

# VETERANS LAW JOURNAL

A QUARTERLY PUBLICATION OF THE COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

2026, Vol. II

## Remembering an Advocate, Friend, Professor, Storyteller, Judge, Father, and Husband – A Tribute to Judge Greenberg

by Mary Tang



On Tuesday, May 12, 2026, over 150 members of the veterans law advocacy community celebrated the life and service of the Honorable William S. Greenberg at the E. Barrett Prettyman Federal Courthouse in Washington, D.C. The afternoon sparkle of the sun with a twinkle in the sky aptly matched the giant personality that graduated much too early from all that he wanted to continue to accomplish while sitting at 625 Indiana Avenue, N.W.

As Clerk of the Court Tiffany M. Wagner called the ceremony to order, the sea of sitting judges—Chief Judge Allen; Judges Pietsch, Bartley, Meredith, Toth, Falvey, Lauer, and Jaquith; and Senior Judges Greene, Hagel, Moorman, and Schoelen—reflected the impact that Judge Greenberg had on the bench and on his colleagues. Judge Greenberg's family and numerous former law clerks were in attendance.

Chief Judge Allen announced that the National Veterans Law Moot Court Competition has renamed their Outstanding Oral Advocate Award after Judge Greenberg.

*Advocate.* Judge Toth began his remarks lightheartedly, sharing that he felt that he was part of the Frank Sinatra “Rat Pack” whenever he dined with Judge Greenberg at the Capital Grille downtown. Judge Greenberg’s lunch invites would turn into a hobnob, as “every person knew him.” Those lunches also revealed the *advocate*, sharing how the law is about people, principles, and connections.



Members of the veterans law advocacy community, including sitting and senior judges of the U.S. Court of Appeals for Veterans Claims, gather for a tribute ceremony honoring the life and service of the Honorable William S. Greenberg. [Photo credit: John Leon].

*Friendship.* Chief Judge Allen delivered remarks from former Chief Judge Bruce E. Kasold, who dubbed himself and Judge Greenberg as *The Odd Couple*. Even though Judge Greenberg disagreed with him the most on the law, he complemented him just as perfectly. Relationships mattered to Judge Greenberg above all else. Judge Greenberg was “born to be a judge” and asked for cases on his first day, ready to work.

*Storyteller, Professor, & Judge.* Eric Oppenheimer, his former senior law clerk, regaled how Judge Greenberg was the “greatest performer at lunch” and how he “selflessly lived.” He was a force of nature

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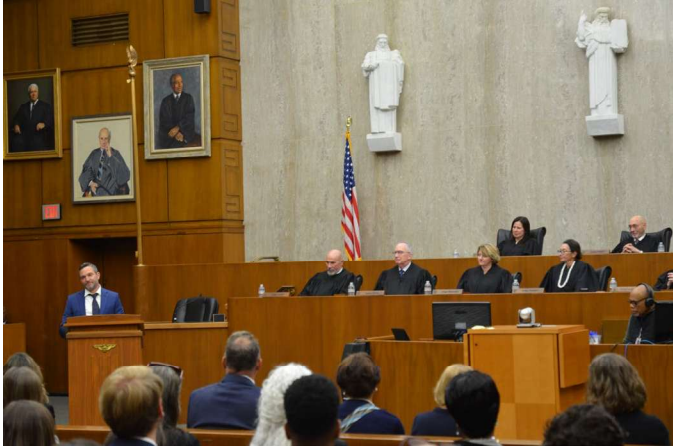
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while teaching and loved being an adjunct professor at Georgetown University Law School. Eric noted how Judge Greenberg was proud he was number one

in producing the most single-judge decisions; he also has cited *Hayburn's Case*, 2 U.S. 409, 410 n. (1792) 2,362 times. And most importantly, he cherished his family.



Judge Greenberg's former senior law clerk, Eric Oppenheimer, addresses the audience at the remembrance ceremony. [Photo credit: John Leon].

For more, see the Congressional Remembrance published on May 11, 2026:  
<https://www.congress.gov/119/crec/2026/05/11/172/79/CREC-2026-05-11-pt1-PgS2195.pdf>.

Mary Tang is a former judicial law clerk to Judge Joseph L. Toth.

Photos provided by John Leon.

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## Message From Chief Judge Allen

Colleagues and friends,

Happy summer! Wishing you all lots of sunshine, BBQs, and beach days in the coming months!

The Court continues to be busier than ever. In March 2026, the Court received 965 appeals, the second highest monthly total number of appeals in the Court's history. In April 2026, we received 940 appeals. If historical trends hold, the Court usually receives more appeals in the second half of the fiscal

year than the first half. This means that we anticipate our appeal numbers will continue to rise. At our current pace, we estimate the Court will receive between 11,500 and 12,000 appeals this fiscal year.

In addition, on March 26, 2026, the Court heard oral argument in *Williams v. Collins*, No. 24-2592, at Albany Law School in Albany, N.Y., presided over by Judge Jaquith in his hometown. This outreach trip was rescheduled from a trip planned in February that was canceled due to weather. Thank you to all Court staff, including my colleagues Judge Toth and Judge Jaquith who sat on the panel with me, and counsel for traveling to attend this outreach event. We participated in a question-and-answer session with the students, and the law school hosted a reception for all of us to meet the students and faculty. It was a very successful outreach trip and another great opportunity to get the word out about our Court and veterans law.

On April 29, 2026, the Court held oral argument before the en banc Court in *Boehringer v. Collins*, No. 23-7995. As you all know, it is rare that we hear argument before the full Court. I enjoyed the lively discussion with counsel and great questions from my colleagues on an important component of the AMA. And we have another en banc oral argument on July 22, 2026, in *Martin v. Collins*, No. 24-4893.

The Court also made some time for fun this past quarter. On April 23, 2026, the Court, in partnership with the Bar Association, hosted Bring Your Kid to Work Day. Nearly 40 children of all ages participated! Clerk of the Court Tiffany M. Wagner welcomed the families, and Judge Bartley provided an overview of the Court to our visitors. The children then participated in a "Court Explorer Passport" event where they received stamps for visiting each department of the Court with activities along the way. The event ended with craft projects in the library. Thank you to all who participated and special thanks to Rosy Garza, who spearheads this operation and does an outstanding job each year!

On April 9, 2026, the Court held its quarterly employee recognition ceremony in conjunction with what's becoming one of my favorite Court traditions: Spirit Week and the Annual Chili Cook-Off! Court employees wore their favorite hats and dressed in denim or western gear throughout the week, leading up to "Court Swag Day" on Thursday, when we gathered to enjoy a hot dog lunch and honor the accomplishments of our staff over the past quarter. I always appreciate the opportunity to gather as a Court family, meet our new employees, and applaud the hard work they do each and every day. It was a great week that made me proud to be part of this fantastic team!

Our Court team has also been hard at work on developing our new case management system, ACMS. As a reminder, our new implementation date for ACMS is October 1, 2026. At that time, all new cases will be filed in ACMS. Cases that were filed in CM-ECF will continue in CM-ECF. In the coming months, the Court will work with some external stakeholders to test ACMS by filing simulated and, eventually, real cases before the October 1 implementation date. The goal is to have those stakeholders provide feedback and have our Court staff proficient in the processing of cases to ensure a smooth implementation. This project has been complex and, at times, difficult, but it is vitally important to ensure that the Court can continue to process appeals at the accelerated rate we continue to receive them. Our team is dedicated to getting this done right, and we appreciate your patience as we continue our hard work.

As we start a new chapter in case management, another chapter is coming to a close. On June 24, 2026, Judge Bartley will retire from active service on our Court. She began her term as judge in June 2012 and served as Chief Judge from December 2019 to September 2024, expertly guiding our Court through the Covid pandemic and a transition to full telework when needed. Her commitment to veterans and their families has been steadfast. She will be greatly missed, and we wish her all the best as she begins her retirement!

Finally, I want to thank everyone who attended the Court's memorial session celebrating the life and service of Judge William S. Greenberg on May 12, 2026. It was wonderful to see our community come together to honor and remember Judge Greenberg and his contributions to the law. I believe he would have been very happy to see the outpouring of support for his family and that we all gathered in his honor. These are the moments that put into perspective the importance of the work that we do together and the community we have built.

Enjoy your summer!



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## Message From Bar Association President Meghan Gentile

Dear Fellow Bar Association Members,

Happy summer to everyone at the Bar Association! As we enjoy the warmer weather, the Bar Association is happy to continue to provide opportunities for us to gather and collaborate.

We were recently honored to contribute to Judge Greenberg's memorial ceremony at the E. Barrett Prettyman U.S. Courthouse in the ceremonial courtroom on May 12th. I attended and can say with sincerity that the memorial was a wonderful way to honor Judge Greenberg and thank his family for sharing their beloved husband and father with us for as long as Judge Greenberg served on the bench.

Our next Bar Association event was on May 28th in the CAVC's library—it focused on the benefits and pitfalls of using artificial intelligence (AI) for veterans' law practitioners. Cari Sheehan, Assistant General Counsel at Taft Stettinius & Hollister, who has extensive experience in presenting and writing on ethics and AI best practices for practitioners, talked about the pitfalls and benefits of AI, as well as how to use this every growing technology. After, some members gathered for a happy hour near the CAVC. For more about Ms. Sheehan's presentation, see p. 12.

As 2026 hurtles onward, the Bar Association is already approaching the time for elections for next year's Board. We'll email all members specific deadlines for ballot submissions, but in the meantime, please take a moment to consider if you would like to join the Board of Governors or run for an officer position with the Bar Association. In my experience, it's a rewarding way to stay in touch with colleagues, especially with our geographically dispersed membership.

If you'd like to know more about running for the Board or for an officer position, keep an eye on your email for our upcoming call for ballots and email me directly if you have any questions.

If you have any job postings you'd like on our website, please reach out to me, and I'll post right away. I'm always happy to see new jobs in our area.

And as we continue to roll out our schedule of programs and events, email me—[meghan@suttonsnipes.com](mailto:meghan@suttonsnipes.com)—if there are any programs you'd like to see in the second half of 2026.

Thank you, and have a great summer,

Meg

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## CLERK'S CORNER

### CLS Practice Tips: Writing an Effective SOI for Your Rule 33 Conference

by Megan Heller and Katherine M. Ebbesson

The summary of the issues (SOI) is usually the first opportunity that the appellant's counsel has to frame the appellant's case and present it to the Secretary's counsel. If an SOI has well-framed arguments that are persuasive and easy to read, it is much more likely that the parties will reach a resolution during the Rule 33 conference. Even if it does not lead to an agreement between the parties, an effective SOI can be a springboard for the conference's discussion and refine the issues for briefing. On the other hand, if an SOI lacks clarity, it is less likely that the Secretary will be able to come to the conference with an offer and clear position. In addition, the Central Legal Staff (CLS) attorney facilitating the conference is less likely to be able to ask productive questions that would be likely to lead to a resolution.

Given the importance of the SOI, CLS staff compiled the tips below for drafting an effective SOI:

#### Know the Rules/Make Sure Your SOI Is Compliant

First thing is first: Ensure your SOI complies with Rule 33. Rule 33 is on the CAVC's website under the "Court Rules and Procedures" tab, or simply click the link provided in the Court order scheduling the conference. On the Rule 33 page, there is a link at the bottom that takes you to additional guidance if your questions aren't answered by Rule 33 itself.

Formatting matters! Under Rule 33, the SOI must be no longer than 10 pages (not including the record before the agency (RBA) excerpts). *See U.S. VET. APP. R. 33(b)(2)*. The SOI must also comply with the

CAVC's formatting requirements in Rule 32(b): The font must be 13-point or larger and the document must be double spaced. *See* U.S. VET. APP. R. 33(b)(2)(citing to Rule 32(b)).

