Brief summaries of court cases for How to Use Common Court Cases PTC 2023

Rice v. Shinseki - May 6, 2009

Veteran Rice served in the Army 1967-73, which included a tour in RVN. Rice was awarded a 30% disability evaluation for PTSD. Veteran filed a NOD regarding the 30% and also asked for IU. An increase was granted to 70%, effective to the original date of claim, and TDIU was granted, with an effective date the day after his reported last date of employment. Rice appealed, asking for an earlier effective date for IU. Board concurred with IU decision, and remanded the case back to RO to readjudicate evaluation of PTSD. Veteran appealed again, arguing that the Board erred by considering the effective date issue for IU prior to completing the development and adjudication of his claim for a higher initial rating for PTSD. He argued that the issues were inextricably intertwined because if he were granted a 100 percent disability rating for PTSD as a result of the Board's remand of the issue, such action would moot his appeal of the effective date for TDIU. He also contended that the submission of evidence regarding unemployability within one year of the RO's initial grant of service connection for PTSD should have been associated with that claim and not have been rated as a new claim for TDIU.

While it seems as though VA chose the effective date correctly, CAVC took the veteran's side on a key matter. The veteran argued that these two issues were not separate, PTSD & IU, and that they needed to be decided together, to ensure that he got the highest evaluation possible at the earliest possible date. CAVC agreed, stating that any claim for IU, expressly claimed or not, was not a separate claim but a veteran's attempt to receive an appropriate rating. As a result of this case, any evidence received by VA in which it is shown that a veteran's employment is lost or in jeopardy because of service connected disability(ies), it is to be treated as a claim for IU, which is treated as a claim for increased evaluation. Further, any new evidence received by VA within one year of a decision relevant to increased evaluation or to IU, is considered part of that claim.

Mittleider v. West - May 8, 1998

Veteran Mittleider served in the Marine Corps from 1967 to 1969, including a tour in RVN. He was granted SC for PTSD at 30% effective on his original date of claim. Veteran disagreed, and RO increased evaluation to 50%, effective to original claim date. Mittleider appealed, asking for an even higher evaluation. Though evidence in the file stated "service-connected disability materially contributed to his serious employment handicap," BVA did not explain why the employment handicap evidence was inadequate to support an increase higher than 50%. Mittleider appealed to CAVC. At the same time, Mittleider had a concurrent diagnosis of personality disorders, which are typically not eligible for service connection. The veteran pointed out that in a 1996 federal register, VA had said, "when it is not possible to separate the effects of the SC and NSC conditions, veteran should be awarded benefit of the doubt, per 38 CFR 3.102." CAVC found in this case that there was no discussion by VA of the other mental health disorders or the symptoms, or any attempt to attribute symptoms to one or another diagnosis. In fact, a VA physician stated "There is no doubt in my mind from the record about his PTSD. This is all muddied, however, by his AXIS II problems (personality DO's) and his drug abuse." CAVC ordered BVA to

consider the implications of 3.102 with regard to their own interpretation in the recent Federal Register, and provide an adequate statement of reasons and bases for any conclusions made. As a result of this case, any time a veteran receives a diagnosis of more than one mental health disorder, VA requires an examiner to attempt to attribute each symptom to a corresponding diagnosis, or to clearly state that the symptoms cannot be separated, in which case, 38 CFR 3.102 becomes relevant.

Perry v. Brown – February 22, 1996

Veteran Perry served in the Army from 1966 to 1968. His entrance exam was normal, but treatment was noted during service for dizziness, blurred vision, and a fall. STRs included veteran's statement that he had experienced sporadic dizziness with fainting spells since age 16. No underlying cause was found at that time. Twenty years after leaving service, Perry suffered a heart attack, and was fitted with a pacemaker. In 1989, he filed a disability claim for service connection of "blackout spells" that he believed were related to his cardiovascular disease. Perry's private physician provided evidence that he had a condition related to inadequate cardiac output and that the dizziness and fainting Perry had experienced while on active duty were the earliest manifestations of the disease. Perry also submitted lay testimony from coworkers attesting to the fact that he had suffered similar symptoms over the two decades since his discharge. VA denied the claim for "blackout spells" saying the spells existed prior to service and were not aggravated by service. VA also found his cardiovascular disease NSC. In a hearing, Perry admitted that he had dizzy spells prior to service, but that prior to service he had never totally lost consciousness. The claim was again denied and the veteran appealed. BVA remanded the case for a medical opinion by a cardiologist, who found no link between in-service treatment and current heart disease, so the RO denied again. Additional evidence was presented to Board on appeal, outlining the complicated case, and BVA requested a review by Board Medical Advisor (BMA), who provided a negative opinion and who also discounted the private doctor's positive opinion, saying there was no data that proved it. Board denied once more, stating that the BMAO was weighted more heavily than the private opinion, in part because the private doctor had written at one point that veteran's heart symptoms began in 1988.

