NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

RECENT COURT DECISIONS YOU CAN USE TO HELP VETERANS

TN Department of Veterans Services

TO DO:

- Duty to maximize benefits
- Reimbursement for non-VA emergency treatment
- Competence of a VA examiner
- Medical opinions & the Record Before the Agency
- Mini case summaries

DUTY TO MAXIMIZE BENEFITS: *MORGAN V. WILKIE*

EXTRASCHEDULAR RATING

- What is an "extraschedular rating" for a service-connected disability?

VA MAY ASSIGN EXTRASCHEDULAR RATING FOR SC DISABILITY

- VA's Director, Compensation Service may approve an extraschedular evaluation where there is:
  - An exceptional or unusual disability picture
  - With related factors such as
    - **marked interference with employment or**
    - **frequent periods of hospitalization**
  - 38 C.F.R. § 3.321(b)(1)

EXTRASCHEDULAR – WHEN VA MUST ADDRESS

- VA is obligated to discuss extraschedular referral only when the claimant expressly raises the issue or it is reasonably raised by the record.

EXTRASCHEDULAR – 3 STEP INQUIRY

1. VA must compare the level of severity and symptomatology of the claimant's SC disability with the established criteria found in the rating schedule for that disability.

2. VA must address whether the disability exhibits "governing norms" according to 38 C.F.R. § 3.321(b)(1), including "marked interference with employment" and "frequent periods of hospitalization."

3. If the first two elements are met, the case must be referred to the Under Secretary or the Director of C&P for a determination of whether an extraschedular disability rating would be in the interest of justice.

- ***Thun v. Peake*, 22 Vet. App. 111, 115 (2008)**

MORGAN V. WILKIE, 31 VET. APP. 162 (2019).

- Vet rated at 10% for SC hearing loss and requested an increased rating
- 2012 VAX: Vet could not hear his preacher or grandchild and had to open car windows to hear traffic
- 2016 Board hearing: Vet testified his hearing had worsened, he frequently had to ask others to repeat themselves, and he had a strained relationship with his wife
- The Board found "Neither the facts of this case nor the Veteran's allegations raise the issue of extraschedular consideration, and a referral for an extraschedular analysis is not necessary."
  - **<u>Did the Board do enough?</u>**