In addition to basic formatting requirements, Rule 33 also requires the appellant's counsel to "cite to relevant authorities" and submit "pertinent material in the [RBA]." *See* U.S. VET. APP. R. 33(b)(1); *see also* "Procedural Guidance for Rule 33 Staff Conferences," [https://www.uscourts.cavc.gov/procedural\\_requirements.php](https://www.uscourts.cavc.gov/procedural_requirements.php). The SOI must include citations to both relevant law and to the RBA to properly comply.

It is important to provide the required RBA excerpts because the CLS attorneys review them before conferences; without them, the CLS attorney may not be able to facilitate an effective conference. Try to compile the excerpts in numerical order so that it is easy for the CLS attorney to locate evidence when they are reviewing the RBA. At the same time, please do not provide the entire RBA, documents that are not pertinent to your argument, or a copy of the Board of Veterans' Appeals (Board) decision, which can be pulled from the Court's docket.

You must redact any personally identifying information (PII) in the RBA excerpts provided. *See* U.S. VET. APP. R. 6(a). The guidelines for what material should be redacted can be found in Rule 6(b). *See* U.S. VET. APP. R. 6(b).

### **Know Your Audience**

Generally, both the Secretary's counsel and CLS attorneys know the law; unless there is a novel legal issue, there is no need to provide extensive rules statements or boilerplate language. You must cite the law but focus on the relevant caselaw. For example, if you are making an inadequate exam argument, focus on the law related to the error you are asserting occurred instead of listing the law for all the ways an exam can be inadequate. This will also improve your chances of having an effective SOI—because you only have 10 pages to make your arguments, focus on the best way to do that, which means discussing the most relevant law.

### **Make it Easy for the Reader to Agree, Understand, and Respond**

It is vital that you make it abundantly clear what issues you are appealing and what issues you are not appealing. List the issues you are appealing at the beginning of the SOI before you begin the argument. Then, clearly tie each issue to an argument—please don't leave it to a CLS attorney or the Secretary's counsel to guess the basis for remand for a particular issue. If you are arguing issues that are intertwined, make that explicit.

Unless it is central to the argument or somehow in question, there is no need to provide a long summary of the procedural history. Focus on what is relevant and what is needed for the Secretary's counsel and the CLS attorney to understand your argument.

Clearly state what relief you are seeking and the errors that you believe were made. Are you arguing that the Board's reasons or bases are inadequate? Are you arguing that there is a duty-to-assist error? Are you arguing both in the alternative?

Put your best foot forward—lead with your strongest and most important arguments and make sure they are fully developed. Be clear how the facts in your case support remand under the relevant law. If there is evidence on point for an argument, please cite it. And it cannot be stressed enough—cite the specific pieces of evidence in the RBA that support your arguments. Citing to the Board decision is not enough.

If you find memorandum decisions that are on point and either factually similar or address a novel legal issue, it can be helpful to cite them in the SOI. Similarly, if you have received joint motions for remand in the past that you believe are informative, especially if they come from multiple teams at the Secretary's office, it is often helpful to mention them in the SOI or, at least, to have them on hand during the conference.

Please don't forget to address prejudice. In addition, if there has been further development at the agency

level that might impact the issue/issues on appeal, be candid about that.

At the end of the day, the easier you make it for the Secretary's counsel and the CLS attorney to review the evidence and understand the arguments, the more likely the Secretary will come to the conference with a clear position and be able to answer questions, and the more likely the CLS attorney will be able to facilitate a productive discussion.

### **You Catch More Flies with Honey**

Finally, as the saying goes, "you catch more flies with honey than with vinegar." In other words, tone matters. Even if you are frustrated with the delay, the process, or prior remands, keep it professional. Every interaction with opposing counsel leading up to the conference (and during the conference) matters. Coming into the process with an open mind and positive attitude can do a lot more legwork than you might think.

### **Best Practices for Better Conferences**

We will leave you with a few more general practice tips to help you get the most out of Rule 33 conferences while maintaining good relationships with Secretary's counsel and CLS attorneys:

If either party realizes that the conference needs to be rescheduled, please reach out as soon as possible—don't wait until the last minute.

If an RBA issue arises late—after you are already preparing for the SOI—file a Rule 10 RBA dispute out of time (checking to see whether it is opposed) rather than waiting to raise the issue during the Rule 33 conference.

Remember that the CAVC Bar is small, and you're likely to end up working with opposing counsel and CLS again—work to build your professional relationship now, and it will help contribute to effective Rule 33 conferences in the future.

*Megan Heller is the Chief Staff Attorney/Deputy Clerk for the Central Legal Staff, Office of the Clerk of the Court.*

*Katherine M. Ebbesson is a Staff Attorney for the Central Legal Staff, Office of the Clerk of the Court.*

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## ***Veterans Law Journal* Accepting Submissions for Student Writing Competition**

The *Veterans Law Journal* invites law students to submit original articles for consideration in its Law Student Writing Competition. The winning submission will be published in the *Veterans Law Journal*, a nationally recognized forum dedicated to scholarship and practice in veterans law.

**Topic Focus:** Emerging Issues in Veterans Law

Submissions should address emerging, novel, or underexplored issues in veterans law and are encouraged to address recent or anticipated statutory or regulatory changes affecting veterans, or recent decisions from the CAVC and U.S. Court of Appeals for the Federal Circuit.

Submissions should demonstrate strong legal analysis, originality, and relevance to current or future veterans law practice. Each submission should be appropriately and carefully annotated to reflect the authorities that support the author's opinions and findings, and on which the author otherwise relies. While citations should follow Bluebook specifications, it need not be a law review "note"-style document.

**Eligibility:** Open to all currently enrolled law students at an accredited law school (J.D. or LL.M.), including third-year students graduating in spring 2026.

**Submission Requirements:**

- Articles must be original, unpublished work not under consideration elsewhere.
- Citations and formatting should conform to the VLJ Style Sheet and articles template (please email [megan@vetlawusa.com](mailto:megan@vetlawusa.com) to obtain copies).
- AI should not be used to write the submission aside from aiding in research.
- Word count: 3,000 words or less (not including endnotes, which are preferred for citations).

**Award:**

- Publication in the *Veterans Law Journal* for the winning article.
- One-year student membership in the CAVC Bar Association.
- One-year regular membership after graduation.
- Recognition at the CAVC's next Judicial Conference.

**Deadline:**

- Submission deadline: **September 28, 2026** by midnight EST.
- Submissions should be emailed to [megan@vetlawusa.com](mailto:megan@vetlawusa.com) with the subject line: Veterans Law Journal Student Writing Competition. Submissions must be accompanied by an email cover letter verifying the author's current law school enrollment and authorizing the CAVC Bar Association to publish the paper in the *Veterans Law Journal*.

Please contact editor-in-chief Megan Kondrachuk at [megan@vetlawusa.com](mailto:megan@vetlawusa.com) with any questions about the competition, and please share this information with any law students you know who may be interested in participating.

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## CAVC HISTORICAL SOCIETY

### Judge Greenberg: A Historical Legacy

by Amie Leonard

Our understanding of history can create social cohesion and a collective identity across generations. However, the study and preservation of history are often quiet and solitary tasks. Judge Greenberg had the rare ability to bridge the divide by employing his knowledge of history as a clarion call to his colleagues, the CAVC's current practitioners, and future generations that will one day take up the mantle of justice for our nation's veterans. His engaging and dynamic use of history contributed greatly to our shared history.

We need look no further than his over 2,300 citations to *Hayburn's* case—a 1792 case about the administration (or lack thereof) of the Invalid Pensions Act of 1792, an act of Congress intending to compensate indigent Revolutionary War veterans. He generally did not cite *Hayburn's* case for any dispositive veterans law principle, at least not in any instance that this author could find. Indeed, the U.S. Supreme Court ultimately avoided any merit-based questions in that case and dismissed the petition on standing grounds. Rather, Judge Greenberg's many references to *Hayburn's* case underscored our nation's earliest and ever-present challenges in satisfying the debt owed to our veterans. Those references also acknowledged the harm that delaying claims could have for both veterans and their families and encouraged us all to meet the challenge of delivering justice to veterans expeditiously. In citing *Hayburn's* case so often, Judge Greenberg was doing many things, but he was also keeping a shared history alive and emphasizing the importance of the public services that we all perform every day.

Judge Greenberg's use of history did not stop there; he also had a special way of communicating his impatience with the status quo in historical

references. Indeed, in one of his last judicial acts, Judge Greenberg spent time referencing historical authorities, including George Washington's 1796 "Farewell Address" to Congress, to disagree with the current limits in the law that prohibited him from awarding relief to a veteran. *See Battle v. Collins*, No. 25-2009 (Vet. App. Feb. 17, 2026). He consistently acknowledged the judiciary's founding principles. For example, while the CAVC has collectively cited *Marbury v. Madison*, 5 U.S. 137 (1803), over 830 times, at least 815 of those citations can be traced back to Judge Greenberg. *See, e.g., Burkhart v. Wilkie*, 30 Vet. App. 414, 428 (2019) (Greenberg, J., dissenting). He also referenced Justice Oliver Wendell Holmes and Arthur L. Corbin when asserting his preference for "the truth that hard cases make good law." *Bonner v. Wilkie*, 33 Vet. App. 209 (2021). Dissenting to what he believed to be the majority's narrow application of equitable tolling, Judge Greenberg relied on a 1770 quotation from Lord Mansfield: "Fiat justitia ruat caelum" (meaning let justice be done though the heavens fall), to assert that the CAVC should use its authority to apply the jurisprudence on equitable tolling more inclusively and more broadly. *Palomer v. McDonald*, 27 Vet. App. 245, 257 (2015) (Greenberg, J., dissenting) (referencing *Rex v. Wilkes*, (1770) 98 Eng. Rep. 327 (K.B.) 347 (Lord Mansfield)). And in honoring Justice Ruth Bader Ginsburg shortly after her death (who was also his civil procedure professor at Rutgers Law School), he shared in her, and Justice William Brennan Jr.'s, sentiments regarding dissenting opinions:

Dissents speak to a future age. It's not simple to say 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant view. So that's the dissenter's hope that they are writing not for today, but for tomorrow.

*Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 63 (2020) (Greenberg, J., dissenting) (quoting Ruth Bader Ginsburg and Malvina Harlan,

[www.npr.org/templates/story/story.php?storyId=1142685](http://www.npr.org/templates/story/story.php?storyId=1142685)). Judge Greenberg proudly went "on to write more separate opinions than all of his colleagues, besides former Chief Judge Bruce Kasold." *Remembering William Greenberg*, 172 Cong. Rec. S. 79 (daily ed. May 11, 2026).

In so many ways, Judge Greenberg made clear that expedient delivery of justice to veterans was of the utmost importance and that he dealt with hard cases because he believed they made good law. He publicly encouraged the CAVC and its practitioners to do more for veterans and their family members. His ethos is often cemented into his opinions through a vigorous application of history. The CAVC Historical Society appreciates Judge Greenberg for many things, but we are especially grateful for the time and attention that he gave to the Historical Society as the CAVC's judicial representative. We will be forever fond of how he engaged with and lived history through his opinions and force-of-nature personality. History, and those charged with preserving it, will remember Judge William S. Greenberg.

*Amie Leonard is vice president of the CAVC Historical Society. She's a law clerk for Judge Joseph L. Toth.*

## HISTORICAL SOCIETY: CALL FOR CONTRIBUTORS

The Historical Society is proud to announce a quarterly column in the *Veterans Law Journal* that will present a piece of history relevant to the practice of veterans law. If you are interested in contributing this the Historical Society column, please submit inquiries to [info@cavchistory.org](mailto:info@cavchistory.org).

