

2017), the court again addressed (1) whether Officer Allen was entitled to qualified immunity for the § 1983 false imprisonment claim; (2) whether he was entitled to qualified immunity on his initial decision to seize and transport Ms. May; and (3) whether the seizure was unreasonable. The opinion is substantially similar to the 2016 decision in reasoning and outcome. As to the first two points, the court ruled that Officer Allen was entitled to qualified immunity. As to the third, there was a genuine point of fact as to whether the seizure was conducted in an extraordinary manner, unusually harmful to Ms. May's privacy interests. Like the 2016 decision, the court affirmed the district court in part, reversed in part, and remanded the third question to the lower court.

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## Disability Evaluations in Veteran's Court

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### Inconsistencies in Mental Health Disability Evaluation Renders Evaluation Incomplete

Since 2011, United States Army Veteran Richard Gillund attempted to obtain disability compensation for service-connected anxiety and depressive disorders. He underwent three separate mental health evaluations, all of which resulted in denial of disability, and he appealed the final decision to the U.S. Court of Appeals for Veterans Claims. In *Gillund v. McDonald*, 2016 WL 7190136 (Vet. App. 2016), the court found the most recent mental health evaluation to be inadequate because of internal inconsistencies, despite the concurrence of opinions among the three separate assessments.

#### Facts of the Case

Mr. Gillund was a U.S. Army Veteran who served on active duty from August 1967 through March 1969. He received service-connected disability ratings of 50 percent for anxiety disorder, not otherwise

specified (NOS) with depressive disorder, and 40 percent for residuals of prostate cancer. He retired from the post office in 2000 because of a back injury after 20 years of employment.

In October 2011, Mr. Gillund requested a total disability evaluation based on individual unemployability (TDIU). He underwent a VA mental disability examination in November 2011, which concluded that his anxiety disorder caused occupational impairment characterized by a decrease in work efficiency and "intermittent periods of inability to perform occupational tasks" (*Gillund*, p 1). However, overall, he was "generally functioning satisfactorily" and urinary symptoms were his primary problem. The VA Regional Office (RO) denied his request for TDIU, and Mr. Gillund filed a Notice of Disagreement. In April 2012, the RO upheld the denial. Mr. Gillund appealed to the Board of Veterans Appeals (Board).

In January 2013, Mr. Gillund underwent his second VA mental disability examination, which included review of the prior assessment, an in-person interview, and testing. The examiner opined that the veteran's anxiety NOS and depressive disorder NOS had remained about the same since his prior assessment, despite subsequent stressors. The examiner commented that the veteran's employability and quality of life were impaired by his psychiatric symptoms, but these were not seen as a large problem, mainly because the veteran was retired. In February 2013, the RO again denied TDIU, and Mr. Gillund was awarded a board hearing, which took place in November 2013. The board remanded the case, because some opinions in the January 2013 report appeared contradictory, and ordered a third VA mental disability examination, which took place in January 2015.

The third examiner noted that Mr. Gillund was hesitant to discuss his symptoms and that psychological testing revealed that he was not "psychologically minded." The examiner opined that the veteran had occupational and social impairment caused by transient exacerbations in mental health symptoms during periods of increased stress. However, the symptoms did not render Mr. Gillund unemployable, stating that nearly all of the functional limitations were due to the veteran's physical symptoms. As support, the examiner reported that the veteran had no problems while working years earlier, that he was unable to describe how his psychiatric symptoms af-

fected his work functioning, and that he had not received mental health treatment in the prior six months. The court later identified, however, that Mr. Gillund had one mental health appointment in October 2014.

In March 2015, the RO again denied Mr. Gillund's request for TDIU, and in July 2015, the board denied entitlement to TDIU. Mr. Gillund appealed to the U.S. Court of Appeals for Veterans Claims, asserting that the Board erred in relying on an inadequate January 2015 mental disability evaluation.

#### *Ruling and Reasoning*

The U.S. Court of Appeals for Veterans Claims vacated and remanded the case. The court found inadequate the January 2015 mental disability assessment. The court outlined required elements of a satisfactory evaluation, which include consideration of the veteran's previous medical history and examinations; description of the veteran's claimed disability in sufficient detail; and the evaluator's judgment on the questions with data and supporting rationale for the opinion. The rating board must deem a report inadequate if a diagnosis is not supported by examination findings or if the report does not contain appropriate detail.

Although the court reviews board decisions for clear error, it found that the January 2015 examiner's reasoning was inadequate to support an opinion of only mild occupational impairment because of internal errors in the report. First, the examiner reported that Mr. Gillund had not received mental health treatment since July 2014; however, the court identified a mental health record from October 2014. Second, the examiner stated that Mr. Gillund was unable to describe how his symptoms affected his occupational functioning. The court found this problematic because his psychological testing was consistent with someone who is not "psychologically minded" and should not be expected to discuss his symptoms in detail.

The examiner's rationale was, according to the court, "at best . . . inconsistent" and "at worst . . . illogical" (*Gillund* p 4). Third, the examiner stated that the veteran's service-rated conditions did not cause him occupational impairment during his previous 20 years of employment. However, the court rejected this, stating that the veteran's "present level of disability is of primary importance" (quoting from

*Francisco v. Brown*, 7 Vet. App. 55, 58 (Vet. App. 1994)), and, here, the examiner did not evaluate the veteran's current level of occupational functioning.