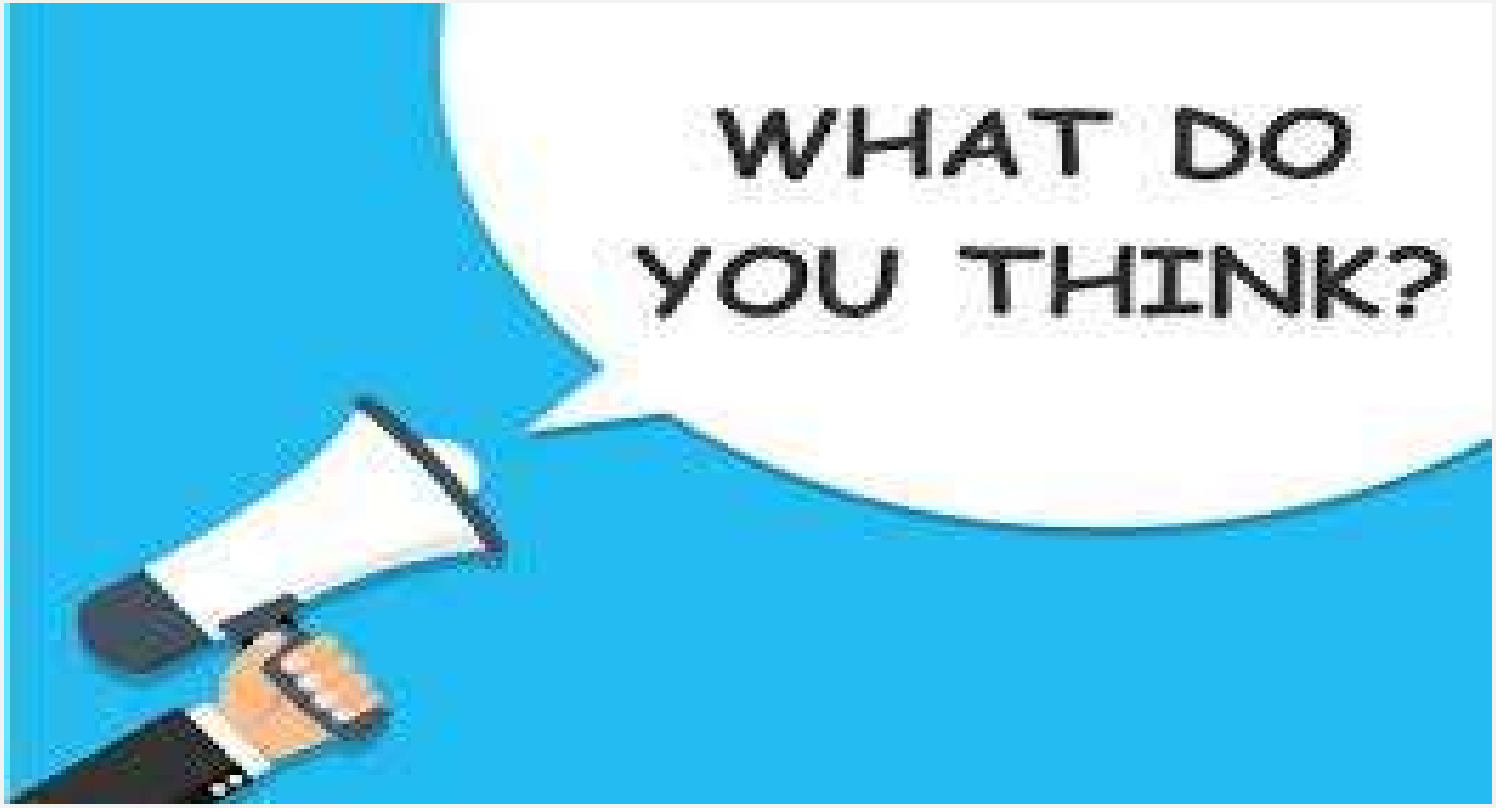
VET'S ARGUMENTS

- The issue of extraschedular consideration was raised by record evidence reflecting safety concerns (having to roll the car window down to hear traffic while driving)

- Thus, Board erred by not **referring him for extraschedular consideration**

VA'S ARGUMENTS

- Board was not obligated to address extraschedular referral as "[t]he functional effects of Appellant's hearing loss did not reasonably raise the issue."



COURT'S HOLDING

- Remand!
- "We are unable to say whether the Board found the issue of extraschedular referral raised, even if it ultimately concluded that referral should be denied, or whether the Board found the issue not raised at all."

DUTY TO MAXIMIZE BENEFITS

- Vets are generally presumed to be seeking the maximum benefit allowed by law and regulation.
- Thus, VA is required to "maximize benefits"
  - 38 C.F.R. § 3.103(a)

SCHEDULAR RATING

38 C.F.R. § 4.85: Evaluation of hearing impairment.

Based on puretone threshold averages and speech discrimination

IS A **SCHEDULAR RATING** MR. MORGAN'S ONLY OPTION?

NO!

"[T]here is much that can be done—indeed that must be done—to ensure a veteran is appropriately compensated before resorting to § 3.321(b)'s extraschedular provisions."

–Morgan v. Wilkie

WHAT OPTIONS DOES A VETERAN HAVE?

WHAT OPTIONS DOES A VETERAN HAVE?

- Secondary SC
- **Analogous ratings**
- TDIU
- **SMC**
- Ability to rate a single disability under multiple diagnostic codes (without pyramiding)
- **EXTRASCHEDULAR!**

SECONDARY SERVICE CONNECTION

- ***Allen v. Brown*, 7 Vet. App. 439 (1995):** A disability that is proximately due to or the result of a service-connected disease or injury shall be service connected

- **38 C.F.R. § 3.310(b):** Any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected

QUESTION

To establish secondary service connection by aggravation, is "permanent worsening" of the secondary condition required?