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## CAVC Historical Society Announces Upcoming Elections

The CAVC Historical Society will hold elections this fall for a new Board of Directors. We invite all interested individuals to submit inquiries and nominations to: [info@cavchistory.org](mailto:info@cavchistory.org). We encourage anyone interested in supporting the Society's mission and future leadership to participate.

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## CAVC Hosts Bring Your Kid to Work Day

by Alyssa E. Lambert



*Clerk of the Court Tiffany M. Wagner addresses attendees at the Court's annual Bring Your Kid to Work Day event. [Photo credit: Rosy Garza].*

From a visit to the courtroom to a scavenger hunt across the CAVC to arts and crafts in the library, on April 23, the CAVC hosted its annual Bring Your Kid to Work Day for CAVC staff and CAVC Bar Association members and their children, grandchildren, and other young relatives.

Visitors started out in The Honorable Frank Q. Nebeker Courtroom where Clerk of the Court Tiffany M. Wagner called the CAVC to order. Judge Bartley then talked to the children about what the CAVC does and its crucial role for veterans, as well as explaining the various symbols on the CAVC's flag and emblem. After, the children explored the

courtroom and got to sit in the Judges' chairs and even bang the gavel.

Everyone was encouraged to participate in a Court-wide scavenger hunt that taught them the different departments and functions of the CAVC. Children were given a passport and could get stamps at each stop after asking a question and finding a hidden item. Highlights included checking out what the CAVC's marshals do to protect the building and its staff, seeing the inside of a computer in the Office of Information Technology, and taking pictures in judicial robes in front of a signed, framed copy of the Veterans' Judicial Review Act, which established the Court, among many other spots.

After the scavenger hunt, visitors returned to the CAVC's library for a fun arts and craft session that included making animal themed bookmarks and butterfly window hangers with beads.



*Alyssa E. Lambert is a legal editor at the CAVC and a former appellants' counsel.*

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## NOVA's Spring Conference Highlights Emerging Issues in Veterans Law

by Megan Kondrachuk

The 2026 National Organization of Veterans' Advocates (NOVA) Spring Conference once again brought together leading veterans law practitioners, advocates, and industry professionals, this time in sunny San Diego, California.

Held April 16–18, 2026, conference presenters explored recent developments in precedential case law; evolving standards for extraschedular TDIU claims due to *Witkowski v. Collins*; and discussed strategies for pursuing earlier effective dates, clear and unmistakable error claims, and toxic exposure litigation. Speakers also discussed practical issues facing advocates, including artificial intelligence, attorney fee disputes, electronic access tools within VA systems, record development strategies, and the effective use of medical and vocational evidence.



*NOVA President Christine Clemens leads a Q&A session with speakers from multiple conference presentations at the end of day two of the spring conference [Photo credit: NOVA].*

Day one also included an awards ceremony. Derek Debus and Samantha Greer were honored with the NOVA Distinguished Advocate Award for emerging leaders. Yelena Duterte received the NOVA Pro Bono Advocate of the Year Award for her dedication to providing legal services to veterans unable to afford representation. The Stetson University College of Law Veterans Law Institute was presented with the Veterans Community Service Award in recognition of its outstanding service to veterans and veterans advocacy programs.

Two emotional moments emerged during the ceremony: Amy B. Kretkowski was presented with the Kenneth M. Carpenter Achievement Award for Excellence, NOVA's highest honor for significant

contributions to veterans law and advocacy; and Katy Whalen, NOVA's Director of Operations, was surprised with the President's Award for her longstanding dedication and service to the organization. The surprise presentation was carefully coordinated, as Ms. Whalen was responsible for organizing much of the conference and awards ceremony.

Day two featured a presentation and lively question-and-answer session with the Honorable Cheryl L. Mason, Inspector General of the Department of Veterans Affairs. She provided valuable insight into oversight priorities and ongoing efforts within the Office of Inspector General (OIG). Audience questions focused heavily on what OIG is doing to improve the quality of contract examinations and combat unaccredited claims consultants engaging in business practices that hurt veterans.

Day three's workshop sessions focused on smaller presentations tailored to practical advocacy and law office management. Topics included the use of medical treatises, maximizing PTSD and TBI ratings, record development during AOJ supplemental claim hearings and informal conferences, leveraging expert witnesses, vocational and practice metrics, and mental health first aid for veterans.

As in prior years, exhibitors remained an important part of the conference experience. NOVA's increasingly popular "lightning round" vendor presentations allowed exhibitors to briefly showcase their services and resources provided in concise 2-minute presentations.

Finally, attendees had opportunities to socialize and experience San Diego. NOVA's social committee organized a City Lights Night Trolley Tour featuring several of the host city's most notable attractions. A "dine-around" event encouraged attendees to expand their professional networks by joining fellow attendees for dinner at designated restaurants throughout the city.

*Megan Kondrachuk is a senior associate attorney at the Law Office of Sean Kendall, P.C.*

## CAVC Bar Association Hosts Program on AI's Benefits and Pitfalls

by Mary Tang

Recognizing the expanding role that AI is having in the practice of law, the CAVC Bar Association wanted to offer members some additional guidance. On Thursday, May 28, 2026, Cari Sheehan, Assistant General Counsel at Taft Law, highlighted how veterans law practitioners can benefit from using AI as a legal tool but also warned us of the potential pitfalls when leaning on AI.

Although Sheehan's practice focuses on ethics compliance, her passion extends to the ethics of AI use and how it affects the legal and business community.

Over the course of two hours, the four-part presentation focused on the ethical duties of generative AI (GenAI); choosing safe GenAI products; case examples and citation vigilance; and practical implications/risk management of GenAI.

Sheehan began with an overview of AI history, sharing that AI technology began using specific input to output specific responses, such as the menu prompts encountered when calling your credit card company. She explained that GenAI, the next level of AI technology, uses "connections" to create a response, as if it is talking to you as a human being. For example, if you prompted GenAI to "write a motion in the voice of Dr. Seuss," then GenAI will source from its connections to review all of Dr. Seuss's works to write that motion. Finally, the current-to-next-level AI is Agentic AI, such as self-driving vehicles—more like the "robots" from the movies or stories.

Sheehan highlighted that AI use can be a good starting point—it can help overcome writer's block, distill and organize lots of legal information at once,

or help figure out the proper tone in emails to others.

Sheehan reminded attendees that the American Bar Association's Model Rules of Professional Conduct address ethical implications of AI use: Rule 1.1 explains a lawyer's duty to be technologically competent; Rule 1.4 addresses communications and disclosing AI; Rule 3.3 discusses a lawyer's duty to use candor with the Court; and Rules 5.1 and 5.3 discuss supervision and training of subordinates in the use of AI.



(L-R): John Juergensen, presenter Cari Sheehan, and CAVC Bar Association President, Meghan Gentile.

Next, Sheehan emphasized the importance of using GenAI safely. She advised reading "terms and conditions" in using Public GenAI tools, cautioning that, for instance, despite ChatGPT having a button that users can select to not save chats, the fine print indicates that it still saved chats for 30 days for "security purposes." But the company doesn't inform users when that chat has been deleted. So, when using Public GenAI, you should omit client information. The preferred tool is Enterprise GenAI because they are a bit "safer." She recommended Perplexity but warned this product is expensive.

Sheehan also reminded practitioners that GenAI results are discoverable—there is no confidentiality privilege. *See, e.g., U.S. v. Heppner*, 820 F.Supp.3d 292 (S.D.N.Y. Feb. 17, 2026). She also presented situations that have led to lawyer sanctions.

After giving attendees six different AI scenarios and their implications, Sheehan shared a helpful best practices checklist. She also gave a brief review of AI notetaking and transcription tools, which include bullet point summaries of the conversation, body tone, facial metrics, and other data points.

Sheehan concluded with a live demonstration of GenAI, asking ChatGPT ABA Model Rules questions. The Association adjourned to a nearby location for a brief social hour.

The recorded presentation is available at: <https://www.cavcbarassociation.org/benefits-and-pitfalls-of-ai>.

*Mary Tang is a former judicial law clerk to Judge Joseph L. Toth.*

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## Upcoming Events at a Glance

June 27: Korean War Memorial Washing

July 15: *Veterans Law Journal* planning meeting

September 29: CAVC Bar Association annual meeting (tentative)

TBD: *Veterans Law Journal* training

Fall 2026: CAVC Historical Society Annual Event

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## Federal Circuit Sheds Light on TDIU Analysis and Harmless Error Doctrine

By John Kitlas

Reporting on *Janich v. Collins*, 168 F. 4th 1371 (Fed. Cir. 2026).

The U.S. Court of Appeals for the Federal Circuit recently provided useful guidance in the often-

complex area of TDIU claims. The Federal Circuit also clarified how the doctrine of harmless error should factor into the CAVC's analysis of decisions by the Board of Veterans' Appeals (Board).

U.S. Army veteran Steven Janich sought TDIU due to impairment from his service-connected PTSD. In a September 2022 decision, the Board found that Mr. Janich's education, training, skills, and work history showed "a capacity for learning, training, and adaptability" that "would facilitate a return to substantially gainful employment in a suitable occupation." Of importance for purposes of this discussion, the Board's reasoning included a finding that Mr. Janich was "capable of occupations such as a warehouse worker, assembly line worker, or custodian, which are positions that would involve repetitive tasks without significant social interaction, such as a packer and sorter at a warehouse or a custodian at an office building," and which "could be performed largely independently without the need for constant supervision" or "constant communication with others." The Board stated that these examples were "not exhaustive but merely illustrative of potential occupations the Veteran could perform."

On appeal to the CAVC, Mr. Janich contended that the Board erred in finding he could maintain specific jobs because it did not provide any evidence that the jobs would involve limited social interaction. Mr. Janich asserted the Board had no foundation for concluding that the jobs it identified would have limited social interactions because it did not provide any evidence. Specifically, Mr. Janich asserted that, when making "core factual findings," the Board "must point to some concrete evidence in the record in support of these findings." However, in a March 2024 memorandum decision, the CAVC affirmed the Board's denial of TDIU. Citing to *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011), the CAVC stated that "a TDIU determination does not require any analysis of the actual opportunities in the job market." As the Board had no duty to identify actual jobs in the market that Mr. Janich could perform, the CAVC found the Board did not commit remandable error.

Mr. Janich appealed the CAVC's March 2024 memorandum decision. Sadly, he died before the Federal Circuit was able to adjudicate his claim. The veteran's surviving spouse, Hoa Janich, was substituted as the appellant in this case.

At the Federal Circuit, Ms. Janich asserted the CAVC made two legal errors. The first was that the CAVC ruled that the "substantially gainful employment" element of 38 C.F.R. § 4.16 is always satisfied by a Board finding of the veteran's physical and mental capabilities to perform various tasks, and to do work involving such tasks, without regard to whether the work enabled by the veteran's capabilities would be "substantially gainful," which excludes "[m]arginal employment," such as employment that produces annual income no higher than the official "poverty threshold for one person." The Federal Circuit noted that such a ruling as to the immateriality of the level of pay of the jobs enabled by the veteran's capabilities, if rendered by the CAVC, would involve a legal proposition and one that VA did not defend on its merits. However, the Federal Circuit concluded the CAVC's memorandum decision contained no such ruling, either explicitly or implicitly, and that Mr. Janich had not meaningfully and timely presented such an assertion. Therefore, it did not address the merits of this argument.

The second, and key, assertion of error was regarding Mr. Janich's challenge to the Board's recitation of three individual jobs as illustrative of the kind of employment he was capable of despite his difficulties with social interaction.

The Federal Circuit agreed that the CAVC appeared to have overread the holding in *Smith*. In pertinent part, the Federal Circuit emphasized that it did not rule in that case that the Board, in denying TDIU, does not ever have to identify and rely on particular jobs a veteran is capable of performing or that, if it does so, it need not have concrete proof of the jobs' characteristics that allow the veteran to do them. The Federal Circuit further stated that *Smith* does not make any error the Board committed here harmless regarding concrete proof.

