Getting to the Root of the It: Broadening the Scope of Claims after *DeLisio v. Shinseki*

Jenny J. Tang[1]

INTRODUCTION

The Department of Veteran Affairs (VA) claims process is designed to be a Veteran-friendly, non-adversarial, and administrative claims system.[2] Accordingly, case law promulgated in the past decade has significantly broadened the scope of pending claims, as VA regional offices (ROs) and the Board of Veterans' Appeals (Board) may now be required to consider the issue of entitlement to service connection for certain disabilities that were not expressly identified or are not pending on appeal.[3] This Comment analyzes the recent case *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011), and posits that this case encourages the practice of broadening the scope of claims to an extent inconsistent with established law.

Prior to *DeLisio*, if the record showed that a claimed disability is solely a result of a causal disability that is not service-connected and not pending for adjudication, the claimed disability would be denied service connection under 38 C.F.R. section 3.310.[4] In *DeLisio*, the United States Court of Appeals for Veterans Claims (Court) held that if the record reasonably indicates that the cause of the pending claimed disability is a non-service-connected disease or disability that may be associated with service, VA must investigate whether that causal disease or disability is related to service to determine whether the pending claimed disability may be service-connected on a secondary basis.[5] If that causal disease or disability is determined to be related to service, then the pending claim reasonably encompasses a claim for entitlement to service connection for that causal disease or disability.[6] No additional filing would be necessary to initiate a claim for service connection for that causal disease or disability.[7]

This holding essentially provides that if such a non-service-connected causal disability may be associated with service, VA claims adjudicators should infer a claim for entitlement to service connection for that causal disability.[8] This holding is problematic, as the application thereof would be in direct conflict with established law that provides that the Veteran must demonstrate intent to seek benefits and submit a communication in writing in order to claim for benefits.[9]

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[1] Jenny J. Tang is Associate Counsel at the Board of Veterans' Appeals (Board).
[2] Evans v. Shinseki, 25 Vet. App. 7, 16 (2011).
[3] See e.g., Clemons v. Shinseki, 23 Vet. App. 1, 5 (2009).
[4] 38 C.F.R. § 3.310(a) (2014) ("[D]isability which is proximately due to or the result of a service-connected disease or injury shall be service[-]connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition.").
[5] *Id*. at 54 (citing McLendon v. Nicholson, 20 Vet. App. 79, 83 (2006) (discussing VA's duty to assist).
[6] *Id.*
[7] *Id.* (citing *Clemons*, 23 Vet. App. at 5-6 (holding that a claim for benefits "may reasonably be encompassed by several factors, including . . . information . . . that the Secretary obtains in support of the claim")).
[8] *DeLisio*, 25 Vet. App. 47.
[9] 38 C.F.R. §§ 3.1(p), 3.155(a) (2014).

I. BROADENING CLAIMS PRIOR TO *DELISIO*

Prior to *DeLisio*, it was clear that broadened claims encompassed only disabilities for which a claimant had the intent to apply for benefits, and the claim must have been communicated in writing.[10] It is established law that a claim for benefits requires "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing."[11]

A claimant could sufficiently file a claim "by referring to a body part or system that is disabled or by describing symptoms of the disability."[12] There was no need for the claimant to identify the precise diagnosis of the claimed disability, as the claimant was expected only to "identify and explain the symptoms that he observes and experiences."[13] Even if the claimant attempted to identify the specific diagnosis, his claim could still encompass disabilities not specifically identified.[14] Thus, VA was required to investigate all disabilities that the record reasonably encompasses.[15] For example, a claim for posttraumatic stress disorder (PTSD) could reasonably be broadened to include any psychiatric disability, to include PTSD, if the medical or lay evidence of record reasonably encompasses any psychiatric disability.[16]

After *DeLisio*, however, these requirements may no longer be set in stone.

II. BROADENING CLAIMS AFTER *DELISIO*

In *DeLisio*, the Court considered the issues of (1) entitlement to an effective date earlier than June 5, 2005 for diabetes mellitus type 2 (diabetes) and (2) entitlement to an effective date earlier than June 5, 2005 for peripheral neuropathy of the left lower extremity (peripheral neuropathy).[17] The Veteran filed his original claim in October 24, 1980, for service connection "for agent orange" and noted symptoms of skin problems, stress, and swollen lymph nodes. On October 31, 1980, the Veteran filed "a supplemental claim . . . for [an] agent orange condition" and listed symptoms of "numbness in [his] left leg," large lymph nodes, an erratic heartbeat, a breathing condition, and hair loss.[18] In January 1994, the Veteran filed a claim for service connection for peripheral neuropathy, and on June 5, 2006, he filed a claim for diabetes and peripheral neuropathy.[19]

