What's New at the VA

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Agenda

- High Impact Court Decisions
- Public Law Change
- Manual Changes
- Proposed changes

Court Decisions – High Impact

Duran v. McDonough July 20, 2023

Court of Veterans Appeals (CAVC) manifestations of Parkinson's disease; pro-Veteran canon; plain meaning

Taylor v. McDonough, June 15, 2023

Court of Appeals – Federal Circuit (CAFC) earlier effective date due to prevention from filing a claim due to classified missions

Spicer v. McDonough March 8, 2023

CAFC – Secondary service-connection due to service-connected condition preventing treatment for said condition

Rudisill v. McDonough December 15, 2022

CAFC – Multiple POS do not entitle Veteran to add'l education benefits

Cook v. McDonough May 17, 2023

CAVC – definition of evidence submitted "with" the NOD

Duran v. McDonough, July 20, 2023

- Veteran Gilbert Duran served from 1959 to 1971, including a year-long deployment to Vietnam, where he was wounded. In January 2017, he sought service-connection for Parkinson's disease as related to presumptive herbicide exposure. In Spring 2017, a VA examiner confirmed a diagnosis of Parkinson's disease and found that Mr. Duran had "motor manifestations" of the condition including stopped posture, balance impairment, slowed motion, speech changes, and tremors in his upper and lower extremities on the right side. He also had mild depression, partial loss of smell, moderate sleep disturbances, mild difficulty chewing and swallowing, moderate constipation, moderate sexual dysfunction, mild stumbling issues, and moderate jaw tremors.

- Mr. Duran was granted 30% rating under DC 8004 for "ascertainable residuals."

Duran v. McDonough, July 20, 2023

- Mr. Duran appealed to the Board, seeking a higher evaluation. In April 2020 decision, the Board increased the rating because the 30% evaluation did not fully capture the severity of his disease.

- The method by which the Board increased the rating is the crux of the dispute.

- The method = §4.12a – if there are ascertainable residuals that can be rated under a separate diagnostic code, and those exceed 30%, then separate ratings will be assigned in place of the minimum rating

- Result: 40% RUE (DC8513), 10% RLE (DC8520), 10% jaw tremors (DC8205) for a combined 50%.

Duran v. McDonough, July 20, 2023

There were 5 other manifestations (depression, sexual dysfunction, chewing/ swallowing, speech) that did not receive separate ratings due to pyramiding:

- Already had 30% for PTSD
- SMC for loss of use creative organ had already been granted
- Constipation under DC7319 for irritable colon syndrome
- Chewing and swallowing under DC8209
- Speech under DC8210
- None met the requirements for minimum compensable ratings under their relevant DCs

Duran v. McDonough, July 20, 2023

- Is the rating schedule ambiguous? Or is the meaning clear?
- Mr. Duran contended that the minimum rating should remain intact so long as there are ascertainable Parkinson's manifestations that cannot be rated compensable under other diagnostic codes.
- The SECVA believes that plain reading requires replacement of DC 8004 minimum rating once any manifestations can be assigned ratings totaling more than 30%. If ambiguous, the Court should defer to the SECVA interpretation (*Auer v. Robbins)*
- The preamble for rating neurological conditions and convulsive disorders and the meaning of the word "residuals."
- "Residual" is a disability that remains following an injury, operation, or disease

Duran v. McDonough, July 20, 2023

- Does Parkinson's disease have residuals? Or is it an active disease?

- Preamble notes that diseases AND residuals may be rated in proportion to the impairment of motor, sensory, or mental function

- §4.12a – when ratings in excess of the prescribed minimum ratings are assigned, the DCs utilized as bases of evaluation be cited, in addition to the codes identifying the diagnoses

Duran v. McDonough, July 20, 2023

- Service-connected Parkinson's disease with at least one ascertainable manifestation entitles the Veteran to a minimum 30% evaluation under DC8004.

- The basis for a minimum rating under DC8004 remains in place even when other manifestations under other DCs combine for a total rating in excess of 30%.

- §4.25b – disabilities arising from a single disease entity are to be rated separately.