The Federal Circuit also expressed concern regarding the CAVC's application of the harmless error doctrine in this case. Specifically, the Federal Circuit found that the CAVC's reasoning appeared to state a rigid rule inconsistent with the flexible, record-dependent standard governing harmless-error determinations, which the relevant court makes by asking whether a particular error was sufficiently likely to have made no difference to the outcome in the court under review and answering that question without making findings of fact the reviewing court is not authorized to make itself.

The Federal Circuit stated that, in the TDIU setting, that inquiry is not necessarily complete before identifying particular jobs and making findings about them, even accepting that, in some cases, no more may be "required" of the TDIU evaluation than assessing history, capabilities, skills, and training. The Federal Circuit acknowledged that, as a logical matter, the Board may find that a veteran can perform certain tasks based on the veteran's physical and mental capabilities (based partly on the veteran's education, occupation history, training, and medical treatment reports), without yet reaching a determination whether the veteran is able to secure and follow a substantially gainful occupation. In such circumstances, the Board's identification of a particular occupation may be an important basis for the Board's crucial finding of fact about the veteran's capability of the required gainful employment.

Looking to the facts of this specific case, the Federal Circuit noted that the CAVC did not state that the Board reached its conclusion about whether the veteran was unable to secure and follow a substantially gainful occupation independently of any finding about the illustrative examples. The Federal Circuit found that without a determination about the role the Board's finding about the illustrative examples played in its overall TDIU denial, it is impossible to say that, if the underlying finding cannot stand for lack of concrete evidentiary support, the Board's error was harmless. Consequently, the Federal Circuit concluded that

the CAVC's determination of harmlessness appeared to rest on legal error, and that it must revisit the challenge to the Board's treatment of the illustrative examples.

In summary, the Federal Circuit's holding in *Janich* reflects that while the Board need not demonstrate concrete proof that a veteran is capable of certain jobs for the purpose of assessing TDIU, there are circumstances where it must support a finding that a veteran can perform certain jobs with evidence and/or further explanation. Moreover, it emphasizes that the application of the harmless error rule is not designed to be rigid, but rather flexible and record specific. In other words, as with many claims for veterans benefits, the ultimate disposition is oftentimes dependent on the specific facts and circumstances of that particular claimant.

*John Kitlas is an attorney with the Board of Veterans' Appeals. The views and opinions provided by Mr. Kitlas are his own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. Mr. Kitlas is writing in his personal capacity.*

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## What Constitutes "One Disability?" Federal Circuit Clarifies That Distinct Definitions Apply for TDIU and SMC

by Issac Shore

Reporting on *Mackey v. Collins*, 170 F.4th 1380 (Fed. Cir. Mar. 30, 2026).

In this precedential opinion, the U.S. Court of Appeals for the Federal Circuit addressed whether distinct diagnoses, which combine to meet the "one disability" requirement for schedular TDIU, may also comprise "a service-connected disability rated as total" for the purpose of establishing special monthly compensation (SMC). Ultimately, the Federal Circuit resolved this question in the negative

and upheld the Court's denial of Terrance G. Mackey's claim for SMC.

Mr. Mackey, who served in the U.S. Air Force from 1986 to 1990, was granted a schedular TDIU rating in a 2009 decision in which a regional office (RO) reasoned that his various orthopedic service-connected disabilities—combining for a 90% rating—precluded him from obtaining or maintaining gainful physical and sedentary employment. Later, in 2018, Mr. Mackey filed two separate claims for SMC at the housebound rate, each of which the RO denied. Mr. Mackey appealed to the Board of Veterans' Appeals (Board), which denied his claim on the basis that he "did not have one service-connected disability that was rated totally disabling, nor was his TDIU rating based on one disability," as required under 38 U.S.C. § 1114(s), which details the requirements for SMC eligibility.

Mr. Mackey then appealed to the CAVC, which affirmed the Board's decision, prompting him to pursue his appeal of SMC before the Federal Circuit.

On appeal, Mr. Mackey offered two statutory interpretation arguments. First, he argued that section 1114(s) should include all TDIU ratings, regardless of whether they originate from one or multiple underlying disabilities. The Federal Circuit disagreed. The Court reasoned that because section 1114(s) uses both the singular "disability" and the plural "disabilities," Congress acted deliberately when choosing one term over the other. Consequently, the qualifying phrase of section 1114(s), which requires that the veteran have "a service-connected disability rated as total," explicitly demands that only a single service-connected disability rated as total qualifies for SMC under section 1114(s). Thus, because Mr. Mackey's TDIU rating was based on multiple service-connected disabilities, the Board properly denied SMC.

Alternatively, Mr. Mackey challenged 38 C.F.R. § 4.16, which sets forth the requirements for TDIU eligibility. Under § 4.16, a veteran has two paths to receive a TDIU rating: schedular and extraschedular TDIU. To qualify for schedular TDIU under § 4.16(a), a veteran must have either one disability

rated at 60% or more, or multiple disabilities with a combined rating of 70% or more with at least one of those disabilities rated at 40% or more.

Alternatively, § 4.16(b) is a catch-all provision for veterans who cannot meet the percentage thresholds of subsection (a) but nonetheless still qualify after special extraschedular review.

Mr. Mackey did not challenge the eligibility requirements for TDIU; instead, he argued that, because he qualified for schedular TDIU based on multiple orthopedic disabilities of a similar origin, his TDIU should, therefore, be classified as “one disability” under § 4.16(a). Thus, Mr. Mackey argued that even if SMC eligibility under section 1114(s) was restricted to TDIU ratings predicated on only a single service-connected disability rated as total, he still qualified because his underlying TDIU rating was based on “one disability” under § 4.16(a).

Once again, the Federal Circuit disagreed. The Federal Circuit reasoned that the “one disability” provision of § 4.16(a) is solely limited to show eligibility for TDIU benefits—not for SMC eligibility under section 1114(s). In support, the Federal Circuit cited the “one disability” provision of § 4.16(a), which begins with the qualifying phrase “For the above purpose . . . the following will be considered as one disability.” In other words, “one disability” is relevant for § 4.16(a) only; it cannot be plucked and placed into section 1114(s).

The Federal Circuit’s opinion should serve as a lesson for veterans and their advocates that, while disabilities that share a common etiology, affect a single body system, or were incurred in action or as a prisoner of war may count as one in a claim under § 4.16(a), the same is not true when pursuing additional benefits under section 1114(s).

*Issac Shore is a law student at the University of Florida Levin College of Law.*

## Federal Circuit Lacks Jurisdiction Over Attorney Fees Orders

by Sophie Feinberg

Reporting on *Kendall v. Collins*, 171 F.4th 1294 (Fed. Cir. 2026).

In *Kendall v. Collins*, the U.S. Court of Appeals for the Federal Circuit dismissed an appeal from a decision of the CAVC affirming a determination that an attorney fees agreement was unreasonable and must be reduced. The CAVC affirmed the Board of Veterans’ Appeals (Board) determination that VA’s Office of the General Counsel (OGC) correctly found that attorney fees were unreasonable, and the attorney was required to repay the excess amount.

Under 38 U.S.C. § 7263(d), “[t]he Court may affirm the finding or order of the Board and may order a reduction in the fee called for in the agreement if it finds that the fee is excessive or unreasonable. *An order of the Court under this subsection is final and may not be reviewed in any other court.*” (emphasis in the CAVC’s opinion).

Here, Mr. Sean A. Kendall (attorney) was appointed counsel for Mr. Martin L. Smith’s (veteran’s) disability benefits claim in September 2012. Mr. Kendall timely filed his fee agreement for 20% of the total amount of any past-due benefits. Mr. Kendall then filed a Notice of Disagreement (NOD) contesting a January 2012 regional office (RO) decision and arguing for a 100% disability rating. However, Mr. Smith had previously and independently filed his own NOD in February 2012 challenging the same January 2012 RO decision by raising a theory of entitlement to TDIU.

In October 2012, the VA granted a 100% disability rating without referencing Mr. Kendall’s NOD, which resulted in past-due benefits totaling \$33,374. However, in keeping with the fee agreement, VA determined that 20% of that amount, or \$6,356.50, was owed to Mr. Kendall. VA failed to withhold this

amount for Mr. Kendall and notified Mr. Smith that the overpayment would be deducted from his future benefits payments.

Subsequently, in September 2015, Mr. Smith filed an NOD challenging the reasonableness of Mr. Kendall's fee with OGC, arguing Mr. Kendall did little and that the award was based on the TDIU theory. In February 2017, OGC said a reasonable fee was \$623.44 and ordered Mr. Kendall to refund the fee paid.

Mr. Kendall challenged the OGC determination at the Board and at the CAVC. Both affirmed. He then appealed to the Federal Circuit.

Judges Dyk, Linn, and Stark heard the case. Judge Stark filed the opinion for the Federal Circuit.

The Federal Circuit held that although it usually has jurisdiction over questions of law under section 7292(a), congressional carveouts exist. The plain language within section 7263(d), as interpreted in *Carpenter v. Principi*, 327 F.3d 1371 (Fed. Cir. 2003), was one of them.

Mr. Kendall argued his appeal fell outside this jurisdictional bar because he did not challenge the determination that the fee was unreasonable, but instead challenged the CAVC's interpretation of 38 C.F.R. § 14.636(f), which indicates reasonableness can be rebutted if there is "clear and convincing evidence that a fee which does not exceed 20 percent of any past-due benefits awarded is not reasonable." Mr. Kendall argued that this regulation was invalid and inconsistent with 38 U.S.C. § 5904(a)(5), which noted that a "fee that does not exceed 20 percent of the past due amount of benefits awarded on a claim shall be presumed to be reasonable."

Therefore, Mr. Kendall argued, the legal question was within the Federal Circuit's appellate jurisdiction as outlined in section 7292(a) and summarized in *Forshey v. Principi*, 284 F.3d 1335 (Fed. Cir. 2002) (en banc), *superseded in part by*

*statute, Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820.*

Not so: The Federal Circuit held that such an argument was expressly rejected within *Carpenter*, highlighting that "when the [CAVC] makes a determination as to the reasonableness of a fee agreement, either in the first instance or on review of a determination by the Board, [the Federal Circuit] has no jurisdiction to review the resulting order of the Court."

Thus, relying on the plain language and legislative intent of section 7263(d) and the binding precedent in *Carpenter*, the Federal Circuit held that it lacked jurisdiction to review CAVC orders concerning the reasonableness of attorney fees agreements in veterans benefits cases. This remains true even in cases where the appellant frames the challenge as one involving statutory or regulatory interpretation rather than the fee determination itself.

Of note, Judge Dyk concurred, finding that *Carpenter* controlled the case outcome. However, Judge Dyk indicated that *Carpenter* was wrongly decided because "there is no evidence that Congress intended to bar review as to the validity and interpretation of rules set forth in statutes and regulations or constitutional issues." He also said that section 7263(d) should not be read to limit other regulatory, legal, and procedural challenges. Further, Judge Dyk wrote that attorney fees have changed since *Carpenter* and, citing *Johnson v. Robison*, 415 U.S. 361 (1974) and *Traynor v. Turnage*, 485 U.S. 536 (1988), Congress likely did not intend to "preclude judicial review of regulations establishing standards for determining the reasonableness of attorney[] fees." The jurisdictional bar, the judge reasoned, was meant to apply to fact-intensive issues and not regulatory or statutory challenges.

Relying on *Carpenter* and the plain language of section 7263(d), the Federal Circuit dismissed the appeal for lack of jurisdiction.

*Sophie Feinberg is a law student at University of Florida's Veterans and Servicemembers Legal Clinic.*

## Dealer's Choice: Court Decides Jurisdiction by Determining Mootness or Standing

by Charity Rohlfs, J.D.

