Olivera
Kirk G. Warner
Daniel Dutilly
David L. Hayden
Leah Hermiller
Judge Donald W. Overby
Patrick Togni
Glen B. Blumhardt
Alicia Jurney
Tod M. Leaven
John P. March Jr.
Charles R. Raphun

© 2017 North Carolina Bar Association. Views and opinions expressed in articles published herein are the authors' only and are not to be attributed to Reveille, the Military & Veterans Law Section or the NCBA unless expressly stated. Authors are responsible for the accuracy of all citations and quotations. No portion of the publication may be reprinted without permission.

NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

The Chair's Comments, continued from the front page

derstand that this section will be a powerful voice within the North Carolina Bar Association.

So for you, my brethren, who may be celebrating or bemoaning recent federal and state elections, please appreciate that our mission has not changed one bit. Also know that our message resonates with people in both parties as well as with the American public. You guys are the agents of change. We have a remarkable organization. We have remarkable energy. Our time, your time, is now. Now, let's go out there and do some good.

Very Respectfully,
Bobby Rideout

Judge Bobby Rideout is currently the Hearing Office Chief Administrative Law Judge for the Office of Disability Adjudication and Review in Raleigh. Additionally, Bobby is a highly decorated veteran of Iraq and Afghanistan. He is currently a Lieutenant Colonel in the U.S. Army Reserves and a Military Judge in the 2nd Judicial Circuit.

VOLUNTEER IN FAYETTEVILLE

4ALL Statewide Service Day

celebrating **10 years** of service

Friday, March 3, 2017

Register for Fayetteville online at
4ALL2017fayetteville.eventbrite.com

Visit ***www.4ALLnc.org*** for more information other locations.

Judge Whitney, continued from the front page

there. Later, following graduation from law school at the University of North Carolina at Chapel Hill in 1987 where he also earned a Master of Business Administration degree as part of the university's joint JD/MBA program, he transitioned from MI to the Army Judge Advocate General's Corps in which he served for the majority of his military career. Having a series of assignments of progressively increasing responsibilities, his Army career culminated in his posting as Military Judge in the USAR Legal Command, during which time he deployed to Southwest Asia – where he adjudicated courts martial in Iraq, Afghanistan and other countries in the U.S. Central Command area.

In his civilian life, Judge Whitney began his legal career in private practice in Washington, D.C. in 1987. Shortly thereafter, from 1988 through 1989, he clerked for Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit. He credits Sentelle with providing him with an enduring mentorship and invaluable experience in the legal profession. Judge Whitney returned to private practice following his clerkship, then worked as a criminal prosecutor as an assistant U.S. Attorney for the Western District of North Carolina from 1990 through 2001. He later was appointed by President George W. Bush as the United States Attorney for the Eastern District of North Carolina, where he served with distinction from 2002 through 2006. In 2006, he was appointed to serve as a U.S. District Court Judge for the Western District of North Carolina, and later in 2013, rose to become Chief U.S. District Court Judge where he presently serves. In this capacity, Judge Whitney supervises the administration of that Court and the officers and personnel therein.

When asked why he joined the Military and Veterans Affairs Section, Judge Whitney was at no loss for words: "Our citizens owe a lot to our veterans. Most people don't know how well off we are as a country because of our veterans and what they and their families have sacrificed. I want to do all that I can to help those who serve and to make sure that they are valued." He went on to explain that in our country, we have had a gradual decline in the percentage of men and women who have served in uniform, and the gap in public understanding of the role of the military—as well as the burdens and sacrifices that the military community has made—has in turn grown. He went on to say, "We went from a time when 10 percent or more of our population was in uniform at any one time [WWII] to today, where less than 2/3 of 1 percent are serving. So this gap has grown and it is important to close that gap—not just to acknowledge their service, but to ensure that future generations are able to recruit, build and maintain a strong force of citizen-soldiers."

Judge Whitney had similarly inspirational views on the legal profession and its role in our society. "Our legal system—our esteem for the rule of law – are incredible. We have the best justice system in the world, and people need to know why that is and how to make it stronger." He went on to extol the strengths of the American jury system as being a model for both enhancing public involvement in the judicial process and also for preventing prosecutorial excesses for political expediency. Judge Whitney is exceptionally well-qualified to provide this articulation of our system of justice. Not only has he seen overseas military service in countries where the rule of law was not as cherished as in America, but he has also experienced global contact with many jurists and attorneys while lecturing on the attributes and principles of the U.S. court system in countries such as Bahrain, Indonesia, South Africa, Japan, and Italy. These exposures and opportunities to positively influence legal systems worldwide are indicative of Judge Whitney's devotion to and love for the legal profession and its tenets.

Judge Whitney cited two common issues that are pervasive across the spectrum of military veterans, serving service members and their families: the lingering effects of PTSD and, relatedly, the loss of an intrinsic cultural structure or support system that they experience when transitioning from military to civilian life. He pointed out that because of the nature of military life and the history of our nation's collective military experience, though often challenging in many ways, there is a built-in support system that pervades military communities, units and formations. This network of formal and informal institutions and norms provides a source of protection, comfort, and direction, in many ways, to troops and units that is rare in civilian life. As warriors leave active service – which all eventually do – some find it difficult adjusting to this loss of paternalistic network. Those with varying degrees of PTSD or other debilitating conditions are most at risk of being undervalued or ignored in their new civilian lives. Judge Whitney believes that by trying to understand these dynamics and how they affect our military communities, our section can make a profound contribution to society. He notes programs such as "Wills for Warriors" and the various law school veterans' clinics as worth supporting, for just this reason.

Judge Whitney's upbringing, education, experiences and insight are profound and serve as an inspiration to our section and the bar as a whole to do all that we can to help both our legal profession and the members of the profession of arms – for the sake of individual service members and that of our country.

Charles R. Raphun is in-house counsel for Genband US LLC, a multi-national telecommunications solutions provider, where he provides legal counsel for software development, technology licensing and regulatory affairs. He is also a retired Colonel in the Army Judge Advocate General's Corps and deployed to Iraq in 2003 in support of OIF I. He lives in Raleigh.

Conflict On the Home Front: PTSD, TBI and the Discharge of Heroic Soldiers

By Todd C. Conormon

I have spent much of my professional life representing soldiers during times of personal crises. Many of these clients are combat veterans. I confess that I have never "seen" combat and my "war experience" put me on the fringe of combat as a judge advocate. Nevertheless, I have also represented countless combat veterans and I have learned this: Combat changes people.