- §4.14 prohibits duplicative compensation of overlapping symptomatology

Duran v. McDonough, July 20, 2023

- Mr. Duran's Parkinson's disease manifested itself in at least eight ways
  - 3 manifestations were entitled to separate compensable ratings that totaled 50%
  - 2 were already compensated as parts of other conditions
  - 3 remaining manifestations that were not compensable under other DCs pertaining to the bodily systems involved

- Even in isolation, any of the 3 warranted the minimum 30% evaluation under DC8004. Therefore, the Board should not have replaced the 30% rating

- Because the Court was able to discern the plain meaning of the relevant regulatory text using standard interpretive tools, the SECVA's interpretation is not entitled to deference under *Auer v. Robbins*

Duran v. McDonough, July 20, 2023

- Judge Jaquith included a separate statement regarding the pro-Veteran canon and plain meaning analysis. Noted that different perspectives determine the law's plain meaning – and that requires more than just reviewing the words of the preamble (for neurological conditions).

- The Court cannot "wave the ambiguity flag" without first exhausting the "legal toolkit" to determine whether there is a single right meaning

- Words should be read in context of the regulatory structure and scheme

- VA has a history of expressly forbidding separate ratings in other circumstances, so the lack of an express bar to separate evaluations for Parkinson's must be read as a deliberate decision to permit separate evaluations

Duran v. McDonough, July 20, 2023

- Brown v Gardner (1994) brings the scope of plain meaning analysis back to the forefront.

- Pro-Veteran canon is a traditional tool of construction – requires Court to discern the purpose of a Veteran's benefit provision in the context of the Veteran's benefit scheme as a whole and ensure that it effectuates, rather than frustrates, that remedial purpose – that benefits that by law belong to the Veteran, go to the Veteran

- Pro-Veteran canon is not meant to be an afterthought – it is a part of the interpretive toolkit to aid in gleaning intent (e.g. not at the bottom of the ninth inning after three outs have been made…)

Taylor v. McDonough, June 15, 2023

- Mr. Taylor served on active duty in the US Army from January 1969 to March 1971, and volunteered to participate as a human subject in a testing program conducted at the US Army facility in Edgewood, Maryland

- The program was designed to study the effects of chemical warfare agents on the ability of subjects to function as soldiers. Testing involved more than 250 different agents and at least 6,700 soldier volunteers from 1955 to 1975

- Mr. Taylor arrived in Edgewood in August 1969 and signed a consent form confirming that the experiment had been explained to him and that he voluntarily agreed to participate, along with an oath prohibiting him from disclosing information under penalty of court-martial.

Taylor v. McDonough, June 15, 2023

- Mr. Taylor was exposed at Edgewood to at least EA-3580 (nerve agent), EA-3547 (tear gas agent) and scopolamine. Mr. Taylor recalls experiencing hallucinations after administration of the agents.

- Mr. Taylor served two tours in Vietnam after leaving Edgewood. He noted experiencing flashbacks, insomnia, and suicidal ideation while in Vietnam.

- Following Vietnam service, Mr. Taylor was honorably discharged September 6, 1971.

- In 2006, DoD declassified the names of the volunteers from Edgewood, and sent letters to the Edgewood participants (including Mr. Taylor) noting that they had permission to disclose information to healthcare providers

Taylor v. McDonough, June 15, 2023

- On February 22, 2007, Mr. Taylor filed a claim for disability benefits, which VA granted from the 2007 date of claim

- Mr. Taylor was granted 70% service-connection for chronic PTSD and recurrent major depressive disorder which the examiner considered a cumulative response to his participation as as a human subject at Edgewood, and subsequent re-traumatization in Vietnam. Was later granted TDIU from DOC.

- July 20, 2010, Board denied earlier effective date and utilized §5110 which specifies that the earliest effective date is the date on which VA receives the Veteran's claim

Taylor v. McDonough, June 15, 2023

- Mr. Taylor argues that the effective date should be day following discharge in 1971 because it was the government's threat of penalties for revealing information for decades that caused him not to file a claim for benefits, which denied his right to due process by failing to have any process in place by which he could make a claim for benefits

- The Board utilized three arguments:
  - PTSD was based on multiple stressors including combat and nothing prevented him from filing a claim on that basis
  - Mr. Taylor appeared to have divulged information despite the oath
  - The governing statute does not allow for equitable tolling

Taylor v. McDonough, June 15, 2023

- April 5, 2019 the Veterans Court affirmed the Board's decision, rejecting the due process argument, reasoning that there is no authority that establishes a property right before a claim is filed.