Reporting on *Perciavalle v. Collins*, 171 F.4th 1364 (Fed. Cir. 2026).

In *Perciavalle v. Collins*, the U.S. Court of Appeals for the Federal Circuit addressed appeals from James M. Kernz, a U.S. Army veteran, and James J. Perciavalle, a non-attorney, VA-accredited agent. Both appeals were dismissed by the CAVC for lack of subject matter jurisdiction. Here, the Federal Circuit found that both appeals lacked standing because there was no additional relief to provide and thus no redressable injury.

The Federal Circuit summarized the issue as whether the CAVC may dismiss the appeals before it as moot based on the Board of Veterans' Appeals' (Board's) sua sponte grant of the entirety of the claimants' requested relief. The claimants' appeals both asserted that the filing of a Notice of Appeal (NOA) to the CAVC immediately divested the Board of jurisdiction; thus, any Board action was void, and not just voidable. The Federal Circuit held that both appeals lacked standing because there was no further relief to grant, and, therefore, it lacked jurisdiction and dismissed both appeals.

Mr. Kernz's appeal arose from a December 2016 regional office (RO) decision that denied his disability compensation claims. In August 2017, Mr. Kernz filed a Notice of Disagreement (NOD). In December 2019, the RO issued a Statement of the Case (SOC) confirming the denials. Mr. Kernz timely appealed the RO decision to the Board in January 2020 and opted in to the AMA system. On March 24, 2020, the Board incorrectly issued a letter to Mr. Kernz stating his appeal was untimely and dismissed it. Mr. Kernz filed a timely NOA to the CAVC, wherein he made clear that the only issue he was

appealing was the Board's March 24, 2020, letter that dismissed his appeal as untimely. As such, the only relief the CAVC could grant was to remand Mr. Kernz's case to the Board to proceed with his appeal of the adverse RO decision. While the CAVC appeal was pending, the Board acted sua sponte and, in two May 2020 letters, restored Mr. Kernz's case to the Board's active docket. At the same time, Mr. Kernz's CAVC appeal continued and on October 4, 2023, a six-judge majority decided that the appeal was moot because the Board corrected its previously erroneous dismissal. Mr. Kernz then appealed to the Federal Circuit. During the pendency of this appeal prior to the Federal Circuit decision, the government provided notice that the RO granted nearly all of the substantive claims Mr. Kernz had originally filed, and the one claim that was denied was part of a separate, ongoing appeal.

Mr. Perciavalle's appeal arose from his claim for fees from a successful representation of a veteran who was ultimately awarded past-due benefits. Mr. Perciavalle filed a claim for fees with the RO, which was denied on April 12, 2021. He sought Board review on the same day as the denial. The Board incorrectly rejected the appeal as untimely due to a miscalculation. Mr. Perciavalle filed a timely NOA to the CAVC in January 2022. While Mr. Perciavalle's appeal was pending before the CAVC, the Board sua sponte reinstated his case and found he was eligible for the full non-attorney fee.

Meanwhile, the Secretary filed a motion to dismiss the appeal as moot. The CAVC granted the motion to dismiss, concluding the appeal was moot because the Board provided the full relief available. Mr. Perciavalle then moved for a three-judge panel to review the dismissal of his appeal, which the CAVC stayed pending the en banc resolution of *Kernz*. Once the en banc order dismissing *Kernz* was issued, the CAVC granted Mr. Perciavalle's request for a three-judge panel, which held that *Kernz* necessitated a dismissal of Mr. Perciavalle's appeal. Mr. Perciavalle then timely appealed to the Federal Circuit asking it to overturn *Kernz* asserting that the failure to vacate the CAVC's dismissal of his appeal would lead to procedural chaos.

The Federal Circuit first explained its appellate statutory jurisdiction to review CAVC cases. The Federal Circuit emphasized that both appeals presented the same issue: whether the CAVC properly dismissed the claimants' appeals. This issue is a question of law to be reviewed de novo.

The Federal Circuit then addressed the subject matter jurisdiction requirement for cases and controversies. Determining if a case or controversy exists at the time of the appeal is the foremost requirement of standing. Likewise, determining if a case or controversy continues to exist during an appeal is the principal requirement of mootness. The Federal Circuit explained that it decides whether to address mootness or standing. If standing is missing or mootness present, the Federal Circuit does not have to address both. Here, the Federal Circuit decided to address both appeals by evaluating standing. Standing requires "an appellant must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). This includes circumstances where an appellant "no longer had any injury to redress" once the tribunal under review issued the appealed-from decision. *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

The Federal Circuit first reviewed Mr. Perciavalle's claim finding that he lacked standing because he received all the substantive relief he requested prior to filing his appeal to the Federal Circuit. As there was no additional relief to provide, beyond what Mr. Perciavalle had already received, he had no injury and lacked standing. Mr. Perciavalle's concern was that this allowed the Board to create "procedural chaos" and exercise dual or concurrent jurisdiction with the CAVC. The Federal Circuit emphasized that it was "not approving 'dual or concurrent jurisdiction'" between the CAVC and the Board. Rather, the record revealed that there was no injury in fact because there was no further remedy available; thus, Mr. Perciavalle did not have standing, and the Federal Circuit had no jurisdiction.

The Federal Circuit then explained that Mr. Kernz also lacked standing and acknowledged that two components of Mr. Kernz's claims had not been resolved. However, the Federal Circuit stressed that the only issue in Mr. Kernz's NOA was the timeliness of his Board appeal. As timeliness was the only issue raised and was resolved, Mr. Kernz lacked standing, and the Federal Circuit dismissed his appeal. The Federal Circuit reminded Mr. Kernz that he must file a separate appeal to raise the other issues, and that issues not addressed in the argument section of a party's opening brief are considered waived.

These two appeals remind practitioners to always establish a court's subject matter jurisdiction when seeking judicial relief. Standing requires an injury for which the court may grant relief. If the record before the court reveals there is no remedy available, the parties lack standing (jurisdiction) and the appeal will be dismissed. Moreover, practitioners must clearly assert all the issues they wish to appeal in their opening brief, otherwise they will be deemed waived. Furthermore, the Federal Circuit emphasized that there is no concurrent or dual jurisdiction between the Board and the CAVC. The Federal Circuit explained that the proper forum for veterans to challenge a Board decision is to timely appeal to the CAVC with all the issues presented in the appeal.

*Charity Rohlfs is an associate professor and chair of the paralegal and criminal justice programs at Midland College. The views and opinions provided are the author's own and do not represent the views of Midland College. The author is writing in a personal capacity.*

**Interested in writing a case summary or other content for the *Veterans Law Journal*?**

Join us at our virtual quarterly planning meeting on July 15 at 3 p.m. EDT or reach out directly to editor-in-chief Megan Kondrachuk at [megan@vetlawusa.com](mailto:megan@vetlawusa.com). A link to the meeting will go out to CAVC Bar Association members in the next few weeks.

## CAVC Grants Join Motion to Certify Class and Sets Fairness Hearing to Address VA Database Error That Closed Thousands of Veterans' Appeals

by Christopher Finelli

Reporting on *Freund v. Collins*, No. 21-4168 (Vet. App. Mar. 18, 2026) (per curiam order).

“This case has been pending before one federal court or another for almost 5 years.” In the latest development, the CAVC has granted the parties’ joint motion to certify a class and appoint class counsel and holding in abeyance the concurrent motion to approve the proposed settlement pending completion of the notice and fairness hearing.

In June 2021, the petitioners, Mr. Freund and Mrs. Mathewson, jointly filed a petition for extraordinary relief with the CAVC. They argued that VA “erroneously closed” their timely pending legacy appeals due to an “automated sweeping function” in the Veterans Appeals Control and Locator System (VACOLS), which was used to track and monitor appeals of regional office (RO) decisions before February 19, 2019. On the same day, the petitioners also filed a Request for Class Certification and Class Action (RCA).

In October 2022, the CAVC dismissed the petition and denied the RCA. As to the petition itself, the CAVC concluded, in part, that the “claims were moot because VA had reactivated their previously closed appeals.” As to the RCA, the CAVC denied class certification “after determining that the commonality and adequacy of representation prerequisites for class certification were not satisfied.”

In August 2024, the U.S. Court of Appeals for the Federal Circuit vacated the CAVC’s October 2022 decision. The Federal Circuit held that the case was

not moot because it satisfied the inherently transitory claim standard, that the proposed class definition provided “objective criteria” for membership, that the ascertainability requirement was “clearly met,” and that the Court abused its discretion when it concluded that the commonality and adequacy of representation requirements were not met.

In November 2024, the CAVC ordered supplemental briefing. However, shortly thereafter, the parties entered into settlement negotiations and requested a stay of the proceedings. After these negotiations, the parties reached a settlement and filed the joint motions in December 2025.

In the joint motion to certify, the parties asked the CAVC [1] to “certify a class consisting of all claimants with an appeal file in [VACOLS] that has been closed and remains closed,” and [2] appoint Mr. John D. Niles as class counsel. Regarding the settlement agreement, the parties agreed, in pertinent part, that VA will undergo a case-by-case review to identify appeals that were improperly closed between December 12, 1990, and February 6, 2025, “despite having potentially timely appeals,” and process them “expeditiously.”

The CAVC began its analysis by reviewing the requirements for class certification under Rule 23(a): [1] numerosity, [2] commonality, [3] typicality, [4] adequacy of representation, and [5] the Secretary or other agent of the Department of Veterans Affairs has acted or failed to act on grounds that apply generally to the class, so that final injunctive or other appropriate relief is appropriate. In addition to these Rule 23(a) prerequisites, the CAVC also highlighted the need to address [1] “whether a class action is superior to issuing a precedential decision,” [2] whether ascertainability was satisfied, and [3] the difficulties of manageability.

But before delving into its discussion, the CAVC noted three important factors. First, the CAVC noted that it was considering class certification “in the context of a proposed settlement.” The “second guide” was that the CAVC was “not writing on a

blank slate” given that the Federal Circuit “has weighed in authoritatively on certain certification-related questions in this case.” And third, the CAVC indicated the “uniqueness of the problem,” namely, “a settlement class in the shadow of a Federal Circuit decision,” which “makes our analysis unlikely to be useful in assessing classes in other contexts.”

Beginning with the numerosity element—all claimants with an appeal file in VACOLS that has been closed and remains closed—the CAVC acknowledged that this term does not include any “constraint on its face.” However, the CAVC read this term in concert with the proposed settlement agreement which “make[s] clear” that the class includes 28,258 appeals that had been automatically closed in VACOLS between December 12, 1990, and February 6, 2025. Given these synthesized facts, the CAVC had no difficulty concluding that this requirement was satisfied.

In addressing commonality, the CAVC noted that while the “proposed class here today is broader than the one the Federal Circuit considered,” it was still going to honor the “spirit” of the Federal Circuit decision. The CAVC made that choice given that the Federal Circuit “addressed commonality directly and determined that the commonality requirement was met . . . at that time.” The CAVC acknowledged that while not everyone in the proposed class will be injured by having their appeal wrongfully closed, every member of said proposed class is injured by having their appeal potentially “closed under the cloud of error,” and the proposed settlement addresses that injury for every member in a “common way.” After reiterating its “earlier caution,” the CAVC found the commonality element met.

Regarding typicality, the CAVC held that this element was “satisfied here in essentially the same way as the commonality prerequisite.” The CAVC acknowledged that the members of the proposed class were “affected by the same conduct by VA.” And because the petitioners’ claims share the “same essential characteristics of the proposed class,” the CAVC found the claims typical.

