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VETERANS BENEFITS LAW: 2016

Holdings of Precedential Opinions Issued by the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit

Cogburn v. McDonald, 809 F.3d 1232 (Fed. Cir. January 7, 2016)
IMPLICIT DENIAL RULE
HELD: The implicit denial rule applies to both formal and informal claims and does not violate the notice provision of VA's due process regulation.

Gazelle v. McDonald, 27 Vet.App, 461 (February 2, 2016)
38 U.S.C. § 1114(s); COMBINED DISABILITY RATINGS
HELD: 38 U.S.C. § 1114(s) provides special monthly compensation (SMC) for veterans with one disability rated 100% and a separate disability or disabilities independently ratable at 60% or more. Where there are multiple additional disabilities, it is appropriate to use the combined ratings table, 38 C.F.R. § 4.25, to determine whether those disabilities are "ratable at 60% or more." It is not appropriate to simply add the ratings together.

Sowers v. McDonald, 27 Vet.App. 472 (Feb. 12, 2016)
38 C.F.R. § 4.59; MINIMUM COMPENSABLE RATING
HELD: 38 C.F.R. § 4.59, which provides for a minimum compensable rating for a painful joint, is limited by the applicable diagnostic code and does not apply where that diagnostic code does not contain a compensable rating.

Yancy v. McDonald, 27 Vet.App. 484 (Feb. 26, 2016)
EXTRASCHEDULAR CONSIDERATION; COMBINED EFFECT OF MULTIPLE DISABILITIES; DC 5284 ("FOOT INJURIES, OTHER")
HELD: "[T]he Board is required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis only when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities."

Johnson v. McDonald, 27 Vet.App. 497 (Mar. 1, 2016)
38 C.F.R. § 4.118, DC 7806; "SYSTEMIC THERAPY" INCLUDES TOPICAL CORTICOSTEROIDS
HELD: VA's diagnostic code for rating dermatitis or eczema provides for compensable ratings based on the use of "systemic therapy such as corticosteroids." The regulation does not distinguish between topical and oral corticosteroids. Therefore, the Court held that "the plain wording of Diagnostic Code 7806 is that systemic therapy includes the use of corticosteroids without any limitation to such use being oral or parenteral as opposed to topical."

Bozeman v. McDonald, 814 F.3d 1354 (Fed. Cir. Mar. 1, 2016)
ISSUE EXHAUSTION; LEGAL ARGUMENT
HELD: The citation of new evidence in the record is not "a new legal argument for purposes of issue exhaustion," and the CAVC's refusal to address the claimant's argument that the Board failed to address relevant evidence was an improper expansion of the legal definition of issue exhaustion. The Court "narrowly" concluded that "issue exhaustion cannot be invoked to bar citation of record evidence in support of a legal argument that has been properly preserved for appeal."

Dickens v. McDonald, 814 F.3d 1359 (Fed. Cir. Mar. 1, 2016)
ISSUE EXHAUSTION; DUTY TO ASSIST
HELD: The CAVC's decision to not consider an appellant's duty-to-assist argument that had not been raised to the Board was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," and was supported by the principles of issue exhaustion.

Hime v. McDonald, 28 Vet.App. 1 (Mar. 3, 2016)
CLEAR & UNMISTAKABLE ERROR (CUE)
HELD: At the time of the November 1983 Board decision that was the subject of this CUE challenge, the Board did not have a reason-or-bases requirement and Board decisions were decided by three-member panels that included one medical professional. The use of the medical opinion provided by the medical member of the panel was common practice. While the Court agreed with the claimant in this case that the 1983 Board decision was not "evidence," the Court determined that the 1983 decision was not CUE because the Board (1) was allowed to exercise its own medical judgment at that time and (2) was not required to provide a statement of reasons or bases for its determinations.