  - Judge Greenberg dissented and would have reversed the decision because the Board did not have the medical expertise to untangle stressor events and that conditions were a cumulative response to human subject testing and other stressors; that whether he divulged information had no bearing on whether the oath prevented him from filing a claim; and that the government waited more than 30 years to recognize the Veteran's participation

Taylor v. McDonough, June 15, 2023

- CAFC determined that the Veteran Court had the authority to equitably estop the government in this particular case, and that Mr. Taylor is entitled to have the government equitably estopped from asserting the claim-filing effective-date limitation from §5110. The panel decision was vacated and reheard en banc.

- Supreme Court granted petition for a writ of certiorari in *Arellano v. McDonough* (2022) – which was another case that addressed equitable tolling

- Court declined to disturb the precedent under which VA's compliance with §6303 is not a precondition of enforcing §5110's effective date limits

- Court agreed that there was no exception for VA adjudicatory processes associated with the secrecy oath backed by court-martial and prosecution threats

Taylor v. McDonough, June 15, 2023

- CAFC determined that it was unconstitutional to apply claim-filing effective-date limits to deny otherwise-awardable benefits for the period during which the government unconstitutionally denied access to the VA adjudicatory forum

- CAFC reversed and remanded the Veteran Court's decision.

Spicer v. McDonough, March 8, 2023

- Luther Spicer, Jr. served in the USAF from May 1958 to September 1959 and was exposed to hazardous chemicals, including benzene, in aircraft fuel. Years later, he developed chronic myeloid leukemia (CML), a blood cancer.

- VA recognized leukemia as service-connected and granted a 100% disability rating.

- Separately, Mr. Spicer developed arthritis in both knees, which caused pain and instability and required use of a wheelchair. He was scheduled for knee replacement surgery, but his surgery was cancelled due to the medications he took to manage his leukemia, which lowered his hematocrit (red blood cell level). He is expected to stay on these medications for life, which would prevent him from ever having the necessary knee surgery

Spicer v. McDonough, March 8, 2023

- Mr. Spicer sought secondary service-connection for his knee disability but it was denied due to no link.

- This was appealed and the Board upheld the decision because there were no applicable laws or regulations to award the disability on the stated grounds.

Spicer v. McDonough, March 8, 2023

- Before the Veterans Court, the plain meaning of the phrase “resulting from” requires but-for causation. This would require that the Veteran’s service be the cause or origin of the disease (e.g. the knee condition would have to be caused by leukemia)

- “resulting from” has no qualifiers or exceptions. Congress could have limited the §1110 causation standard, and drafted a narrower statute using qualifiers in §1153.

- §1110 applies for the natural progression of a condition not caused by the service-connected injury or disease, but that would have been less severe if not for the service-connected disability (so it provides for compensation for worsening of a condition due to an inability to treat)

Spicer v. McDonough, March 8, 2023

- CAFC argues that this interpretation is also consistent with VA's treatment of secondary conditions (e.g. disability caused by medication used to treat a service-connected condition)
- VA also awards compensation for a disability where a service-connected disability prevents exercise, which leads to obesity, which leads to another disability, like hypertension
- In this case, the assessment is too speculative in a "but-for" world in that it requires imagining that which did not occur
- §1151 – could also include negligence for not performing a corrective surgery and the impact on medical intervention
- **Veteran Court's decision was vacated and remanded**

Rudisill v. McDonough, December 15, 2022

•Background:

•This case involves two education programs enacted by Congress for the benefit of Veterans – Montgomery (GI Bill) and Post-9/11 program. The number of months of entitlement to educational assistance is limited for Veterans who switch from the Montgomery program to the Post-9/11 program without first exhausting the Montgomery program benefits - Section 3327(d)(2). The Veterans Court held that this limitation does not apply to Veterans with multiple periods of service (*BO v. Wilkie*, 2019)

•Chapter 30 - Montgomery GI Bill was enacted in 1984 and covers active duty between July 1, 1985 and September 30, 2030 = 36 months of benefits

•Chapter 33 - Post-9/11 GI Bill was enacted in 2008 and covers active duty anytime after September 11 ,2001 = 36 months of benefits

Rudisill v. McDonough, December 15, 2022

•What the case is about:

