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NATIONAL VETERANS LEGAL SERVICES PROGRAM

RECENT COURT DECISIONS VETERANS ADVOCATES NEED TO KNOW ABOUT APRIL 2023 – OCTOBER 2023

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PRESENTER – LOU GEORGE

- Special Counsel, focusing on matters at CAVC and Training
- VSO liaison
- Began prior tenure at NVLSP in 1998, served as Staff Attorney, Senior Staff Attorney, and Director of Training and Publications (2013-2015)
- Previously worked at BCMR of the Coast Guard, BVA, and SSA

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TODAY'S AGENDA/OVERVIEW

- *Crews v. McDonough*, 36 Vet. App. 67 (2023)
  - Whether the Blue Water Navy Vietnam Veterans Act of 2019 precludes a veteran from receiving a retroactive effective date for an award of benefits under that Act for an herbicide-related condition, if his or her claim was previously denied in part due to the lack of evidence of a current disability?

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TODAY'S AGENDA/OVERVIEW

- *Webb v. McDonough*, 71 F.4th 1377 (Fed. Cir. 2023)
  - Whether 38 C.F.R. § 4.20, relating to analogous ratings, requires a veteran with an unlisted condition (in this case, erectile dysfunction) to meet each and every requirement of the listed rating criteria?
- *Estevez v. McDonough*, 36 Vet. App. 157 (2023)
  - Whether a veteran can be compensated for limited internal or external rotation of the shoulder under the pre-amendment version of 38 C.F.R. § 4.71a, DC 5201 (limitation of motion of the arm), and (2) whether pain on motion and pain at rest are different manifestations of disability for purposes of assigning separate knee evaluations?

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TODAY'S AGENDA/OVERVIEW

- *Encarnacion v. McDonough*, 36 Vet. App. 194 (2023)
  - Whether a rating decision that simply implements a BVA decision can be appealed back to the BVA? (update regarding a case we highlighted in a previous webinar)
- *Davis v. McDonough*, 36 Vet. App. 142 (2023)
  - Whether a VA Form 10182 (Notice of Disagreement) faxed to the Board is "received" on the date it was faxed, or the date it was uploaded and acknowledged by VA, for purposes of calculating the 90-day period during which evidence can be submitted in the evidence submission lane under the AMA?

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TODAY'S AGENDA/OVERVIEW

- *Frazier v. McDonough*, 66 F.4th 1353 (Fed. Cir. 2023)
  - Whether 38 C.F.R. § 4.59 contains a freestanding requirement for VA to grant at least a 10 percent rating for any service-connected joint condition that is associated with pain?
- *Duran v. McDonough*, 36 Vet. App. 230 (2023)
  - Whether, under DC 8004, when some manifestations of Parkinson's disease are rated as compensable and total more than 30 percent under DCs other than DC 8004, but some manifestations remain that are not rated as compensable, do the ratings under the other DCs replace or combine with DC 8004's minimum 30 percent rating?

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TODAY'S AGENDA/OVERVIEW

- *Perciavalle v. McDonough*, 74 F.4th 1374 (Fed. Cir. 2023)
  - Whether, in determining if a claim of CUE was pled with specificity, VA has a duty to sympathetically read a Vet's pro se CUE motion, and whether CUE must be based on an error already identified as erroneous by court decision or VA publication?
- *Wright v. McDonough*, 36 Vet. App. 272 (2023)
  - When a child of a totally disabled Vet exhausts DEA benefits before finishing a chosen program of education or special restorative training, is the disabled parent forever precluded from again receiving a dependent allotment based on that child?

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TODAY'S AGENDA/OVERVIEW

- *Cook v. McDonough*, 36 Vet. App. 175 (2023)
  - Under the AMA, whether evidence submitted "with" the NOD means all evidence associated with the VA claims file when the NOD is filed (specifically, evidence submitted during the period between the time the RO decision was issued and the time the NOD was filed)?
  - How specific must the Board be when explaining what evidence it did not consider in deciding a claim?

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Crews v. McDonough,
36 Vet. App. 67 (2023)
Issued: April 17, 2023

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Crews – Issue/Holding

- Whether the Blue Water Navy Vietnam Veterans Act of 2019 (BWNVVA) precludes a veteran from receiving a retroactive effective date for an award of benefits under that Act for an herbicide-related condition, if his or her claim was previously denied *in part* due to the lack of evidence of a current disability?
  - The Court held that the Act does **not** preclude a retroactive effective date

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Crews – Facts

- Robert E. Crews served on active duty in the Coast Guard from 7/1963 to 7/1983
- He filed a claim for VA benefits for ischemic heart disease (IHD) in 9/2013, asserting that the condition began in 1/1991 and was caused by in-service exposure to Agent Orange
- RO denied the claim in 7/2014, listing under "evidence," military service personnel records showing confirmed Vietnam service, and no response received for private treatment records from a Dr. Cook at the Sanger Clinic

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Crews – Facts

- RO found:
  - Evidence did not show an event, disease, or injury in service and STRs did not reflect complaints, treatment, or diagnoses of the condition; and the condition did not develop to a compensable degree w/in the presumptive period
  - Presumptive SC based on herbicide exposure was warranted for certain conditions, including IHD, but here the evidence did not show a diagnosis of a condition for which VA has found a positive association to herbicide exposure
  - IHD did not happen in military service, nor was it aggravated or caused by service

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Crews – Facts/Law

- 6/2019: BWNVVA signed into law
  - 38 U.S.C. § 1116(c)(2)(B) allows effective date for benefits to be based on previously denied claim, if Vet:
    i. Submitted a claim for disability compensation on or after 9/25/1985, and before 1/1/2020, for an AO presumptive disease, and the claim was denied because evidence did not establish that the disease was incurred or aggravated by the service of the Vet
    ii. Submits a claim for disability compensation on or after 1/1/2020 for the same condition covered by the prior claim, and the claim is approved under the BWNVVA