Modern warfare is lethal and life-giving, terrifying and exhilarating, full of great cruelty and great compassion, producing in some extraordinary valor while inducing in others breathtaking cowardice. Authentic combat is nasty business. Soldiers use every conceivable means to kill or wound each other. Moreover, the enemy is deadly, radically committed and difficult to identify. A suicide bomber or assassin can be a military aged man, a woman, a young child or an old man. In the modern combat zone, the threat of violence and death is a full spectrum menace.

The physiological impact of combat on the warrior is tangible. In combat the body reacts; adrenalin is propelled throughout the body, heart rates increase, sphincter muscles are loosened, and the mind comes into uncanny focus. During periods of prolonged combat or exposure to the enemy, the body and mind stay watchful, constantly prepared for the sudden onslaught of lethal force. The brain becomes rewired, constantly vigilant and never truly at rest. It is not surprising that combat has a deep and protracted impact on the life of combat veterans and this is often manifested in mental and emotional disorders. These disorders often lead to misconduct and the threat of administrative separation from the military. To make matters worse, we have seen a manic effort by the armed forces to reduce its force, often leading to intolerance toward any service members who acts out. Accordingly, a high percentage of soldiers, sailors, Marines and airmen are being separated despite their deployment history and potential impairment due to PTSD, TBI and other related mental disorders. *See* Michelle Tan, Army Times, December 3, 2015, access on January 28, 2017, at https://www.armytimes.com/story/military/pentagon/2015/12/03/army-launches-review-Soldier-misconduct-discharges/76731238/ (In 2015 The Army began a "thorough, multidisciplinary review" in response to a call from a group of 12 senators to investigate reports that as many as 22,000 soldiers who had been diagnosed with mental health problems were discharged for misconduct.).

Historical Context

It is important to understand that PTSD and combat stress are not modern phenomena. Dr. Walter McDermott writes, "Over the centuries wise men have known that war may cause chronic psychological problems in the minds of returning Soldiers." Walter F. McDermott. *Understanding Combat Related Post Traumatic Stress Disorder,* (Jefferson: McFarland & Company, 2012), 7. The effect of war on the psyche of soldiers has been chronicled as far back as the early Greeks. Wendy Holden, "Shell Shock: The Psychological Impact of War" (Great Britain: WHINC, 2014). Kindle Edition. In World War I the term became "shell shock," supposing that soldiers suffered from injury to the central nervous system resulting from intense shelling. After the war Freudians used the term "war neurosis," supposing that combat stress was caused by subconscious conflicts dating back to childhood. In World War II medical personnel used words like "combat fatigue" and "combat exhaustion" reflecting that soldiers frequently encountered an inability to go on after many weeks of combat." *See* Holden, Chapter 1; Jones and Wessely, Chapter 1; McDermott. Chapter 2. This history firmly rebuffs the myth that soldiers in the past never suffered from PTSD. In truth, as author Wendy Holden puts it, "Descriptions of strange behavior in the face of battle were recorded by Homer and in early Chinese literature." Holden, Wendy (2014-03-28). "Shell Shock: The Psychological Impact of War" (Kindle Locations 117-119). WHINC. Kindle Edition.

Today post-traumatic stress disorder is "the most common and conspicuous residue of combat-induced stress." Zahava Solomon, "Combat Stress Reaction: The Enduring Toll of Combat," (New York: Plenum Press 1993) 73. The symptoms of PTSD can include *inter alia* intrusive memories, flashbacks, hyper-vigilance, nightmares, suicidal thoughts, depression, increased alcohol use or drug use. *See* http://www.ptsd.va.gov/public/PTSD-overview/basics/symptoms_of_ptsd.asp; *See also* Diagnostic and Statistical Manual of Mental Disorders (DSM–5). The usual estimate is that roughly 20 percent of combat veterans suffer from PTSD. This estimate is probably low since historically there has been reluctance on the part of soldiers to concede the true scope of their mental health problems stemming from combat. A new study by the Veterans Administration now reveals that nearly 30 percent of its patients who served in Iraq and Afghanistan have PTSD. "Nearly 30% of Vets Treated by V.A. Have PTSD", The Daily Beast, Jamie Reno, October 21, 2012. For many, untreated and unresolved PTSD can devastate a life and incapacitate its victims. The painful paradox is that fighting for one's country can render one unfit to be its citizen. Jonathan Shay, "Achilles in Vietnam: Combat Trauma and the Undoing of Character," (New York: Scribner 1994) xx.

Another aspect of war and its impact that is not fully encompassed by the concept of PTSD is the notion of *moral injury*. When representing services members, especially soldiers and Marines who have served in combat, the issue of moral injury requires careful attention. When American soldiers commit acts or witness scenes that violate deeply ingrained moral and religious beliefs, it has a profound impact on the conscience. Accordingly, commentators have observed that "… it is very clear that the experience of killing other human beings— particularly, but not only, if the killed are civilian noncombatants or if the killing was done under morally uncertain or dubious conditions—can be associated with profound suffering

well after return from combat. Warren Kinghom, "Combat Trauma and Moral Fragmentation: A Theological Account of Moral Injury," Journal of the Society of Christian Ethics, 32, 2 (2012): 57-74. Today's asymmetrical battlefield is often characterized by ambiguous circumstances. Enemy combatants do not wear uniforms. Insurgents use our rules of engagement against us, using noncombatants as cover or hiding next to non-military targets like schools and hospitals. While soldiers are trained to kill the enemy, they are often unprepared for the death of women and children who are caught in the middle of the modern battlefield. These experiences can have a profound impact on service members and often lie behind a veteran's self-destructive behavior.

These conditions are further exacerbated by the increased incidence of traumatic brain injury (TBI). It is important to note that PTSD and TBI are often mentioned together, but they are two distinct conditions - one can have one without the other. Recent studies are demonstrating that explosions that are common place, such a IEDs, VIEDS, breaching explosions all potentially cause significant neurological damage. Robert F. Worth, "What if PTSD Is More Physical Than Psychological" The New York Times Magazine, June 10, 2016. It has been my experience that very often soldiers facing discharge for misconduct have all of these conditions in varying degrees and too often the command has failed to consider these potential mitigating circumstances.

Crisis and Conflict

The result of ignoring these conditions in that our wounded warrior population has been increases in suicide, unemployment, homelessness, domestic violence, criminal behavior, and incarceration. Combat veterans drink and drive, assault their spouses, abuse drugs and even kill themselves, doing enormous harm to our communities in North Carolina. Sometimes these veterans are diagnosed with PTSD, but often these diagnoses are missed, ignored, or diagnosed as something less severe. As a result combat veterans are filling our courts, our hospitals, and our morgues.

