

VETERANS LAW JOURNAL

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Judge Bartley Retires from Active Service

by Tom Susco and Dan DiLuccia



On June 24, 2026, Judge Margaret Bartley served her final day as an active judge at the CAVC. For 14 years on the bench, including nearly four serving as chief judge, Judge Bartley worked tirelessly to ensure that veterans and their dependents received the process to which they were entitled, a fair and just decision on their claims, and a full explanation of the reasons underlying those decisions.

A proud native of Pittsburgh, Pennsylvania, Judge Bartley spent 18 years serving veterans and their survivors before being appointed to the bench. During that time, she worked as senior staff attorney for the National Veterans Legal Services Program and director of outreach and education for the Veterans Consortium Pro Bono Program. She also served as a judicial law clerk for Judge Jonathan Steinberg.

In 2012, Judge Bartley was nominated by President Barack Obama and began her term as the 16th judge

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COURT OF APPEALS
FOR VETERANS CLAIMS
BAR ASSOCIATION

in the history of the CAVC. In 2013, she authored her first panel decision, *Robertson v. Shinseki*, 26 Vet.App. 169 (2013), *aff'd sub nom. Robertson v. Gibson*, 759 F.3d 1351 (Fed. Cir. 2014). She would end up authoring 57 more panel cases during her active service, not to mention countless more separate concurrences or dissents. Although every case was important to Judge Bartley, several of those panel decisions have had significant enduring effects on the veterans benefits process and veterans law in general, including *Ingram v. Collins*, 38 Vet.App. 130 (2025), *dismissed*, No. 2025-1972, 2026 WL 866833 (Fed. Cir. Mar. 30, 2026) (order); *Calhoun v. McDonough*, 37 Vet.App. 96 (2024); *Edwards v. McDonough*, 36 Vet.App. 56 (2023); *Sharp v. Shulkin*, 29 Vet.App. 26 (2017); *Bankhead v. Shulkin*, 29 Vet.App. 10 (2017); *Emerson v. McDonald*, 28 Vet.App. 200 (2016); and *Wise v. Shinseki*, 26 Vet.App. 517 (2014). In addition, she was a member of the panel in *Godsey v. Wilkie*, 31 Vet.App. 207 (2019) (per curiam order), the Court's first certification of a class, and *Gladney-Chase v. Collins*, 38 Vet.App. 216 (2025) (per curiam order); 38 Vet.App. 340 (2025) (per curiam order), the Court's first approval of a class settlement.

As chief, Judge Bartley led the CAVC through the COVID-19 pandemic, overseeing the near-seamless transition to telework and continuity of operations to ensure that the CAVC maintained its priority to decide cases in a timely fashion. This transition ultimately led to streaming oral arguments on YouTube, allowing a greater audience to watch the CAVC in action. She also bolstered the CAVC's recall chambers, a group of law clerks and staff dedicated to assisting recalled senior judges, as well as other parts of the CAVC.

Now in "retirement," Judge Bartley is enjoying more time with her husband Charlie and her daughters and spoiling her four grandchildren (and she's hoping for more!). She has plans to travel more, become fluent in Spanish, dedicate more time to her personal writing projects, and complete both the Maryland Master Gardener Program and Maryland Master Naturalist Program. But her commitment to serving the CAVC and our nation's veterans persists—one day after leaving active service, she was immediately recalled to the bench to continue deciding cases. And her legacy at the CAVC and in

veterans law will endure, as many of her former law clerks and interns continue to work at the CAVC and throughout the field, carrying with them Judge Bartley's dedication to ensuring fairness throughout the veterans benefits process.

Congratulations, Judge Bartley!

Dan DiLuccia and Tom Susco both served as Judge Bartley's senior law clerk: Dan from 2013 to 2019, and Tom from 2019 to 2026.

Message From Chief Judge Allen

Colleagues and friends,

This summer, the Court has explored the world of artificial intelligence (AI) and whether there's a role for AI to assist in our ever-growing caseload, as well as in the general administration of the Court. Many of our Court employees, from chambers staff to the Public Office to the Central Legal Staff, have been experimenting with ChatGPT Enterprise on how to be more efficient, especially with administrative tasks. We want to provide access to a powerful tool to empower our Court staff to do their best work but with proper safeguards in place. It's an ongoing process, but it presents some exciting possibilities!

As part of that testing process, I asked ChatGPT to assist with my quarterly message. What I learned was that while it struggled to get some facts right (ChatGPT thinks I joined the Court in 2019, not 2017), my writing style is apparently not as unique as I thought and quite easy to replicate! The rest of this message was drafted with the assistance of ChatGPT—with some heavy editing! A quick word about professional responsibility before turning to my chatbot friend. I encourage you all to use caution as you explore the world of AI. Remember, the Court may not have a rule of professional responsibility that focuses on AI specifically, but counsel have an obligation to ensure the accuracy of their work no matter how it's prepared.

As summer begins to wind down, it is hard not to reflect on how much the Court has accomplished

over the past several months. Like many organizations, we have balanced the demands of our day-to-day work while also preparing for significant change. Through it all, I continue to be impressed by the dedication, professionalism, and resilience of the people who make this Court what it is.