- Mr. Rudisill served three periods of active-duty service between January 2000 and August 2011, totally nearly 8 years of active-duty service.
- Ultimately he used 25 months and 14 days of Montgomery benefits for his undergraduate education
- After leaving military service in 2011, Mr. Rudisill was accepted into Yale Divinity School. He filed an online application for VA Education benefits and acknowledged that, by electing Chapter 33 benefits, his months of entitlement will be limited to the number of entitlement months remaining from Chapter 30.
- A certificate of eligibility for 10 months and 16 days of Chapter 33 (Post-9/11) was issued

Rudisill v. McDonough, December 15, 2022

•What the case is about:

- The eligibility was appealed, requesting the additional entitlement based on Chapter 33 (Post-9/11) benefits up to a 48-month maximum cap so that he could complete post-graduate education.

Rudisill v. McDonough, December 15, 2022

•Argument:

- Purpose of the Post-9/11 GI Bill is to enlarge and reinforce education benefits for Veterans – designed to enhance and give appropriate level of recognition and respect to people who have been serving since 9/11 rather than having to rely on the Montgomery GI Bill, which is a peacetime bill.

- §3695 provides 48 months of total education benefits for re-enlisting Veterans (showing appreciation of their additional service and to provide incentive)

- GI Bills since 1968 all provide that a re-enlisting Veteran eligible under multiple programs earn aggregate education benefits up to 48 months.

- §3322 and 3327 do not deprive re-enlisting Veterans of the 48-month cap

Rudisill v. McDonough, December 15, 2022

•Argument:

- §3322(e) and (g) do not provide that conversion to Post-9/11 benefits result in loss of access to additional months of Post-9/11 benefits

- Regulations for education benefits make no mention of any forfeiture by re-enlisting Veterans of their additional Post-9/11 benefits

Rudisill v. McDonough, December 15, 2022

- Conclusion:

- CAFC found that the Veterans Court erred in holding that Mr. Rudisill's total benefit is limited to the initial term of 36 months. He did not forfeit his entitlement to the additional months of Post-9/11 benefits earned by re-enlistment, up to the 48-month cap.

Cook v. McDonough, May 17, 2023

•What the case is about:

•Mr. Cook served on active duty in the USAF from December 1971 to December 1975. In March 2019, Mr. Cook filed a claim for service-connection for chronic rhinitis, sinusitis, headaches, and diabetes mellitus type II.

•June 2019 he was granted service-connection for allergic rhinitis, assigning a non-compensable evaluation. The other conditions were denied service-connection.

•July 2019, Mr. Cook submitted lay statements from him and his sister. September 2019, a private examination report was submitted (Dr. Cesta from August 2019). An NOD was filed in October 2019, selecting the additional evidence docket. At that time, he did not resubmit the lay statements or Dr. Cesta's private examination. In June 2020, BVA upheld the decisions.

Cook v. McDonough, May 17, 2023

•Argument:

- BVA argued that evidence was added to the claims file during a period when new evidence was not allowed (after the 90 days following election of the evidence appeal lane). Suggested that the Veteran could file a supplemental claim and submit or identify the evidence.

- Veteran argues that the Board must consider all evidence associated with the VA claim file when the NOD is filed

- Both used examples from the same section (7113) in the argument – indicating the Board should consider evidence submitted “with” the NOD

Cook v. McDonough, May 17, 2023

•Argument:

- "with" the NOD – question as to whether that means at the time the NOD was filed, or does it include evidence submitted since the last decision?
- What is Veteran friendly in the interpretation of the timeframe for evidence?
- In this case, the Board did not inform Mr. Cook that the evidence received prior to the NOD was not considered in the June 2020 decision.

Cook v. McDonough, May 17, 2023

- Conclusion:

- The Court set aside and remanded the June 3, 2020 BVA Decision for further proceedings.

Cook v. McDonough, May 17, 2023

•What does this mean?

- It appears that the primary reasons for remand are more to do with the reasons BVA provided in upholding the decisions, rather than the review of evidence itself (procedural v evidentiary)

- There are defined lanes for appeals and the remand does not appear to change that – but decisions may need to be more clear as to the rationale

- What do you think?