Service Women's Action Network, VVA v. Sec'y of Veterans Affairs, 815 F.3d 1369 (Fed. Cir. Mar. 3, 2016)
PTSD/MST; PETITION FOR RULEMAKING
HELD: VA denied petitioners' request to promulgate a new subsection of 38 C.F.R. § 3.304 to allow a veteran to establish the occurrence of a PTSD/MST stressor event through his/her lay testimony alone as long as a psychiatrist or psychologist confirms that the stressor is adequate to support the diagnosis. The Federal Circuit determined that VA's refusal to promulgate a new rule was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and was supported by "reasoned decisionmaking."

Sullivan v. McDonald, 815 F.3d 786 (Fed. Cir. Mar. 8, 2016)
38 C.F.R. § 3.159(c)(3); DUTY TO OBTAIN VA MEDICAL RECORDS (REGARDLESS OF "RELEVANCY")
HELD: 38 C.F.R. § 3.159(c)(3) identifies four categories of records that VA will help a claimant obtain in connection with a compensation claim: (1) service medical records, if relevant to the claim; (2) other relevant service records that are held by a government entity; (3) VA medical records; and (4) any other relevant records held by any federal agency. Based on the plain language of the regulation, the Federal Circuit found that VA clearly knew how to impose a relevancy standard on three of the four categories of records – and that it did not impose that requirement on VA medical records. The Court found that the CAVC erred in its interpretation of § 3.159(c)(3) when it concluded that

VA's duty to assist extended only to "potentially relevant" VA records, including VA medical records.

Thompson v. McDonald, 815 F.3d 781 (Fed. Cir. Mar. 8, 2016)
38 C.F.R. §§ 4.40, 4.71a; FUNCTIONAL LOSS DUE TO PAIN ON MOTION
HELD: Section 4.40 does not provide for a rating separate from 38 C.F.R. § 4.71a. Section 4.40 "speaks generally in terms of disability of the musculoskeletal system, and explains what may cause a functional loss," but does not explicitly provide a rating for any disability. Instead, "§ 4.40 must be viewed in light of the explicitly listed disability ratings for the musculoskeletal system in § 4.71a."

Dixon v. McDonald, 815 F.3d 799 (Fed. Circ. 2016)
TIMELINESS
HELD: The CAVC does not have the sua sponte authority to dismiss an untimely appeal when the Secretary has waived a timeliness defense.

McKinney v. McDonald, 28 Vet.App. 15 (Mar. 11, 2016)
HEARING LOSS; PRESUMPTION OF SOUNDNESS
HELD: If the degree of hearing loss noted on a veteran's enlistment medical examination does not meet VA's definition of "disability" for hearing loss under 38 C.F.R. § 3.385, the veteran is entitled to the presumption of soundness. The Court also rejected the Secretary's argument that hearing loss that is not considered a "disability" for VA compensation purposes under § 3.385 should be considered a "defect" and, therefore, ineligible for disability compensation.

Veterans Justice Group, LLC v. Sec'y of Veterans Affairs, 818 F.3d 1336 (Fed. Cir. Apr. 7, 2016)
CHALLENGE TO RULE REQUIRING STANDARD FORMS
HELD: VA's final rule requiring standard claims and appeals forms is valid.

Dover v. McDonald, 818 F.3d 1316 (Fed. Cir. Apr. 7, 2016)
EAJA
HELD: Where a remanding court does not retain jurisdiction over a case and the remand order contemplates and/or precipitates additional agency proceedings on the merits – even if the order just leaves open "the *possibility* of attaining a favorable merits determination through further agency proceedings" – the appellant is a "prevailing party" for purposes of being entitled to EAJA fees.

Staab v. McDonald, 28 Vet.App. 50 (Apr. 8, 2016)
MEDICARE; REIMBURSEMENT; 38 U.S.C. § 1725; 38 C.F.R. § 17.1002(f)
HELD: VA is required to reimburse the costs for emergency medical treatment "when coverage by a third party [including Medicare] is less than total." In other words, partial Medicare reimbursement does not bar VA reimbursement for the uncovered medical expenses. VA's regulation stating that VA will only reimburse when a "veteran has no coverage under a [third-party] health-plan contract" is invalid because it is inconsistent with the 2009 amendment to 38 U.S.C. § 1725.