A. YES

B. NO

WARD & NEAL V. WILKIE, 31 VET. APP. 233 (2019)

- **Any increase in severity** of an NSC condition that is proximately due to or the result of a SC disease or injury will be service connected
  - 38 C.F.R. § 3.310(b)
  - flare-ups for musculoskeletal conditions, incremental pain, etc.
- The "permanent worsening" standard has no application in cases involving an increase in disability of an NSC condition related to an SC disease or injury.
- **Take away: If a VA adjudicator or examiner requires "permanent worsening" to establish aggravation, appeal!**

ANALOGOUS RATINGS

- When regs do not provide DCs for specific conditions, VA must evaluate those conditions under codes for similar or analogous conditions
  - 38 C.F.R. § 4.20
- Factors VA must consider:
  1. Functions the condition affects
  2. Condition's location on the body
  3. Similarity of symptoms

OTHER SCHEDULAR TOOLS

- Where there is a question as to which of two evaluations shall be applied, the **higher evaluation** will be assigned if the disability picture more nearly approximates the criteria required for that rating
  - 38 C.F.R. § 4.7
- VA must resolve **reasonable doubt** in favor of the claimant when assigning a rating
  - 38 C.F.R. § 4.3
- TDIU
- SMC

LAST RESORT: EXTRASCHEDULAR

"Focusing on the full scope of schedular rating devices will significantly reduce the need to address extraschedular referral, reserving it for those cases that are truly 'exceptional.'"

-*Morgan v. Wilkie*

MORGAN: TAKE-AWAYS

- Consider all symptoms and effects of a condition
- Look for a schedular rating (or multiple) that contemplates those symptoms and effects
- Consider other schedular options: TDIU, SMC, etc.
- Argue for extraschedular referral as a last resort
- If you want extraschedular consideration, expressly raise it to the VA adjudicator

WOLFE V. WILKIE, VET. APP. NO. 18-6091 (SEPT. 9, 2019)

WOLFE V. WILKIE

- **Issue**:
  - The validity of 38 C.F.R. § 17.1005(a)(5), which states that VA will not reimburse a Vet for any copayment, **deductible**, **coinsurance**, or similar payment that the Vet owes the 3rd party or is obligated to pay under a health plan contract.

WOLFE V. WILKIE BACKGROUND

- VA must reimburse a Vet for the reasonable value of emergency treatment furnished to the Vet in a non-VA facility, if the Vet is personally liable for the treatment and an active participant in the VA health care system

- VA may not, however, reimburse a Vet for any "co-payment or similar payment"

  - 38 U.S.C. § 1725

WOLFE V. WILKIE BACKGROUND

- Jan. 2018: VA updated its regs to *limit* reimbursable expenses:
  - VA will not reimburse a Vet for any "copayment, **deductible, coinsurance**, or similar payment" the Vet owes the third party or is obligated to pay under a health-plan contract
    - 38 C.F.R. § 17.1005(a)(5)

WOLFE V. WILKIE BACKGROUND

- **Co-insurance:** % of costs the enrollee must pay; not a predetermined dollar figure
- **Deductible:** Amount an insured must pay each year before the insurance source pays its share
- **Co-payment:** fixed amount paid for a covered health care service after insured paid the deductible

WOLFE V. WILKIE VET'S ARGUMENT

- **§ 17.1005(a)(5)** is inconsistent with **§ 1725(c)(4)(D)** and *Staab* to the extent if forbids VA from reimbursing Vets for coinsurance and deductible payments
- **§ 1725(c)(4)(D)** only prohibits reimbursement for "copayments or similar payments" that Vet owes third party or is responsible for under a health-plan contract
- **Co-insurance** and **deductible** amounts can vary widely and be thousands of dollars
- **They are not "similar to" co-payments, which are typically a minimal fixed amount**

WOLFE V. WILKIE VET'S ARGUMENT

- § 17.1005(a)(5) undermined Congress's intent in amending § 1725
  - VA, not Vet should be responsible for excess cost of emergency services
  - Vet's should not be saddled with massive ER bills
  - Gives Vets disincentive to obtain 3rd party insurance
    - Costs VA more if Vet has no 3rd party insurance

WOLFE V. WILKIE HOLDINGS

- **Class certification for:**
  - All claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part, on the ground that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible.

