

# LAW REVIEW 938

## 11.0 Veterans' Claims

### Due Process Clause Held To Apply to Veteran's Claim

By Captain Samuel F. Wright, JAGC, USN (Ret.)

**Cushman v. Shinseki, 2009 U.S. App. LEXIS 17848 (Fed. Cir. Aug. 12, 2009).**

A three-judge panel of the United States Court of Appeals for the Federal Circuit recently held that the Due Process Clause of the 5th Amendment to the United States Constitution was violated by the Department of Veterans Affairs (VA) when it considered an altered document in adjudicating a veteran's claim for benefits for a service-connected disability. The Federal Circuit is a specialized federal appellate court here in our nation's capital. It has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from the United States Court of Appeals for Veterans Claims.

The 5th Amendment to the United States Constitution provides, in pertinent part, that, "No person shall be ... deprived of life, liberty, or property, without due process of law." The big question in this case is whether Mr. Cushman's right to fair consideration of his VA claim for benefits for a service-connected disability constituted "property" for purposes of the 5th Amendment. The Federal Circuit answered that question affirmatively.

Philip E. Cushman served on active duty in the Marine Corps in Vietnam, during the Vietnam War, and he suffered a serious back injury in the line of duty. He was honorably discharged in January 1970, after which he underwent four spinal surgeries to treat his injury and he received continuous pain medication. The Board of Veterans Appeals (BVA) found that his condition was service-connected and that his symptoms were "pronounced" (one step beyond "severe" in the VA terminology).

Mr. Cushman secured a job as a manager at a flooring store. During his time on the job, his back condition worsened. During his last months on the job, he would typically lie flat on his back behind the store counter to fill out paperwork, because his back pain was so overwhelming. Finally, in November 1976, the employer asked him to resign and he did resign because his physical condition made him unable to perform his job duties.

In the fall of 1976, he made an appointment and saw a VA physician for his back problems. The final entry in his VA medical record was, "Is worse + must stop present type of work." His VA medical record was copied for claims adjudication purposes. Mysteriously, the final notation was altered on the copy used for claims adjudication purposes, to read, "Is worse + must stop present type of work, *or at least [] bend, stoop [], lift.*" The emphasis (italics) was added by the Federal Circuit, while the brackets show illegible or stray marks. This alteration on the copy used for the adjudication of his claim was not discovered until several years later, and the VA was unable to explain who made the alteration or with what motive.

After he resigned his job because of his worsening condition, Mr. Cushman applied to the VA for a total disability based on individual unemployability (TDIU), but the VA denied that claim at several stages. These VA determinations apparently relied upon the altered record (not knowing that it had been altered), which seemed to show that Mr. Cushman's condition was not as serious as he claimed. The Federal Circuit held that these VA determinations were tainted by the altered document and that relying on the altered document violated the Due Process Clause of the 5th Amendment. "We vacate the June 6, 2008 decision of the Veterans Court and remand the case with instructions to grant Mr. Cushman a new hearing before the Board [BVA] to determine de novo and without the presence of alterations in his medical record whether Mr. Cushman was unable to secure a substantially gainful occupation between May 3, 1977 and August 31, 1994, because of his service-connected disability."

We will keep the readers informed of any future developments in this important case.