CAVC vacated that decision and remanded it to the Board because it had not followed legal procedure. When a BMAO is used, the veteran must be provided an opportunity to respond to it – including submitting any new evidence – prior to a decision, and the Board had not done this. CAVC said that if BMAO was not used by Board, then a medical opinion was still going to be required. According to the Court, the following medical questions must be answered in order for this case to be fully developed: "whether the heart condition is congenital, whether any preexisting condition was aggravated by service, and whether a relationship exits between the in-service symptoms and the current disability."

It is possible that the most useful part of this decision is when the Board asks specifically for a medical opinion regarding symptoms in service. McClendon v Nicholson in 2006 made this very clear, but here we see some early pushback from CAVC who understands that there is competent lay evidence of a current disability, per 38 CFR 3.159(c)(4)(i)(A). This decision may be an early look at what was later clarified for VA about what constitutes a competent lay statement.

Wilson v. McDonough – December 20, 2021

Wilson was an Army National Guardsman and served ACDUTRA during 1982 and he deployed for Operation Desert Storm 1990-91. During the second period of active service, his diastolic blood pressure was consistently above 100. While deployed, Wilson received a diagnosis of hypertension and was prescribed Procardia, which the veteran began taking and takes consistently to this day. Wilson was granted service connection for HTN in 2003 at a non-compensable (0%) level and in 2008 he was denied a claim for increased evaluation. In support of his appeal, Wilson cited M21-1 V.iii.5.3.b. Blood Pressure Readings Required for SC of Hypertension, where it stated at the time of his appeal that if "current predominant blood pressure readings are non-compensable, a 10 percent evaluation may be assigned if…continuous medication for blood pressure control, and …past diastolic pressure (before medication was prescribed) was predominantly 100 or greater." The Board denied the appeal, arguing that the provision allowing for consideration of a history of diastolic pressure 100 or higher was only for an initial claim, and since the veteran was asking for an increase, then only the blood pressure readings taken during the appeal period needed to be considered. CAVC remanded this to the Board in 2018 requiring them to address the M21-1 provision, and they did, and repeated that it is not relevant because it only applies to initial claims.

CAVC disagreed, stating that the DC 7101 provision does not state or imply that it is only intended to be used for initial claims. DC 7101 provides three distinct means of qualifying for a compensable evaluation for hypertension. CAVC argued that if the veteran has a history of HBP but also needs to show diastolic pressure above 100 during the appeal period, then the third avenue becomes functionally meaningless, and there are really only two options for compensation. The structure of 7101, CAVC says, is intended to compensate veterans who have a history of HBP and control it with medication, and the M21-1 supports that this is the intended meaning. The case was remanded to the Board to determine whether Mr. Wilson's blood pressure was predominantly over 100 before he began taking medication.

Walker v. Shinseki – February 21, 2013

Veteran Walker served in the Army Air Force from 1943-45 as a pilot of four-engine planes, then a flight instructor. Walker's STRs were lost in the fire at NPRC in 1973. Walker made a bilateral hearing loss claim, and his wife and son provided statements that veteran had HL, that it started in service, and it was chronic in service as well as after. A VA examiner provided negative opinion, citing that service noise exposure was over 60 years prior, and his hearing loss was likely age-related. Further, Walker reported to the examiner that he went hunting 7-8 times a year w/o hearing protection; thus the examiner also opined that HL was likely due to post-service exposure. When the appeal went before BVA, Walker asked that VA consider service connection for hearing loss under 38 CFR 3.303(b) and asserted that the term "chronic disease" therein should apply to any disease that ordinarily would be medically defined as chronic. Thus, the statements of chronicity and continuity of the hearing loss should be sufficient to qualify for presumptive service connection. His claim was denied by BVA who focused on the three required elements for direct service connection. They weighed the VA examiner's negative opinion more heavily than the statements from Walker's wife and son, and found that a nexus was not shown. BVA did not address the question of chronicity per 38 CFR 3.303(b). The veteran appealed to CAVC but then died, and his son, Walker (also a vet) substituted.