WOLFE V. WILKIE HOLDINGS

- § 17.1005(a)(5) is invalid for two related, but distinct reasons:

  1) It is inconsistent with *Staab's* interpretation of section § 1725, and

  2) Deductibles and coinsurance are not "similar" to a copayment (and VA didn't explain how they are "similar" to a copayment)

WOLFE V. WILKIE HOLDINGS

- No matter how one compares a copayment, deductibles, and coinsurance to determine "similarity," the effect of § 17.1005(a)(5) is to eliminate any potential reimbursable remaining liability for Vets who have partial coverage from a health plan contract
- Because § 17.1005(a)(5), in effect, eliminates all possible remaining liability, it is necessarily inconsistent with § 1725

WOLFE V. WILKIE HOLDINGS

- VA's decisions under § 17.1005(a)(5) are invalid to extent they denied reimbursement for medical expenses deemed deductibles or coinsurance
- VA must readjudicate reimbursement claims under § 1725(c)(4)(D)'s proper interpretation

WOLFE TAKE AWAYS & ADVOCACY ADVICE

- VA must reimburse Vets for **co-insurance**, **deductible payments**, and **balance billing**, but not co-payments
- Options if VA **denied** payment for deductible or coinsurance payments for emergency treatment at a non-VA facility:
  - File NOD (legacy) or HLR (AMA) (if denied in past year)
  - File a CUE claim (if 1 year appeal deadline passed)
  - Await VA instructions in corrected notice letter (or possible notice of readjudication)
  - Contact NVLSP for additional guidance if necessary

ADVOCACY ADVICE – REJECTED CLAIMS

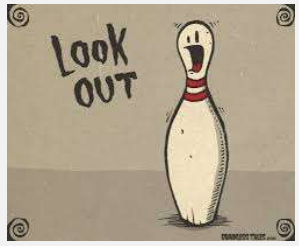
- Review letter to see if VA "rejected" the claim, rather than denied claim.
  - VA did not "deny" the benefits
- Determine *why* VA rejected the claim, and try to correct
  - Missing Explanation of Benefits? Submit it!
  - Other missing info? Submit it!

NVLSP'S ROLE

- NVLSP is monitoring cases to ensure VA correctly adjudicates them.
- If you think VA erroneously denies claim or provides incorrect or confusing notice to Vet, let us know:

Alexis Ivory

alexis@nvlsp.org



VA EXAMINER COMPETENCE

VA MEDICAL EXAMINATIONS

- VA is required in certain situations, under its duty to assist, to provide a claimant with a medical exam
  - 38 U.S.C. § 5103A(d)

VA MEDICAL EXAMINATIONS

- Once VA undertakes the effort to provide an exam when developing a service-connection claim, even if not statutorily obligated to do so, it must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided
  - *Barr v. Nicholson*, 21 Vet. App. 303 (2007)
- Medical evidence must be "provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions."
  - 38 C.F.R. § 3.159(a)(1)

HISTORY OF EXAMINER COMPETENCE

- "Absent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion."
  - ***Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009)**
  - ***Cox v. Nicholson*, 20 Vet. App. 563, 565 (2007)** (VA not required to affirmatively establish an examiner's qualifications absent evidence that would cast doubt on the examiner's competence and qualifications)

EXAMINER COMPETENCE

- In other words, VA examiner *competence is presumed* and VA does not have to "prove" an examiner's qualifications *unless* the claimant raises the issue or the examiner calls their own qualifications into question

WHAT SHOULD YOU DO IF YOU SUSPECT THE VA EXAMINER IS INCOMPETENT?

MAKE THE ARGUMENT IMMEDIATELY—BEFORE VA ISSUES A DECISION

FRANCWAY V. WILKIE, 930 F.3D 1377 (FED. CIR. 2019)

- Vet was examined by an orthopedist, an internist, and a physician's assistant
- Board remanded the case to the RO based on buddy statements, with instructions that Vet's "claims file should be reviewed by an appropriate medical specialist for an opinion"
- 2014: same internist reviewed buddy statements and rendered a negative opinion

FRANCWAY: SUMMARY

- Board denied the claim for SC for back disability
- Vet appealed to CAVC, arguing for the first time that internist was not "an appropriate medical specialist" within the meaning of the remand order
- CAVC held that Vet had not preserved that claim because Vet did not challenge examiner's qualifications before the Board
- Vet appealed to Federal Circuit

FRANCWAY: SUMMARY

- Fed. Circuit's analysis:
  - Presumption of competency requires nothing more than is required for Vet claimants in other contexts—simply a requirement that the Vet raise the issue
  - Once Vet raises the issue, "the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion."