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Crews – Facts

- 9/2019: Vet filed supplemental claim for IHD, stating that he served directly off the coast of Vietnam and sometimes went ashore, and saw clouds of AO coming across the water as it was dropped in the trees
  - Evidence developed showed that, in 1991, he underwent coronary artery bypass graft by Dr. Cook to treat CAD
- 3/2020: VA memo conceded Vietnam service in both inland waterways and in waters offshore as defined by BWNVVA

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Crews – Facts

- 4/2020: RO granted SC benefits for CAD and assigned a 60% rating
  - Effective date was 9/5/2019, the date of the supplemental claim
  - SC was granted on the basis of presumption due to AO exposure
  - Because original claim for IHD was denied due to no evidence of a diagnosis, an earlier effective date under the BWNVVA could not be applied

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Crews – Facts

- Vet sought review of the effective date, arguing:
  - 2013 claim had been denied only because AO exposure at the time was limited to inland water/boots-on-ground exposure
  - Effective date should be retroactive to the date of earlier claim
- RO granted earlier effective date of 9/2018, one year before supplemental claim, based on CUE, because he had a compensable diagnosis of CAD as early as 1991, and CAD was added to the list of herbicide-related conditions on 8/31/2010

Crews – Facts

- 11/2020: BVA denied an even earlier effective date:
  - BWNVVA's exception to general rules for effective dates did not apply, because the original claim was not denied based on lack of confirmed Vietnam service, but due to lack of a current disability
  - BVA acknowledged that the record showed that Vet had CAD as early as 1991, but these records were not associated with the file until after Vet filed his supplemental claim

Crews – Analysis

- CAVC addressed the legal landscape regarding herbicide exposure and Blue Water Vietnam Vets
  - When Vet filed his 2013 claim, VA interpreted service "in the Republic of Vietnam" as including service on the landmass and inland waterways
  - The presumption of exposure did not extend to service members who did not set foot in Vietnam. *See Haas v. Peake*, 525 F.3d 1168, 1193 (Fed. Cir. 2008).
  - The above interpretation was overruled in *Procopio v. Wilkie*, 913 F.3d 137 (Fed. Cir. 2019) (en banc)
  - In 6/2019, Congress enacted the BWNVVA, which recognized offshore service. *See* 38 U.S.C. § 1116A.

Crews – Analysis

- Legal landscape (cont'd):
  - 11/2020: U.S. District Court for the Northern District of California found that VA wrongly excluded blue water Vietnam Vets relief under *Nehmer*
  - Blue water Vietnam Vets are now eligible for "automatic readjudications" of certain prior claims under *Nehmer,* and potentially eligible for retroactive compensation

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Crews – Analysis

- CAVC stated that BVA's rejection of a retroactive effective date was based on:
  - The prior claim being denied on the basis that the evidence did not show that he had a current disability
  - The RO's determination that the prior denial was not based on a more restrictive definition of Vietnam
- The Court focused on whether the retroactive effective date provision of 38 U.S.C. § 1116(c)(2)(B) contained such limits

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Crews – Holding

- The Court concluded that a retroactive effective date "is not conditioned on the prior claim having been rejected on the grounds that service in the Republic of Vietnam was not confirmed"
- All that the law requires is that the prior claim was denied because the veteran did not establish that the claimed disease was "incurred or aggravated by . . . service"
  - There was nothing in the purpose or legislative history of the BWNVVA suggesting that Congress intended to create hurdles for obtaining an earlier effective date

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Crews – Holding

- The Court concluded that BVA erred by requiring that the prior claim must have been denied based on a more restrictive definition of service in Vietnam in order to qualify for the retroactive effective date, because 38 U.S.C. § 1116(c)(2)(B) contained no such requirement
  - The Court vacated and remanded the matter for further findings by the Board

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Crews – Advocacy Advice

- If a claim for SC is granted under the BWNVVA, carefully review the file to determine whether a claim for the same disability was previously denied, and why it was denied
  - Under the retroactive benefits provision of the Act, a denial based on lack of a current disability (or any other reason), does not preclude assignment an earlier effective date, as long as the prior denial was based at least *in part* on a finding that the disease was not incurred or aggravated by service

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Webb v. McDonough,
71 F.4th 1377 (Fed. Cir. 2023)
Issued: June 29, 2023

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Webb – Issue/Holding

- Whether 38 C.F.R. § 4.20, relating to analogous ratings, requires a veteran with an unlisted condition (specifically, erectile dysfunction) to meet each and every requirement of the listed rating criteria to qualify for a particular rating?
  - The Court held that the regulation does **not** require that the symptoms of an unlisted condition identically match the criteria of the DC under which the condition is rated by analogy to qualify for a particular rating

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Webb – Facts

- Vet served in the Army from 1968 to 1970
- After service, he developed SC prostate cancer, for which the treatment caused erectile dysfunction (ED)
  - RO assigned a non-compensable rating for ED; at the time, the Rating Schedule did not include a DC for ED (note: it does now, but the revised regulation was not applicable in this case)
  - RO rated the ED by analogy to DC 7522, which provided for a 20% disability rating for "deformity" of the penis "with loss of erectile power"

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Webb – Facts

- Vet appealed to BVA, which denied a compensable rating, acknowledging that while the disability was rated by analogy, under 38 C.F.R. § 4.20, he did not show "deformity of the penis with loss of erectile power"
- CAVC affirmed BVA's decision, relying *Williams v. Wilkie*, 30 Vet. App. 134 (2018)
  - The Court explained that implicit in its holding in *Williams*, the Vet must establish a penile deformity to be entitled to benefits

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Webb – Holding

- Fed. Cir. concluded that CAVC "erred by requiring Mr. Webb, to be eligible for benefits, to show that his unlisted condition identically matched the criteria of the listed condition to which his condition was rated by analogy"
  - By doing so, the CAVC imposed a requirement not stated in 38 C.F.R. § 4.20
- Fed. Cir. held that when rating by analogy under § 4.20, VA must adhere to the regulation:
  - The listed disease or injury to which a Vet's unlisted condition is being rated by analogy must only be "closely related," not identical, to the unlisted condition

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Webb – Holding

- 38 C.F.R. § 4.20 provides guidance for determining whether a listed condition is "closely related" to the unlisted condition
  - It is one "in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous" to the unlisted condition
- Once VA has concluded that a listed disease is "closely related" to the unlisted condition, there is "no source of law directing the VA to withhold the rating based on the qualifying criteria associated with that listed disease or injury's [DC]."

