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HENDERSON V. SHINSEKI

THE SUPREME COURT HANDS DOWN A FAVORABLE DECISION

Rarely does the Supreme Court hear cases concerning Veterans' law. Prior to the decision in *Henderson*, the last case was "*Shinseki v. Sanders*" in 2009, and then one must look back over a decade for a notable case. Any time the Court considers an appeal from the U.S. Court of Appeals for Veterans Claims (CAVC) it is significant. The precise issue decided by the High Court in this case – whether the deadline to file an appeal at the CAVC is "jurisdictional" – may seem abstract and unimportant; however, the decision will likely impact a great many CAVC appeals.

The Veteran, David Henderson, served in the Korean War and was service-connected for paranoid schizophrenia with a 100 percent rating. The Regional Office and Board of Veterans' Appeals ("Board") denied his claim for additional benefits based upon his need for in-home care. He attempted to appeal the Board's denial to the CAVC, but he missed the statutory 120-day deadline by 5 days. His claim was dismissed by the

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Bergmann & Moore, LLC provides premium legal services to Veterans and their dependents. While consultations and other services are offered free of charge, fees are charged for representation before VA on the condition that the case is won. The firm encourages Veterans and their dependents to make full use of the free services available to them through their local Veterans Service Officer and/or Veterans Service Organizations.



...Henderson, Continued from Page 1

CAVC for being untimely. He asserted that his lateness should be excused because he missed the deadline due to his service-connected disability.

Justice Alito authored the unanimous opinion of the eight judges who considered the case (Justice Kagan did not participate in the decision). He noted early on that deciding whether this procedural rule has jurisdictional consequences “is not merely semantic” as “the consequences that attach to the jurisdictional label may be so drastic...” Indeed, had the Supreme Court determined that the 120-day NOA filing rule was jurisdictional, there would be no circumstances where a late NOA would be accepted by the CAVC – even if, for instance, the Veteran was hospitalized during the entire 120-day period. In turn, this would mean that the CAVC would not consider the appeal on its merits, and the unfavorable Board decision would stand. In order for VA to re-consider the claim at the lower level, the Veteran would need to present “new and material” evidence to re-open it, but even then the effective date for any favorable decision by VA down the line would generally not be as early as had the original claim been appealed and later granted.

Justice Alito classified the 120-day filing rule as a “claims-processing” rule which is typically not deemed jurisdictional – unless Congress intends it to be. For many reasons, the Supreme Court found that Congress did not intend for the filing deadline to be jurisdictional. The Court determined that the language of the statute containing the deadline as well as the placement of the statute in the section on Procedure”, not in the section on “Organization and Jurisdiction,” indicated that Congress did not intend for this to be a jurisdictional rule. The Court concluded that the general pro-claimant structure of the administration of Veterans’ benefits established by Congress further showed that Congress did not intend for the NOA deadline to “carry the harsh consequences that accompany the jurisdiction tag.”

The Supreme Court decision did not go so far as to say that Mr. Henderson was excused from the 120-day deadline or that his claim should be considered by the CAVC. Noting “[t]he 120-day limit is nevertheless an important procedural rule”, it left it for the court below to determine “[w]hether this case falls within any exception to the rule. . .” As such, this decision is a victory for any Veteran/claimant who wants to appeal a denial by the Board to the CAVC, but fails to do so on time, as it at least opens the door to the

...Continued on Page 5

THIS DAY IN HISTORY - MAR. 19

IRAQ WAR BEGINS: MARCH 19, 2003

On this day in 2003, the United States, along with coalition forces primarily from the United Kingdom, initiated war on Iraq. Minutes after coalition missiles reached Baghdad, President George W. Bush announced in a televised address, "At this hour, American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger."

Hostilities started about 90 minutes after the U.S.-imposed deadline for Saddam Hussein to leave Iraq or face war passed. Sustaining relatively few casualties, coalition forces toppled his regime and captured Iraq's major cities in only three weeks. President Bush declared the end of major combat operations on May 1st, 2003. Despite the defeat of conventional military forces, a determined insurgency has continued with an intense guerrilla war in Iraq in the years following the announcement of military victory, resulting in thousands of coalition, insurgent and civilian deaths.



MEDICAL MINUTE

APHASIA AND TRAUMATIC BRAIN INJURY

Aphasia is a neurological disorder usually caused by brain damage or head injury, stroke, or transient ischemic attack where oxygen supply to the brain is stopped. There are approximately 4.6 million stroke survivors each year in the United States. Of those, almost one million suffer from some form of aphasia. VA outpatient clinics treat somewhere around 2,000 new cases every year.

