These questions were not addressed directly by the current decision, but a few other recent appellate court decisions have also examined the them. In *Centeno v. Holder*, 584 Fed. Appx. 476 (2014), the Ninth Circuit Court of Appeals decided that a woman's history of major depression constituted sufficient indicia of incompetence to warrant ordering an evaluation. In *Barker v. Attorney General United States*, 792 F.3d 359 (2015), the Third Circuit Court of Appeals considered whether an immigration judge has an obligation to inquire about an immigrant's competence, even when not presented with evidence raising the question. Gregory Barker represented himself during his immigration hearings, and only after the judge ordered his removal did Mr. Barker raise a question of his competence. Applying the *M-A-M-* framework, the *Barker* court reasoned that immigrants are not entitled to routine *sua sponte* questioning by the judge about their mental competence. The court noted that setting such a standard would actually afford more procedural due process rights to immigrants than are given to criminal defendants.

The appellate courts in all of these cases compared immigration proceedings to criminal trials, finding many similarities between them. In both contexts, the stakes are high, and individuals risk losing the fundamental building blocks of the lives they have created. *Matter of M-A-M-* seems to recognize the parallels with criminal cases, establishing a test for competency that is remarkably similar to *Dusky v. United States*, 362 U.S. 402 (1960): "whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses" (*M-A-M-*, p 484). Despite these similar standards for determining competence, immigration detainees are still a long way from having all of the procedural protections afforded criminal defendants.

According to 8 U.S.C. § 1229a (2012), individuals in immigration cases are entitled to representation by an attorney if they can afford one, but indigent people do not have a right to counsel at the government's expense. *Franco-Gonzalez*, cited by the majority in this decision, moved one step closer to a universal right to counsel in immigration cases by establishing such a right for individuals with mental disabilities. The court in *Franco-Gonzalez* reasoned that individuals with mental disabilities are particularly vulnerable and may need the assistance of an advocate to help them present the strongest case against deportation. Future legal decisions may continue with this trend toward providing more protections for immigrants, treating the immigration courts more and more like criminal courts.

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Expertise in Determining Service Connection for Mental Illness as Cause of Death

Holly Reid, MA
Fellow in Clinical Psychology

Madelon Baranoski, PhD
Professor of Psychiatry

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

The Veterans Affairs Board Must Provide Adequate Justification for Denial of Service Connection for Veterans' Mental Health Conditions Potentially Sustained in Service

In *Learman v. McDonald*, 2015 U.S. App. Vet. Claims Lexis 447, the U.S. Court of Appeals for Veterans Claims granted Maureen Learman's appeal of the Board of Veterans Appeals decision to deny service connection for the cause of her husband's death. The court remanded the case for determination.

Facts of the Case

Perry Learman served in the army from 1974 to 1977 and was honorably discharged. In 1978, he was hospitalized for psychotic symptoms and, according to VA medical records, given a diagnosis of "paranoid-type schizophrenia, multiple drug dependence, and alcohol abuse" (*Learman*, p 1). Mr. Learman died in 2002 of a gastrointestinal hemorrhage secondary to esophageal varices and cirrhosis. At the time of his death, Mr. Learman had the service-connected disabilities of schizophrenia and a right shoulder injury.

Mrs. Learman applied for VA widow benefits in March of 2002 and was denied by the VA regional office in January 2005. She filed a Notice of Disagreement before the Board of Veterans Appeals.

The board denied her request in March 2008, and Mrs. Learman appealed the decision to the U.S. Court of Appeals for Veterans Claims. In December 2008, the court granted Mrs. Learman's joint motion for remand, directing the board to consider specifically whether a VA medical opinion was needed to determine whether Mr. Learman's antipsychotic medication or alcohol contributed to his death. In September 2009, the board requested opinions from two experts regarding Mr. Learman's cause of death.