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Webb – Analysis

- Fed. Cir. found that the regulatory text supported its analysis
  - If a Vet's condition precisely met the requirements of a listed condition, the condition could simply be rated under the listed condition's DC—there would be no need to rate by analogy
- CAVC's earlier decision in *Williams* was distinguishable, because the Vet in that case explicitly claimed that he met each of the requirements of the DC

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Webb – Conclusion

- Fed. Cir. vacated and remanded CAVC's decision, because it misinterpreted the requirements of 38 C.F.R. § 4.20
  - Fed. Cir. ordered that on remand, Mr. Webb's case be considered under a proper understanding of the regulation

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Webb – Advocacy Advice

- This case provides helpful guidance when dealing with analogous ratings in general, in addition to ED in particular
  - Make sure that VA has not required that a disability rated by analogy meet each and every one of the requirements of a listed condition
  - Point this out in written submission and hearing presentations, and argue for a higher rating

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Webb – Advocacy Advice

- VA revised the rating criteria for ED effective 11/14/2021, providing for a non-compensable rating "with or without penile deformity"
  - 38 C.F.R. § 4.115b, DC 7522 (2021).
  - This revision did not apply to Mr. Webb's case, since he filed his claim before 2021
- Even though a compensable rating is unavailable under the current law, ensure VA awards SMC for loss of use of a creative organ

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Estevez v. McDonough,
36 Vet. App. 157 (2023)
Issued: May 19, 2023

Estevez – Issues/Holdings

1. Whether a Vet can be compensated for limited internal or external rotation of the shoulder under the pre-amendment version of 38 C.F.R. § 4.71a, DC 5201 (limitation of motion of the arm)
2. Whether pain on motion and pain at rest are different manifestations of disability for purposes of assigning separate knee evaluations?
   - For both questions, the Court answered "**no**"

Estevez – Facts

- Emilio Estevez served in the Marine Corps from 3/1979 to 10/1992, and for several periods from 4/1998 to 9/2001
- 4/2010: Vet filed claim for increased evaluations
- 7/2020: BVA decision
  - Denied a rating greater than 20% for the Vet's right shoulder disability under then-DC 5201
  - Awarded a 20% rating, but no higher, for left knee disability prior to 5/2013, and denied a rating greater than 20% under DC 5258 for the period since 5/2013

Estevez – Facts

- BVA denied right shoulder evaluation greater than 20% under pre-amendment DC 5201, because record showed abduction limited to 90º (i.e., at shoulder level)
  - Under pre-amendment DC 5201, limitation of motion of the arm "at shoulder level" warrants a 20% rating
  - Limitation of motion of the arm midway between the side and shoulder level warrants a 30% rating (major arm) or 20% rating (minor arm)
  - Limitation of motion of the arm to 25º from the side warrants a 40% rating (major arm) or 30% rating (minor arm)

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Estevez – Arguments

- Vet argued that the BVA misinterpreted DC 5201 by focusing solely on limitation of shoulder abduction, and wrongly excluded limited internal rotation
  - 30% evaluation (he is right-handed) is required for limitation of motion midway between side and shoulder level (~45º)
  - 10/2019 VA examiner's finding of internal rotation limited to 55º more nearly approximates the criteria for a 30% rating because 55º is closer to 45º than to 90º

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Estevez – Arguments

- Regarding knee, Vet argued BVA erred by denying him a separate evaluation for limitation of extension under DC 5261, by applying all of his knee pain—both at rest and on motion—to the 20% evaluation under DC 5258
- Under DC 5258, a 20% rating is warranted for dislocated semilunar cartilage (meniscus) with frequent episodes of "locking," pain, and effusion into the joint
  - Court noted that other relevant DCs are DC 5259 (10% rating for symptomatic removal of semilunar cartilage), and DC 5261 (0% evaluation for leg extension limited to 5º, and a 10% rating for extension limited to 10º)

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Estevez – Holding

- For right shoulder disability, CAVC found that while the pre-amendment version of DC 5201 did not expressly limit its scope, the structure of 38 C.F.R. § 4.71 precluded a broad interpretation that would consider both internal and external rotation
  - § 4.71 identifies different starting points for measuring shoulder flexion and abduction (from anatomical position as 0º to 180º), and for shoulder internal and external rotation (from the position of the "arm abducted to 90 degrees, elbow flexed to 90 degrees with the position of the forearm reflecting the midpoint 0 degrees between internal and external rotation of the shoulder" as 0 degrees)

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Estevez – Holding

- CAVC found that these differences were "fatal to Mr. Estevez's proposed interpretation"
- CAVC concluded that "although pre-amendment DC 5201 did not specify that it applied only to certain types of arm motions, the language and structure of the DC indicates that it was, in fact, limited to shoulder flexion and abduction"
  - Because Vet only argued that BVA committed error in not awarding a higher rating under DC 5201 based on limited shoulder internal rotation, CAVC affirmed that part of the BVA decision

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Estevez – Holding

- For left knee disability, CAVC relied on *Lyles v. Shulkin* and *Walleman v. McDonough*
  - These cases "direct VA, when considering the appropriate evaluation under a meniscal DC, to catalog a veteran's manifestations of a service-connected knee disability and resulting functional impairment, and assign all independently supportable knee evaluations that correspond with these manifestations"
- CAVC noted that although Vet characterized his knee pain with movement and on prolonged sitting/standing as distinct manifestations capable of being separately evaluated, they were the same manifestations of pain, just arising under different circumstances

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Estevez – Analysis

- The Court contrasted this case to the fact pattern of *Esteban v. Brown*, 6 Vet. App. 259 (1994)
  - In *Esteban*, the Court held that facial disfigurement, painful scars, and muscle damage causing problems with mastication were separate manifestations of a single SC facial injury
  - Here, Mr. Estevez's pain at rest and pain on motion are not "distinct and separate"—they are both pain
  - This is fatal to the Vet's argument, as he conceded that pain was a necessary component of the evaluations he was seeking under DCs 5258 and 5261