Sneed v. McDonald, 819 F.3d 1347 (Fed. Cir. Apr. 22, 2016)
ATTORNEY ABANDONMENT; EQUITABLE TOLLING; DILIGENCE
HELD: Although attorney abandonment may, in certain circumstances, justify equitable tolling of the filing deadline in an appeal to the CAVC, there is no attorney abandonment absent a representation agreement between the parties. Even if the claimant in this case had been able to show that there was attorney abandonment, she would still not be entitled to equitable tolling because "she failed to demonstrate that she diligently pursued her rights."

Warren v. McDonald, 28 Vet.App. 194 (May 10, 2016)
DC 7806; "SYSTEMIC THERAPY" DEFINED
HELD: "[T]he types of systemic treatment that are contemplated under Diagnostic Code 7806 are not limited to 'corticosteroids or other immunosuppressive drugs.' Compensation is available for all systemic therapies that are like or similar to corticosteroids or other immunosuppressive drugs." (emphasis added). This holding is further supported by VA's own adjudication manual, which defines "systemic therapy" as "any oral or parenteral medication prescribed by a medical professional to treat the underlying skin disorder."

Threatt v. McDonald, 28 Vet.App. 56 (May 17, 2016) (per curiam order)
EQUITABLE TOLLING
HELD: A veteran's correspondence to his congressional representative expressing disagreement with a 2003 Board decision was a "timely misfiled" Notice of Appeal. Because this correspondence was submitted to the RO within the 120-day appeal period, the Court found that the appellant "has satisfied all the requirements of circumstance and diligence to warrant the application of equitable tolling."

Hudgens v. McDonald, 823 F3d 630 (Fed. Cir. May 18, 2016)
DC 5055; TOTAL KNEE REPLACEMENT
HELD: The Federal Circuit reversed the CAVC's determination that DC 5055, which provides for a 100% disability rating for "[p]rosthetic replacement of knee joint . . . [f]or 1 year following implantation of prosthesis" applies only to total knee replacements and not partial knee replacements. (Note: While this appeal was pending, VA amended its regulation to clarify that language referring to "Prosthetic Implants" refers to replacement of the whole joint, unless otherwise stated in DC 5054.)

Ortiz-Valles v. McDonald, 28 Vet.App. 65 (May 20, 2016)
TDIU; 38 C.F.R. § 4.16(a)
HELD: In determining whether a claimant is entitled to a total disability rating based on individual unemployability (TDIU), the plain language of 38 C.F.R. § 4.16(a) does not allow VA "to limit consideration of marginal employment to only currently employed veterans." The regulation defines "marginal employment" as one example "of what is not substantially gainful employment." Therefore, "when the facts of the case reasonably raise the issue of whether the veteran's ability to work might be limited to marginal employment," VA must address this issue and "explain why the evidence does not demonstrate that the veteran is incapable of more than marginal employment."

Butts v. McDonald, 28 Vet.App. 74 (June 3, 2016)
EQUAL ACCESS TO JUSTICE ACT
HELD: "[U]nder the [EAJA's] totality-of-the-circumstances test, the Secretary's compliance does not relieve the Court of its duty to evaluate the reasonable ness of the Secretary's regulatory interpretation and his conduct at the administrative level" and, thus, "the Secretary may be required to pay EAJA fees despite following [Court] precedent."

Holle v. McDonald, 28 Vet.App. 112 (June 10, 2016)
CHAMPVA, 38 U.S.C. § 1781; EQUITABLE TOLLING
HELD: Eligibility for CHAMPVA requires enrollment in Medicare Part B, subject to only one exception, and the enrollment requirements cannot be construed as a statute of limitations that would be subject to equitable tolling.

Noah v. McDonald, 28 Vet.App. 120 (June 10, 2016)
EQUITABLE TOLLING; DUE PROCESS; 38 U.S.C. § 3003(a); 38 C.F.R. § 3.158(a)
HELD: When VA sends "affirmatively misleading notice" to a claimant, that notice does not "satisfy the requirements of procedural due process guaranteed by the Fifth Amendment to the U.S. Constitution."