On adequacy of representation, the CAVC likewise noted that it was “bound” by the Federal Circuit’s holding because “in each case at the time of the filing of the complaints they had received no communication from the VA concerning the closure of their appeals.” The Federal Circuit indicated that this lack of communication is “all that is required for representation” since “petitioners suffered the same injury as the other proposed class members.”

Regarding the general applicability of the Secretary’s conduct, the “primary question” the CAVC focused on was whether the same relief is appropriate for both the representatives and members of the class. Here, the CAVC concluded that this element was met as each member of the class seeks the same injunctive relief—reinstatement of their erroneously closed substantive appeal.

Turning to ascertainability, the CAVC repeated the Federal Circuit’s binding holding that this element was “clearly met here because the class is defined by objective criteria—whether a claimant timely filed a Substantive Appeal yet had their appeal closed in VACOLS,” even though it was “not presently known which claimants will ultimately qualify for the class.” Accordingly, the CAVC took the Federal Circuit’s “logic” and applied it to the class in this case.

In addressing superiority, the CAVC held that the *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) balancing test was met. Under *Skaar*, a court will weigh these nonexhaustive factors to determine whether the presumption against aggregation is rebutted: whether [1] the challenge is collateral to a claim for benefits, [2] litigation of the challenge involves compiling a complex factual record, [3] the appellant record is sufficiently developed to permit judicial review of the conduct, and [4] the putative class has alleged sufficient facts suggesting need for remedial enforcement.

Regarding *Skaar* elements one and three, the Secretary conceded these points. As to the second *Skaar* element, the CAVC held that this factor “drops out of the equation in the context of a settlement class.” And on the fourth *Skaar* element, the CAVC

likewise highlighted that the proposed settlement agreement—i.e. a case-by-case review of 28,258 appeals—“basically recognizes the equivalent of the type of remedial enforcement that the fourth *Skaar* factor contemplates.”

Lastly, on manageability, the CAVC recognized that it need not consider manageability issues that may preclude class certification in this appeal “because the parties have agreed to a settlement.”

In conclusion, after “placing great weight on the Federal Circuit’s determinations,” and given the proposed settlement agreement, the CAVC held that proceeding as a class is appropriate. Accordingly, the CAVC appointed Mr. Niles, the chief executive officer of the firm Carpenter Chartered, as class counsel and directed the parties to implement the detailed notice provisions of the settlement agreement. After completing said class notice, the CAVC scheduled a Rule 23(e)(2) fairness hearing for August 13, 2026.

*Christopher Finelli is an attorney-advisor at the Board of Veterans’ Appeals. The views and opinions provided by Mr. Finelli are his own and do not represent the views of the Board of Veterans’ Appeals, the Department of Veterans Affairs, or the United States. Mr. Finelli is writing in his personal capacity.*

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## Divided Court Revisits the Reasons or Bases Requirement

By Giovanna Gibson and Sydnie Rouleau

Reporting on *Medlin v. Collins*, No. 24-3304 (Vet. App. Apr. 6, 2026).

The CAVC has affirmed the Board of Veterans’ Appeals’ (Board’s) denial of Alexander A. Medlin’s claim for service connection for a psychiatric disorder. The CAVC granted Mr. Medlin’s motion for reconsideration, withdrew its prior memorandum decision, and issued a precedential

decision addressing the Board’s duty to provide an adequate statement of reasons or bases under 38 U.S.C. § 7104.

Mr. Medlin served in the U.S. Air Force from 1985 to 1993, when he was honorably discharged for failing to meet Air Force weight standards. His claim for benefits centered on the theory that his in-service weight gain and alleged decline in performance were evidence of an in-service event or, alternatively, evidence that his psychiatric symptoms began during service. Although his service records documented weight management issues, reprimands, and eventual discharge, they also reflected positive performance evaluations, strong work performance, and a promotion near the end of his service.

Years after discharge, Mr. Medlin began receiving mental health treatment. Early treatment records included a 2005 note in which he denied a history of depression, anxiety, or related disorders. In 2007, he reported anxiety and anger-related symptoms, but the record also noted that he described his military service in favorable terms. In 2010, a treating physician noted that Mr. Medlin had experienced chronic depression and anxiety for approximately two to three years. Later, in support of his claim, Mr. Medlin submitted letters from his treating psychiatrist, Dr. Komareth, who opined that it was highly probable that Mr. Medlin had bipolar disorder for many years, including while he was in the Air Force.

The Board denied the claim. It found that Mr. Medlin’s service records did not show a decline in performance, that his reports of in-service psychiatric symptoms were not credible and that Dr. Komareth’s opinion was not probative because it relied heavily on Mr. Medlin’s own reported history. The Board also determined that VA was not required to provide a medical examination because the evidence did not establish an in-service event, injury, or disease sufficient to trigger the duty to assist.

On appeal, Mr. Medlin argued that the Board failed to provide an adequate statement of reasons or bases. Specifically, he contended that the Board mischaracterized his military performance evaluations, improperly rejected his lay statements regarding in-service psychiatric symptoms, and wrongly discounted Dr. Komareth's favorable medical opinion. He also argued that the Board erred by failing to remand for additional private treatment records.

Judge Toth authored the majority opinion affirming. In doing so, the CAVC used the case as an opportunity to revisit the meaning of the Board's reasons-or-bases obligation. The CAVC emphasized that section 7104 requires the Board to provide enough explanation for the veteran to understand the precise basis of the decision and for the CAVC to conduct judicial review. However, the Court also made clear that the Board is not required to discuss every piece of evidence in the record or provide a line-by-line accounting of every factual detail.

The CAVC explained that a Board decision satisfies the reasons-or-bases requirement when, read as a whole, it addresses all material issues of fact and law, analyzes the credibility and probative value of the evidence, identifies which evidence it finds persuasive or unpersuasive, and explains why it rejected material favorable evidence. The CAVC cautioned against treating minor omissions or non-material misstatements as automatic reasons for remand where the Board's overall path can still be reasonably understood.

Applying that framework, the CAVC concluded that the Board adequately explained why Mr. Medlin's service records did not demonstrate a meaningful decline in performance. Although Mr. Medlin pointed to lower scores in certain evaluation categories, the CAVC concluded that the Board reasonably focused on the overall picture reflected by the records. Those records showed that, despite weight-related deficiencies, Mr. Medlin continued to receive positive evaluations, maintained strong work performance, and was promoted near the end of his service.

The CAVC also upheld the Board's credibility determination. The Board relied on several records that conflicted with Mr. Medlin's later reports that his psychiatric symptoms began in service, including his 1993 separation examination, the 2005 treatment note denying psychiatric history, the 2010 report identifying symptom onset only a few years earlier, and the 2007 note describing his military service in positive terms. The CAVC held that the Board permissibly weighed these records against Mr. Medlin's later statements made in connection with his claim.

As to Dr. Komareth's opinions, CAVC held that the Board did not err in assigning them limited probative value. Although Dr. Komareth was Mr. Medlin's treating psychiatrist, the Board found that his opinions were based largely on Mr. Medlin's own reports of in-service symptoms. Because the Board had already found those reports not credible, the CAVC held that the Board adequately explained why it discounted the opinions.

The CAVC also rejected Mr. Medlin's argument that his in-service weight gain itself may have been evidence of psychiatric symptoms. Mr. Medlin relied on medical reference material to argue that weight gain can be associated with bipolar disorder. But because that material was not before the Board, and because the CAVC declined to take judicial notice of the medical conclusions within it, the CAVC refused to evaluate the Board's decision through that lens. The CAVC reasoned that the Board had already considered and rejected the theory that Mr. Medlin's weight gain reflected psychiatric symptoms during service.

Finally, the CAVC declined to consider Mr. Medlin's duty to assist argument regarding missing private treatment records. The CAVC applied the doctrine of issue exhaustion, noting that the argument had not been raised earlier despite multiple opportunities to do so. Because Mr. Medlin had been represented during prior proceedings and the relevant information had been available for years, the CAVC concluded that entertaining the argument

for the first time on appeal would encourage piecemeal litigation.

Judge Bartley dissented. She argued that the majority's approach diluted the CAVC's review of Board factfinding and reasons-or-bases compliance. In her view, the Board failed to adequately address material evidence showing that Mr. Medlin's performance evaluations declined in multiple categories toward the end of service. Judge Bartley emphasized that this evidence was material because it could support Mr. Medlin's argument that he experienced an in-service event sufficient to trigger VA's duty to obtain a medical opinion.

The dissent also criticized the majority for weighing evidence in the first instance. Judge Bartley argued that rather than deciding for itself whether the lower performance marks were significant, the CAVC should have remanded for the Board to address that evidence. In her view, the majority's decision risked transforming reasons-or-bases review into a more deferential, rubber-stamp inquiry.

This case has now been appealed to the U.S. Court of Appeals for the Federal Circuit (No. 26-1885). *Medlin* is significant because it clarifies how the CAVC will evaluate the Board's reasons or bases obligations. The decision reinforces that the Board must address material evidence and explain its findings, but it need not discuss every detail in the record. For veterans and advocates, the case underscores the importance of clearly identifying favorable evidence, explaining why that evidence is material, and raising duty-to-assist arguments as early as possible.

*Giovanna Gibson is a law student, and Sydnie Rouleau is a staff attorney at Stetson University College of Law's Veterans Advocacy Clinic.*

## CAVC Reviews Error Notice and Clarifies That Only Findings Actually Favorable to Claimants Are Binding on Later Adjudicators

By Shahin Mirzaei

Reporting on *Ortega v. Collins*, No. 24-4799 (Vet. App. Apr. 13, 2026).

*Ortega v. Collins* clarifies two important matters in veterans law: whether a Board of Veterans' Appeals (Board) notice error under the AMA is prejudicial to the claimant and whether VA's finding that a disability preexisted service can bind later adjudicators when that finding is not favorable to the claimant. The CAVC held that because U.S. Army veteran Stephanie Ortega never attempted to submit any evidence, the notice error was harmless. The CAVC also explained that only findings that are favorable to the claimant are binding on later adjudicators.

In a September 2020 rating decision, VA granted Ms. Ortega service connection for cephalgia with a 30% rating, a 10% GERD rating, and a noncompensable left knee scar rating. VA also denied service connection for chronic fatigue syndrome (CFS), bilateral hallux valgus, and bilateral pes planus. Ms. Ortega appealed that decision to the Board, selecting the evidence submission docket. On her October 27, 2020, Notice of Disagreement (NOD), she stated that she had additional evidence in support of her modernized appeal and would provide it within 90 days. However, the Board never notified her of the date that it received her appeal, which marked the beginning of her 90-day window for submitting evidence under the AMA.

Instead, the Board waited more than three years before issuing a decision on April 4, 2024, granting a 50% rating for cephalgia and denying service connection for CFS, left and right foot hallux valgus, and left and right foot pes planus. The Board also

denied a rating higher than 10% for GERD and a compensable rating for left knee scars. Ms. Ortega appealed.

The CAVC addressed two matters: whether the Board violated Ms. Ortega's due process rights by failing to give timely notice of the receipt of her VA Form 10182 for purposes of the 90-day evidence submission window and whether an agency of original jurisdiction finding that foot conditions preexisted service was binding even though it was not actually favorable to her.

The CAVC held that because nothing suggested that Ms. Ortega tried to submit evidence with or following her NOD, her arguments regarding the notice error and any confusion caused by it were inconsequential. The CAVC further held that because the Board's error never actually harmed Ms. Ortega, it was not prejudicial to her, citing *Shinseki v. Sanders*, 556 U.S. 396 (2009), and *Slaughter v. McDonough*, 29 F.4th 1351 (Fed. Cir. 2022).

