

New Developments in How to Win Benefits

New Court Cases

Savage v. Shinseki,
Vet. App. No. 09-4406

Duty to seek clarification of
a private medical report

What happened?

- Veteran sought higher rating for service-connected bilateral hearing loss.
- Veteran submitted several PRIVATE hearing evaluations that included speech discrimination scores.
- VA obtained several VA C&P hearing exams that also included speech discrimination scores.

...the source of the problem:

- The PRIVATE doctors did not specify that they used the “Maryland CNC” test.
- The VA examiners did.

- In denying a higher rating, BVA
 - Relied solely on the VA C&P exams

 - Rejected the private evaluations, reasoning:
“[I]t is unclear whether the speech discrimination testing was conducted using the Maryland CNC test and therefore, these examinations are not considered adequate for VA rating purposes.”

What did the parties argue?

- Veteran argued that BVA's duty to assist compelled it to first seek clarification of the private evaluations.
- Secretary argued that duty to seek clarification applies only to VA C&P exams.

What did CAVC do?

- CAVC reviewed applicable statutes
 - 38 C.F.R. § 19.9 (*Tyrues v. Shinseki*)
 - 38 C.F.R. § 4.2
- CAVC reviewed case law
- CAVC concluded that nothing limited the duty to seek clarification to VA C&P exams

- CAVC held:

“[I]n some circumstances, VA does have a duty to return for clarification unclear or insufficient private [medical reports] . . . or the Board must explain why such clarification is not needed.”

- CAVC noted that this holding also applies to VA progress notes!

What are the triggering circumstances?

1. IF private report contains info necessary to properly decide claim
2. BUT private report is “unclear” or “not suitable for rating purposes”
3. AND info cannot be obtained from other source

IMPORTANT NOTE:

The missing information must be factual and objective (not a matter of opinion) and must bear greatly on probative value of private report.

How does VA satisfy duty once triggered?

- VA must
 - ask private provider to clarify the report,
 - ask veteran to obtain necessary info to clarify the report, OR
 - explain why such clarification is not needed.

What was CAVC's reasoning?

- CAVC held that the duty was triggered because:
 - the missing information – whether the private doctor used the Maryland CNC test – was a “yes” or “no” answer
 - private reports were otherwise competent evidence
 - evidence on the severity of Veteran's hearing loss over the lengthy period of time in question could not now be developed

What does this mean for practitioners?

- When gathering evidence from private providers, do everything to ensure it is detailed and meets BVA's needs.
- BUT, if VA questions sufficiency of evidence because of missing info – that is factual and objective – urge VA to request clarification.

Chandler v. Shinseki,
Vet. App. NO. 08-0932

Applying *Hartness*

Background Law

- 38 U.S.C. § 1521(a)
- 38 U.S.C. § 1521(e)
- 38 U.S.C. § 1513(a) and (b)
- *Hartness v. Nicholson*
- VA Fast Letter 06-28

What Happened?

- At 57, Veteran granted pension under § 1521(a) because he is permanently and totally disabled.
- At 71, Veteran applied for higher pension under § 1521(e).
- VA denied claim because Veteran does not have a disability rated at 100%.

VA acknowledged that Veteran is over 65, but reasoned that § 1521(e) and *Hartness* don't apply, given VA Fast Letter 06-28.

What did the parties argue?

- Veteran argued that § 1513(a), as interpreted in *Hartness*, means that he is not required to have a disability rated at 100% now that he is over 65.
- Secretary argued that under § 1513(b) a veteran already entitled to pension under § 1521(a) cannot get pension under § 1513(a) also.

What did the CAVC do?

CAVC rejected VA's and
Secretary's approach.
CAVC reversed BVA's holding
and awarded Veteran
higher pension under § 1513(e).

What was CAVC's reasoning?

- CAVC reasoned that VA's approach would mean that veterans who are over 65 and totally disabled, but started receiving pension before turning 65, would receive less pension than veterans who are over 65 but not totally disabled when they started receiving pension.
- CAVC reasoned that § 1513(b) only means that a veteran cannot collect two pensions.

DISSENT POSITION

- Two judges dissented.
- They argued that *Hartness* should be overruled and that all veterans – regardless of age – should be required to have a 100% disability rating for higher pension under § 1521(e).

What does this mean for practitioners?

- If a veteran gets pension and either has a disability rating of 60% (single or combined) or is permanently housebound, once he turns 65, apply for higher pension.

Evans v. Shinseki,
Vet. App. No. 09-2133

BVA Must Liberally Construe VA Form 9

What happened?

- Veteran filed claims for several disabilities.
- VA RO issued a rating decision denying each.
- Veteran filed an NOD as to SIX of the claims.