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Estevez – Conclusion

- CAVC remanded for BVA to provide an adequate statement of reasons or bases for its assignment of a 20% rating for the knee
  - For pre-5/2013 period, it was unclear what DC was the basis of the award
  - For period since 5/2013, BVA did not list limited left knee extension among the symptoms it found to be covered by the 20% evaluation under DC 5258, nor did it explain how limited extension overlapped with or was duplicative of the frequent episodes of locking, pain, and effusion into the joint that DC 5258 expressly contemplates

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Estevez – Advocacy Advice

- Although CAVC shut the door for the specific symptoms / disabilities at issue, advocates should nonetheless be mindful—in an attempt to maximize benefits—to demonstrate how separate manifestations of disability should be compensated separately
  - For example, a low back disability may be compensated under General Rating Formula, but radiculopathy (radiating pain and numbness) may be separately compensated
  - Carefully review the medical evidence and the relevant DCs, and explain how symptoms / manifestations should evaluated separately, but not constitute "pyramiding"

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Update:
Encarnacion v. McDonough,
36 Vet. App. 194 (2023)
Issued: May 18, 2023

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Encarnacion – Issue/Holding

- Whether the RO's pure implementation of a BVA decision was a "decision" of the Secretary and could be appealed through the filing of an NOD
  - Answer: No – the pure implementation of a BVA decision cannot be regarded as a decision that can be appealed back to the Board
  - We discussed this case during our last webinar on Court decisions – *Encarnacion v. McDonough*, 36 Vet. App. 31 (2023)

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Encarnacion – Facts

- 5/2018: BVA issued a decision that
  - granted an initial rating of 10% for Vet's right knee limitation of flexion
  - Denied an effective date earlier than 10/2009 for SC for right knee disability
- 6/2018: the RO implemented the BVA's decision

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Encarnacion – Facts

- Just over a month later, Ms. Encarnacion, the substitute surviving spouse, filed an NOD with the RO's implementation decision regarding the rating
- On 9/20/2018, the RO sent her an SOC on the merits of the right knee rating claim
- On 9/21/2018, the RO sent her a letter rejecting the appeal of the 6/2018 RO decision, because the action strictly implemented BVA's 5/2018 decision
  - It informed her that she had 120 days from the date of BVA's decision to file a Notice of Appeal with the CAVC

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Encarnacion – Facts

- Ms. Encarnacion filed a substantive appeal to BVA, which issued another decision on the merits of the right knee rating claim
- Ms. Enarnacion appealed to the CAVC, and her appeal was terminated by a JMR
  - Ms. Encarnacion and VA agreed that BVA erred by addressing the merits of the increased rating claim before determining whether the RO properly found it could not accept the 7/2018 NOD
  - The Court later commented on the "questionable utility to Ms. Encarnacion of the joint motion to remand the case"

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Encarnacion – Facts

- On remand in June 2020, BVA dismissed the appeal, reasoning that it lacked jurisdiction, because an appellant "may not challenge the merits of a Board decision by expressing disagreement with" the RO's implementation
  - BVA did not address whether the NOD should have been sympathetically construed as a motion for BVA to reconsider its May 2018 decision
- Ms. Encarnacion appealed to CAVC

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Encarnacion – Original Holding

- CAVC held that the pure implementation of a BVA adjudication cannot be regarded as a decision "affect[ing] the provision of benefits" under 38 U.S.C. § 511(a) and cannot be appealed to the Board, which has already rendered the Secretary's final determination on the matter
  - The Court noted that the RO's implementation of the BVA decision in this case was accompanied by no new findings of fact or law affecting the award of disability benefits

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Encarnacion – Original Holding

- BVA had resolved the proper rating and effective date
  - RO couldn't render new findings on factual or legal issues already determined by BVA, because that would place the RO in the untenable position of reviewing the decision of a superior tribunal on those matters
- Thus, the RO's purely ministerial implementation of the Board's judgment was not a "decision" of the Secretary and thus could not be appealed through the filing of an NOD

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Encarnacion – Original Holding

- But, CAVC found that it was possible to construe the NOD as a motion for BVA to reconsider its 5/2018 decision
  - The written expression of disagreement was submitted to the RO w/in 120 days of the BVA's decision, thus abating the finality of that decision for purposes of appealing to the CAVC until the BVA Chairman determines whether the document should be considered a motion for reconsideration, and notifies the claimant of its determination
- Because BVA should have determined whether the NOD qualified as a motion for recon, the Court remanded the matter for BVA to do so and vacated the 5/2018 and 6/2020 BVA decisions

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Encarnacion – Update

- VA filed a motion for reconsideration – which CAVC granted in part
  - CAVC agreed that it should rescind its vacatur of the 5/2018 BVA decision, since its finality had been abated by the filing of a written expression of disagreement in 7/2018
    - Finality is abated until the BVA determines whether it was a motion for recon
  - VA also argued the remand of the 6/2020 decision was "pointless" because in 10/2022, BVA construed the 7/2018 NOD as a request for reconsideration

Encarnacion – Update

- CAVC rejected VA's second argument, finding that BVA's action in 10/2022 ignored the Court's admonition in *Cerullo v. Derwinski*, 1 Vet. App. 195, 197 (1991), that "[o]nce an appellate body takes jurisdiction over a claim, the lower tribunal may not consider the same issues"
- CAVC vacated BVA's 6/2020 decision, noting that "the Board is *now* permitted to construe the NOD as a motion for Board Chairman reconsideration"

Encarnacion – Advocacy Advice

- When appealing an RO decision that stems from a BVA remand, ensure that RO decision is not a *pure* implementation of the BVA decision (i.e., the RO didn't make any new findings of fact or law)
  - An RO decision that purely implements a BVA decision can't be appealed back to BVA by filing NOD
  - Vet may timely appeal BVA decision to CAVC or file a supplemental claim w/ new and relevant evidence
  - Vet may alternatively file a motion for recon of BVA decision or motion to vacate BVA decision