FRANCWAY: SUMMARY

- **Silver Lining:** Once a request for information is made regarding the examiner's competence, VA's duty to assist *mandates* disclosure of relevant information

> Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by the VA's duty to assist. *See* 38 U.S.C. § 5103A; *Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013) (collecting cases).

FRANCWAY: EN BANC REVIEW

- **Oct. 2019:** Fed. Cir. *sua sponte* granted en banc consideration of its decision in *Francway*

FRANCWAY: EN BANC REVIEW

[1] The en banc court formed of PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*, has determined that to the extent that the decision here is inconsistent with *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), those cases are overruled. We note that in the future, the requirement that the veteran raise the issue of the competency of the medical examiner is best referred to simply as a "requirement" and not a "presumption of competency."

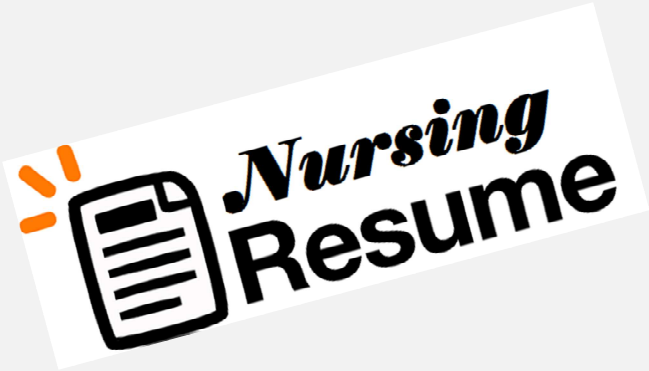
FRANCWAY: EN BANC REVIEW

FRANCWAY: TAKE AWAYS

- If you have any reason to believe the examiner is not competent/qualified to provide a medical opinion in a particular case, BE SURE TO MAKE THE ARGUMENT to VA
  - **Wrong specialty**
  - **Not in compliance with remand orders**
  - **Suspect lack of VA required training (TBI, etc.)**
  - **Past discipline**

FRANCWAY: TAKE AWAYS

- Consider requesting credentials, curriculum vitae, evidence of relevant training, etc. if you suspect a problem
  - **Caution: it may result in information being added to the record that bolsters weight of negative opinion**
    - Ex: Doctor has impressive CV



EXCEPTIONS

WISE V. SHINSEKI, 26 VET. APP. 517 (2014)

- Even though claimant did not raise a competence challenge before VA, ***the presumption of competence did not attach*** to the examiner's opinion because the examiner admitted she lacked the expertise necessary to provide requested opinion
- Cardiologist asked to opine on mental health case: "I will preface my remarks by stating . . . I have no formal training or background in psychiatry other than the rudimentary month-long psychiatry rotation in medical school more that 25 years ago. And I have precious little experience treating veterans, having worked briefly as a cardiologist part time at a VA clinic some 12 years ago, and the past few months at my current position."

WISE EXAMPLES . . .

- "I recognize my own personal limitations of knowledge in this area of medicine."
- "From a relative lay person's perspective of psychiatry, the veteran's treatment notes do not suggest that he has PTSD"
- A dermatologist or eye doctor providing a psychiatric exam

HYPO

Which facts that would trigger the *Wise* exception:

A. Examiner was previously discharged from an Army medical residency program

B. News articles suggest that examiner was involved in mishandling exams at a VA facility

C. Both of the above

D. None of the above

(AS WE *FEAR*-ED)

FEARS V. WILKIE, 31 VET. APP. 308 (2019)

FEARS: FACTS

- Claim for SC for hepatitis
- 5/2014: BVA remand: get a new medical opinion by an appropriate examiner (preferably a hepatologist) addressing the etiology of Vet's hepatitis.
- 7/2014 and 12/2014: Non-hepatologist VA examiner gave negative nexus opinion
- 4/2017: BVA found RO complied with remand instructions and denied claim
- VA examiner was previously discharged from an Army medical residency program and news articles suggested that he mishandled VA exams, but this info was not submitted to VA by Vet or in VBMS