This is especially true in Fayetteville, North Carolina, a city of over 200,000 people, and the backyard of Fort Bragg. *See* City data at http://www.city-data.com/city/Fayetteville-North-Carolina.html (Cumberland County's population alone is over 320,000 according to US census records). Fort Bragg is home to over 50,000 active duty military personnel. *See* http://www.army-technology.com/features/feature-largest-military-bases-world-united-states/ (Army –Technology.com, which reports that Fort Bragg is the Largest Army Base in the world by population; Accessed December 28, 2016). Fort Bragg borders the towns of Fayetteville, Spring Lake and Southern Pines as well as four counties—Cumberland, Harnett, Moore and Hoke. See http://www.census.gov/quickfacts/table/PST045215/37051 (U.S. census data accessed December 28, 2016). Fort Bragg is home to the Army's 82nd Airborne Division, XVIII Airborne Corps, the United State Special Operations Command, Forces Command, the Joint Special Operations Command and United Army Reserve Command. Fort Bragg has so many generals that it is sometimes called "the Pentagon South." Consequently, the Fort Bragg region has become an epicenter to the maelstrom known as PTSD.

When it comes to addressing PTDS, TBI and acute combat stress, the Army is confronted with competing priorities. Its role is to fight and win the nation's wars. This requires courageous, disciplined and fully committed soldiers. Soldiers are "ready to deploy, engage, and destroy, the enemies of the United States of America in close combat." https://www.army.mil/values/warrior.html (accessed December 28, 2016). Historically, the military has struggled with the tension between training its soldiers to kill and die while effectively treating those who are impacted by combat. It is hard to reconcile PTSD with the warrior ethos promoted by the Army. Soldiers find it difficult to ask for help when this is at odds with their warrior identity. What's more, Army providers are sometimes slow to diagnose PTSD and its related conditions because this is at odds with the mission to deploy men and women into combat especially when many of these Soldiers want to deploy.

The Military Solution: Kick Them Out

These concerns facing combat veterans are particularly acute in the area of administrative separations. Soldiers who engage in self-destructive behavior frequently face discharge. According to the Department of Defense administrative separations "promote the readiness of the Military Services." DODI 1332.14, paragraph 4a. Thus when combat veterans drive drunk, become combative, assault their wives, abuse drugs or commit countless others acts of misconduct; they come face to face with a system increasingly intolerant of misbehavior or delinquency. The increased pressure to reduce the force has caused commanders to turn their backs on combat veterans who get in trouble. Zero tolerance is the consistent mantra of commanders who encounter misconduct within the ranks.

The Advocate's Role

These conditions present a challenge and an opportunity for advocates. Attorneys representing Service Members need to understand the phenomenon of PTSD and its associated disorders and educate commanders and administrative separation boards. To do this, it is essential to explore the soldier's combat experience and assess whether the client suffers from PTSD, TBI, moral injury or other combat-related disorders. In almost every separation case involving a combat veteran, the experience of combat plays an important mitigating factor. The key is to identify the unique characteristics of each client and then to convey your client's story. Some soldiers have multiple combat tours. Special Forces Soldiers often have eight-to-10 combat rotations. So it is especially important to understand the cumulative effect of combat since multiple deployments can exacerbate the impact of PTSD and its related disorders. It is important to note that it is not necessary for a service member to have been in combat to suffer from PTSD. Consider a trauma nurse or physician who sees gruesome scenes every day. They may not have deployed, but they still experience traumatic events and may suffer from PTSD or its associated symptoms.

Issues To Address

There are various issues to address when facing an administrative separation action for a combat veteran. First, it is important to note DoD requirements to evaluate soldiers who have deployed and who have medical conditions. DODI 1332.14 requires that the Service Secretaries comply with federal law (*See* 10 USC §§ 1145 & 1177) and conduct a health assessment of all members facing sepa-

ration at the time of separation. Too often this requirement is given cursory compliance routinely finding a soldier "fit for duty." Thus it is essential to insure the client have been adequately evaluated, especially since many have avoided the diagnosis of PTSD and TBI throughout their career. Recently, we represented a soldier with nearly a dozen deployments. He initially was initially deemed fit of duty. Despite many years of outstanding service, there was a significant deterioration over the past year. At my insistence, he was evaluated by a concussion care clinic. The clinic found evidence of PTSD and TBI. Conversations with another witness revealed a history of dissociative blackouts that had previously not been assessed. At the board, his counselor testified and explained the physiology of PTSD and TBI. Despite a laundry list of alleged misconduct, the board retained the soldier. Afterward, the board members expressed concern that his chain of command had not gotten this soldier help sooner. We told this soldier's story and he will now retire.

Sometimes military health care providers can be very helpful. Sometimes it is necessary to obtain an independent examination of a client. Either way, it is essential to look carefully at your client's history, his combat experiences and his actions. It is too easy in today's military culture to take no notice of combat-related stress and disorders until it is too late and it often the advocate who must first identify the evidence of PTSD.

Once there is a diagnosis of PTSD or TBI, the advocate should attempt to educate the chain of command. Too often we have seen commanders who do not know the service member. All they know is the alleged misconduct. Educating the chain of command includes not only conveying the diagnosis but the service history and how your client's sacrifice has led them to this separation action. When this is successful the command can become an ally. On occasion, a commander or separation authority may agree to a medical separation in lieu of a separation board.

When alternative solutions are not available the advocate must educate the board. Helpful articles, government websites that address PTSD like the Veterans Administration, medical records, and expert witnesses, are useful. Some military medical professionals go out of their way to assist combat veterans, and these witnesses can educate the board members of the true meaning of PTSD and TBI.

It is essential to insure the board recognizes the importance of mitigating factors. This can be done through a thorough an effective voir dire. Be prepared for some unusual looks from board members when you ask probing questions. Many young judge advocates eschew the opportunity to voir dire board members, but I have found the process extremely helpful. If done carefully, good questions can identify board members predisposed to separation as well as those with a *hyper-zero-defect* orientation. Moreover, effective questioning can educate the board and introduce the themes you intend to use in the hearing.

I also find it important to explain the differences between medical discharges and misconduct discharges. Too often the quip is: "Let the VA handle it." However, the truth is that a medical discharge generally offers a veteran greater medical care and benefits than are available to a service member discharged for misconduct. Many soldiers suffering from PTSD or TBI are entitled to medical retirement. This means a lifetime of medical coverage. This is not available to soldiers discharged early for misconduct. Moreover, the DoD often offers far better programs for TBI and even PTSD than is currently available from the VA. A discharge for misconduct means no medical coverage, no retiree ID, and no TriCare—a serious loss for a soldier with multiple deployments and many years of service. It is often argued that a prior honorable discharge entitles a service member to benefits regardless of a subsequent discharge for misconduct. This may be true, but I advise caution. Eligibility for VA benefits can change over time and be subject to varying regulations. Consequently, I resist any argument by the government counsel to suggest that an other-than-honorable discharge will have no impact on the availability of VA medical benefits.