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[10] 38 C.F.R. § 3.1(p); *see also* Brokowski v. Shinseki, 23 Vet. App. 79, 84 (2009); Brannon v. West, 12 Vet. App. 32, 35 (1998).
[11] 38 C.F.R. § 3.1(p) (2014); *see also Brokowski*, 23 Vet. App. at 84; *Brannon*, 12 Vet. App. at 35.
[12] *Brokowski*, 23 Vet. App. at 86.
[13] *Clemons*, 23 Vet. App. at 5.
[14] *Id.* at 4-5.
[15] *Brokowski*, 23 Vet. App. at 85; Ingram v. Nicholson, 21 Vet. App. 232, 256-57 (2007) ("It is the pro se claimant who knows what symptoms he is experiencing and that are causing him disability . . . [and] it is the Secretary who . . . can evaluate whether there is a potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission."). Furthermore, a claim is not limited to one theory of service connection; VA has a duty to consider all theories under which service connection may be granted. *See* Kent v. Nicholson, 20 Vet. App. 1, 16 (2006). Note, however, that VA is not required to raise and investigate "all possible" theories of service connection for each claim. Robinson v. Peake, 21 Vet. App. 545, 553 (2008) ("[T]he Board is not required *sua sponte* to raise and reject 'all possible' theories of entitlement . . . .").
[16] *Clemons*, 23 Vet. App. at 3.
[17] 25 Vet. App. 45, 47 (2011). The Court also adjudicated the issue of entitlement to a rating greater than 20 percent for a low back disability; however, its disposition did not involve a discussion of the scope of any claim.
[18] DeLisio v. Shinseki, 25 Vet. App. 45, 47 (2011).
[19] *Id.* at 48.

By June 2006, the Veteran had been diagnosed with peripheral neuropathy, diabetic neuropathy, and diabetic polyneuropathy, with symptoms of tingling, numbness, and decreased sensation of the left-lower extremity.[20] The RO granted service connection on a presumptive basis for diabetes and assigned an effective date of June 5, 2006, the date of the Veteran's express claim for service connection for diabetes.[21] The RO also granted service connection for peripheral neuropathy as secondary to diabetes and assigned an effective date of June 5, 2006.[22]

On appeal in December 2008, the Board concluded that the scope of the Veteran's October 31, 1980, claim for service connection did not include a claim for diabetes because "[t]he [V]eteran could not claim a disorder that was not diagnosed. Nor did he."[23] The Board found that the Veteran was first diagnosed with diabetes mellitus in 2000 and with peripheral neuropathy in 2001.[24] The Board found that medical evidence thereafter showed that the peripheral neuropathy was a result of diabetes.[25] As such, the Board tied the claim for service connection for peripheral neuropathy with the claim for diabetes.[26] The Board ultimately held that the Veteran was entitled to an effective date of June 5, 2005, for both diabetes and peripheral neuropathy.[27]

In *DeLisio*, the Court found the Board's assignment of an effective date of June 5, 2005, for diabetes and peripheral neuropathy was clearly erroneous.[28] The Court held:

> [W]hen a claim is *pending* and information obtained reasonably indicates that the claimed condition is *caused* by a disease or other disability that may be associated with service, the Secretary generally must investigate the possibility of secondary service connection; and, if that causal disease or disability is, in fact, related to service, the pending claim reasonably encompasses a claim for benefits for the causal disease or disability, such that no separate filing is necessary to initiate a claim for benefits for the causal disease or disability, and such that the effective date of benefits can be as early as the date of the pending claim.[29]

The Court noted, "[W]e do not hold that claim for benefits reasonably encompasses a claim for unclaimed disabilities that are not the cause of the condition for which benefits are sought, or for unclaimed disabilities that arise as a result of the condition for which benefits are sought."[30]

The Court concluded that the Veteran's January 1994 claim for service connection for peripheral neuropathy "reasonably encompassed" a claim for service connection for diabetes because it was pending when he submitted his claim for diabetes in June 2006 and remained open when medical