FEARS: VET'S ARGUMENTS

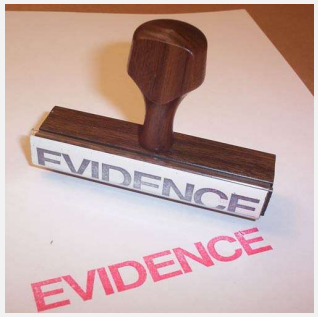
- BVA erred in relying on examiner's opinion because of examiner's litigation history
- Examiner's litigation history raised the competency issue such that BVA should have addressed it

FEARS: HOLDING

- Examiner's litigation history and news articles were not before BVA, so nothing to put BVA on notice of competency issue, and CAVC could not evaluate the litigation history or articles b/c they weren't in the record
  - No *Wise* exception where evidence is not in the record!
- Challenging the competence of an examiner and challenging the adequacy of an exam are two separate inquiries

FEARS TAKEAWAYS

- *Wise* exception not restricted to the facts of *Wise*
- Something in the record must trigger VA's duty to address competency
- Competency evaluations and arguments must happen at VA (not the Court)
- Don't count on the *Wise* exception – RAISE THE ISSUE AT THE RO / BVA



MEDICAL OPINIONS & THE RECORD

McCRAY V. WILKIE, 31 VET. APP. 243 (2019)

- Vet claimed SC for hearing loss.
- In support of negative nexus opinions VA examiners cited a 2005 IOM report—*Noise and Military Service: Implications for Hearing Loss and Tinnitus:*
  - "The evidence from laboratory studies in humans and animals is sufficient to conclude that the most pronounced effects of a given noise exposure on puretone thresholds are measurable immediately following the exposure, with the length of recovery, whether partial or complete, related to the level, duration, and type of noise exposure. Most recovery to stable hearing thresholds occurs within 30 days."

McCRAY V. WILKIE

- Vet submitted excerpts of IOM report showing the conclusions cited by the examiners had qualifying and contradictory aspects, which the examiners did not discuss:
  - "There is ***not sufficient evidence*** from longitudinal studies in laboratory animals or humans to determine whether permanent noise-induced hearing loss can develop much later in one's lifetime, long after the cessation of that noise exposure. Although the ***definitive studies to address that issue have not been performed***, based on the anatomical and physiological data available on the recovery process following noise exposure, it is unlikely that such delayed effects occur."

McCRAY V. WILKIE

- BVA relied on the VA opinions to deny claim, but didn't discuss qualifying and contradictory aspects of IOM report

McCRAY V. WILKIE

- CAVC held:
  - Where the Vet's arguments concerning apparently qualifying or contradictory statements in the IOM report were of record when the Board made its decision, the Board was obligated to address the issue when assessing the probative value and adequacy of the medical opinion that relied on the IOM report.

McCRAY V. WILKIE

- CAVC held:
  - If it is explicitly raised by the Vet or reasonably raised from review of the evidence of the record, BVA must address that issue and explain whether those aspects of the medical text diminish the probative value of the medical opinion evidence to render the opinion inadequate, and if not, why not.

MCCRAY TAKEAWAYS

- Review any medical study / article / treatise that a VA examiner cites in support of a negative opinion to see if it fully supports the examiner's conclusion
  - If there is any qualifying or contradictory language that the VA examiner has not addressed, submit a copy to the VA and point out the language

MINI CASE SUMMARIES

EUZEBIO V. WILKIE VET. APP. NO. 17-2879 (AUG. 22, 2019)

- **1966-69:** Vet served in Vietnam and at Camp Lejeune
- **5/2011:** Vet filed a claim for SC for benign thyroid nodules
- **1/2017:** Vet testified to BVA that he believed thyroid was related to AO exposure
- **7/2017:** BVA denied claim w/out providing medical exam