Finally, tell your client's story! This is always our primary role. Board members can be greatly influenced by a compelling narrative. It is through the vehicle of the story that the mitigating and extenuating factors embedded in our client's cases come to life. When possible, describe the experiences of combat that stands out—especially when this conduct involved heroic actions by your client. Ideally, board members, especially combat veterans, will identify with your client's experiences and struggles. To be sure we must proceed cautiously. We do not want to overstate the impact of combat to board members whom themselves have multiple combat tours. Nevertheless, when presented respectfully and accurately, most combat veterans understand the debilitating impact of combat. I have seen too many officers and NCOs weep in my office not to believe that combat changes people and most veterans understand this. The more effectively we can convey our client's story, the more likely the board members will take into account these factors when deciding our client's future.

From a lawyer's standpoint, nothing is more fulfilling than representing combat veterans. I am constantly impressed with the sacrifices our soldiers, Marines, sailors, and airmen make on behalf of their country. I am also convinced that modern combat impacts each participant deeply and in ways that are difficult to explain and understand. When suffering soldiers jeopardize their military careers, the lawyer must marshal his or her skills as an advocate and story teller. In the words of Dietrich Bonheoffer, "We must learn to regard people less in the light of what they do or omit to do, and more in the light of what they suffer." Dietrich Bonheoffer, "Letters and Papers from Prison" (New York: Touchstone 1953, 1977 Updated Edition) 10. Our challenge as advocates is to enable commanders and board members to regard our clients in the light of what they suffered in service to their country. When we do this well, we provide an important service to our clients, their families, our communities and our nation.

Todd Conormon began the Military Justice Center in 1999, concentrating on serving the legal needs of the military community in Fayetteville. He retired from the North Carolina National Guard in 2008 in the rank of Colonel. He holds a B.A. from St. Bonaventure University; a J.D. from New York Law School; and a M. Div. from Gordon-Conwell Theological Seminary.

Todd was assisted in this article by ***Andrew Dualan***, who joined the Military Justice Center in October. Andrew holds a B.A. from George Washington University and a J.D. from Chapman University School of Law.

The National Defense Authorization Act and Military Discharge Upgrades

By Robert R. Davis

The National Defense Authorization Act for fiscal year 2017 (NDAA) was signed into law on Dec. 23, 2016. Although the primary focus of the law was the Department of Defense budget and expenditures, the law contains provisions that are important for those assisting clients with discharge upgrade requests and are summarized below. Together, the NDAA's changes reflect a move toward more standardized practices among the boards and the effect of continued advocacy in improving board procedures.

1. **Modifications to BCMR Reconsideration Rules (10 U.S.C. § 1552)**

The NDAA makes significant changes to the reconsideration standard at the Boards for Correction of Military/Naval Records (BCMRs). Under the new law, BCMRs must reconsider any claim if the reconsideration request is supported by "materials not previously presented to or considered by the board in making such determination." The NDAA specifies that the timing of the reconsideration request does not matter. It is worth noting that BCMRs often fail to describe the record evidence and leave substantial room for advocacy regarding the scope of materials not previously considered.Previously, each BCMR had its own reconsideration procedures, some of which were substantially stricter than the rule contained in the NDAA and therefore overturned. The Army required reconsideration requests be made within one year of denial of the initial request. 32 C.F.R. § 581.3. The Air Force required the submission of "newly discovered evidence that was not reasonably available at the time of the original application" and excluded cumulative evidence from its definition of new. 32 C.F.R. § 865.6. The Coast Guard only considered evidence that could not have been initially presented with the exercise of reasonable diligence in determining whether to reconsider a case. 33 C.F.R. § 52.67.

Under 32 C.F.R. § 723.9, the Navy (which also reviews Marine Corps cases) could grant reconsideration of a final decision for new and material evidence and matters not previously considered. The Navy's rule on new and material evidence was similar to the Air Force's rule and is likewise replaced by the broader rule in the NDAA. The Navy's rule on matters not previously considered, however, expressly includes both new factual allegations and new arguments, issues which are not expressly described in the NDAA.

In addition to the limitations described above, the rules for each branch of service had other limitations that have been removed by the amendments to 10 U.S.C. § 1552. The new rule indicates a clear intent to broaden the scope of reconsideration at the BCMRs and should therefore be construed generously for claimants.

2. **Codification of the Hagel Memo at 10 U.S.C. 1443(d)**

On Sept. 3, 2014, after litigation with Yale University and the Vietnam Veterans of America, former Secretary of Defense Chuck Hagel issued a Memorandum for Secretaries of the Military Departments (Hagel Memo), which described certain policies and procedures for dealing with Post Traumatic Stress Disorder (PTSD) at the BCMRs. The NDAA codifies much of the substance of the Hagel Memo, but limits these provisions to Discharge Review Boards (DRBs), which can review most discharges for service within 15 years of discharge. Under the NDAA, DRBs are required to give liberal review to the contribution of PTSD or Traumatic Brain Injury (TBI) to a discharge and must review certain medical evidence that is presented.

3. **Publication Requirements**

The NDAA directs the BCMRs and DRBs to publish data on the number of claims considered, submitted, and corrected each quarter and data on cases involving PTSD or TBI and war or contingency operation involved. The NDAA also requires the publication of the final decisions of the boards. Some BCMR and DRB decisions are currently available at http://boards.law.af.mil/AFboards.htm.

4. **Additional Provisions**

There a variety of other NDAA provisions related to guiding and assisting claimants in the development of evidence, training members of the boards, and whistleblower protections that are worth review for those interested.

Robert R. Davis is an attorney at Legal Services of Southern Piedmont, a non-profit law firm in Charlotte that acts to provide a full measure of justice to those in need. His work includes assisting veterans with discharge upgrade requests and veterans benefits.

Follow us on Twitter @NCBAorg

Reopening VA Disability Claims After a Final VA Denial

By Tod M. Leaven

The VA minimizes large legal hurdles in a disability benefit claim by allowing veterans to reopen closed claims after the VA has issued a final denial. This opportunity never exhausts as long as the veteran continues to submit "New and Material" evidence.

Though most veterans and veteran service organizations put the primary focus of disability benefit claims upon medical evidence, in the end, VA claims are legal procedures. They are specific remedies requested from a federal administrative agency and are governed by federal statutes, federal regulations, and judicial precedence. As with any legal proceeding, some of the toughest barriers to a remedy sought are the deadlines – often the statutes of limitations or the statutes of repose. In allowing a veteran to reopen a claim after the VA has issued a final denial of that very same claim, the VA has made it more possible that no valid claim should ever be uncompensated, even if the veteran misses every single deadline.