Correia v. McDonald, 28 Vet.App. 158 (July 5, 2016)
38 C.F.R. § 4.59, RANGE-OF-MOTION TESTING; NON-PRECEDENTIAL DECISIONS
HELD: "[T]o be adequate, a VA examination of the joints must, wherever possible,[] include the results of the range of motion testing described in the final sentence of § 4.59." This includes tests for both passive and active motion, in both weight-bearing and non-weight-bearing circumstances, and testing of the opposite, undamaged joint.

Parseeya-Picchione v. McDonald, 28 Vet.App. 171 (July 11, 2016)
THAILAND, AGENT ORANGE
HELD: Even if the Board determines that a veteran's testimony is not credible, it must still review the other evidence of record and provide an adequate statement of reasons or bases for rejecting it. Evidence relevant to this appeal – and to other Thailand veterans with appeals related to herbicide exposure – includes (1) third-party evidence showing that most flights from the U.S. to Thailand stopped in Vietnam en route to Thailand; (2) VA's C&P Bulletin stating that "some evidence that the herbicides used on the Thailand base perimeters may have been either tactical, procured from Vietnam, or a commercial variant of much greater strength and with characteristics of tactical herbicides"; and (3) the Project CHECO report, describing the air base locations.

***Robinson v. McDonald*,** 28 Vet.App. 178 (per curiam order) (July 14, 2016)
RIGHT TO REVIEW PAPER RECORDS
HELD: VA's refusal "to allow an appellant's representative access to the paper source documents is contrary to the requirements under 38 U.S.C. § 7252(b) and Rule 10 [of the Court's Rules of Practice and Procedure] that the Court's review be on the record before the Secretary and the Board and that the appellant be permitted to inspect and copy any original material from that record."

Emerson v. McDonald, 28 Vet.App. 200 (Aug. 10, 2016)
38 C.F.R. § 3.156(c)(1) REQUIRES RECONSIDERATION EVEN IF VA HAS ALREADY GRANTED SERVICE CONNECTION
HELD: Even if a veteran is granted service connection on the basis of a liberalizing regulation, 38 C.F.R. § 3.156(c)(1) still requires VA to reconsider the veteran's initial claim on the basis of its receipt of newly associated service records.

Garza v. McDonald, 28 Vet.App. 222 (Aug. 11, 2016)
ONLY DoD CAN REVISE EFFECTIVE DATES FOR EDUCATION BENEFITS
HELD: Under 38 C.F.R. 21.9625(j), the effective date for the transfer of education benefits from a veteran to an eligible dependent "may not be earlier than the later of either the date the Secretary of the service department concerned approved the transfer or the date the transferor specified in his or her designation."

Mathis v. McDonald, 834 F.3d 1347 (Fed. Cir. Aug. 19, 2016)
PETITION FOR EN BANC REHEARING DENIED
HELD: The Federal Circuit denied the veteran's petition for en banc rehearing of its prior (non-precedential) decision that declined to disavow the presumption of competence afforded to VA examiners.

Braan v. McDonald, 28 Vet.App. 232 (Aug. 26, 2016)
VETERAN CANNOT APPEAL DENIAL OF SPOUSE'S CLAIM
HELD: Because the veteran did not have the right to appeal *his spouse's claim* for CHAMPVA benefits, the Board did not have jurisdiction over this appeal and the appeal must be dismissed.

Aldridge v. McDonald, 837 F.3d 1261 (Fed. Cir. Sept. 9, 2016)
EQUITABLE TOLLING
HELD: The Federal Circuit affirmed the Veterans Court's holding that equitable tolling was not warranted in this case when the veteran failed to demonstrate how the multiple deaths in his family "directly or indirectly affected the timely filing of his appeal."

Warren v. McDonald, 28 Vet.App. 214 (Sept. 14, 2016)
WITHDRAWAL OF NOTICE OF DISAGREEMENT VIA TELEPHONE IS INVALID
HELD: An appellant or his/her representative may withdraw an appeal, but unless the withdrawal is on the record at a hearing, it must be in writing. A withdrawal "is only effective where withdrawal is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant."

