



**FULFILLING OUR PROMISES**  
TO THE MEN AND WOMEN WHO SERVED

# NONPROFIT ADVISOR

For DAV Departments and Chapters

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LIFELINES AND LESSONS FROM THE *AUSMER* CASE

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In late October 2013, the United States Court of Appeals for Veterans Claims (CAVC) heard the appeal of Lt. Col. Wilson J. Ausmer, Jr. Apart from its obvious significance to Lt. Col. Ausmer, the case was noteworthy for three other reasons. First, it presented a novel issue concerning the application of the Servicemembers Civil Relief Act (SCRA), which protects active-duty military forced to neglect personal legal matters while in the service of our nation. Second, the case was heard in the courtroom of Harvard Law School (HLS), the venerable academic institution in Cambridge, MA. Third, the case evolved from the growing partnership between and among DAV, HLS and Chisholm, Chisholm & Kilpatrick, LTD (CCK), a highly regarded Rhode Island law firm.

Mr. Ausmer prevailed in this appeal and the facts of the case, interesting in themselves, provide valuable instruction for departments and chapters operating service programs in conjunction with DAV's National Service Program.

## 1. The Nature of the Case

In 2005, Mr. Ausmer was awarded VA compensation for disabilities incurred during many years of service in the Middle East. At some point, he sought service connection for an additional disability. His claim was denied at the regional office and, with the assistance of his DAV representative, he filed an appeal at BVA.

In early 2011, while the appeal was pending, Lt. Col. Ausmer was recalled to active duty in Afghanistan.

While he was deployed, the BVA denied his appeal and sent notice of the denial to his home address. That notice was sent in October, 2011. As a general rule, BVA denials must be appealed to the CAVC within 120 days.

Although Mr. Ausmer was aware of the BVA decision, he did not attempt to file an appeal while he was deployed. Eight months after the BVA denial, he was discharged from active duty. He subsequently filed his appeal with CAVC, but not until 192 days after his discharge and 440 days after the BVA denial. At that point, CAVC ordered him to show cause why his appeal should not be rejected as untimely.

## 2. The Two Delays

Mr. Ausmer's delinquency breaks down into two distinct periods: the eight months that he was still on active duty and the 192 days after his discharge.

### *a. The Active Duty Period*

The SCRA essentially stops the clock ticking on a statute of limitations for any period that an affected person is on active duty in the military. Although an appeal period is not technically a "statute of limitations," it does have much the same effect.

In the *Ausmer* case, CAVC held that the 120 day deadline for Mr. Ausmer to file his appeal of the BVA decision did not start to run until his discharge from service.



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*b. The Next 192 Days*

Unfortunately, Mr. Ausmer did not meet the 120 day post-discharge deadline. Due to the understandable readjustment issues that he faced following a long period of stressful service, he was unable to perfect his appeal until the 192<sup>nd</sup> day, 72 days later than would typically be permissible. Relying on another provision of SCRA – and giving it quite a liberal interpretation – CAVC determined, based on medical evidence, that the effects of Mr. Ausmer’s military service had “materially affected” his ability to file a timely appeal even after his discharge. The court then exercised its discretion under SCRA to grant him an additional 90 days on top of the 120 days to file his appeal. Mr. Ausmer’s filing fell within that enhanced deadline, so he will have the opportunity to contest BVA’s denial of his claim.

**3. Lessons From *Ausmer***

There are several lessons to be learned from this interesting case:

- In some cases, veterans returning from active duty may take advantage of extended filing deadlines. There is no reason to think that the logic of the *Ausmer* case would not, in appropriate circumstances, apply to filings at VA as well. A service officer should never decline to file a claim based on timeliness issues until and unless all avenues have been explored.
- If there is a timeliness issue, the claim should be filed immediately. Mr. Ausmer would have had a much easier time at CAVC had he filed within 120 days of his discharge. For the extra 72 days that he needed, he was required to gather medical evidence and to rely on the discretion and, frankly, the compassion of the court. As is appropriate, CAVC “bent over backwards” to accommodate this veteran with a long history of honorable service.
- This fine outcome involved the efforts of DAV, CCK and HLS. It is always important to have a strong team. That is why it is critical that CSOs and DSOs work in conjunction with NSOs to achieve everyone’s goal, which is a good result for the veteran.

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