The CAVC then addressed VA's alleged errors. In September 2020, VA stated that the foot disabilities preexisted service and labeled the finding as favorable. The CAVC held that under 38 U.S.C. § 5104A, only findings that are *actually* favorable to the claimant are binding. The CAVC found the foot examinations inadequate because they were based on an incorrect legal premise and did not apply the proper standard for aggravation and service connection. The CAVC also found that the Board relied upon flawed medical opinions and failed to address contradictory evidence regarding the onset of Ms. Ortega's foot conditions. Accordingly, remand was required to correct these errors.

The CAVC also remanded the CFS claim, reasoning that the Board had mischaracterized the September 2020 examination. This examination showed that Ms. Ortega had arranged a work-up for CFS but had not completed it because of COVID-19 delays. The CAVC also remanded the GERD and left knee scar claims because the Board failed to address favorable evidence without providing adequate reasons or bases. The CAVC affirmed the 50% cephalgia rating.

Judge Jaquith concurred in part and dissented in part. He agreed with the remands but dissented from the majority's affirmance of the Board's 50% cephalgia rating. He reasoned that Ms. Ortega's request for a 60% rating reasonably raised extraschedular consideration, and the notice defects were prejudicial because they potentially deprived Ms. Ortega of an opportunity to submit additional evidence.

This case underscores that claimants must demonstrate prejudice when alleging violations of AMA's notice provisions. It also clarifies that only findings actually favorable to claimants are binding under section 5104A.

*Shahin Mirzaei is a recent law graduate from Penn State Dickinson Law.*

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## **Hawkins and Jones: Clarifying When a Board Letter Is Not a Final Decision**

by Gregory Davis

Reporting on *Jones v. Collins and Hawkins v. Collins*, Nos. 25-3797, 25-4538 (Vet. App. Apr. 14, 2026).

In this consolidated appeal, the CAVC addressed whether Board of Veterans' Appeals (Board) letters advising Lawrence Jones and Deveron Hawkins that their Notices of Disagreement (NODs) were untimely constituted final Board decisions that were subject to judicial review. The CAVC held that they did not constitute final Board decisions and granted the Secretary's motions to dismiss for lack of subject matter jurisdiction.

The appeal arose from March 2020 and June 2023 VA regional office (RO) rating decisions, which denied several claims submitted by Mr. Jones and by Mr. Hawkins, respectively. In March 2025, each party filed an NOD addressing select claims and

explained that he believed his appeal was timely because the notice he received regarding the denial of each claim was inadequate, and, therefore, the decision never became final. Each party also requested that the Board remand his claims to the RO with instructions to provide adequate notice, including hearing rights.

The Board sent Mr. Jones and Mr. Hawkins letters stating that it had received their NODs but could not docket their appeals because the NODs were not filed within one year of the contested rating decisions. The letters also stated that the parties could request good-cause time extensions if they believed their NODs were timely, and that a veterans law judge (VLJ) would determine whether each appeal was in fact timely. Additionally, the letters stated that if the parties did not respond, the Board would consider the matters closed. The notice letters differed only insofar as Mr. Jones' was issued on March 20, 2025, by the "Inbound Operations Branch" in the "Office of the Clerk of the Board," whereas Mr. Hawkins' was dated April 8, 2025, and included contact information for assistance but, instead of a signature block, contained the line "Signature from common," which appeared to be a placeholder.

Rather than respond to the Board's letters, Mr. Jones and Mr. Hawkins filed Notices of Appeal with the CAVC identifying the March and April 2025 Board letters as the decisions they respectively wanted to appeal. The Secretary moved to dismiss, arguing that the Board had not issued an appealable final decision but simply notified the parties that their NODs appeared untimely and provided them a path to obtain a formal timeliness decision from a VLJ. The Secretary distinguished the case from *Cardoza v. McDonough*, 37 Vet. App. 407 (2024), where the CAVC held that a Board letter refusing to docket an appeal constituted a final decision because it essentially ended the veteran's pursuit of benefits.

Mr. Jones and Mr. Hawkins opposed dismissal and contended that, as in *Cardoza*, the Board's letter was a written decision that included the Board's

finding that it would not process the appeal, explained that the reason was untimeliness, and effectively denied the issue he sought to pursue. The appellants also argued that under *Evans v. Shinseki*, 25 Vet. App. 7 (2011), the CAVC has jurisdiction to review the Board's refusal to take jurisdiction over a matter.

The CAVC rejected those arguments and agreed with the Secretary that the facts of the consolidated appeal were materially different from *Cardoza*. First, unlike the letter in *Cardoza*, the letters sent to Mr. Jones and Mr. Hawkins were not signed by a Board member. Rather, they appeared to be form letters issued by administrative staff and did not reflect consideration by a VLJ.

Second, the letters did not represent the Board's final refusal to process the appeals. Instead, they informed both parties that if they disagreed with the timeliness determination, they could respond within 60 days, and the matter would then be forwarded to a Board member for an appealable timeliness decision.

The CAVC explained that although the letters were in writing and stated that the NODs were perceived to be untimely, neither letter contained findings by a Board member that the appeals could not be docketed, nor did they claim to deny either appeal. Instead, they invited a response if the party wanted a formal decision by a VLJ on the timeliness issue. As the letters did not reflect the Board's outright refusal to process the appeals and did not have the same procedural impact as a dismissal, they were not final Board decisions under 38 U.S.C. § 7252.

Ultimately, the CAVC held that the March and April 2025 letters were not governed by *Cardoza* and were not appealable final Board decisions. Because no final Board decision existed, the CAVC lacked jurisdiction and granted the Secretary's motions to dismiss both appeals.

This decision reinforces that routine Board administrative letters identifying potential jurisdictional defects do not become appealable

decisions when they preserve a claimant's opportunity to obtain formal Board review.

*Gregory Davis is a law student at Stetson University College of Law's Veterans Advocacy Clinic.*

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## Federal Circuit Addresses the Scope of the *Chenery* Doctrine in Context of TDIU and Increased Rating Claims

by Beck Webster

Reporting on *Lewis v. Collins*, No. 2023-1867 (Fed. Cir. Feb. 27, 2026), nonprecedential.

In *Lewis v. Collins*, the U.S. Court of Appeals for the Federal Circuit issued a nonprecedential decision clarifying the scope of the CAVC's review of Board of Veterans' Appeals (Board) decisions.

In relevant part, the questions before the Federal Circuit were 1) whether VA had bifurcated TDIU from an underlying claim for an increased schedular rating, and 2) whether the CAVC, by affirming the Board's dismissal of a PTSD-based theory of TDIU, violated the *Chenery* doctrine. A hallmark of U.S. administrative law, this doctrine precludes a reviewing court from upholding an agency's adverse action on any grounds other than those that were stated at the time that it was undertaken. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87, (1943) (holding that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

Here, the appellant, Shirley Moore Lewis, was the surviving sister of veteran William Moore. Ms. Lewis's appeal stemmed from Mr. Moore's claim for an increased rating for PTSD and for TDIU.

The claim has a lengthy procedural history spanning back to a 1969 rating decision that granted entitlement to service connection for a muscle

damage disability. In April 1995, the VA regional office (RO) granted entitlement to service connection for PTSD and assigned an initial 30% rating. In a 2001 decision, the Board found that clear and unmistakable error (CUE) was committed in the 1969 rating decision and increased the disability rating for the muscle damage disability. In the same decision, the Board increased the rating for PTSD to 50%. Mr. Moore timely appealed the decision, requesting a 70% rating for PTSD and an effective date for service connection for this disability back to 1968, when he separated from service.

While that claim was pending, but in a separate claim stream, the RO granted entitlement to a 60% rating for degenerative disc disease in 2006 and notified Mr. Moore that, although TDIU was raised, it would not address the issue because his combined rating was 100%, which constituted the higher benefit.

In May 2011, the RO increased Mr. Moore's PTSD rating to 70% but denied entitlement to an earlier effective date. He timely appealed to the Board and during his hearing he insisted that he only intended to appeal the effective date issue and that "a 70[%] evaluation would fully satisfy" his increased rating claim. In a 2013 decision, the Board remanded entitlement to an earlier effective date for PTSD and dismissed entitlement to an increased rating for PTSD based on Mr. Moore's statements during the hearing.

In 2015, the Board denied entitlement to an effective date prior to April 1995 for PTSD. Mr. Moore did not appeal the 2013 or 2015 Board decisions.

In 2018, Mr. Moore filed a new claim asserting entitlement to an increased rating for PTSD, including TDIU. The RO denied the claim, and Mr. Moore appealed to the Board. In 2023, the Board denied entitlement to a rating higher than 70% for PTSD and found that TDIU was moot based on the veteran's current benefits. The Board noted the prior final decisions and that the appeal period before the Board did not extend prior to the 2018 claim.

Mr. Moore appealed to the CAVC, arguing that his TDIU claim was not moot, and began prior to the period on appeal.

The CAVC affirmed the Board's 2023 decision that TDIU was moot and held that the final 2013 Board decision dismissing entitlement to an increased rating for PTSD included entitlement to TDIU. Regarding an earlier effective date for PTSD, the CAVC additionally affirmed the Board's finding that the 2015 decision became final when the veteran elected not to appeal.

Mr. Moore argued that the CAVC violated the *Chenery* doctrine because the Board, in the 2023 decision on appeal, made no finding as to whether its 2013 decision also dismissed entitlement to TDIU.

Alternatively, Mr. Moore argued that VA had previously bifurcated the TDIU claim from the claim for PTSD in the 2006 notification letter and that the CAVC could not conclude that the 2013 Board decision was final regarding TDIU without additional fact-finding in violation of *Chenery*. See also *Locklear v. Shinseki*, 24 Vet. App. 311, 313, 318 (2011).

The Secretary responded that the CAVC did not violate *Chenery* because rather than making additional factual findings, it permissibly applied a different legal theory, namely that a claim for TDIU is considered part and parcel of an underlying claim for an increased rating. See *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998).

The Federal Circuit first addressed whether the RO's 2006 notification letter bifurcated entitlement to an increased rating for PTSD from TDIU and held that it did not. In doing so, the Federal Circuit distinguished Mr. Moore's claim from the claim in *Locklear*, because in the 2006 notification letter, the RO did not place TDIU into a separate adjudication path, but instead adjudicated entitlement to TDIU, bringing that claim stream to an end in 2006.

Regarding *Chenery*, the Federal Circuit agreed with the Secretary's argument and found that the CAVC

did not violate the *Chenery* doctrine by applying a different legal framework rather than making additional fact-finding. Specifically, the Federal Circuit noted that the CAVC properly applied the framework that a TDIU remains part and parcel of an underlying claim for an increased rating.

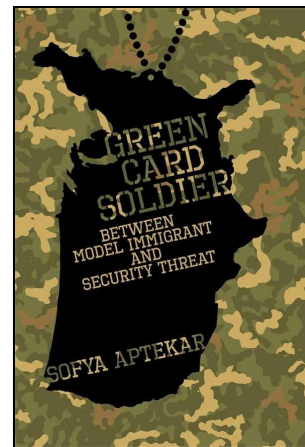
In sum, the Federal Circuit found that "[r]ather than engaging in additional fact finding or relying on a separate rationale, the [CAVC] simply identified a legal consequence of Mr. Moore's withdrawal of his increased rating claim," namely, that withdrawing an increased rating claim can include a withdrawal of entitlement to a TDIU as part and parcel of that claim.

*Rebecca "Beck" Webster is an attorney-advisor at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.*

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## Book Review of *Green Card Soldier: Between Model Immigrant and Security Threat*, by Sofya Aptekar

Review by Sophie Feinberg



The MIT Press, Cambridge, 2023. \$24.95 (paperback). 346 pages.

A common myth circulating in discussions of noncitizen servicemembers in the military is that immigrants who enlist receive automatic naturalization through their service.