CAVC concurred with BVA, focusing on the three elements of direct service connection and agreeing that Walker Sr.'s HL was due to age and post-service noise exposure. Walker Jr. then appealed to CAFC, who finally addressed the unanswered question about presumptive service connection of chronic diseases. CAFC argued that for VA presumptive SC purposes, "chronic disease" is a term that only applies to the diseases identified in 3.309(a). If a nexus is shown, chronicity is assumed. But if one of the chronic diseases is shown and the nexus is not clear, then 3.303(b) provides an alternate, relaxed, criteria. In that case, a veteran can use statements of chronicity and continuity to support a nexus. CAFC argued that since bilateral hearing loss is not listed in § 3.309(a), the continuity of symptomatology provisions of § 3.303(b) are inapplicable, and thus the statements from the wife and son about continuity of symptoms were inadequate to show a nexus.

Buchanan v. Nicholson – June 14, 2006

Veteran Buchanan served two terms in Army, from 73-75 with HON discharge and 80-82 with OTH. In 1986 he filed a claim for SC of psychiatric DO. Veteran submitted multiple lay statements in support, to include relatives, acquaintances, and a sergeant who led the unit to which Mr. Buchanan was assigned in 1973, describing their perceptions that his symptoms began in service or soon after. All submitted statements were clear that behavior relating to mental health disability occurred during or after first period of service. Over the course of the claim being appealed to the Board, Buchanan attended three mental health examinations in five years, and was diagnosed in all 3 with "schizophrenia, chronic paranoid type, severe." The first examiner provided a positive nexus opinion but acknowledged that there was nothing in the files to support the veteran's claim that he had sought treatment in service. The second examiner stated that it was at least as likely as not that the veteran's symptoms began before his first treatment in 1978, but without actual medical evidence in the STRs, it was impossible to say for sure when they did start. The third examiner noted all the supportive statements, but said without any corresponding medical evidence in the file to back it up, she had to conclude that the symptoms did not begin in service. Buchanan submitted another exam from a private medical professional, with a positive opinion. BVA found that the lay statements submitted by Buchanan were not credible for two reasons: they were recollections of something that happened 20 years prior, and because there was no objective medical evidence backing them up. The claim was denied by BVA.

CAVC upheld Board decision. Buchanan then appealed to CAFC and argued that CAVC committed a legal error by affirming Board's decision, which falsely interpreted the law regarding lay statements. CAFC pointed out that while it is in the Board's discretion to make the first argument about 20-year-old recollections, as long as it is supported, the second part of their argument about no concurrent medical evidence is "unreasonable" and "legally untenable." The Court said that 38 CFR 3.307(b) specifically allows that proof of a chronic disease may be established by "medical evidence, lay evidence, or both," proving that lay evidence can be sufficient in and of itself. CAFC found that the Board "improperly determined that the lay statements lacked credibility merely because they were not corroborated by contemporaneous medical records."

Jandreau v. Nicholson – July 3, 2007

Veteran Jandreau received HON discharge from Army 1957-59. He filed a claim for SC in 1997 for residuals of right shoulder injury. Veteran stated that he had dislocated his shoulder during Army training. His STRs were destroyed in the 1973 fire. In support of his claim, Jandreau submitted a statement from a fellow servicemember who asserted that he recalled the injury during training, and he also recalled that Jandreau suffered lingering symptoms afterward. Jandreau submitted current medical records diagnosing arthritis, and rotator cuff impingement of his right shoulder. One report included his doctor's statement that his pain was most likely sequelae of his dislocation of the right shoulder. There was also a radiology report indicating a history of right shoulder dislocation. RO denied the claim for no evidence of continuity of symptoms between 1959 and 1997. When appealed, the Board also denied the claim, stating that the private doctor's opinion was only based on what the veteran told him, and that the veteran was not competent to "diagnose" his history of shoulder dislocation without an additional medical diagnosis. BVA also said the statements of both the veteran and the fellow servicemember were not credible in stating any relationship between current symptoms and an injury in service. (I did not see that he was offered a VAE.) CAVC upheld this decision, stating that "whether Jandreau experienced a dislocation of his shoulder requires a medical diagnosis."

CAFC disagreed with that statement, mostly based on the decision from Buchanan v Nicholson (decided one year earlier). They stated that "Unless lay evidence were allowed, it would be virtually impossible for a veteran to establish his claim to service connection in light of the destruction of the service medical records. Lay evidence can be competent and sufficient to establish a diagnosis of a condition when 1) a layperson is competent to identify the medical condition, 2) the layperson is reporting a contemporaneous medical diagnosis, or 3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. CAFC points out that CAVC seemed to rely on 3) only, but 1) and 2) are just as viable. Whether lay evidence is competent is a fact issue to be resolved by the Board, not a legal issue. Case was remanded for CAVC to return to Board and have them decide on competency of lay statement.