Congress allows veterans to reopen their claims by way of 38 U.S.C. § 5108, which states "If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." 38 C.F.R. § 3.156(a) states:

> New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

A key phrase that is often misunderstood in this pertinent section of the C.F.R. is "relates to an unestablished fact necessary to substantiate the claim." The three important elements in this phrase are (1) the evidence has to relate to a fact, (2) the fact must be previously unestablished, and (3) the fact must be necessary to substantiate the claim. There is also the requirement that the evidence must be new, but new is a concept readily grasped by most laypersons. The only quirk about the evidence being new is that the VA defines new as evidence not previously submitted to *agency decisionmakers*. This means that evidence discussed by or submitted to individuals not deemed as *agency decisionmakers* is still fair game to submit.

A *fact* is a legal term of art. Facts are "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation…." Black's Law Dictionary 628 (8th ed. 2004). Element 1 discussed above (that the evidence has to relate to a fact) means that the new evidence submitted must address a question of fact, such as whether a veteran was sexually assaulted by a superior officer or whether a motor vehicle accident occurred while a veteran was still in service, and cannot address a question of law, such as whether a veteran's PTSD claim should be service-connected. The difference is subtle, but an over-simplified example can be the following:

- Expert evidence stating "Mr. Veteran was not incarcerated between the dates of Sept. 12, 2013, and Dec. 27, 2014" addresses a question of fact.
- Expert evidence stating "Ms. Veteran is entitled to VA Pension" addresses a question of law.

Element 2 discussed above (that the fact must be unestablished) means that the new evidence must not relate to a fact that the VA has already agreed to. For example, a veteran files a claim for her lower back pain by submitting evidence of:

(a) an in-service injury,
(b) a current diagnosis of a lower back condition, and
(c) a letter from her brother stating that the veterans has continuously complained about the same lower back symptoms since her discharge.

The VA denies her claim, stating that (a) she did indeed have a lower back injury while in-service and (b) she does indeed currently suffer from a lower back condition; however, she was involved in an automobile accident two years after she left the military and the C&P examining orthopedic doctor opined that (c) the automobile accident, and not the in-service injury, is the causative factor of her current condition. In order for the new evidence to be unestablished, it must not relate to (a) or (b). Submitting new evidence that she had an in-service injury or that she currently suffers from a lower back condition would not relate to an unestablished fact because the VA has already agreed to these facts – thus they are already established. The veterans would need to submit new evidence relating to the fact that the in-service injury, and not the automobile accident, caused her current back condition, such as a medical opinion letter from a new physician.

The last element, Element 3 discussed above (that the fact must be necessary to substantiate the claim), is common sense. If the same veterans with the lower back condition were to submit evidence that she has three siblings, it would relate to an unestablished fact because the VA has not established the number of siblings she has; however, the number of siblings had no bearing upon her claim for service-connection for her lower back and therefore

it is not necessary to substantiate her claim.

The courts have issued no precedential guidance on how substantial this new evidence must be, but there are non-precedential guidelines that a veteran or veteran's advocate would be wise to heed. In **Shade v. Shinseki,** 24 Vet. App. 110 (2010), Judge Lance stated in a concurring opinion:

> The essential issue in this case is the proper relationship between the new-and-material evidence standard to reopen a claim and the standard for triggering the Secretary's duty to provide a medical examination under 38 U.S.C.S. § 5103A(d). In cases where medical evidence is necessary to prevail, the two standards are the same. In other words, if the VA determines that the new evidence, when viewed with the old evidence, would be sufficient to trigger a medical examination, then the evidence is sufficient to reopen, and a medical examination must be provided. Similarly, if the evidence supporting the claim is insufficient to trigger the duty to assist when the old and new evidence is considered together, then the new-and-material standard has not been met, and the claim should not be reopened.
>
> **Shade v. Shinseki**, 24 Vet. App. 110, 123 (2010) (Lance, J., concurring).

It is important to note here that this only applies in cases where medical evidence is needed to prevail. There are cases when the missing evidence is strictly lay. It is also important to note that the suggested requirement of triggering a medical examination includes both the new evidence and the evidence of record.

Even if a veteran does not meet the requirements for the new evidence to be considered new and material, he or she can always simply gather even more evidence and file for yet another reopen. There is no time limit on when a veteran can file to reopen most claims, and there is no limit on the number of times a veteran can reopen his or her previously denied claims. In many cases, appealing a denial can yield a greater monetary award to the veterans as opposed to filing a reopen claim, but an appeal must be made before the deadline. There are no deadlines for filing most reopen claims.

Tod M. Leaven is a service-connected veteran of the United States Army and a partner at the law firm of Grimes Teich Anderson, LLP, in charge of the firm's Veterans Law Section. His firm has offices in North and South Carolina, and his veterans practice is national.

NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

You've been
UPGRADED.

FIRST CLASS

The NCBA has enhanced the Bar Center experience with cutting edge technology.

You now enjoy **first-class picture and sound in the auditorium, plus updated tech in conference rooms** for your CLEs and meetings.

Understanding First Amendment Compromises Made in Defense Of Military Operational Security

By Jennifer M. Davis

The current era of protracted war and frequent deployments has put great strains on both military service members, and their families. Grappling with the absence of a loved one, family and friends may experience even more stress than the deployed service member. Social media has replaced letters as the primary form of communication between deployed service members and their loved ones. While social media has allowed unprecedented connection between deployed service members and their family, the unfortunate side effect is an increased transmission of sensitive military activities. In an effort to connect, service members and their families often forget that what is posted on social media is available to *all* who have access to the internet. It may be difficult to navigate what can and cannot be disclosed on social media; this article is an attempt to explain the legal history and current importance for everyone connected to the military to know the consequences of disclosure of sensitive operational information.

In the United States, we are cultured to hold dear our freedom of speech as constitutionally granted to us through the First Amendment. While the First Amendment applies to all citizens, when a civilian decides to join the nation's military ranks, his or her constitutional rights are no longer absolute. In the interest of national security, service members agree to abridged constitutional rights when they sign their service contract.

Citing 18th-century British military rules for perspective, in 1974, the U.S. Supreme Court, in **Parker v. Levy,** held that First Amendment assertions do not work in the military the way they do in the civilian world because "military society has been a society apart from civilian society" and so "to maintain the discipline essential to perform its mission effectively," the military has established a separate code of law. **Parker v. Levy** 417 U.S. 733, 744 (1974).