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[20] *Id.*
[21] *Id.* at 49.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 49, 58.
[25] *Id.*
[26] *Id.*
[27] *DeLisio*, 25 Vet. App. at 48-49; 38 U.S.C. § 5110(g) (2012); 38 C.F.R. § 3.114(a)(3) (2014) ("If a claim is reviewed at the request of the claimant more than 1 year after the effective date of [a liberalizing law or issue], benefits may be authorized for a period of 1 year prior to the date of receipt of such request."). *But see DeLisio*, 25 Vet. App. at 48-49 (noting that, pursuant to 38 C.F.R. section 3.816(c)(2) (2014), the Veteran "was a '*Nehmer* class member' and potentially entitled to an effective date for benefits for diabetes earlier than the date presumptive service connection for diabetes was authorized.").
[28] *DeLisio*, 25 Vet. App. at 47.
[29] *Id*. at 55 (emphasis in original).
[30] *Id.; see also* KL v. Brown, 5 Vet. App. 205, 208 (1993) (noting that the record lacked evidence indicating an intent to apply for service connection for PTSD).

evidence found diabetes was the cause of his peripheral neuropathy.[31] The Court also concluded that the Veteran's October 31, 1980, claim for numbness of the leg was never finally decided and thus still pending; therefore, the cause of the numbness of the leg had not been established, and "the full scope of that claim ha[d] not yet been determined."[32] If it were determined that the Veteran's numbness of the leg were causally related to his diabetes, his October 31, 1980, claim would "reasonably encompass" a claim for service connection for diabetes and, in turn, for peripheral neuropathy.[33] Accordingly, the effective date for the grant of benefits for both peripheral neuropathy and diabetes could be as early as October 31, 1980.[34]

A. <u>Potential Causal Disabilities</u>

The holding in *DeLisio* allows for the adjudication of any disabilities that may be associated with service and that the record reasonably indicates caused the claimed and pending disability.[35] The Court in *DeLisio* did not provide specific guidance for determining when the record reasonably indicates that the claimed disability is secondary to a non-pending causal disability. However, one unpublished case shows an example of how the Court has applied the holding in *DeLisio*.

In *Clark v. Shinseki*,[36] the Board referred the issue of entitlement to service connection for cervical spine degenerative disc disease and denied the claim for a left arm disability. The Court found that the Veteran's cervical spine degenerative disc disease and his left arm symptoms were inextricably intertwined, and it concluded that the Board erred in denying the claim for service connection for a left arm condition because the cervical spine disability was a possible cause for the left arm disability. Significantly, the Court's decision does not clearly address how it applied *DeLisio* to broaden the claim for the cervical spine disability to reasonably encompass the claim for a left arm disability.

In *Clark*, the Veteran complained of neurological symptoms involving the left arm.[37] The record contained an examination for a neurological disability in which the Veteran was diagnosed with cervical radiculopathy.[38] The Board noted that the Veteran's left-arm neurological symptoms had been attributed to cervical spine degenerative disc disease, which the Board referred back to the RO for development; however, it then denied service connection for left arm neurological symptoms because "there [wa]s no basis to attribute these symptoms to a separate disability."[39] In addition, the Veteran "himself related his left arm condition to his cervical spine condition."[40] Accordingly, the Court found that the Veteran's left-arm complaints could be related to the cervical spine degenerative disc disease, which was not before the Court, and remanded the case to the RO for a determination regarding service connection for the cervical spine condition in the first instance, such that a determination as to secondary service connection for the Veteran's left arm condition could be made thereafter.[41]

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[31] *DeLisio*, 25 Vet. App. at 55-56.
[32] *Id.* at 54 n.9, 58.
[33] *Id.* at 59-60.
[34] *Id.* at 56.
[35] *Id.* at 60 n.14.
[36] Clark v. Shinseki, 10-1892, 2012 WL 432280 (Vet. App. Feb. 13, 2012).
[37] *Id.*
[38] *Id.* at *3.
[39] *Id.*
[40] *Id.* at *6.
[41] *Id.*

The reasoning behind the Court's decision in *Clark* is unclear. The Veteran in *Clark* was diagnosed with cervical radiculopathy, but the Court did not cite the specific medical evidence that specifically indicated that degenerative disc disease caused the upper extremity radiculopathy.[42] It seems that the Court based its decision primarily on the Board's finding that that the left arm symptoms may be related to the Veteran's non-service-connected cervical spine degenerative disc disease. It is unclear from the Court's decision whether the Board based its finding on medical evidence. On the other hand, it is possible that the Court considered that the Veteran's lay argument that the left arm symptoms may be related to the cervical spine degenerative disc disease was a reflection of the Veteran's intent to submit a claim for the cervical spine degenerative disc disease. Either way, the lack of clarity in the Court's decision may cause misapplication of the holding in *DeLisio* going forward, as *Clark* seems to suggest that if the Veteran contends that the claimed disability is secondary to a causal disability that is not currently pending, the Veteran's argument alone is sufficient to show that the pending claim reasonably encompasses a claim for the alleged causal disability.

