



# **Lesson 26**

## **How Federal Court Decisions Assist Veterans**

*The American Legion DSO School*

*March 2022*

# Lesson 26 Overview

This lesson describes why our Federal Court system is vital for Veterans and dependents who appeal a VA decision:

- Introduction to Bergmann & Moore, LLC, the VA claim appeal litigation partner for The American Legion.
- Brief overview of VA's disability claim appeal process, with a ***focus on the court system***.
- How the courts matter to The American Legion's Veterans and dependents.

# Introducing Bergmann & Moore

- Bergmann & Moore is The American Legion's training and litigation partner
- National law firm based in Bethesda, Maryland.
- Managed by former VA attorneys who know VA well.
- Goals:
  - Litigate appeals from the Board to the U.S. court system for Veterans with Legion Power of Attorney.
  - Train DSOs on how best to quickly and efficiently help Veterans.

# Introducing Bergmann & Moore



Legion Training  
Washington, DC



# VA's Disability Claim Process

- A Veteran's disability claim starts at one of VA's 56 Regional Offices. VA decides about 1.5 million claims per year.
- A Veteran's **review** process begins when a Veteran files a **Supplemental Claim** or a **Higher Level Review** that is decided by a Regional Office (RO) under the new Appeals Modernization Act (AMA).
- A Veteran can also **appeal** from the RO directly to the Board of Veterans' Appeals (Board) using a **Notice of Disagreement** (NOD) under AMA.

# The Board of Veterans' Appeals



- The Board is the highest appellate body ***within VA***, deciding 103,000 appeals a year.
- The Board's VA employees are attorneys and Veteran Law Judges deciding appeals.
- Veterans often have advocates, such as The Legion's Board unit – who add critical arguments to the Veteran's appeal.
- Unfortunately, the Board makes mistakes. These mistakes necessitate corrective action by filing an appeal with the court outside VA.

# Appealing to the Court



- If a Veteran disagrees with a Board decision, then the Veteran can ***appeal*** to the Court of Appeals for Veterans Claims (CAVC): <http://www.uscourts.cavc.gov/>
- CAVC appeals are ***adversarial*** – ***VA uses attorneys*** and opposes the Veteran's appeal.
- The decision-maker here, a CAVC judge, does not work for VA.
- CAVC successfully disposed of more than 8,400 claim appeals during 2020.

# Further Court Appeals



- A Veteran can appeal a CAVC denial to the U.S. Court of Appeals for the Federal Circuit (Fed. Cir.), located in Washington, DC.



- A Veteran can appeal a Fed. Cir. denial to the U.S. Supreme Court, also in DC.



# The Importance of the Courts

- Courts resolve conflicts (or correct misconceptions) in how VA's statutes and regulations are interpreted.
- In ***precedential cases***, a court decision forces VA to change VA's practices to better serve more Veterans.
- Specifically, a court can force VA to change VA's regulations impacting one Veteran or even ***millions***.
- A court can force VA to change how VA develops evidence and provides medical opinions.

# Miller v. Wilkie

- Bergmann & Moore attorneys advocated for Veteran Miller, and his court appeal decision assists ***all Veterans.***
- *Miller v. Wilkie*, 32 Vet. App. 249 (2020) held that a VA C&P examination is not adequate if the exam does not address the Veteran's ***relevant lay statements.***

Department of Veterans Affairs		VA DATE STAMP (DO NOT WRITE IN THIS SPACE)
<b>STATEMENT IN SUPPORT OF CLAIM</b>		
<small>INSTRUCTIONS: Read the Privacy Act and Respondent Burden on Page 2 before completing the form. Complete as much of Section I as possible. The information requested will help process your claim for benefits. If you need any additional room, use the second page.</small>		
<b>SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION</b>		
<small>NOTE: You will either complete the form online or by hand. Please print the information request in ink, neatly, and legibly to help process the form.</small>		
1. VETERAN/BENEFICIARY'S NAME (First, Middle Initial, Last)		
<input type="text"/>		
2. VETERAN'S SOCIAL SECURITY NUMBER	3. VA FILE NUMBER (if applicable)	4. VETERAN'S DATE OF BIRTH (MM/DD/YYYY)
<input type="text"/> - <input type="text"/> - <input type="text"/>	<input type="text"/>	Month - <input type="text"/> - <input type="text"/> Day - <input type="text"/> Year
5. VETERAN'S SERVICE NUMBER (if applicable)	6. TELEPHONE NUMBER (Include Area Code)	7. E-MAIL ADDRESS (Optional)
<input type="text"/>	<input type="text"/>	<input type="text"/>
8. MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)		
No. & Street <input type="text"/>		
Apt./Unit Number <input type="text"/>	City <input type="text"/>	
State/Province <input type="text"/>	Country <input type="text"/>	ZIP Code/Postal Code <input type="text"/> - <input type="text"/>
<b>SECTION II: REMARKS</b> <small>(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)</small>		
<div style="background-color: #90EE90; border-radius: 25px; padding: 20px; margin: 20px auto; width: 80%;"><p style="text-align: center;"><b>Advocacy Tip: A Veteran's lay statement is often critical to a successful VA claim!</b></p></div>		

# Why Appeal to the Court under AMA?

- Appealing to the federal courts is about *much more* than preserving a Veteran's effective date.
- Court appeals produce ***precedential decisions***.
- Sometimes a court order is required to *force VA to consider the evidence* favorable to a Veteran.
- Appealing to the CAVC provides the Veteran the most *thorough review of the claims file* that it will ever receive.

# How TAL Uses the Courts

- Every TAL Board decision where a claim is denied is reviewed by two B&M attorneys trained to identify VA errors in the Board's decision.
- When B&M finds VA errors, B&M offers the Veteran ***no-cost representation*** before the CAVC.
- The Veteran has 120 days to sign a ***limited*** power of attorney.