Encarnacion – Advocacy Advice

- If the BVA simply grants SC, downstream issues, such as rating and effective date, may be separately appealed by filing an NOD with the implementing rating decision
  - However, certain grants of SC by BVA may by their nature require the RO to assign a specific effective date, such as grants of presumptive SC under the PACT Act
  - In such cases, appeal to the CAVC may be the safest/best option

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CAVC "Short Take"
Davis v. McDonough,
36 Vet. App. 142 (2023)
Issued: May 31, 2023

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Davis – Background

- Stanley Davis served in the U.S. Navy from 8/1985 to 6/1988
- 5/2016: RO denied his CUE challenge to a prior a RO decision denying SC for lupus
- 12/2018: Vet filed NOD with 5/2016 RO decision
- 1/2019: RO informed Vet that NOD was not timely filed
- 1/2019: Vet filed NOD with RO's timeliness determination

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Davis – Facts

- 6/2019: RO issued SOC
- 8/14/2019: Vet faxed VA Form 10182 to BVA to opt into AMA, and chose evidence submission lane
- 9/9/2019: BVA advised Vet he had 90 days from the date of receipt of the Form 10182 to submit new evidence
- 12/5/2019: Vet submitted a brief with evidence

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Davis – Facts / Argument

- 7/2020: BVA found NOD untimely
  - BVA found that the 90-day evidence submission window began 8/14/2019 and ended 11/12/2019, and it could not consider the evidence
- Vet appealed to CAVC and argued BVA erred in not considering evidence submitted by Vet related to VA's mailing of the 5/2016 decision
  - Argued that that the VAF 10182 (NOD) was not "received" until it was uploaded to his claims file and BVA acknowledged it

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Davis – Relevant Law

- In the BVA "Evidence Submission" lane, in addition to the evidence of record at the time of the RO's decision on the issue on appeal, the evidentiary record before the BVA includes:
  - "Evidence submitted by the appellant or his or her representative: (1) with the Notice of Disagreement or **within 90 days following receipt of the notice of disagreement . . . .**"
    - 38 C.F.R. § 20.303(b)(1); *see* 38 U.S.C. § 7113(c)(2)

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Davis – Holding

- CAVC concluded that Vet failed to show how "filed" and "received" were different
  - Vet submitted the NOD via fax and BVA received it the same day
  - Vet failed to demonstrate clear error in BVA's finding that the 90-day period to submit additional evidence closed on 11/12/2019

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Davis – Holding

- CAVC rejected Vet's alternative argument that documents pertinent to timeliness were constructively before BVA
  - The documents were not subject to the constructive possession doctrine, which "ensures that the record before the Board includes relevant evidence that VA reasonably would have investigated, gathered, and considered"

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Federal Circuit "Short Take"
Frazier v. McDonough,
66 F.4th 1353 (Fed. Cir. 2023)
Issued: May 5, 2023

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Frazier – Facts

- Jeanine Frazier brought the appeal as the substituted appellant for her deceased father, Clarence Frazier
  - Vet served on active duty in the U.S. Navy from 6/1988 to 4/1993
  - Vet fractured the 4th and 5th fingers of the right hand when he ran into a TV following a nightmare (he was SC for PTSD)
  - BVA granted SC for the injury to his fingers, but the RO assigned a 0% rating
  - RO evaluated the Vet under DC 5230, which covers "[a]ny limitation of motion" to the ring or little finger, but provides a 0% rating

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Frazier – Facts

- On appeal to the CAVC, Vet claimed he was entitled to a 10% rating under 38 C.F.R. § 4.59, which provides:
  - "The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint"
  - He argued that because he experienced pain in his 4th and 5th fingers, he should be assigned the minimum compensable rating, i.e., 20% and 10%, respectively, for unfavorable and favorable ankylosis of the ring and little fingers under DCs 5219 and 5223
  - CAVC affirmed BVA's decision

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Frazier – Argument and Holding

- At Fed. Cir., Ms. Frazier argued that even for a condition falling under DC 5230, 38 C.F.R. § 4.59 provides a free-standing requirement for VA to grant at least a 10% rating for any SC joint condition associated with pain
- Fed. Cir. rejected Ms. Frazier's argument
  - The Court read § 4.59 as applying in conjunction with the appropriate DC for a particular condition, and requires reference to the DC to determine the minimum compensable rating for the injury in question
  - The Court did not interpret the term "disability" in § 4.59 as indicating an intent by VA to award at least a 10% rating whenever painful motion was present, regardless of the DC applicable to the underlying condition

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NATIONAL VETERANS LEGAL SERVICES PROGRAM

Duran v. McDonough,
36 Vet. App. 230 (2023)
Issued: July 20, 2023

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Duran – Issue/Holding

- Whether, under DC 8004, when some manifestations of Parkinson's disease are rated as compensable and total more than 30% under DCs other than DC 8004, but some manifestations remain that are not rated as compensable, do the ratings under the other DCs replace or combine with DC 8004's minimum 30% rating?
  - Answer: Compensable ratings under other DCs should be added to DC 8004's minimum 30% rating, so long as additional ascertainable Parkinson's manifestations exist that are not otherwise compensable under the rating schedule

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Duran – Facts

- Gilbert Duran served in the Army from 1969 to 1971, including a year-long deployment to Vietnam
- 1/ 2017: He filed claim for SC for Parkinson's disease as caused by presumed herbicide exposure
- Spring 2017: VA examiner confirmed dx of Parkinson's disease with:
  - Motor manifestations, including stooped posture, balance impairment, slowed motion, speech changes, and tremors in his upper and lower extremities on the right side
  - 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

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Duran – Facts

- VA granted SC for Parkinson's disease and assigned a 30% rating under DC 8004 for "ascertainable residuals"
  - Rating decision said that "[h]igher evaluations are based on more severe residuals," but said no more than that
- Vet appealed rating to BVA