Our nation's armed forces exist and are employed to protect national interests, and to further that unique role; its members are asked to sacrifice themselves for our nation. That sacrifice sometimes includes life and limb, and other times rights and freedoms otherwise granted freely. An article written by Gene Policinski of the First Amendment Center explains the irony of the situation: "[t]he very people who risk their lives in defense of the First Amendment live under regulations banning their full use of it." Gene Polinski, Free Speech, Military Collide (Jan. 15, 2017), http://www.presspubs.com/kanabec/opinion/article_2aafca26-8a59-11e1-8185-0019bb2963f4.html. For instance, where a café worker may only face termination and potential harm to reputation for speaking out against the café manager, a service member speaking out against a superior officer may face an other than honorable discharge; be subject to garnished pay and benefits, or even be sentenced to jail time.

Upon entering military service, members are commanded not to engage in public political speech and are barred from showing public support for a political candidate. Furthermore, commissioned officers are forbidden from using contemptuous words against the President, as codified and punishable under Article 88 of the Uniformed Code of Military Justice (UCMJ). In 1966, Lt. Henry Howe, was court marshaled and found guilty of violating Article 88, for his protest at an anti-war rally where he carried a sign calling President Johnson a petty, ignorant fascist. Howe appealed his conviction asserting his First Amendment rights, but the Army Board of Review refused his pleas holding that the "preservation of the necessary subordinate-superior relationship in the military service permits no such privilege or impunity, especially where, as here, a military officer notoriously and ignominiously vilifies the very superior authority to whom a duty of respect is owing and who appointed him to military office." U.S. v. Howe 37 C.M.R. 555, 559 (A.B.R. 1966).

This example simply illustrates the judicial system's respect and understanding of the importance of the discipline it takes to run the most effective military forces in the world, and the sacrifice of privilege that each service member must make. The abridged First Amendment right seen in this example extends even further into the daily lives of service members and governs even those actions that do not automatically strike one as "disobedient".

For instance, service members are given strict guidelines on how to respond to the press and what they are allowed to post on social media. The guidelines generally prohibit speaking on behalf of the military as a whole or the service member's unit, and about military mission and training activities. According to an article published in Air University Review, "[n]o officer or man in the armed forces has a right, be it constitutional, statutory or otherwise, to publish any information (or make any statement) which will imperil his unit or its cause." Felix F. Moran, Air U.R. (May-Jun 1980).

Operational Security, commonly referred to as OPSEC, is one of the most important ways the military ensures that its members will be safe and its operations will be successful. Often under the advisement of unit OPSEC managers, commanders impose specific regulations on military members with regard to speech. Commands typically include restrictions on when a member may begin speaking about a pending deployment; when they can reveal the specific dates to their family; and the type of duty information they can report home to their friends and family via phone conversations, emails, and social media. Since service members are ordered to obey regulations set in place by their commanding officers they can be punished for disobeying these orders if the commander finds a violation which compromises OPSEC. Possibly the most visible example of leaking operational information, to include classified materials, is the infamous PVT Manning case. Although Manning was convicted on a number of serious criminal charges, at the heart of the offense was an operational security breach. Es-

sentially, information that could harm and imperil the military and the nation was disclosed and the military justice system reacted accordingly, sentencing Manning to 35 years. The examples of Howe and Manning show the perceived harm and ensuing consequences of military members disclosing sensitive information. Service members give up so much to maintain the necessary discipline that secures our nation, but that may be compromised without impunity by civilians disclosing the same information.

Many familiar WWII posters tout the slogan "loose lips sink ships," and silly as it sounds to our ears now, that slogan was intended for widespread understanding and compliance even to those who were not military members. Of course, commanders may not impose such restrictions on friends and family who have not entered into the same contract that their loved one has. Still, I urge families and friends of those deployed to consider the mission impact and the ultimate impact on national security when OPSEC is compromised. We can no longer afford to be naive about the extreme danger posed when operational information falls into the hands of our adversaries. Nearly all military and insurgent forces scan social media looking for any information that relates to foreign military members and activities.

What may seem like "too little information to matter" can be just the type of thing our adversaries can use to more efficiently plan attacks, and several bits of "too little information," when combined, begin to create a clear picture of our military forces. Any information on morale, deployment, and training is valuable to our adversaries. If adversaries know when we are training, they know when our garrison bases are vulnerable and they can also glean information about our training and deployment cycles. There may also be immediate consequences; if our adversaries know when a unit has left the United States for foreign territory, they can calculate the unit's arrival to plan an ambush on the plane as it lands.

In conclusion, although there is no legal imperative, on the contrary—free speech is foundational to our culture and protected by the First Amendment—military family and friends should understand that what may seem like harmless updates on social media may actually be information that has a lasting impact on our national security and the freedoms that a secure nation bring us and can even be used to immediately harm deployed, or garrison military members and their families. Lest this article leaves you with an uneasy feeling, a final word on the First Amendment and the military: service members free to, and even encouraged, to disobey and report objectively illegal, unethical, or immoral commands by superior officers.

Jennifer Davis spent five years in the active duty Army as a military intelligence officer. While stationed at Schofield Barracks, she deployed with the 25th Infantry Division to Afghanistan as part of the Operation Enduring Freedom campaign. She is currently a second-year law student at Carolina Law and will be specializing in privacy and data security law.

SMARTER LEGAL RESEARCH.

Log in to Fastcase at www.ncbar.org using your NCBA member ID or password.

As a member of the North Carolina Bar Association (NCBA) you now have free access to Fastcase.
Fastcase is the leading next-generation legal research service that puts a comprehensive national law library and smarter searching tool at your fingertips.

NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

With Some Prior VA Claims, Determinations of Finality May Dictate Present Strategies

By Matthew Wilcut

Advocates representing claimants before the Department of Veterans Affairs (VA) may find it prudent to investigate more than just the merits of those claims which are active (or are being considered for filing) at the time their representation begins. Often, veterans or their family members have applied previously in an attempt to obtain the same or similar benefits. Many claimants have filed several times previously, and the most recent attempt may have been several decades in the past. Regulatory, statutory, and judicial protections have long recognized that the VA is more than capable of introducing error into its review for eligibility and entitlement of benefits. Therefore, it is provided that in certain situations the correction of past errors may result in, for example, an earlier effective date for service-connection or pension with corresponding backpay. However, advocates should also be aware that not all errors are treated equally in the eyes of the law and claims to potential benefits may be extinguished when a sub-optimal strategy is applied to an identical or similar set of claims years later.