# TAL and B&M CAVC Results

In 2021, Veterans and B&M attorneys were successful in 1,211 out of 1,213 cases completed at the Court of Appeals for Veterans Claims (CAVC):

## Bergmann & Moore CAVC Results on TAL POA Appeals

1/1/2021 to 12/31/2021

Final Result	#	%
<b>Total Appeal Dispositions</b>	<b>1,213</b>	
<b>Favorable</b>	<b>1,211</b>	<b>99.8%</b>
- Joint Motion for Remand	1,105	91.1%
- Court Decision (full or part remand)	97	8.0%
- Settlement	9	0.7%
<b>Unfavorable (Fully Affirmed)</b>	<b>2</b>	<b>0.2%</b>

# After a Court decision ...

- When a Veteran/widow prevails, CAVC issues a “remand,” and this sends the case back to the Board, and CAVC orders VA to fix one or more VA errors.
- B&M attorneys write a letter to the Veteran, with a copy to The Legion’s service officer, explaining what happened as well as the next steps to be taken by the Board.
- B&M informs the Veteran that the Board will issue a new decision based on the CAVC’s remand.

# After a Court decision ...

- B&M also prepares a detailed memo about all of the other unresolved issues, and B&M places the memo into the Veteran's claim file that goes to the Board.
- The memo forces VA to resolve VA's other errors with the goal of avoiding repeated "hamster wheel" appeals.
- This allows the Veteran and The Legion to **present new evidence and/or arguments** to the Board.
- The Board then issues a new decision that addresses VA's errors.

# Remand Example

- Here is an example of the first page of a Joint Motion for Partial Remand.
- This remand sends the Veteran's claims back to the Board to fix and then issue a new decision.
- CAVC's docket is public: <http://www.uscourts.cavc.gov/>

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

[REDACTED]	)	
Appellant,	)	
v.	)	
DAT P. TRAN,	)	Vet. App. No. [REDACTED]
Acting Secretary of Veterans Affairs,	)	
Appellee.	)	

**JOINT MOTION FOR PARTIAL REMAND**

Pursuant to U.S. Vet. App. Rules 27(a) and 45(g), Appellant and Appellee, by and through their undersigned counsel, respectfully move this Court to issue an order to vacate that part of the May 6, 2020, Board of Veterans' Appeals (Board) decision that denied Appellant's claims of entitlement to: (1) a rating in excess of 20% for a cervical spine disorder; (2) a rating in excess of 20% for a thoracolumbar spine disorder; (3) a rating in excess of 10% for right knee impairment; (4) a rating in excess of 10% for left knee arthritis; (5) a rating in excess of 10% for a left knee meniscal condition; (6) a rating in excess of 10% for a right ankle condition; and (7) a rating in excess of 10% for radiculopathy of the lower left extremity, and remand all seven issues for readjudication. (Record (R.) at 5-40) (May 2020 Board Decision).



# B&M Memo Example

- Here is an example of a B&M memo sent to the Board.
- The B&M memo describes all of VA's errors that need to be fixed.
- The B&M memo is based on B&M's review of the Veteran's entire claim file.
- Our goal is avoiding future appeals.

## Issues:

1. Entitlement to a rating in excess of 20 percent for a cervical spine disorder.
2. Entitlement to a rating in excess of 20 percent for a thoracolumbar spine disorder.
3. Entitlement to a rating in excess of 10 percent for right knee impairment.
4. Entitlement to a rating in excess of 10 percent for left knee arthritis.
5. Entitlement to a rating in excess of 10 percent for a left knee meniscal condition.
6. Entitlement to a rating in excess of 10 percent for a right ankle condition.
7. Entitlement to a rating in excess of 10 percent for radiculopathy of the lower left extremity.

## All Claims

### 1. *Duty to Assist and Inadequate Reasons or Bases: Inadequate V.A Examination*

The Board relied extensively on August 2018 VA medical examinations to deny all of Appellant's claims. **R. at 14-40 (5-40)**. However, all of these examinations are inadequate because each explicitly stated that the "[s]everity is speculative." **R. at 187 (174-88); 198 (188-99); 210 (199-211); 221 (211-22)**. The medical examiner who provided all of these examination reports did not explain why a non-speculative opinion as to severity could not be provide, and the examinations are therefore inadequate. *See Sharp v. Shulkin*, 29 Vet.App. 26, 33 (2017); *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). Accordingly, the Board clearly erred in concluding that the August 2018 VA examinations were adequate and should have remanded Appellant's claims for new, non-speculative, examinations.

Furthermore, in the alternative to the duty to assist argument above, the Board failed to provide an adequate statement of reasons or bases for its finding that the August 2018 VA examinations were adequate. In a January 2020 hearing, Appellant argued that all of these examinations were inadequate because they were rushed and did not properly capture the severity of his disabilities. **R. at 65-66, 68, 70-71 (63-85)**. The Board addressed this argument

# Final Notes on Court Appeals

- CAVC handles more than 8,400 claim appeals per year.
- As an advocate, when you see a CAVC remand, know the Veteran has been waiting years for help.
- B&M stands with The American Legion so our Veterans win these complex appeals.
- Some appeals assist one Veteran. Also remember ***some appeals help thousands of Veterans.***
- If you have questions about a CAVC appeal, reach out to your DSO who can then contact B&M.

# Thank You !



**B&M is grateful to The American Legion for trusting us as your training and litigation partner.**

**Together, we train Legion service officers and represent Veterans and dependents with claim appeals in Federal Court.**

# Conclusion

- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the school for future reference.