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Duran – Facts

- 4/2020: BVA increased rating because a single 30% rating did not fully capture the severity of his disease
  - Referring to the preamble of 38 C.F.R. § 4.124a, BVA found, if "there are ascertainable residuals that can be rated under a separate [DC], and the combined disability rating resulting from these residuals exceeds 30 percent, then these separate ratings will be assigned in place of the minimum rating assigned under [DC] 8004"
  - BVA referred to 38 C.F.R. § 4.120 (Evaluations by comparison) to explain that neurological and convulsive disorders are rated in proportion to impairment of motor, sensory, or mental function – meaning that evaluations are made by comparison to the appropriate rating criteria

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Duran – Facts

- BVA replaced the Vet's single 30% rating with separate ratings for three manifestations:
  - 40% for right upper extremity condition under DC 8513 (paralysis of major extremity)
  - 10% for right lower extremity condition under DC 8520 (paralysis of sciatic nerve)
  - 10% for moderate jaw tremors under DC 8205 (paralysis of fifth trigeminal cranial nerve)
- These DCs fall under the rating schedule for neurological diseases and convulsive disorders and combine to 50%

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Duran – Facts

- BVA found that there were five other manifestations of Parkinson's: (1) constipation, (2) depression, (3) sexual dysfunction, (4) a chewing and swallowing condition, and (5) a speech condition
  - BVA determined that a separate rating wasn't permitted for depression, because it would violate the prohibition against pyramiding, since symptoms were already contemplated in Vet's 30% rating for PTSD
  - BVA found that separate rating for sexual dysfunction was not warranted, because the Vet already received SMC for loss of use of a creative organ

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Duran – Facts

- BVA denied separate compensable ratings for remaining manifestations, because none of the conditions met the requirements for minimum compensable ratings under their relevant DCs:
  - Constipation under DC 7319 (irritable colon syndrome)
  - Chewing and swallowing condition under DC 8209 (paralysis of the ninth (glossopharyngeal) cranial nerve)
  - Speech condition under DC 8210 (paralysis of tenth (pneumogastric) cranial nerve)

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Duran – CAVC Arguments

- Vet contended that under a plain reading of the relevant regulations, the minimum rating should remain intact, so long as there are ascertainable Parkinson's disease manifestations that cannot be rated compensable under other DCs
- VA argued that the plain reading requires the replacement of DC 8004's minimum rating once any Parkinson's disease manifestations can be assigned ratings totaling more than 30% under other DCs

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Duran – Analysis

- CAVC stated that the three components of § 4.124a at issue were:
  - The preamble to the rating schedule for neurological conditions and convulsive disorders
  - DC 8004 itself
  - The note applicable to DCs 8000 through 8025
- Court state that its analysis is practically unaffected by whether the Vet's problems related to Parkinson's are referred to as "residuals" or "manifestations"

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Duran – Holding

- CAVC found that the 3 regulatory provisions offered a clear answer:
  - By virtue of having a diagnosis of Parkinson's disease with at least one ascertainable manifestation, Vet is entitled to a minimum 30% rating under DC 8004
  - Even when ascertainable manifestation ratings under other DCs combine for a total rating in excess of 30%, the basis for the minimum rating under DC 8004 remains, as long as there is at least one ascertainable manifestation of Parkinson's that is not compensable under any other DC
  - When VA assigns compensable ratings for Parkinson's manifestations that total more than 30% under DCs other than DC 8004, those other ratings do not replace the minimum 30% rating under DC 8004, *provided that* some manifestations remain that are not rated as compensable

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Duran – Holding

- BVA found that Vet's Parkinson's disease manifested in at least eight ways
  - BVA concluded that three manifestations were entitled to separate compensable ratings that totaled 50%
  - The other two manifestations were already compensated as part of other conditions
  - That left three remaining manifestations that were not compensable under other DCs pertaining to the bodily systems involved—constipation, a chewing and swallowing condition, and a speech condition
  - Even in isolation, any of these three ascertainable manifestations warrant the minimum 30% rating under DC 8004

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Duran – Conclusion

- BVA should not have replaced the 30% rating under DC 8004
- CAVC reversed BVA's discontinuance of that rating

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Duran – Advocacy Advice

- Be mindful and ensure that VA properly rates a Vet with Parkinson's disease, particularly if the Vet has some manifestations / symptoms that are rated as compensable and others that are not
  - Be wary of a situation where VA—as it did here—rates some manifestations under DCs other than DC 8004, but discontinues or fails to assign a rating under DC 8004 to compensate the Vet for other manifestations/symptoms that are not contemplated by those other DCs

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Perciavalle v. McDonough,
74 F.4th 1374 (Fed. Cir. 2023)
Issued: July 25, 2023

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Perciavalle – Issue/Holding

- Whether, when determining if a claim of CUE was pled with specificity, VA has a duty to sympathetically read a Vet's pro se CUE motion, and whether CUE must be based on an error already identified as erroneous by court decision or VA publication?
  - The Court held that (1) VA has a duty to sympathetically read the pro se CUE motion; and (2) a legal error may be clear for purpose of CUE, even though there was no preceding court or agency decision on the precise legal question

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Perciavalle – Facts

- Rocco Perciavalle served in the Army from 1962 to 1964
  - While in the Army, he injured his left knee and underwent surgery
  - In 1966, he filed a claim for SC for his left knee injury, and VA granted a 10% rating for a medial meniscectomy under DC 5259 (cartilage, semilunar, removal of, symptomatic)
    - At 1966 VA exam, left knee ROM was 0-145º

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Perciavalle – Facts

- In 1971, Vet sought an increased disability rating and underwent another orthopedic exam
  - There was "normal" extension of the knee with flexion to 135º, no quadriceps atrophy or weakness, no swelling or tenderness
    - He had "very slight instability" of the joint laterally
  - VA reviewed the exam report and found that it did not warrant an increased rating
  - Vet did not appeal the decision and it became final

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Perciavalle – Facts

- In 1971, regulations allowed for the combination of two or more disability ratings (38 C.F.R. § 4.25 (1971)), but required the "[a]voidance of pyramiding" (38 C.F.R. § 4.14 (1971))
- 1994: CAVC addressed the issue of pyramiding in *Esteban v. Brown*, 6 Vet. App. 259 (1994)
- 1997: VA's General Counsel issued a precedential decision citing *Esteban* and holding that a claimant who has arthritis and instability of the knee may be rated separately under DCs 5003 and 5257