This summer has also underscored the extraordinary pace of the Court's work. We have continued to receive a record number of appeals, reflecting both the growing demand placed on the Court and the importance of the work we do on behalf of our nation's veterans. In June, we received 983 appeals, the second highest month in the Court's history—at that time at least. June moved to third because, in July, for the first time in the Court's history, we received over 1,000 appeals in a single month (in fact, over 1,050). These numbers are truly extraordinary! While increasing caseloads present real challenges, they also reinforce our commitment to ensuring that every appeal receives the careful attention and thoughtful consideration it deserves. I am grateful to our judges, law clerks, and professional staff, whose dedication and hard work have enabled the Court to meet these demands while continuing to provide the high level of service that veterans and their families deserve.

We also found some time this summer to gather as a Court community for our quarterly employee recognition ceremony, paired with an ice cream social. We enjoyed ice creams sundaes, Fudgey the Whale ice cream cake, and an ice cream tasting station, which featured some unusual flavors, like Guinness ice cream! It was great to spend an afternoon together and appreciate the accomplishments of our staff over the last quarter.

This summer has also been defined by another milestone: the continued development of the Court's new case management system, Appellate Case Management System (ACMS). Our internal Court team worked with outside stakeholders from the private bar and VA to work through test cases submitted through the ACMS portal. This testing helped us to identify key areas of development and provided invaluable feedback as we move closer to implementation. The work on ACMS continues, and I thank you all for your continued patience as we work through this huge undertaking. Any major

technological change comes with a learning curve. New systems require us to adapt established practices, develop new routines, and occasionally exercise a bit of patience. That has certainly been true here. The launch of ACMS at a time of historically high appeal numbers brings even more of a challenge, but your continued cooperation will help us get through this transition smoothly.

Finally, this summer, the President nominated three individuals to fill vacancies at our Court that resulted from Judge Bartley taking senior status, Judge Greenberg's passing, and the creation of a new seat. The nominees are Robert Fleck, currently the Deputy General Counsel in VA's Office of General Counsel; David Jones, currently serving in the White House Counsel's Office; and Daniel Rendleman, a U.S. Army JAG officer. These nominees will be considered by the Senate Committee on Veterans Affairs and then will be voted on by the entire Senate. While we don't have a timeline for the nominations, we are looking forward to this big change in the life of the Court.

We have been working toward a lot of changes, many of which we will see come to fruition this fall. This summer has demonstrated what can be accomplished when talented professionals work together toward a common purpose.

Thank you for your continued dedication to the Court and, most importantly, to the veterans we are privileged to serve. Have a great fall!

From the desk of Chief Judge Allen (and his chatbot)!



Message From Bar Association President Meghan Gentile

Happy fall to everyone at the Bar Association! This year has flown by, and it's been my pleasure to serve as President. I hope our programming and social events were helpful and enjoyable, and I look forward to welcoming our 2026-27 CAVC Bar Association President, John Juergensen.

We received a full slate of nominations for governors at large and officers, including treasurer, secretary, and president-elect. Ballots were distributed on September 8 and closed on September 24. We will announce the results in our annual meeting.

Our annual meeting is on September 29th in the Court's library. We will have a short meeting to announce the election results and hand over the presidency to John Juergensen, followed by a panel discussion led by the Court about ACMS, and then, of course, a happy hour!

This year's panel discussion is an unusual, but I think timely, topic for our members: changing roles within the veterans law field. It's topical because the last year-plus has introduced some major structural changes in our field, including the protracted government shutdown in 2025 and the extensive DOGE-related cuts at VA. These events present a potential risk to the Bar Association as we face losing strong practitioners to other fields.

I believe everyone at the Bar Association benefits from the institutional knowledge and expertise our practitioners bring to work. When we face challenges that risk losing those practitioners from our field, we all lose. I think it's in the best interests of everyone at the Bar Association to retain our best and brightest, while fostering our newer practitioners' growth.

So, we put together a panel of veterans law practitioners who have stepped out of certain roles in our field without exiting veterans law. They will discuss the challenges and opportunities that

changing roles presents, including moving in and out of government employment, beginning a new practice, and the ethical implications of making these shifts.

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

As we move into our next year, please let us know what topics you'd like to see in our programs!

As we close out this year, please reach out to me directly—meghan@suttonsnipes.com—if there's anything you'd like to see in the new year.

And we are rolling out new contact information for the Bar Association! We've upgraded our email system so we can seamlessly hand off contacts to new officers every year. Our new emails are:

President@cavcbarassociation.org
Hello@cavcbarassociation.org
Journal@cavcbarassociation.org

Thank you and have a great fall,

Meg

CLERK'S CORNER

Inside the Court: A Primer on the Office of General Counsel

Meet the team that serves as in-house counsel to the CAVC and learn how OGC's work supports the CAVC and the veterans bar community.

by Shabnam N. Ahmed

The Office of General Counsel (OGC) plays an important role in the administration and day-to-day business of the CAVC. As the CAVC's in-house counsel, OGC advises the chief judge, the CAVC's judges, the Clerk of the Court, managers, and employees on the legal, ethical, policy, and operational issues involved in judicial

administration. Although much of its work occurs behind the scenes, OGC's counsel enables the CAVC to operate lawfully, fairly, and effectively.