EUZEBIO: VET'S ARGUMENT

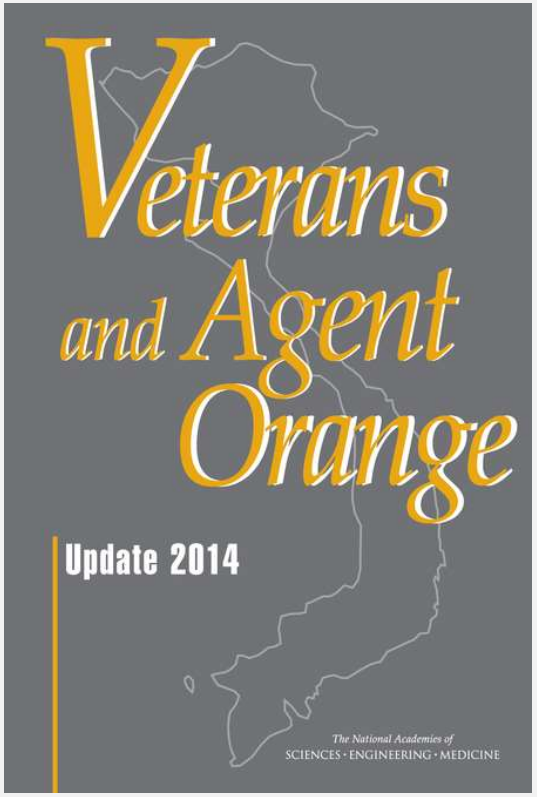
- VA must provide Vet with medical opinion when there is:

1. Competent evidence of a current disability or persistent or recurrent symptoms of a disability, and
2. Evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the Vet qualifies, and
3. **An indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Vet's service or with another SC disability**, but
4. Insufficient competent medical evidence on file for VA to decide claim.

- ***McLendon v. Nicholson*, 20 Vet. App. 79 (2006)**

EUZEBIO: VET'S ARGUMENT

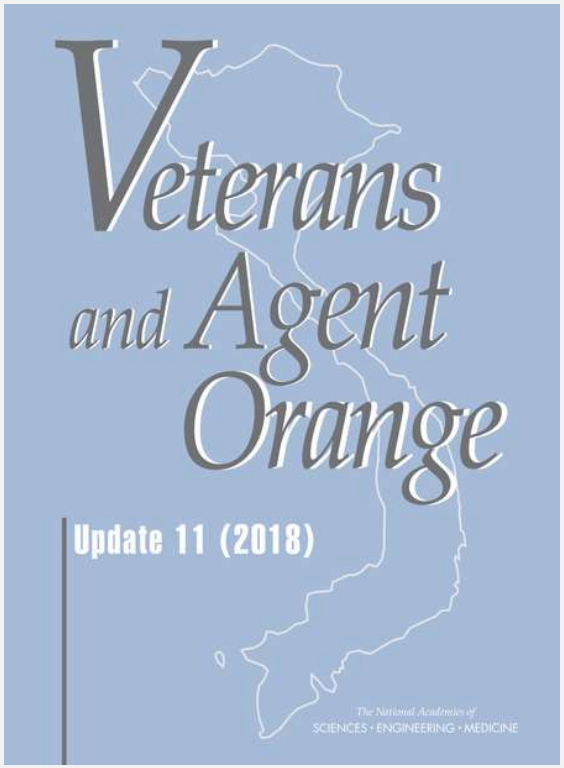
- BVA failed to address "all evidence and material of record and applicable provisions of law and regulation," including NAS's Veterans and Agent Orange: Update 2014
- NAS report would have satisfied the third *McLendon* element
  - Found limited or suggestive evidence of an association between AO and hypothyroidism
- NAS report was constructively before BVA because VA knew of report's content



EUZEBIO: HOLDING

- Veterans and Agent Orange: Update 2014 was not constructively part of the record as it did not have a "direct relationship" to client
- Board satisfied the duty to assist
- Affirmed
- BUT, appealed to Fed. Circuit, so stay tuned

EUZEBIO: TAKEAWAYS



- Review the NAS findings on Agent Orange and submit report to the RO/BVA, if relevant.
  - Update 2018: https://www.nap.edu/catalog/25137/veterans-and-agent-orange-update-11-2018
- Submit all relevant evidence to the RO/BVA, including VA generated evidence

YOUNGBLOOD V. WILKIE VET. APP. NO. 18-0378 (SEPT. 12, 2019)

- SMC(s) warranted if Vet has SC **disability rated as total**, and
  1. additional SC disability or disabilities independently ratable at 60 percent or more, or
  2. by reason of Vet's SC disability or disabilities, Vet is permanently housebound
     - 38 U.S.C. § 1114(s)
- TDIU based on one SC disability meets the "service-connected disability rated as total" requirement for SMC(s)