Some cases of aphasia may develop over time due to tumors or infections in the brain and almost always leads to language difficulties. An aphasia patient may partially or completely lose the ability to speak coherently. Through treatment, these skills can be partially or completely regained. The extent of recovery is based on the extent of damage to the brain, the skills lost, the response to treatments, and medication. ■



Vietnam Veteran Wives

helping all veterans and their families

by Danna Hughes

AN INSIGHTFUL HISTORY OF VVW BY PRESIDENT AND FOUNDER DANNA HUGHES

Vietnam Veteran Wives (VVW) was founded out of necessity in 1996. It was the beginning of a learning experience that has taken fifteen years of blood, sweat, and tears. It has truly been a “Voice Crying in the Wilderness” on behalf of the needs of Veterans and their family members.

VVW is a 501c19 non-profit organization that helps Veterans from the beginning of the VA claims process to the end. My name is Danna Hughes and I created VVW to help rural Veterans and their dependents in Washington State. My husband was a Marine who served in Vietnam and my son served in the Gulf War as an Army tanker. They both received a 100% service connected disability rating from VA. As a wife and mother in a rural area, I quickly found out that many of their needs were going unmet and that someone needed to do something to help Veterans and their dependents in sparsely populated areas. It was in this way that I quickly came to understand the meaning of courage under fire!

I was trained as a service officer with the Washington State Department of Veterans Affairs (WDVA). It has taken years for me to truly understand the real needs of Veterans, what is needed for a claim to succeed, and how to work with Veteran counselors through the aegis of VVW. If I had to pick the areas most in need for improvement in this industry, it would be better training for service officers. They need to learn how to present a claim in the same way an attorney would present a case in court.

For years I have felt that all the states in the union processing claims at a regional level should all play with the same deck of cards. I see big differences from state to state on what claims are turned down for. In VA’s defense, some of the time it is because of a lack of evidence - an outcome the service officer could likely prevent if they do research and work with their Vets.

Rural areas should all have a Veteran center where counseling is available for the whole family. PTSD is a contagion that envelops everyone in the family and nobody is left out. VVW was fortunate enough to work with the VA Medical Center in Spokane, Washington to develop a partnership with clinics here in Republic, Washington. This means that local Veterans will not longer have to make a 300-mile round trip.

The work we do at VVW is all-volunteer and the monies go to keeping the small Veteran centers’ doors open and utilities on. The town of Republic and the County works with us to get Veterans the help they need. They have seen what happens when a combat Veteran comes back without the help they need.

My last thought is my feeling that counseling for the whole family is a must when those in combat come home. The State of Washington has this available, but many states do not. This is a huge need. We always worry about the combat Veteran, but how about the wife, mother, father, and children of the Veteran who have to readjust to the realities of a new life? ■

For more information, visit www.vietnamveteranwives.org



VVW founder Danna Hughes (center) with friends at the Veterans Center

NEW NON-PROFIT TO HEAL THROUGH SERVICE DOGS

Veterans Moving Forward (VMF) is a nearly year-old organization that vows to provide free service dogs to Veterans with a variety of disabilities, especially those suffering from PTSD and traumatic brain injuries. VMF will provide skilled companion dogs and also help Veterans through employment opportunities.

According to service-disabled Veteran and VMF founder Karen Jeffries, "We want to make a meaningful difference in the lives of our veterans by increasing their safety and independence within their environment." Ms. Jeffries retired as a commander from the Navy nine years ago and has since worked to develop VMF.

VMF has spent the last year developing partnerships with orthopedic clinics, psychologists, private practices, visitation programs, practitioner's health care, and licensed clinical social workers. "We have helped dozens of vets in our comfort and therapy program, but I have not yet placed a dog with a vet that has been trained by my organization," Jeffries said. She went on to say that the training program required to get dogs ready can take up to two years to complete. Her dogs and the volunteers who train the dogs are all on schedule to provide these four specialized services:

- Comfort dogs exist to provide opportunities for motivational and therapeutic benefits to enhance quality of life for Veterans.
- Therapy dogs participate in animal-assisted therapy with specific goals, objectives and progress, documented by health care professionals.
- Facility dogs are assigned duty to work at the side of a professional caregiver, health care practitioner, or physical or occupational therapist to engage Veterans in activities.
- Assistance/Service dogs stay with Veterans for a period of up to seven years and help to carry and retrieve items, close and open doors, turn light switches on or off, and alert authorities in the event of an emergency.