- VA RO issued an SOC continuing its denial of the SIX claims.
- Veteran filed an appeal to BVA, using a VA FORM 9.

...the problem arose from how
Veteran completed the VA Form 9.

■ On the VA Form 9, Veteran

- Checked the box in Section 9.A. that states,
"I WANT TO APPEAL ALL OF THE ISSUES LISTED
ON THE STATEMENT OF THE CASE AND ANY
SUPPLEMENTAL STATEMENTS OF THE CASE THAT
MY LOCAL VA OFFICE SENT TO ME."
- Also completed Section 9.B., specifically listing only
THREE of the claims as issues he wished to appeal.

- On appeal, BVA

- addressed the three issues listed in Section 9.B. of the VA Form 9
- but dismissed the other three issues, reasoning that Veteran indicated on the VA Form 9 that he only wished to appeal certain claims.

What did the parties argue?

- Veteran argued that BVA should have liberally read his VA Form 9 and addressed all issues possibly raised.
- Secretary argued that the three dismissed claims were never properly before BVA because Veteran failed to allege error as to these.

What did CAVC do?

- “[I]f a claimant uses a VA Form 9 and checks box 9.A. . . . then all issues listed on the SOC are on appeal to the Board and it has waived its ability to dismiss any of those issues.”
- So, the Court remanded for BVA to address the other three claims also.

What was CAVC's reasoning?

- The Court determined that by including a box allowing claimant to appeal all issues listed in the SOC, Secretary essentially waived the statutory adequacy requirements for an appeal.
- The Court concluded that, if claimant checks that box, BVA is obligated to consider all the issues, even if claimant does not state a single argument.

What does this mean for practitioners?

- If a veteran checks the box in Section 9.A., BVA MUST address each claim listed in the SOC, even if the veteran says nothing else.
- Remember: A veteran may still withdraw an issue from appeal.

Cogburn v. Shinseki,
Vet. App. No. 08-1561

Implicit Denial Doctrine

What happened?

In 1974, Veteran filed claim for "severe nervous condition." VA RO denied pension but didn't discuss service connection.

In 1983, Veteran filed a claim for “nervous disorder.” In 1985, BVA denied service connection for PTSD.

In 1991, Veteran filed a motion to reopen his PTSD claim. VA RO granted service connection and assigned a disability rating of 100%, effective 1991.

Later, Veteran asserted that his 1974 “severe nervous condition” claim was still pending.

VA RO stated that the 1974 claim was implicitly denied in BVA’s 1985 decision denying service connection for PTSD.

On appeal, BVA failed to address whether the 1974 claim was ever adjudicated.

What is the implicit denial doctrine?

- *Deshotel v. Nicholson*:
 - “Where the veteran files more than one claim with the [RO] at the same time, and the [RO]’s decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run.”

- *Ingram v. Nicholson:*

- “[A] reasonably raised claim remains pending until there is either a recognition of the substance of the claim in a [RO] decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent ‘claim’ for the same disability.”

What did Veteran argue on appeal?

- BVA's 1985 decision did not put him on notice that his 1974 "severe nervous condition" claim was denied.
- If his 1974 claim *was* implicitly denied, his due process right to notice was denied.

What did CAVC do?

CAVC held that the implicit denial doctrine does not violate the due process clause *on its face*.

CAVC held that whether the implicit denial doctrine applies to a claim depends on certain factors.

What are these factors?

1. The specificity and relatedness of the claims.
2. The specificity of the adjudication.
3. The timing of the claims.
4. Whether the veteran is represented.

How did CAVC apply its holding to the case?

- CAVC held that BVA must address the issue in the first instance, including considering these factors.

Hornick v. Shinseki,
Vet. App. No 08-3221

Applying Ten-Year Protection
to 38 U.S.C. § 1151 Benefits

Background Law

- 38 U.S.C. § 1151
- 38 U.S.C. § 1159
- GC Precedent Opinion 13-96

What happened?

- Veteran was granted § 1151 benefits, with a 100% disability rating effective September 16, 1994.
- In January 2006, VA severed the benefit, on CUE grounds.

- On appeal, BVA stated that § 1159 did not “protect” the benefit, relying on the GC Precedent Opinion.

Issue Before CAVC

- Does § 1159 apply to benefits awarded under § 1151?

What did CAVC do and why?

- CAVC reviewed and considered:
 - The legislative history of § 1151.
 - The legislative history of § 1159.
 - The principles of statutory construction.

- CAVC rejected the GC Precedent Opinion as a misstatement of the law.
- CAVC held that § 1159 DOES apply to § 1151 benefits and protects those benefits from severance if they have been in effect for 10 or more years.

How did the CAVC resolve the case?

- CAVC reversed BVA's decision and remanded to BVA with instructions to reinstate Veteran's benefit.