Recent Trends Work to Make Certain Forms of Relief More Widely Available

Since 2008, the Federal Circuit has grappled with the question of what effect a subsequent final decision has on an identical but still-pending claim which has not been fully and properly adjudicated. For simplicity, one can imagine that a "final" decision is defined as one that was fully and properly adjudicated. When the court encountered these facts in **Williams v. Peake**, 521 F.3d 1348 (Fed. Cir. 2008), a general rule was born that any subsequent final decision will terminate the pending status of an earlier incomplete claim, if the pendency was due to ineffective notice and the subsequent decision acted as a cure through adjudication on identical merits and apprisal of identical rights. **Williams**, 521 F.3d at 1351. Though it may have appeared (or been intended) broader in scope at the time it was stated, by 2014 the number of exceptions to this general rule represented all regulatory and statutory provisions which spoke expressly to the finality of VA decisions, and therefore **Williams** was largely trumped. *See* **Beraud v. McDonald**, 766 F.3d 1402, 1406 (Fed. Cir. 2014) (holding that failure of the VA's express obligations under 38 C.F.R. § 3.156(b) did not permit a pending claim to become final even after a subsequent identical decision). **Beraud** may have gone in the other direction to expand **Williams** had it not been for **Bond v. Shinseki**, 659 F.3d 1362 (Fed. Cir. 2011). Decided only a few years earlier, the Court felt that **Bond** left little room to second-guess whether some statutory and regulatory obligations could project such strength that they would never permit pending claims to become final without being corrected in the same action in which they were lacking, even for claims close to 20 years old. **Beraud**, at 1405-06. **Bond**, unlike the facts in **Beraud**, did not involve identical claims but ones where additional evidence was submitted by the veteran during a short gap of time between the two, while the period of appeal was still running, but where the veteran had characterized his own submission as not related to an appeal but to a new claim. **Beraud**, at 1405 (*citing* **Bond**, at 1363). Still, the Court held there that any characterization by claimants is similarly incapable of foreclosing a failure of statutory or regulatory obligations, which vitiates finality. **Beraud**, at 1405 (*citing* **Bond**, at 1368).

Despite Judge Lourie's signaling in her dissent in **Beraud**, at 1407, the Court has arguably lit a torch for reexamining qualifying original claims as far back as the late 1950s and early 1960s when regulations like 38 C.F.R. §§ 3.105 and 3.156 were free to mix with statutes like 38 U.S.C. § 7105(c) (at the time, § 4005(2)(c)) to affect the finality of decisions.

38 U.S.C. § 7105(c) now, and since first being promulgated in 1962, states:

> If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, *except as may otherwise be provided by regulations not inconsistent with this title*.

Stayin' Alive

Only by giving **Williams** more authority than is due, would advocates advise clients as a matter of routine to discontinue or delay advancing an identical subsequent claim or, in the extreme case, to immediately withdraw any such claims, until an adequate investigation of the original decision and applicable legal protections has concluded. Withdrawal is appropriate only in the rarest cases as a kind of last resort and before any denial on an identical claim, when it will not leave a final denial to stand in place of an original.

One practical solution is actually to advise clients to maintain the status quo. Though it might only be beneficial in the case of a directly subsequent (second in time and no later) and identical claim, advocates should consider keeping these types of claims alive at least as long as it takes to complete that kind of investigation. As long as a second identical claim is pending and not final, no termination of the pending status of the original claim can occur, and all issues related to the original may still be raised. This is true even where there has been a full grant of benefits sought, in the second claim dating back to when it was initiated. On the other hand, if the requisite condition of a directly subsequent and identical claim is not met, the damage may have already occurred in the past, or further investigation may be needed. If you find yourself having trouble remembering any strategy that involves keeping the

claim alive, use this little nugget of trivia gold – In 1958, when the VA was reforming and all relevant laws were being reorganized under Title 38 exclusively, the Beegees were forming together as a band at the same time!

Do or Don't, There is No Right to Ask

Knowles v. Shinseki, 571 F.3d 1167, 1169-70 (Fed. Cir. 2009), was a recent case which attempted to identify and describe the applicability of a number of the statutory and regulatory exceptions to the rule of finality.

Among the exceptions to finality listed:

(1) Clear and unmistakeable error under 38 U.S.C. § 5109A (for regional office [RO] decisions)
(2) Clear and unmistakeable error under 38 U.S.C. § 7111 (for Board of Veterans' Appeals [BVA] decisions)
(3) Correction of obvious errors in the record under 38 U.S.C. § 7103(c) (of BVA decisions)
(4) Reconsideration of a decision by the Chairman of the BVA under 38 U.S.C. § 7103(a)
(5) Reopening based on new and material evidence under 38 U.S.C. § 5108
(6) Recourse from a final RO decision under regs "not inconsistent" with Title 38 under 38 U.S.C. 7105(c).

Knowles, at 1169-70. Read together with its immediate predecessor, **AG v. Peake**, 536 F.3d 1306, 1309-1311 (Fed. Cir. 2008), **Knowles** puts advocates and claimants on notice that if you believe an error has occurred or your rights are enforceable under one of the above or a similar provision, you will do well to take whatever the provision's prescribed actions are with an accompanying explanation of why and how such action is allowed to be taken. Id. at 1170. In other words, claimants are not entitled to a prior "finality" decision that will give them a declarative ruling on their rights, so it is best not to complain of an error unless the complaint is actionable itself. **Knowles**, at 1170. This line of reasoning builds on advances that were made in 1990 like the promulgation of 38 C.F.R. § 3.109(b), dealing with "good cause" for challenging *any* adverse VA decision, and the Supreme Court's decision in **Irwin v. Dep't of Veterans Affairs**, 493 U.S. 1069 (1990), concerning a presumption for federal statute equitable tolling periods. Relevant to the earlier point about disrupting prior "final" determinations, the VA promulgated 38 C.F.R. § 3.109(b) with comments that it would carry only prospective effect. 55. Fed. Reg. 13,522, 13,526 (Apr. 11, 1990); However, the VA has conceded, at least since the oral arguments in **AG** in 2008 that they might now apply retroactively to the time before promulgation; **Knowles**, at 1170 (*citing* 55. Fed. Reg. at 13,526-527; *see* **AG**, in fn. 4. The comments to the amended regulation also included a long paragraph describing the requirement, when requesting an extension of time for "good cause" when the deadline has already passed, that the claimant takes action concurrent with or before any request for the extension. 55. Fed. Reg. at 13,526-527. The most recent Supreme Court case to deal with a question of VA benefits found that the deadline for appealing from the BVA to the Court of Appeals for Veterans Claims remains non-jurisdictional and will continue to be subject to equitable tolling since it had never historically been treated as jurisdictional and the VA continues to espouse that it promotes a system of non-adversarial resolution. **Henderson v. Shinseki**, 562 U.S. 428, 430 (2011).