To learn more, please visit www.vetsfwd.org

LAST AMERICAN WWI VETERAN PASSES AWAY

Frank W. Buckles, America's last survivor of the First World War, died peacefully in his home in West Virginia on Feb. 27th. He was 110 years old. His loss means that only two World War One Veterans remain, both of whom are British: Claude Choules, aged 109, and Florence Green, aged 110.

Buckles was born in Bethany, Missouri on February 1st, 1901. In August of 1917, he misstated his age to enlist and, at only 16, left with his army detachment to Europe the following December. He left on the British liner *Carpentia* and served on the Western Front driving ambulances.

Following the end of the war, Buckles travelled the world working on commercial ships. He visited Nazi Germany on many occasions and remembered seeing Hitler at the 1936 Summer Olympics, but was caught in Manila during the 1941 Japanese invasion of the Philippines. For 38 months he was held captive as a civilian prisoner. In the last years before his death, Buckles described the terrible living conditions in the Japanese internment camp at Los Baños in the Philippines. He was quoted as saying that "The starvation was so bad... it is surprising that any of us survived."

Buckles eventually returned home to settle on his farm in West Virginia. He received the French Legion of Honour from President Jacques Chirac at the French Embassy in December 1999, and later campaigned to renovate the existing World War One Memorial in Washington D.C. ■

To learn more about his life, visit www.frankbuckles.org



...Henderson, Continued from Page 2

opportunity to show that missing the deadline was excusable. However, this does not mean that every late NOA will be accepted, and we will likely see several cases in the coming years that define what kinds of circumstances will be exempted from the deadline and which will not.

If you or someone you know wants to appeal a Board decision, it is still by far the best course of action to do so within 120 days of that decision. However, if circumstances prevent that, *Henderson* lays the groundwork for the possibility that the CAVC may still have jurisdiction to hear the appeal. ■

For more information, please visit: www.supremecourt.gov/opinions/10pdf/09-1036.pdf



CONGRESSWOMAN WANTS RAPE TREATED AS PTSD

A bill recently introduced in Congress by Rep. Chellie Pingree (D-Maine) (pictured above) could make soldiers and Veterans who are victims of rape eligible for VA treatment and disability benefits for PTSD under the newly revised PTSD regulations.

According to H.R. 930, Pingree wants last year's rules for PTSD diagnosis to be amended to include instances of sexual trauma. According to Pingree, "It's very difficult to prove sexual assault within the current system, which makes it just as difficult for veterans who have been victims to qualify for the treatments and benefits they need to recover. It's a classic case of adding insult to injury."

If the rule change is adopted, men and women who were sexually assaulted in the military would be able to file a PTSD claim without having to produce evidence such as criminal reports and medical records.

Greg Jacob, policy director for Service Women's Action Network, said the near sole reliance on the victim's narrative and secondary evidence is important here because the majority of sexual assaults aren't reported at the time they occur. Some sexual assaults are filed as so-called "restricted" reports (meaning the victim receives care but no investigation is conducted).

VA would have to accept a mental health professional's diagnosis as well as a written statement from the victim as sufficient proof of PTSD stemming from sexual trauma. However, according to the bill, a connection between PTSD and military service may be denied with "clear and convincing evidence to the contrary."

H.R. 930 was a joint project between SWAN and Pingree's office. It is billed as being consistent with the less restrictive evidence for combat-related PTSD that requires only that the service member's claim be supported by the circumstances and conditions of the assignment. The new approach to establishing service connection for PTSD means a claimant no longer needs to come up with medical records or eyewitness statements corroborating the circumstances surrounding the cause of the PTSD.

According to Jacob, evidence that would be acceptable with the amended sexual assault rule would be "secondary evidence" of a rape. "So if I didn't report the rape, but if I e-mailed a friend [about it], wrote in my diary or called my mom ... that would be considered evidence," he said.

H.R. 930 was referred to the House Committee on Veterans' Affairs on March 3rd. ■

For more information, please visit www.govtrack.us/congress/bill.xpd?bill=h112-930

