

What is the Scope of the CAVC's Equitable Powers?

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Reporting on *Gazaille v. McDonald*, 27 Vet.App. 205 (2014).

The Court of Appeals for Veterans Claims has stated time and again that it does not have equitable relief powers. *Brown v. Principi*, 15 Vet.App. 421, 428 (2002); *Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997). The Court has exercised equitable powers, however, in enlarging the time to appeal a Board of Veterans' Appeals decision where it felt it was appropriate. See *Ausmer v. Shinseki*, 26 Vet.App. 392, 402 (2013); see also *McCreary v. Nicholson*, 19 Vet.App. 324, 332 (2005), overruled in part by *Checo v. Shinseki*, 748 F.3d 1373, 1379-80 (Fed. Cir. 2014). Recently, in *Gazaille v. McDonald*, 27 Vet.App. 205 (2014), the Court wrestled with the question of whether its equitable power allowed it to lengthen the period a deceased veteran and surviving spouse are considered to have been married for purposes of obtaining Dependency and Indemnity Compensation.

For marriages which occurred following a deceased veteran's discharge from active service, an award of DIC benefits requires that the surviving spouse be married to the decedent for at least one year prior to the decedent's death. 38 U.S.C. § 1304(2); 38 C.F.R. § 3.54(c)(2) (2014). In *Gazaille*, the widow of a deceased veteran who passed away 58 days before their first wedding anniversary sought DIC benefits. 27 Vet.App. at 207. The veteran's death certificate indicated he died from respiratory distress due to lung cancer. *Id.* Although nearly two months short of the one-year minimum, she argued that if VA medical staff had properly diagnosed her husband's cancer in time, he would have been alive for their first wedding anniversary. *Id.* The Board held that the lack of a legal marriage for an entire year prior to death precluded an award of DIC benefits and that an equitable finding to the contrary was precluded by law. *Id.*

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On appeal to the CAVC, the surviving widow reiterated her argument that the failure of VA medical staff to promptly diagnose her husband's lung cancer delayed treatment for the disease and, thus, hastened his death. *Id.* at 208. She also argued that 38 U.S.C. § 1304 should be read in conjunction with 38 U.S.C. § 1151, which calls for DIC benefits where VA's negligence caused the veteran's death, and that this meant that there was an exception to the one-year rule in cases where the veteran died as a result of VA's negligence. *Gazaille*, 27 Vet.App. at 208.

Judge Hagel authored the Court's opinion. *Id.* at 206. He determined that the plain language of both statutes contained no exceptions to the one-year requirement. *Id.* at 209-10 (citing 38 U.S.C. §§ 1151, 1304). He further noted that the Supreme Court had never applied the doctrine of equitable estoppel against the government but conceded that it had "perhaps, left the door to that possibility slightly ajar." *Gazaille*, 27 Vet.App. at 211. But he found the doctrine inapplicable regardless because there was nothing to suggest that either Mr. or Mrs. Gazaille relied on any misrepresentation of law by the government to their detriment. *Id.* He affirmed the Board's decision. *Id.* at 212.

In a concurring opinion, Judge Greenberg noted his agreement with Judge Hagel that the plain language of 38 U.S.C. § 1304 did not permit an exception to the one-year requirement. *Gazaille*, 27 Vet.App. at 213 (Greenberg, J., concurring). But he expressed the view that the CAVC had the same inherent constitutional power as an Article III Court to administer equitable remedies. *Id.* at 213-14. Yet he found that Mrs. Gazaille did not show that she was entitled to an equitable remedy, as she failed to provide evidence that her husband's death was due to VA's negligence or that the veteran would have lived to the date of the one-year anniversary if not for VA's negligence. *Id.* at 215.

Chief Judge Kasold issued a dissenting opinion in the case. *Id.* at 215 (Kasold, C.J., dissenting). He agreed with Judge Greenberg that the Court had the

power to order equitable relief. *Id.* He expressed the view that the death of a veteran as a result of VA's medical malpractice required a finding that VA was equitably estopped from asserting that a DIC award is not appropriate since the veteran's marriage lasted less than a year. *Id.* at 217. He stated that if it were up to him, he would remand the case back to the Board for it to provide development on the issue of whether the veteran died because of VA's negligence. *Id.* at 218.

Contrary to the Court's past decisions, when read together, the three opinions rendered in *Gazaille* tend to indicate that the Court does have equitable powers which extend beyond the matter of whether tolling of the appeal deadline is appropriate. Judge Hagel's opinion indicates some reluctance to apply the doctrine of equitable estoppel to the government. *Id.* at 211. Like the Supreme Court, however, he did not completely shut the door on this possibility, but instead found that the lack of detrimental reliance precluded its application to Mrs. Gazaille's claim. *Id.* Conversely, both Chief Judge Kasold and Judge Greenberg believe that the Court does have the power to grant equitable relief on the ultimate question of whether benefits are warranted. But, unlike Chief Judge Kasold, Judge Greenberg was not persuaded that the duty to assist required the Board to develop evidence to aid in determining whether equitable estoppel was necessary. *Id.* at 215 (Greenberg, J., concurring). However, Judge Greenberg's opinion does not appear to foreclose the potential for this type of development. *Id.* It is not clear how Judge Hagel would feel about this type of evidentiary development if the government could be equitably estopped under different circumstances.

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If the Court were to apply the plurality rule, the holding of *Gazaille* would be that the CAVC does have the power to grant equitable relief but that it was not appropriate here. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single opinion explaining the Court's rationale gains the support of a majority of the Court, the holding of the case is that of the judges who concurred in the judgments on the narrowest grounds). However, since neither Judge Hagel nor Judge Greenberg were required to reach the question of whether equitable estoppel could ever be applied to the government, one could also argue that their opinions on this matter are simply dicta. As Chief Judge Kasold stated: "it is likely that the issue of equitable relief will return to the Court." *Gazaille*, 27 Vet.App. at 215 (Kasold, C.J., dissenting).