Closing Thoughts

For each kind of error that may exist and for which relief may be eligible under a statute or regulation mentioned above, there is always some nuance because no two veterans are alike and no two cases have ever proceeded alike. Advocates should proceed zealously as they have for a generation under judicial review of VA issues and much longer before that, with an ever-vigilant eye towards the future, the past, and present.

Matthew Wilcut is an attorney with Deuterman Law Group in Greensboro. He handles VA and SSA disability cases. Matt has held his accreditation with the VA since 2014 and has been licensed to practice before the Court of Veterans Appeals since 2016.

Did you know the NCBA has a blog?
For featured posts and more,
check out: *ncbarblog.com*

Arguing for Extraschedular Ratings

By Tod M. Leaven

Sometimes a veteran may be entitled to a higher disability rating than is contemplated in the Schedule for Rating Disabilities when the VA's schedule does not contemplate the level of symptoms or disability that the veteran presents.

The VA's Schedule for Rating Disabilities (hereinafter referred to as "Schedule") is found in 38 C.F.R. Part 4, §§ 4.40 - 4.150. Separated into separate sections depending upon body system and condition, the Schedule lists a host of illnesses and injuries, designating particular rating percentages for different levels of symptomatology. For example, the schedule for non-arthritic knee issues generally centers on limits to the range of motion. This setup is great for when this is the only condition presented by the veteran. A problem arises when the veteran also suffers from massive soft-tissue swelling, knee collapse, and frequent pain that interferes with work and results in severe sleeplessness. Fortunately, the VA is required to look into extraschedular ratings under certain circumstances when the VA's schedule does not contemplate the level of symptoms or disability that the veteran presents. Technically, extraschedular ratings are not separate claims but are part of the determination of a regular claim. However, the VA will seldom offer them without the veteran specifically requesting one. The extraschedular rating is for when a condition presents "such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards." 38 CFR 3.321(b)(1).

The first step is to compare the veteran's symptoms to the schedule corresponding to those symptoms. In the knee example above, an appropriate Diagnostic Code ("hereinafter "DC") could be DC 5261. Unfortunately, DC 5261 only contemplates limits of leg extension. DC 5003 allows for an automatic 10 percent rating if the limits of extension under DC 5261 are too low for compensation, but x-ray evidence must show degeneration of the joint and the maximum rating is only 10 percent per major joint. Another appropriate DC could be 5257, but that only contemplates joint instability. In this case, the veteran should request an extraschedular rating due to the exceptional or unusual disability picture his or her condition presents. If the rater agrees that the veteran's condition meets this first prong, the rater must proceed to the second step - evaluate whether the veteran's condition also exhibits "related factors as marked interference with employment or frequent periods of hospitalization." The Court of Appeals for Veterans Claims (hereinafter "CAVC") seems to waiver between either only allowing interference with employment and frequent hospitalization as the only two related factors allowed or allowing other related factors to be considered. **Johnston v. Brown**, 10 Vet. App. 80, 87-88 (1997) (Steinberg, J., concurring). Since the CAVC is not consistent at this second step, and the Court of Appeals for the Federal Circuit has not given the CAVC any guidance on the matter, it is encouraged that veterans and their representatives cite seemingly supportive case law if the "related factors" are not based on employment or hospitalization. *Id*. at 87 (Moreover, the language of the regulation, listing interference with employment or frequent hospitalization as "***such*** related factors" (emphasis added), seems to contemplate more than merely those two examples).

The Federal Circuit has clarified that extraschedular ratings do not have to rest upon a single condition and that the VA can view the cumulative effects of multiple conditions. **Johnson v. McDonald,** 762 F.3d 1362, 1366 (Fed. Cir. 2014). This is important because one claimed condition may meet the first prong, the schedule does not contemplate the level of symptoms or disability that the veteran presents, while another condition may meet the second prong, significantly affecting employment or leading to hospitalization. Also, the VA cannot deny extraschedular ratings if the record is significantly incomplete because extraschedular consideration requires a complete picture of all service-connected disabilities. **Brambley v. Principi**, 17 Vet. App. 20, 24 (2003).

Extraschedular rating can significantly increase a veteran's overall rating percentage when a veteran has conditions that exceed what is listed in the schedule. There are specific criteria which need to be met, but once met this system allows a more just compensation.

Tod Leaven is a service-connected veteran of the United States Army and a partner at the law firm of Grimes Teich Anderson, LLP, in charge of the firm's Veterans Law section. His firm has offices in North and South Carolina, and his veterans practice is national.

For more news you can use,
visit *www.ncbar.org*

Building Connections to Enhance and Support the Impact of Your Legal Career (Strategic Plan: 2015–2020)

In 2015 the North Carolina Bar Association launched a new, five-year plan that identifies **five strategic priority pillars** to guide the Association and Foundation's mission.

Lawyer's Practice

Priority:
Raise awareness and support for the Association's mentorship and professional development programs through the promotion of the Center for Practice Management.

Major Initiative:
Implement a Center for Career Services

Profession

Priority:
Preserve and enhance a culture of professionalism, civility and collegiality among all segments of the legal community.

Major Initiative:
Develop a mentorship program to assist new attorneys in forming strong, career-long relationships with other lawyers in our state.

Courthouse

Priority:
The NCBA strives for a court system in which judges are highly competent and independent; litigants are treated equally, regardless of race, gender, economic status, location language skills or physical disability.

Major Initiative:
Advocate for funding increases and educate the public on the negative effects of funding cuts.

Community

Priority:
Increase leadership opportunities and positions in business, civic, charitable and governmental activities and educate the public on the leadership role of lawyers.

Major Initiative:
Create leadership academies and other outreach programs in collaboration with local bars throughout the state; promote Citizen Lawyer at local levels.

Bar Association

Priority:
Maintain and grow membership with special efforts to recruit new and retain current members.

Major Initiative:
Focus on value to members by enhancing benefits, minimizing geographic considerations and strengthening law school connections.

NORTH CAROLINA
BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

NORTH CAROLINA
BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

North Carolina Bar Association
P.O. Box 3688 | Cary, NC 27519-3688

Nonprofit Org.
U.S. Postage
PAID
Raleigh, N.C.
Permit #297

Thank you for joining us!

Is there something you would like to see in the next newsletter? Let us know!

Contact The NCBA

Call toll-free 1.800.662.7407

Email ***newsletter@ncbar.org***

Visit us at ***www.ncbar.org***

We like to socialize. Visit us online for the latest news, photos, useful links and more.

@NCBAorg | twitter.com/NCBAorg

Search for North Carolina Bar Association

facebook.com/NCBAorg

@NCBAorg | instagram.com/NCBAorg