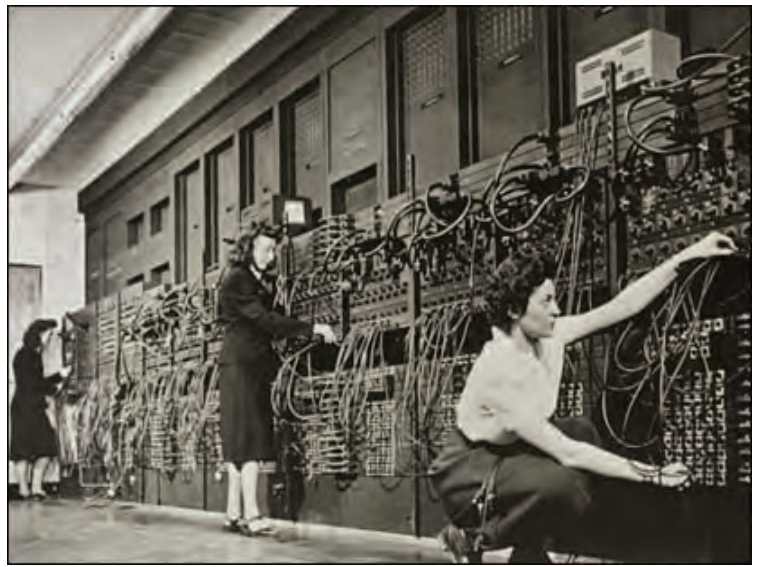
FORGOTTEN WWII HEROES: FEMALE “COMPUTERS”

LeAnn Erikson, a professor at Temple University, was interviewing sisters Shirley Blumberg Melvin and Doris Blumberg Polsky in 2003 to create a documentary on what she thought at the time was the sisters’ most exciting employment – founding the first female-owned real estate company in Philadelphia. Through their company, the sisters helped integrate Philadelphia neighborhoods and received many civic honors for their work. Professor Erikson had no idea that long before the women served their local community in this way, they had served their country during WWII as “computers” – historically, a job title for those who computed complex calculations used in areas such as ballistics.

Sadly, it is almost fitting that the story of the sisters’ war service – and the dozens of other female computers with whom they worked – was uncovered by accident, as the contribution these women made to the war effort was largely unacknowledged at the time and forgotten today. Professor Erikson recognized the need to tell these women’s stories and created the documentary: “Top Secret Rosies: The Female Computers of World War II,” which was recently released on DVD.

While the contributions that women made during WWII in blue collar jobs has been glorified in lasting images of Rosie the Riveter, most people are unaware that highly educated women also participated in white collar capacities as part of the war effort.

During WWII, Aberdeen Proving Ground in Maryland was the military’s major ballistic testing site. Officials at Aberdeen realized that they did not have enough manpower to create the ballistic projecting tables needed in the field. They contracted with the University of Pennsylvania to provide the calculations, as it was home to one of the world’s few Bush Differential Analyzers – a giant mechanical accounting machine that could significantly cut down the time it took human computers to complete the calculations by hand. UPenn recruited females with math skills, like the Blumberg sisters, to do the manual calculations and run the big machine. The women worked in three shifts, though they pulled double or even triple shifts when needed. Demand for the women’s work only increased when it was realized that



the weapons worked differently in the sands of Africa than they did in testing facilities in Maryland.

Two engineers had an idea about how to calculate the artillery firing tables even faster, the Electronic Numerical Integrator And Computer (ENIAC). The military financed their idea, which became the first general purpose electronic computer, capable of functions such as addition, subtraction, multiplication, and division. ENIAC needed programmers though – which at the time meant connecting the proper series of the over 18,000 tubes in the right order to run the problem. These first computer programmers were selected from the leading experts at the time – the female computers. Yet, when ENIAC was officially debuted in February 1946, the women who programmed it were not included in any of the Army’s official publicity materials or even invited to the celebration dinner that followed the highly successful demonstration. All these women have to show for their groundbreaking work is a unit commendation and their memories.

Professor Erikson’s look into the history of female computers is a valiant effort to bring light to the subject before it is too late. Indeed, two of the four women highlighted in her work have since passed away, including Shirley Blumberg Melvin. Dr. Kathy Peiss states in the film that the biggest impact of World War II on women was the psychological impact – the knowledge that they were capable of doing that which they had been told they would not or could not ever do. Hopefully, the story of the “Top Secret Rosies” can provide the same boost to the grandchildren and great-grandchildren of these once overlooked heroines. ■

For more information, please visit www.topsecretrosies.com/Top_Secret_Rosies/Home.html



VETERAN EVENTS CALENDAR

HERE IS A LIST OF SOME EXCITING
EVENTS HAPPENING NATIONWIDE
THROUGHOUT APRIL

Veterans Financial Information Fair

Michael E. DeBakey VA Medical Center
2002 Holcombe Blvd. - Houston, TX 77030
Telephone: (713) 483-3551
April 2nd, 2011
www.moneyweekusa.com/events/event/financial-information-fair/

Wisconsin Veterans Capitol Rally

Wisconsin Department of Veterans Affairs
30 West Mifflin Street - Madison, WI 53707
Telephone: (608) 267-0784
April 13th, 2011
<http://dva.state.wi.us/VeteransRally.asp>