YOUNGBLOOD V. WILKIE

- For the purpose of determining eligibility for TDIU under 38 C.F.R. § 4.16(a) (one 60% disability, or one 40% disability with combined 70% rating), the following are considered **one disability**:

1. Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable
2. Disabilities resulting from common etiology or a single accident
3. Disabilities affecting a single body system
4. Multiple injuries incurred in action
5. Multiple disabilities incurred as a POW

YOUNGBLOOD: ISSUE

Can the "one disability" definition in 38 C.F.R. § 4.16 (TDIU) be applied to 38 U.S.C. § 1114(s) (SMC), to combine disabilities to reach the "total" rating required for SMC?

QUESTION

A. Yes

B. No

No!

YOUNGBLOOD: HOLDING

The purpose of the "one disability" phrase in § 4.16(a) was to assist Vets in reaching TDIU eligibility, no other purpose can be read into the regulation, including retaining the "one disability" designation to establish "a service-connected disability rated as total" for SMC eligibility.

YOUNGBLOOD: TAKE AWAY

- Advocates should not try to apply the principles of "one disability" combinations under § 4.16(a) to other regulations

- A Vet cannot combine disabilities to establish "**a service-connected disability rated as total**" for purposes of SMC

SUCIC V. WILKIE, 921 F.3D 1095 (FED. CIR. 2019)

- **6/2007:** RD granting SC for PTSD, appeal began for appropriate effective date
- **4/8/2016:** Fed. Cir. issued Mandate
- **4/13/2016:** Vet passed away
- **8/22/2016:** CAVC issued Mandate
- **8/31/2016:** Vet's counsel filed motion to substitute Vet's three adult children as claimants

SUCIC V. WILKIE

Substitution

- If a claimant dies while a claim/appeal is pending, **a *living person who would be eligible to receive accrued benefits*** under § 5121(a) may, file a request to be substituted as the claimant.
  - 38 U.S.C. § 5121A

Accrued Benefits

- Order of eligibility for accrued benefits:
  1. Vet's spouse
  2. ***Vet's children*** (in equal shares)
  3. Vet's dependent parents (in equal shares)
  - 38 U.S.C. § 5121

SUCIC: ISSUE

Do three adult, non-dependent children qualify as

"***the veteran's children***"

sufficient to establish entitlement to accrued benefits and substitution?

HYPO

A. Yes

B. No

No!

SUCIC: HOLDING

- 38 U.S.C. § 101(4)(A) defines "child" as a person who:
  - is unmarried and under the age of 18 years, or
  - became permanently incapable of self-support before turning 18, or
  - is pursuing a course of instruction at an approved educational institution and is 18 to 23 years old
- This definition of "child" in § 101 applies throughout Title 38
- The term "[t]he veteran's children" used in § 5121(a)(2)(B) clearly and unambiguously excludes Vet's non-dependent, adult children

SUCIC: TAKE AWAYS

- Non-dependent, adult children not eligible accrued benefits beneficiaries as "the veteran's children"
- But, might be eligible for accrued benefits to reimburse for expenses of the last sickness and burial
- Identify a potential substitute early
- Move the claim/appeal along as quickly as possible
- Ask Vet to promise he/she will not die

QUINN V. WILKIE, 31 VET. APP. 284 (2019)

- **4/2011:** Vet filed claim
- **3/2012:** RO issued RD and Vet appealed
- **8/2014:** Vet testified at BVA hearing

- **4/2015:** BVA denied one claim and remanded four claims with instructions for the RO to acquire relevant medical records and schedule VA exams

QUINN V. WILKIE

- VA issued SSOC, continuing to deny four claims
- **12/2016:** Vet submitted a letter disagreeing with the denial and requesting another hearing so that she could offer further evidence in the form of her testimony before the BVA decided her appeal
- RO denied Vet's hearing request
- **7/2017:** BVA denied claims without addressing Vet's request for 2nd hearing

QUINN: HOLDING

- A BVA remand nullifies a prior rating decision and the Board must decide anew whether to grant benefits based on a new rating decision or SSOC
- Vet entitled to a new hearing!

QUINN: TAKE AWAY

- Vet returning to BVA after a remand is entitled to a BVA hearing, if one is timely requested

QUESTIONS?