Chisholm v. McDonald, 28 Vet.App. 240 (per curiam order) (Sept. 30, 2016)
PARALEGAL ACCESS TO VBMS
HELD: The Court ordered the Secretary to issue a decision on an attorney's request for paralegal access to VA's electronic claims system (VBMS) on behalf of the law firm's clients.

Hill v. McDonald, 28 Vet.App. 243 (Oct. 7, 2016)
ACDUTRA & AGGRAVATION
HELD**:** Once a claimant has established "veteran" status for a disability incurred or aggravated during a period of ACDUTRA, that status applies to all other disabilities claimed to have been incurred or aggravated during that period – and the veteran is entitled to the presumption of aggravation for those claims, even if there is no entrance examination of record.

Bly v. McDonald, 28 Vet.App. 256 (Oct. 7, 2016)
EAJA; EQUITABLE TOLLING
HELD**:** The 30-day appeal period to file an EAJA application is subject to equitable tolling, but the person seeking equitable tolling must show (1) that he has pursued his rights diligently and (2) that extraordinary circumstance prevented timely filing.

Mathews v. McDonald, docket no. 15-1787 (Oct. 14, 2016)
REASONS OR BASES; COMPLIANCE WITH PRIOR REMAND ORDER
HELD**:** The Board cannot "sub silentio incorporate its reasons or bases from a prior remand order into a later decision"; the Board must "provide or reiterate reasons or bases for unfavorable findings made in prior remand orders – assuming those reasons or bases still apply, given that new evidence or argument may have been submitted in the interim . . . – so that they become part of a final Board decision and subject to appellate review."

Green v. McDonald, 28 Vet.App. 281 (per curiam order) (Oct. 24, 2016)
REMOTE VBMS ACCESS
HELD**:** There is no regulatory right to *remote* access to the Veterans Benefits Management System (VBMS) for attorneys practicing before the Veterans Court who are *not* accredited to practice before VA.

Cox v. McDonald, docket no. 14-2779 (Nov. 7, 2016)
AFGHANISTAN VETERANS NOT ENTITLED TO PERSIAN GULF PRESUMPTIONS
HELD**:** Veterans with Afghanistan service are not entitled to the presumption of service connection for certain conditions, including chronic undiagnosed illnesses, provided in 38 U.S.C. § 1117 and 38 C.F.R. § 3.117. VA's exclusion of Afghanistan from its definition of the geographic area comprising the "Southwest Asia theater of operations" is "reasonable" in light of the legislative history of 38 U.S.C. § 1117, and VA's Training Letter that indicated that VA was going to amend its regulation to include Afghanistan was not a substantive rule that required a "notice-and-comment" period in order to be rescinded.

McCarroll v. McDonald, 28 Vet.App. 267 (en banc) (Nov. 7, 2016)
DISABILITY RATING FOR HYPERTENSION
HELD**:** Because the diagnostic code for hypertension (38 C.F.R. § 4.104, DC 7101) specifically discusses the effects of medication, the Board was not required to consider whether a compensable rating would be warranted if the veteran was *not* medicated.

Cornell v. McDonald, docket no. 15-3191 (Dec. 12, 2016)
NO ENTITLEMENT TO ATTORNEY FEES
HELD**:** Attorney is not entitled to additional attorney fees on award for a total disability rating based on individual unemployability (TDIU) when the attorney did not raise the issue of TDIU during the underlying claim/appeal process and abandoned the client prior to the application for TDIU.

Southall-Norman v. McDonald, docket no. 15-1357 (Dec. 15, 2016)
RATING MUSCULOSKELETAL DISABILITIES; 38 C.F.R. § 4.59
HELD: VA regulations require the award of a minimum compensable disability rating where there is "evidence of an actually painful, unstable, or malaligned joint or periarticular region and the presence of a compensable evaluation in the applicable DC [Diagnostic Code]," regardless of whether that DC is "predicated on range of motion measurements."