#### *Discussion*

The U.S. Court of Appeals for Veterans Claims is an Article I court, established by Congress, to provide judicial review for veterans denied benefits. The court has exclusive jurisdiction to review these matters, on appeal from the Board. As an appellate body, Congress has precluded the court from making factual determinations (Allen MP: The United States Court of Appeals for Veterans Claims at twenty: a proposal for a legislative commission to consider its future. *Cath. U. L. Rev.* 58:361, 2009). In limited cases, a veteran who is dissatisfied with the court's decision can further appeal to the U.S. Court of Appeals for the Federal Circuit, which reviews only legal questions and does not rule on facts of the law or the law's applicability to a particular case. Finally, one could seek review in the Supreme Court.

Although this case is designated for electronic publication only and is not binding as precedent, the *Gillund* case is instructive for forensic evaluators in that it highlights the importance of the evaluator explaining one's rationale behind an opinion, especially if there appear to be internal inconsistencies in a report. In *Gillund*, the court found three specific errors in the evaluator's report: failure to consider a medical record; the weight afforded the evaluatee's prior occupational functioning; and failure to incorporate the psychological testing results in a manner consistent with the opinion. Although all three mental disability evaluators who assessed Mr. Gillund agreed that his mental health symptoms did not cause him to meet criteria for TDIU, the court found that internal errors in the report negated the expert's findings and that Mr. Gillund should be afforded another evaluation.

Forensic mental health evaluators recognize that inconsistent or contradictory materials can undermine conclusions. In performing forensic assessments, evaluators look for internal consistency in the claimant's reports and also consistency across collateral sources. What is interesting about *Gillund* is that the court identified inconsistencies that discredited the expert's report.

Forensic evaluators also recognize that in few if any cases will all of the available data support one conclusion. Commonly, there are some facts or

sources that tend to support one side of the case; other materials support the other side. The forensic evaluator, then, is tasked with assessing the materials thoroughly and rendering an opinion in light of all of the materials considered. The evaluator may highlight the strongest points, but should recognize limitations.

The *Gillund* court took issue with the examiner's insufficient explanation of his opinion in light of the inconsistencies. Had the examiner carefully explained his reasoning in support of his opinion, it is possible that his explanation would have been sufficient to uphold the report. For example, had the evaluator explained how he used prior occupational functioning as a baseline and attempted to gather information about daily functioning for comparison, given that the veteran was not working at the time of the evaluation, perhaps this would have been sufficient. Similarly, had the examiner explained how he incorporated the results of the psychological testing into his opinion, perhaps the court would have agreed with the examiner's report.

This opinion cautions forensic evaluators to be mindful of any inconsistencies and to make efforts to explain any discrepancy thoroughly. It is unreasonable to think that inconsistencies will never arise; they most certainly will, but the task is not to brush aside any differences but rather to explain them in a coherent manner. Unfortunately for Mr. Gillund, as a result of the court's ruling, he must submit to yet another (fourth) mental disability evaluation and wait longer than the already six years since he started this process.

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## Post-Hall Determination of Intellectual Disability in a Death Penalty Case in Florida

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## The Supreme Court of Florida Rules That Adaptive Functioning Must Be Included in Assessing Intellectual Disability in Claims of Postconviction Relief for Individuals Facing the Death Penalty

In *Thompson v. State*, 208 So.3d 49 (Fla. 2016), the Supreme Court of Florida reconsidered an appellant's intellectual disability claim for postconviction relief and remanded it back to circuit court for a new evidentiary hearing. Pursuant to the United States Supreme Court's ruling in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Supreme Court of Florida held that Florida courts must consider adaptive functioning, as well as one's intelligence quotient (IQ) in capital case intellectual disability determinations, including retroactive application for postconviction relief.

### Facts of the Case

On March 30, 1976, William Thompson and codefendant Rocco Surace were perpetrators in the brutal beating of Sally Ivester. Mr. Thompson and Mr. Surace instructed the victim to obtain money from family members at home. When she could not obtain the specified amount, Mr. Surace began beating her, after which Mr. Thompson joined in the beating. The two men tortured the victim and she died as a result of her injuries. The murder was witnessed by Barbara Savage, who feared similar treatment had she tried to escape or intervene. Mr. Thompson was charged with, and pleaded guilty to, first-degree murder. He was convicted and sentenced to death. He was also convicted of kidnapping and sexual battery, for which he received concurrent life sentences.

After his initial sentencing in 1976, Mr. Thompson filed appeals and motions for postconviction relief. At issue in those filings was his mental condition. Upon direct appeal, the Florida Supreme Court allowed him to withdraw his original plea. On remand, he again pleaded guilty and was again sentenced to death. In affirming his death sentence, the Florida Supreme Court concluded that the trial court did not abuse its discretion in deciding not to order additional psychiatric evaluations for him "in view of the four previous reports" (*Thompson*, p 51).

Before the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Mr. Thompson had raised his purported intellectual disability, both in his original criminal trial and in postconviction motions. In his third postconviction motion, Mr. Thompson claimed that, during his second trial, he was "incompetent to make a knowing, intelligent, and voluntary