B. Consequences of *DeLisio*

Though *DeLisio* certainly conforms to VA's pro-Veteran ideology, its holding raises two legal quandaries.

First, even though the intent to seek benefits and a communication in writing have long been requirements to establish a claim,[43] *DeLisio* allows VA claims adjudicators to infer a claimant's intent to seek benefits for a causal disability.[44] Further, established law provides that the mere existence of medical evidence referencing the disability does not raise an informal claim for benefits.[45] In the wake of *DeLisio*, VA adjudicators are required to consider the "causal chain" between an initially claimed disability and service. Adjudicators are then required to consider in the first instance the non-pending causal disabilities that fall within that "causal chain," and infer claims for benefits for such disabilities. Potentially, medical evidence alone may show a causal relationship between a non-service-connected causal disability and a pending claimed disability. Accordingly, this "information" may be sufficient evidence on which VA adjudicators may rely to infer a claim for entitlement to benefits for the causal disability.[46] As the Court stated, no additional filing would be necessary to initiate a claim for service connection for that causal disease or disability.[47]

Thus, *DeLisio* is inconsistent with prior law providing that requirements for a claim include the intent to seek benefits and a communication in writing.[48] Consequently, VA adjudicators such as the Board will likely be cautious to apply *DeLisio*, despite its pro-Veteran ideals, as application

[42] *Id.*
[43] 38 C.F.R. §§ 3.1(p), 3.155(a) (2014).
[44] DeLisio v. Shinseki, 25 Vet. App. 45, 55 (2011).
[45] Criswell v. Nicholson, 20 Vet. App 501, 504 (2006). The only exception to this rule pertains to informal claims for an increased rating for a disability raised by medical records demonstrating a worsening in the Veteran's condition. *See* 38 C.F.R. § 3.157(b) (2014); Massie v. Shinseki, 25 Vet. App. 123, 132 (2011).
[46] *See DeLisio*, 25 Vet. App. at 55 (holding that if *information* obtained during the processing of the claim reasonably indicates that the cause of the condition is a disease or other disability that may be associated with service, the pending claim reasonably encompasses a claim for benefits for the causal disease or disability) (emphasis added).
[47] *Id.* (citing Clemons, 23 Vet. App. at 5-6 (holding that a claim for benefits "may reasonably be encompassed by several factors, including . . . information . . . that the Secretary obtains in support of the claim")).
[48] *See* 38 C.F.R. §§ 3.1(p), 3.155(a).

thereof may result in errors under law and may cause decisions to be set aside by a higher court. On the other hand, VA adjudicators who readily apply *DeLisio* may be inferring claims for which the Veteran never intended to receive benefits, thereby substantially imposing additional burdens on VA with no intended benefit flowing to the Veteran.

Second, the Court's holding in *DeLisio* seems to imply that the Board has jurisdiction over claims for service connection where established law has limited the Board's jurisdiction. The Board has jurisdiction over questions of law and fact pertaining to claims for benefits that are on appeal for review.[49] *DeLisio* provides that if the record reasonably shows that a claimed disability is secondary to a causal disability that is not pending before the Board and that may be associated with service, the Board may make a determination as to service connection for the causal disability in the first instance.[50] The Board has applied this holding to circumstances that are analogous to the facts in *DeLisio*, where there was medical evidence to support a determination that the claimed disability was secondary to an unclaimed causal disability.[51] Thus, where the RO has denied a claim for service connection for a causal disability and that claim is not on appeal, the three-prong test in *DeLisio* seems to suggest that the Board's jurisdiction may extend to claims for service connection for the causal disability when the secondary disability is pending on appeal, which is significant consequence given a Veteran's right to one appeal within VA. It is unclear whether the Court in *DeLisio* intended for this effect, and there is no guidance for the Board regarding this circumstance.

It remains to be seen how the Court will reconcile these two issues with established law.

III. UNCLAIMED SECONDARY DISABILITIES

The Court in *DeLisio* expressly stated that "[i]t is important to note that we do not hold that a claim for benefits reasonably encompasses a claim for unclaimed disabilities that . . . arise as a result of the condition for which benefits are sought."[52] Despite this caveat, the Court's holding potentially causes confusion, and, consequently, claimants have repeatedly interpreted *DeLisio* as allowing for non-service-connected secondary disabilities to be raised by the record in claims for a casual disability that is pending for adjudication.