Mason County Veterans Stand Down

Veterans Memorial Hall
2nd & Franklin Street - Shelton, WA 99584
Telephone: (360) 426-4546
April 22nd, 2011
www.dva.wa.gov/public_events.html

Rochester Regional Veterans Business Council: Personal Value Propositions

Shults Center, Nazareth College
4245 East Avenue - Rochester, NY 14618
Telephone: (585) 295-7854
April 27th, 2011
www.veteransbusinesscouncil.org/newsevents.asp



CLAIMS PROCESS ADVICE

VA CLAIMS PROCESS 101: DIRECT SERVICE CONNECTION

There are four ways to service connect a disability. Direct service connection is the most obvious way to establish that a current medical condition arose in or as the result of service. To establish direct service connection, a Veteran must establish that theirs was an in-service injury, disease or incident is demonstrated to have been the direct cause of the Veteran's currently diagnosed medical disability. Service connection means that the facts, shown by evidence, establish that a particular injury or disease resulting in the disability incurred during or as the result of military service.

The key to proving direct service connection is obtaining a "nexus" letter from a doctor. There are two common reasons why these crucial letters are not given proper consideration by VA or weighed less heavily than other opinions. First, if the doctor who wrote the letter did not review the Veteran's file and service medical records (SMRs/STRs). It is always important that if at all possible, a doctor note in their opinion that the claims file or the SMRs were reviewed and refers to specific evidence in the record. Another reason a doctor's nexus letter would be found as less credible by VA would be if the doctor's description of the nexus between the current disability and the in-service injury, disease, or incident fails to use the "proper" language preferred by VA.

BVA DOCKET DATE

The purpose of the Board of Veterans Appeals (BVA) is to review benefit claims determinations made by local VA offices and issue decisions on appeals. The median docket date for the BVA as of March 2011 is January 2010. This means that on average, Veterans who filed their appeal to the BVA around January of 2010 – usually a VA Form 9 – are now being adjudicated by the BVA. ■

VSO SPOTLIGHT

**AMELIA GRISSETT, VETERANS SERVICE OFFICER
FOR ONSLOW COUNTY, NORTH CAROLINA**



European and English settlers arrived in what was originally part of the colonial precincts of Carteret and New Hanover in 1713. Onslow County was formed in 1734 and was named for the Honorable Arthur Onslow, Speaker of the British House of Commons. Following a lethal 1752 hurricane, the county courthouse was relocated from Town Point to Wantland's Ferry. This settlement was eventually incorporated in 1842 and named Jacksonville after President Andrew Jackson.

Website: www.onslowcountync.gov/veterans

Know a VSO who should be honored? Email us at drohde@vetlawyers.com and we'll feature them in a future issue.

Q: Why did you decide to become a VSO?

A: I was hired as an Assistant Veteran Service Officer in 1993. I worked at that time with a retired Sgt. Major who gave me an opportunity to begin working claims. He hired me because I was the wife of a retiree and he felt that my exposure in that area would add to the office.

Q: How many Veterans do you serve in Onslow County?

A: Onslow County has about 19,000 Veterans with over half of these being military retirees. This number does not include the spouses of Veterans that might qualify for benefits.

Q: How long have you been a VSO?

A: I was hired in 1993 as the Assistant Veteran Service Officer and was promoted to Director of Veteran Services in July 2000.

Q: What is your favorite part of the job?

A: There are so many parts of this job that are rewarding. However, it is always great to see the Veteran receive the benefits that he has fought for long and hard. In addition, to see them receive the ancillary benefits that will help their family is always gratifying.

Q: What is your biggest challenge in assisting with claims?

A: Since our office sees a great number of Veterans that retired years ago and never applied for benefits, the greatest challenges are supporting records and documents to support their claims. Also, it is hard for some of them to obtain medical opinions to support their cases.

Q: What was your most memorable case?

A: The first year I came to work in 1993, I had a surviving spouse that came in to file for DIC benefits. Her husband had died from Chronic Lymphocytic Leukemia (CLL) which was not considered an Agent Orange condition at that time. She had a disabled son and their monthly income was less than \$600 at that time and she felt very strong about the condition being the result of Agent Orange. Years later when the VA picked up CLL, I was able to call her in and refile a claim for her.

Q: What advice would you give about the claims process?

A: Take time and get as much of your evidence together before you file your claim. With the duty to assist rules, the VA will obtain the information, but the more you have and send the better you are laying your case out for them.



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