Manual Changes Summary

- Transportation benefits associated with Veteran burials
  - M21-1, XI.iii.1.B – Burial Benefits

- Exceptions to applying the bilateral factor
  - Federal Register – April 14, 2023

- DIC for COVID-19

- Expanded Benefits Access for Karshi-Khanabad Veterans

Manual Changes Summary- Transportation for Burial

- Transportation benefits associated with Veteran burials

  - M21-1, XI.iii.1.B – Burial Benefits
  - April 3, 2023 – PL 116-315 significantly impacted when the transportation benefit may be paid.
  - For deaths that occurred on or after January 5, 2023, any claimant who would be eligible to receive the NSC burial allowance based on a Veteran's death may also be eligible for the transportation benefit if they incurred transportation expenses. This is true even when the sc burial allowance was paid as the greater benefit
  - For deaths that occurred before January 5, 2023, eligibility may exist if the Veteran is buried in a National or covered Veteran's cemetery or died while under VA care

Manual Changes Summary- Transportation for Burial

- Eligibility under USC 2303(a)
  - After January 5, 2023
  - Death occurs within a State
  - Place of burial is in any State
  - Veteran:
    - Died while hospitalized by VA or approved facility (State, Mexico, or Canada)
    - Remains are unclaimed
    - Veteran was in receipt of disability compensation, military retired pay in lieu of disability compensation, or VA pension

Manual Changes Summary- Transportation for Burial

•Unclaimed remains

- VHA is responsible for burial if a Veteran's remains are unclaimed and they died in a VA facility or were under VA care
- VBA would not pay burial benefits in this situation
- Before paying a burial benefit, claims processors are required to check the efolder for the *Veteran Unclaimed Remains Memo*

•NSC Burial section was updated to include language that the Veteran's estate must also not be sufficient to cover burial expenses.

•NSC Burial also updated with requirement to check to ensure another agency did not pay for services (e.g., VHA)

Manual Changes Summary – Exceptions to biliteral factor

•Exceptions to applying the bilateral factor

- Federal Register – April 14, 2023
- VA conducted a claims data analysis and discovered there could be an unintended miscalculation when calculating certain bilateral factors (e.g. adding an extremity to a Veteran's 100% combined eval could result in a combined 90%).
- Bilateral factor combines 2 extremities and also adds 10% - but the closer to 100% the smaller the increase. The disability can be rounded down in some circumstances which is not the intended impact
- Solution is published in the Federal Register and allows certain cases to be excluded from the bilateral factor to ensure there is no negative impact
- Unless you want to have a math class today we'll just say that the register provides a great example of this and will explain in great detail for those of us who like to nerd out.

Manual Changes Summary – COVID 19

- Pension and Fiduciary Service just updated the va.gov website to include verbiage that DIC is now available for survivors or Veterans who died from COVID-19, and they had a service-connected condition that made COVID-19 worse.

- This is to be compliant with the Joseph Maxwell Cleland and Robert Joseph Dole Memorial Veterans Benefits and Health Care Improvement Act of 2022

Expanded Benefits Karshi-Khanabad Veterans

VA has announced that veterans who served after Sept. 11, 2001, at Karshi-Khanabad (K2) base in Uzbekistan should soon receive expanded access to benefits. Taking steps to acknowledge the presence of various contaminants at K2 will enable VA to ensure appropriate health care and compensation for these veterans and their survivors.

Expanded Benefits Karshi-Khanabad Veterans

- Making chronic multi-symptom illness a presumptive condition for K2 Veterans
- Recognition of exposures at K2 as toxic exposure risk activities (TERAs)
- Ensuring that toxic exposures are fully taken into account when processing K2 Veterans' claims
- Pre-decisional review of K2 claims

Expanded Benefits Karshi-Khanabad Veterans

- Importantly, in addition to these steps, all Veterans who served at K2 and meet basic eligibility requirements are already eligible to enroll in VA health care to get world-class, low-cost care for all their health conditions – without needing to apply for disability compensation first. These Veterans are also eligible for presumptive benefits for the more than 300 conditions covered by the PACT Act, meaning that they do not need to prove that their service caused their condition to receive benefits for it; instead, VA automatically assumes service-connection for the condition and provides benefits accordingly.

Forms and Digestive Updates

These have been covered

- 0995 - New
- 0781 – New
- 0781a – No longer used
- Digestive updates: New codes and criteria
- New conditions under PACT Act
- Markers and burial benefits

Questions