For example, in *Boza v. Shinseki*,[53] the Veteran Philip S. Boza argued that pursuant to *DeLisio*, he should be entitled to earlier effective dates for disabilities that were secondary to his service-connected diabetes.[54] Significantly, Mr. Boza made a claim for diabetes first and then later made claims for the medical conditions that are secondary to his diabetes.[55] The Court in *Boza* specifically noted the caveat in *DeLisio* that "we do not hold that a claim for benefits reasonably encompasses a claim for unclaimed disabilities that . . . arise as a result of the condition for which benefits are sought."[56] The Court stated that the outcome in *DeLisio* clearly did not apply to the

[49] 38 U.S.C. §§ 511, 7104, 7105 (2012); 38 C.F.R. § 20.101 (2014).
[50] *DeLisio*, 25 Vet. App. at 55.
[51] *See* No 10-10 838, 2013 WL 3767836 (BVA May 8, 2013).
[52] *DeLisio*, 25 Vet. App. at 55; *see also* KL v. Brown, 5 Vet. App. 205, 208 (1993) (the mere presence of medical evidence does not establish an intent on the part of the Veteran to seek secondary service connection for the condition.)
[53] Boza v. Shinseki, 10-3844, 2012 WL 1021476, *1 (Vet. App. Mar. 28, 2012) *aff'd*, 504 F. App'x 923 (Fed. Cir. 2013).
[54] *Id.*
[55] *Id.*
[56] *Id.* (citing *DeLisio*, 25 Vet. App. at 55).

circumstances of Mr. Boza's case.[57] The Court stated that "even when a disability is secondary to a service-connected disability, the veteran must still take affirmative action and make a claim in order to receive benefits for the secondary disability."[58]

In *Robertson v. Shinseki*,[59] the claimant's primary disability was PTSD, for which he was already service-connected. The claimant argued that his claim for PTSD should have been construed as encompassing the secondary disability of substance abuse.[60] The Court in Robertson stated that "*DeLisio* would apply only where substance abuse was the condition the appellant was initially seeking service connection for, and information obtained during the processing of the substance abuse claim reasonably indicated that PTSD may have caused the underlying substance abuse condition."[61]

Thus, though the Court cautioned on the misapplication of its holding in *DeLisio*, the holding potentially causes confusion and misapplication, including attempts to apply *DeLisio* to allow for non-service-connected secondary disabilities to be reasonably encompassed by pending claims for a causal disability.

CONCLUSION

As with any law that relaxes regulation of entitlement to benefits, *DeLisio* raises legal and practical challenges. First, by potentially allowing VA claims adjudicators to infer claims for service connection for causal disabilities from only medical evidence, *DeLisio* seems to render moot the requirements for a claim of intent to seek benefits and a communication in writing.[62] Second, confusion and lack of clarity regarding how to apply the Court's holding can lead to misapplication of its holding, as demonstrated by many claimants insisting that *DeLisio* requires VA claims adjudicators to broaden the scope of a claim to include any potential secondary disabilities not on appeal when the causal disability is already pending or service-connected.

Despite these quandaries, the fact remains that *DeLisio* significantly benefits Veterans and furthers VA's mission to adjudicate claims in a Veteran-friendly and non-adversarial system.[63] Therefore, it is unlikely that future case law will limit the holding in *DeLisio*. The trend in the past decade has been to broaden the scope of claims,[64] and courts will likely continue expanding their interpretation of which disabilities are "reasonably encompassed" by the record.

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[57] *Id.*

[58] *Id*. at *2 (citing *KL*, 5 Vet. App. at 208). *See also* Bolden v. Shinseki, 12-2280, 2014 WL 1246492 (Vet. App. Mar. 27, 2014) (may not be cited as precedent).

[59] Robertson v. Shinseki, 10-4072, 2012 WL 885005, *1 (Vet. App. Mar. 16, 2012)

[60] *Id.* at *2.

[61] *Id*. at *3.

[62] 38 C.F.R. §§ 3.1(p), 3.155(a) (2014); *cf.* DeLisio v. Shinseki, 25 Vet. App. 45, 55 (2011).

[63] *See* DeLisio v. Shinseki, 25 Vet. App. at 55 (citing Kouvaris v. Shinseki, 22 Vet. App. 377, 381 (2009)).

[64] *See e.g.*, DeLisio v. Shinseki, 25 Vet. App. 45 (2011); Clemons v. Shinseki, 23 Vet. App. 1 (2009); Ingram v. Nicholson, 21 Vet. App. 232 (2007).