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Perciavalle – Facts

- In 2015, Vet asserted CUE in the 1971 rating decision
  - He contended that he should have been assigned two separate disability ratings:
    - One rating for slight instability of the left knee under DC 5257
    - Another rating based on the 1971 exam, for limitation of flexion and discomfort secondary to arthritis under DC 5003-5260

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Perciavalle – Facts

- In 2015, the RO denied the Vet's CUE claim, because
  - The decision not to grant a separate rating was properly based on the available evidence of record and the rules in effect at the time
  - The 1997 VA General Counsel opinion was not in effect at that time
- Vet filed an NOD, arguing that the law has always permitted separate ratings and he was not relying on the 1997 GC Opinion or any VA rules after the 1971 rating decision

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Perciavalle – Facts

- BVA concluded that the 1971 rating decision did not contain CUE, stating that "a later interpretation of an existing regulation cannot constitute CUE and that is the only basis on which the Veteran asserts CUE"
- Veteran appealed to the CAVC, which reviewed the case en banc
  - A majority of the CAVC held that BVA erred in construing the Vet's CUE claim as one based on retroactivity of later legal authorities, but…
  - A different majority of the Court voted to affirm the Board's decision

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Perciavalle – Analysis

- Fed. Cir. discussed the law governing CUE:
  - The Supreme Court, in *George v. McDonough*, 142 S. Ct. 1953 (2020), affirmed that CUE is a "narrow category" of claims that could include "the VA's failure to apply an existing regulation to undisputed record evidence"
  - A later change in the law (including a later invalidation of the law) cannot constitute the basis for CUE
  - The correct application of a binding regulation does not constitute CUE at the time the decision was rendered, even if the regulation was later invalidated.
    - A CUE claim must be evaluated by the law that existed at the time the challenged regulation was rendered

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Perciavalle – Holding

- Fed. Cir. found there was no legal error in the CAVC majority opinion finding that BVA erred in interpreting the Vet's CUE claim
  - Fed. Cir. rejected CAVC Judge Allen's concurring opinion that in order to state a claim of CUE, a Vet must set forth in the initial pleading a full-fledged legal argument
  - VA has a duty to sympathetically read a Vet's pro se CUE motion to discern all potential claims.
    - Fed. Cir. considered the Vet "pro se," even though he was represented by a VSO, because they are generally not trained or licensed in the practice of law

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Perciavalle – Holding

- Fed. Cir found error in CAVC Judge Toth's opinion that CUE claims were impermissible "wherever the alleged legal error or disputable question of law was resolved by a court decision or official Agency publication (such as a General Counsel precedential opinion) issued after the decision the veteran seeks to collaterally attack became final"
  - Judge Toth had explained that where an error "has yet to be identified as erroneous by a court decision or VA publication," it cannot be CUE

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Perciavalle – Holding

- Fed. Cir. found that the language of a regulation itself can establish the existence of CUE
  - It is clear from the Supreme Court decision in *George* that the correct CUE inquiry is simply whether the original decision was a correct application of a binding regulation or law—regardless of later changes in law or later decisions
  - A finding of CUE is not prohibited simply because the law at issue was the subject of a later decision
  - "In short, a legal error may be clear for the purpose of CUE despite the fact that there was no preceding court or agency decision on the precise legal question"

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Perciavalle – Conclusion

- Fed. Cir. found that the CAVC erred in affirming the Board's decision
- The Court vacated and remanded the claim to the CAVC with directions to remand the case to the BVA to address the question of CUE in the 1971 decision, consistent with its opinion

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Perciavalle – Advocacy Advice

- This case is particularly helpful in CUE cases, as well as cases involving multiple ratings, such as for instability and limitation of motion of the knee
  - The key in filing a successful CUE claim is to rely on the statute/regulations in effect at the time of the rating decision, not on post-decisional interpretations
  - But the fact that a later decision (like *Esteban*, in this case) spoke to the issue at hand, does not preclude a challenge based on CUE
  - Your CUE claim should be as specific as possible, but lack of specificity (if the Vet is represented by a VSO) is not fatal to the claim

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CAVC "Short Take"
Wright v. McDonough,
36 Vet. App. 272 (2023)
Issued: August 4, 2023

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Wright – Issue/Holding

- When a child of a totally disabled veteran exhausts his or her DEA benefits under 38 U.S.C. chapter 35 before finishing a chosen "program of education or special restorative training," does 38 U.S.C. § 3562 forever preclude the disabled parent from again receiving, under 38 U.S.C. § 1115, a dependent allotment based on that child?
  - The Court answered "yes"—the disabled parent is precluded from again receiving a dependent allotment

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Wright – Facts

- 12/2014: VA granted Vet TDIU and basic eligibility for DEA
  - Award accounted for dependent daughter from 11/2011 to 4/2015, when she turned 18
- VA later awarded DEA to daughter, effective 8/2015
- 2/2016: RO advised the Vet that as of 8/2015, the daughter was no longer considered a dependent for purposes of increased compensation benefits, because she was over 18 and receiving DEA benefits

Wright – Facts

- 8/2018: Vet asked that daughter be added back on to his VA comp award, because she was over 18 and had exhausted her DEA benefits, but was still a full time student
- 11/2018: RO informed Vet that once a child has opted for Chapter 35 benefits, the choice is final and VA can't add the child back to Vet's award as a dependent
- 3/2020: BVA affirmed that daughter could not be reinstated as Vet's dependent

Wright – Holding

- CAVC concluded that the bar to payments for a dependent child under 38 U.S.C. § 3562(2):
  - Is triggered when an adult child begins using DEA benefits for an educational program intended to lead to an educational, professional, or vocational objective at a secondary school
  - Applies to a permanently and totally disabled Vet parent who may otherwise receive payments because his or her adult child is attending an educational institution
  - Prohibits the payment of "additional" monthly compensation to the Vet parent under 38 U.S.C. § 1115(1)(F), and
  - **IS PERMANENT**