Penelope Kiss, a board-certified advanced registered nurse practitioner, opined that Mr. Learman's death was not service connected and deemed his use of alcohol to be unrelated to self-medication for schizophrenia. Dr. David Vigor, board certified in psychiatry, geriatric psychiatry, and addiction psychiatry, opined that Mr. Learman's death was service connected. Dr. Vigor stated that the hemorrhage and cirrhosis were likely caused by Mr. Learman's alcohol use disorder, which was secondary to his schizophrenia. In January 2012, the board used Ms. Kiss' opinion to deny service connection for the cause of Mr. Learman's death. Mrs. Learman appealed this decision to the U.S. Court of Appeals for Veterans Claims. In March 2013, the court set aside this decision and remanded the case, citing that the board failed to provide adequate bases for the decision.

In July 2013, Mrs. Learman submitted a brief, highlighting conflict between the VA medical opinions of Ms. Kiss and Dr. Vigor. This brief argued that Ms. Kiss' lack of experience in treating veterans with mental health and substance use disorders precluded her from offering a qualified opinion about the cause of Mr. Learman's death. In September 2013, the board decided Mr. Learman's death was not service connected. Mrs. Learman filed the present (third) appeal which the court again granted.

Ruling and Reasoning

The Court of Appeals for Veterans Claims set aside the September 2013 board decision and remanded the present matter for readjudication. In making its ruling, the court cited precedent that holds that the competence of medical evaluators in the Court of Appeals for Veterans Claims is assumed unless expressly called into question (*Wise v. Shinseki*, 26 Vet. App. 517 (2014); *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009)). The court held that Mrs. Learman's brief, which challenged Ms. Kiss' expertise in assessing the contributions to Mr. Learman's death, was sufficient to require the board to address the matter of Ms. Kiss' experience and training. The court held that the board failed to consider adequately whether Ms. Kiss had the expertise to render an opinion.

Discussion

Learman underscores the critical and complex role of experts in VA claims determinations. To rely on the information experts provide, courts must be assured of its merit. In both criminal and civil courts, qualification of experts is a critical first step. Had the *Learman* matter been heard in either of these court systems, the qualification of experts would have preceded testimony on the case. Similarly, written reports would be critiqued based on qualifications. Education, experience, reputation, and opinions in previous cases are evaluated and challenged before the court considers the opinions.

In the VA system, unlike in other courts, competency of experts is assumed unless expertise is challenged. In *Wise*, a comparable and recently decided case before this court, the spouse appealed the board's denial of dependency and indemnity compensation after the death of her husband, a veteran, secondary to heart and pulmonary disease. Before his death, her husband had been deemed to have 100 percent service-connected PTSD, related to his service as a medic in World War II. In this case, the VA expert, a VA cardiologist, testified about the medical cause of death and questioned the diagnosis of PTSD. However, the expert also indicated a lack of expertise in psychiatry and opined "from a relative lay person's perspective of psychiatry" (*Wise*, p 527). In *Wise*, the court cited, "'the presumption of regularity' allows courts, in certain situations and 'in the absence of clear evidence to the contrary,' to 'presume that public officers have properly discharged their duties.'" (*Wise*, p 525, citing *Miley v. Principi*, 366 F.3d 1343 (Fed. Cir. 2004), p 1346). The *Wise* court held that the expert's own declaration of nonexpertise was an irregularity "that prevented the presumption of competence from attaching" to the testimony (*Wise*, p 526). The court also quoted *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013): "competency requires some nexus between qualification and opinion" (p 585).

Although assumption of expert competence is limited by irregularity in choice of expert, even this limit depends on a challenge by the veteran. This system

would appear to place an ethics-related burden on the professionals to consider the level of their own expertise, as well as the relevance of that expertise to the question posed. It cannot be assumed, however, that experts know their own limitations or understand the full complexity of the question. There is further complexity when the interface between psychiatric and medical conditions is involved.

In other legal circumstances, choice of expert is the prerogative of the retaining party, but the qualification of expertise is an initial and automatic point of inquiry and ruling. The absence of this first step in the veterans system appears to relegate questions regarding the independence and quality of expert testimony to appellate courts.

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