*Green Card Soldier* turns many of the myths surrounding immigrants in the military on their head. The book offers deep insight into the immigration process and experience in relation to the military through a sociological lens, drawing on the stories of 72 immigrants from 28 different countries who were or are in the military. Using these interviews, as well as primary and secondary sources, Apkar examines the complex and diverse narratives and experiences that emerge from layers of identities and cultural, global, racial, and social structural forces, shaping a complicated experience and identity for servicemembers who did not enlist as citizens.

Apkar, who has a Ph.D. in sociology, is a professor of Labor and Urban Studies. She is also the author of *The Road to Citizenship: What Naturalization Means for Immigrants and the United States*. *Green Card Soldier* sits at the intersection of two of her academic interests: immigration and the military and United States empire.

As Apkar notes, today, enlistees to the United States military must have green card status. She further indicates that, according to 2018 data, about 3% of veterans are immigrants. About 20% of that number are not United States citizens. And between 1999 and 2010, about 4% of first-term military recruits were noncitizens, though more than 80% of immigrants in the military have citizenship, having obtained it at various points before, during, or after enlisting.

Against this backdrop, any VA employee, lawyer, or student working with servicemembers or veterans has a chance to interact with a noncitizen. This book is eye-opening in its portrayal of the added complexities and hurdles facing immigrant enlistees and their complicated paths to and relationships with American citizenship. Thus, this book would be

particularly relevant for anyone working at the nexus of veteran and immigrant experiences.

After an overview, the book traces the immigrant experience and perspective within the United States military, focusing on the enlistment process and the unique twists and added complications behind immigrants' enlistment decisions. Next, Apkar covers military naturalization policies and related hurdles; the various injuries, physical and not, that immigrants face in the military; and the experiences of immigrants who enlisted during a now-suspended special program, Military Accessions Vital to the National Interest, which fast-tracked naturalization but brought its own difficulties for its participants. Then, she explores the nexus of racial and economic issues that lead to deportation for some veterans, particularly in the wake of trauma from enlistment and reentering civilian life.

Finally, the book concludes by examining how immigrants' experiences in the military subvert certain military narratives. It questions the dangerous role the military may place immigrant enlistees in and challenges policy fixes, instead suggesting forms of resistance, such as counter recruitment organizing.

The book excels at painting vivid, firsthand accounts of so-called "green card soldiers" and pairing these stories with data and history. It offers unsettling stories and facts that confront the typical narratives of military brotherhood, diversity, model immigrants, and patriotism. Apkar critiques assimilation, imperialism, and militarism and the military's use of immigrant labor.

A particularly poignant aspect of the book is hearing the stories of enlistees like Amy or Manuel in their own words. It highlights that the experience of an immigrant in the U.S. military is not a monolith. Each enlistee had a personal view, path, or experience, though they shared the experience of being immigrants in the military.

I recommend this book for a confronting, in-depth look at the challenges faced by immigrants who join

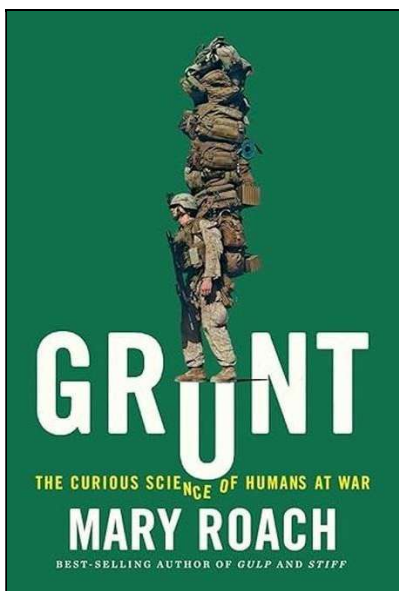
the military. Although the book was published before the current administration's changes and policies, and therefore, lacks insight into impacts they might be having on immigrant enlistees or veterans, it provides an informative background that offers important insight for anyone who wishes to learn more about an underpublicized area of the military and veteran experience.

*Sophie Feinberg is a law student at University of Florida's Veterans and Servicemembers Legal Clinic. In the fall, she will be working in the school's Immigration Law Clinic.*

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## Book Review of *Grunt: The Curious Science of Humans at War*, by Mary Roach

Review by Matthew Wilcut



W.W. Norton & Company, New York 2016. \$11.99 (ebook). 285 pages.

*Grunt* kicks things off by way of lighthearted introduction, detailing the Air Force's "chicken gun" for aircraft turbine testing—and yes, it's exactly what it sounds like. By its conclusion though, the

tone is somber, as one would expect when covering the purpose and day-to-day realities of the Armed Forces Medical Examiner System (AFMES) program called Feedback to the Field—a combat-related death autopsy videoconference that occurs monthly. I enjoyed the delightfully comic mental imagery conjured by the chicken gun. In the latter, I discovered a potentially valuable new source of medical evidence to use while advocating for veterans and their families seeking combat-related benefits.

At the time of writing this book review, the United States has just confirmed that six servicemembers were killed—the first American fatalities since the U.S. and Israel launched military operations against Iran. Roach describes how the AFMES will come to review the circumstances of these deaths and how the personnel who conduct that review will work across various expert domains. With constitutions that must be orders of magnitude stronger than most, they will all be singularly focused on ensuring that an exhaustive review of the fallen can save future lives.

One of Roach's stated goals for the book, which reads like an anthology of thematically related *Popular Science* and *National Geographic* articles, is to show that a chicken is as legitimate a vehicle for serious inquiry—and lifesaving research—as a postmortem examination. Roach summarizes by writing: "Surprising, occasionally game-changing things happen when flights of unorthodox thinking collide with large, abiding research budgets." It resonated with me as a reader that the book is a celebration of weaponizing (as a shield, not a sword) curiosity about the comparatively less considered.

The audience for this book would do well to enjoy, or at least put up with, an author who can't help but throw in more jokes than the material needed, including the occasional crass one. I was already a captive reader when Roach discussed an individual within the military who once advocated for dropping aphrodisiacs on the enemy to destroy morale. I felt that the joke that followed (precisely because it was "low hanging fruit") actually

detracted from the enjoyment. I'm not some square asking for an academic law journal out of a humorist author, but the editing could have done better with less "trying to be funny when you were already plenty humorous" passages. Some parts in particular read like the author wants us to imagine we're watching her conduct a YouTube-style interview of the same information.

Otherwise, and overall, I very much enjoyed the book. If you love Crichton and Vonnegut as much for what you can learn as how it was phrased, you'll enjoy this. Roach is a humorist "popular science" author, with the majority of her best-selling titles playing on some variation on "X: The Curious Science of Y."

This book will serve advocates well with cases for service connection which depend on impressing upon VA employees that the military is well aware of the severe risks of heat exhaustion (ch. 7), sleep deprivation (ch. 13), and postenteric-infection sequelae (ch. 8). Chapter 4 discusses urotrauma, including the uncomfortable truth that VA needed a strong push to cover in vitro fertilization for veterans left sterile. I did find it curious that Roach included hearing loss/tinnitus and blast injuries on her journey to cover only the "less covered" topics, but I'm willing to chalk that up to advocate bias. It's not as though I've spent the last decade-plus litigating, case by case, what this book confirms is openly acknowledged—by way of being heavily funded—by the military itself.

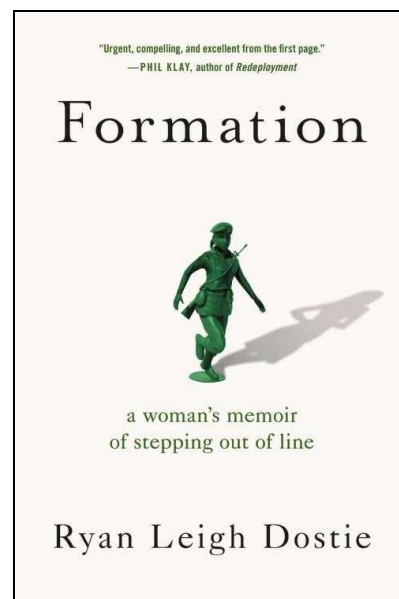
*Matthew Wilcut is a VA-accredited attorney and partner at Sutton Snipes, LLC, a veterans law firm.*

### Interested in writing a book review or other content for the *Veterans Law Journal*?

Join us at our virtual quarterly planning meeting on July 15 at 3 p.m. EDT or reach out directly to editor-in-chief Megan Kondrachuk at [megan@vetlawusa.com](mailto:megan@vetlawusa.com). A link to the meeting will go out to CAVC Bar Association members in the next few weeks.

## Book Review of *Formation: A Woman's Memoir of Stepping Out of Line*, by Ryan Leigh Dostie

Review by Alexandra Smith



Little Brown and Company, 2019. \$28.79 audiobook. 12 Hours.

Ryan Leigh Dostie is an Army veteran, former linguist, and current author whose work focuses on military sexual trauma and women's experiences in the military. "But you didn't say no," "You understand that for sex to be rape you had to have said no?" These were just some of the rape myths the author and other victims had to hear.

Although *Formation* discusses Dostie's personal experience, the details of her rape and what followed highlight the broader culture surrounding rape. Rather than illustrating her experiences in 2003 as an isolated incident, Dostie emphasizes how the military compounds military sexual trauma through a lack of accountability, disbelief, and indifference.

While the book is a strong account of women's experiences, its strongest quality is the author's

ability to describe the unfair reality of being a woman in a male-dominated field. Early on, she describes the pressure felt by women to prove themselves amongst their male counterparts, recounting leadership asking her, “Are you sure you’re man enough for that uniform?” This comment illustrates how women are often forced to navigate the misogyny of the military long before their military sexual trauma occurs.

The rape itself is described fragmentally and in a very intentionally disorientated way that allows the reader to understand the author’s experiences. As do most victims, she consistently questions her own reactions and states that she does not “act like a rape victim,” and she wonders if she is “one of those girls,” the ones everyone considered a whore. Her heartbreaking testimony exposes how quickly victims can internalize doubt and shame when they expect to be scrutinized.

The most compelling sections of the memoir focus on military leadership’s response following her military sexual trauma. She describes her supervisor standing in the doorway immediately after the assault, admitting, “I was afraid this was going to happen,” while doing nothing to intervene during the assault. Dostie repeatedly exposes that the problem is not just individual actors but a command culture that minimizes women’s experiences and treats reports as inconveniences.

Following the assault, the author depicts the very reality of victims in the military by discussing retaliation and social isolation. She discusses being forced to stand beside her rapist in formation as she was called a “lying whore” and publicly ridiculed by her leadership. One of the most devastating discussions of the memoir is when she reflects on this experience stating, “I’m being treated different, either because I am a woman that was raped, or a woman who reported rape, or simply because I’m a woman.”

Dostie does not portray herself as a perfect victim. She openly discusses experiencing confusion, anger, and dissociation. In doing so, she rejects the

ignorantly simplistic myth about how victims are “supposed” to react. Additionally, the memoir illustrates broader systemic issues following military sexual trauma, including inadequate healthcare and the dismissive attitudes of male leadership toward women’s issues. This description makes the memoir relevant for servicemembers, veterans, advocates, and anyone seeking to better understand military sexual trauma.

If the book has any weakness at all, it is that it is emotionally overwhelming due to the repeated institutional failures. However, the exhaustion created by the author allows the reader to feel the same frustration and isolation that she experienced.

I would strongly encourage any advocate or person seeking to better understand women’s experiences during military service to read *Formation*. Dostie’s bravery and willingness to document her assault, as well as the culture surrounding it, make the memoir an extremely important tool for advocacy. The reader is forced to face the uncomfortable, but very real reality, that for most, if not all, victims, the institutional failures are just as damaging as the assault.

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If you are interested in contributing to the *Veterans Law Journal*, either as an author or editor, please reach out to Megan Kondrachuk, our Editor-in-Chief, at [megan@vetlawusa.com](mailto:megan@vetlawusa.com)

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