Wright –Holding

- After applying these factors, CAVC held that the Vet had not demonstrated that BVA erred in denying benefits under 38 U.S.C. § 1115(1)(F) for any time after his daughter exhausted her DEA benefits but was still attending an educational education
  - CAVC affirmed BVA's decision denying an additional allowance for a dependent to the Vet

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Cook v. McDonough,
36 Vet. App. 175 (2023)
Issued: May 17, 2023

Cook – Issues/Holdings

- Whether, under 38 U.S.C. § 7113(c)(2)(A), evidence submitted "with" an AMA NOD means all evidence associated with the claims file when the NOD is filed, including evidence submitted after the date VA issued the decision?
  - Answer: BVA does not need to consider evidence submitted during the period between the RO decision and NOD filing
- How specific must BVA be in explaining what evidence it did not consider in deciding a claim?
  - Answer: BVA must "accurately" inform the claimant whether the Board did not consider evidence because it was not received during an evidence submission window, and what options may be available for VA to consider that evidence

Cook – Background

- Under the AMA, claimants who appeal an RO decision to the BVA must choose from three Board dockets – "direct review," "additional evidence," or "hearing"
  - 38 U.S.C. § 7113(c) concerns the evidentiary record before the Board when a claimant elects the "additional evidence" docket, which includes
    - Evidence considered by the AOJ in the decision on appeal
    - Evidence submitted by the appellant with the NOD
    - Evidence submitted by the appellant within 90 days following receipt of the NOD

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Cook – Background

- The AMA also includes a requirement for the BVA to include in its decision a general statement "reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under [38 U.S.C. § 7113]" and the options that may be available for having VA consider that evidence
  - 38 U.S.C. § 7104(d)(2)

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Cook – Facts

- Everett W. Cook, served on active duty from 12/1971 to 12/1975
- 3/2019: He filed claims for SC for several disabilities
- 6/2019: RO issued rating decision denying SC for several disabilities and granted SC for another
- 7/2019 Vet submitted lay statements
- 9/2019: Vet submitted a private exam report
- 10/2019: Vet filed an NOD and selected the additional evidence docket, but did not resubmit the lay statements or the private opinion

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Cook – Facts

- 6/2020: BVA issued decision
  - BVA noted that evidence was added during the period when new evidence was not allowed – *after* the 90 days following the election of the "additional evidence" appeal lane
  - Citing 38 C.F.R. § 20.300, BVA stated that it could not consider the evidence, and the Vet may file a supplemental claim and submit or identify this evidence
  - BVA noted a negative VA opinion, stating that "[t]here are no competing medical opinions associated with the claims file during the applicable evidence period"

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Cook – Arguments

- Vet urged CAVC to interpret the language "[e]vidence submitted . . . with the [NOD]" in 38 U.S.C. § 7113(c)(2)(A) as meaning all evidence in the VA claims file when the NOD is filed
- Vet also argued that BVA failed to provide a general statement required by 38 U.S.C. § 7104(d)(2), because it failed to correctly identify the evidence it did not consider in making its decision

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Cook – Holding

- CAVC rejected Vet's interpretation of 38 U.S.C. § 7113:
  - "[s]ubsection 7113(c)(2)(A) plainly requires the Board to consider evidence submitted at the same time as, or simultaneously with, the NOD. It follows that subsections 7113(c)(1) and 7113(c)(2)(A) together plainly **exclude from the evidentiary record before the Board evidence submitted during the period between the issuance of the AOJ decision and the filing of the NOD**."
- Thus, BVA properly did not consider evidence submitted between the 6/2019 rating decision and the 10/2019 NOD, including the private medical opinion submitted in 9/2019 and lay statements submitted in 7/2019

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Cook – Holding

- With respect to the second issue, CAVC held
  - Congress obviously intended for the Board's decision to include an **adequate** general statement
  - An adequate general statement is one that **accurately informs** a claimant whether BVA did not consider evidence because it was received during a time not permitted by § 7113, and what options may be available for having VA consider that evidence

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Cook – Holding

- CAVC found that, in this case, BVA provided an inadequate general statement that failed to complied with 38 U.S.C. § 7104(d)(2)
  - The Board provided "a misleadingly inaccurate general statement" informing Mr. Cook that it did not consider only evidence received *after* the 90 days following the NOD

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Cook – Holding / Conclusion

- Vet was prejudiced by BVA's inadequate general statement
  - He demonstrated that because BVA's general statement misled him as to the evidence it did not consider, he was prevented from making an informed decision on whether and how to have VA consider any evidence not considered by BVA
  - BVA's error prevented him from effectively participating in the adjudicative process
- CAVC vacated and remanded BVA's decision to provide an adequate general statement as required by 38 U.S.C. § 7104(d)(2)

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Cook – Advocacy Advice

- Be careful to follow the evidence submission rules of the selected BVA lane
- If relevant evidence was submitted during a period BVA cannot consider it, then **resubmit the evidence** during the appropriate evidence submission window
  - In Mr. Cook's case, BVA would have been required to address the evidence in question if he had *resubmitted* it (or initially submitted it) with the NOD or during the 90-day evidence submission window following the date he submitted his NOD

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Cook – Advocacy Advice

- Advocates should scrutinize the record to determine if BVA's general statement regarding evidence submitted during a period when it cannot be considered is adequate / accurate
  - If it is not accurate, discuss with the appellant whether a supplemental claim (to consider evidence submitted outside of an evidence submission window) or CAVC appeal (to attempt to vacate the BVA decision) is the best course of action

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Cook – Advocacy Advice

- In many recent decisions, BVA uses boilerplate stating
  - "If evidence was associated with the claims file during a period of time when additional evidence was not allowed, the Board has not considered it in its decision. . . . If the Veteran would like VA to consider any evidence that was added to the claims file that the Board could not consider, the Veteran may file a Supplemental Claim . . . ."
- This language does not appear to be adequate under *Cook*, because it does not *accurately* inform the appellant if evidence was submitted during a period when it cannot be considered
- But, the appellant must also show prejudice to have decision vacated by CAVC

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