Did You Know? The CAVC's OGC does not practice veterans law. Unlike VA OGC—which represents the Secretary and litigates appeals before the CAVC—the CAVC's OGC functions as a generalist in-house legal department. The team is a legal “jack of all trades,” advising on matters ranging from ethics, appropriations, procurement, and employment issues to attorney discipline, Court rules, cybersecurity, and emerging technology. That breadth requires OGC to wear many hats, quickly learn unfamiliar subject areas, and stay current on legal developments affecting court operations. Artificial intelligence is one recent example: OGC must understand the technology, follow evolving legal and ethical issues, and advise the CAVC on appropriate uses, limitations, and safeguards.

OGC's broad portfolio reflects the wide range of issues involved in court administration. Its work may involve a question of judicial ethics in the morning, a contract or employment issue in the afternoon, and a policy, technology, or attorney discipline matter the next day. The common thread is protecting the CAVC's institutional interests and enabling its judges, managers, and employees to carry out the CAVC's mission.

What OGC Does

Ethics and Judicial Administration. OGC advises judges and CAVC employees on the codes of conduct and related statutes, regulations, and policies. Questions may involve recusal, conflicts of interest, gifts, political activity, outside activities, travel reimbursements, and financial disclosures. The office also provides ethics training and supports the CAVC's processes for addressing judicial misconduct complaints.

Court Operations, Rules, and Policy. OGC advises on legal issues arising from the CAVC's status as an Article I Court, as well as statutory and regulatory requirements, internal governance, and operational matters. It drafts and reviews court policies, orders, and other guidance; interprets and evaluates

proposed revisions to the CAVC's Rules of Practice and Procedure and related rules; and supports special projects affecting court administration.

Workplace, Fiscal, and Business Matters. Like other in-house legal offices, OGC counsels its client on employment and workplace matters, appropriations and fiscal law, procurement, audits, vendor agreements, facilities, and other business needs. The office works closely with the Clerk and court managers to translate legal requirements into practical policies and sound day-to-day decisions.

Professional Responsibility and Institutional Risk. OGC supports the CAVC's attorney grievance and disciplinary processes, including matters involving members of the CAVC's bar. It also assists with defensive litigation and advises on records, privacy, information governance, cybersecurity, and emerging technology. These responsibilities protect the CAVC's institutional integrity while promoting consistent, transparent processes.

Partnerships and Access to Justice. OGC serves as a liaison to the Veterans Consortium Pro Bono Program and works with other courts, the Administrative Office of the U.S. Courts, the Judicial Conference, and outside partners as appropriate. Those relationships keep the CAVC informed about developments across the judiciary and strengthen the pro bono infrastructure on which many unrepresented appellants rely.

Why This Work Matters to the Veterans Bar

Although OGC does not take positions in appeals before the CAVC, OGC's work shapes the environment in which those appeals are adjudicated. Practitioners may see the results in updated rules and policies, professional responsibility guidance, disciplinary processes, technology initiatives, public notices, or in the CAVC's work with the Veterans Consortium. Careful administration behind the scenes supports fair and efficient judicial review in every case.

OGC also values appropriate communication with the veterans bar. Questions and feedback can identify areas where Court processes or guidance may be clearer. OGC cannot provide legal advice, discuss the merits of a pending case, or replace the

Clerk's Office as the resource for case specific filing and e-filing questions. But the veterans bar is encouraged to contact the office about OGC-related programs, policies, professional responsibility matters, and opportunities for constructive engagement with the CAVC.

Meet the Team

Shabnam N. Ahmed

Shabnam is the CAVC's general counsel and chief legal officer. Before joining the Court, she spent more than 13 years at the Social Security Administration and earlier practiced investment management law at Morgan, Lewis & Bockius LLP.

Brian J. Redar

Brian is the deputy general counsel and previously clerked for Judge Robert N. Davis from 2007 to 2009. Before returning to the Court, he spent 17 years with U.S. Customs and Border Protection's Office of Chief Counsel, most recently as part of the leadership team supporting operations throughout the Southeastern United States and the Caribbean.

Amy Byrne

Amy is the associate general counsel and first worked with OGC as a law student. She returned to the CAVC after clerking at the D.C. Superior Court and practicing as a civil litigator. Before law school, she served as a deputy sheriff in Orange County, Florida. She is also an FAA-certificated commercial pilot.

John G. Parrott

John is OGC's paralegal specialist. He joined the CAVC after retiring from the U.S. Navy in March 2026. During his Navy career, he served as a legalman in the JAG Corps and developed extensive experience in misconduct matters, administrative law, and federal ethics.

Connect with OGC: ogc@uscourts.cavc.gov

***Veterans Law Journal* Invites Submissions to Law 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 U.S. Court of Appeals for Veterans Claims (the "Court") 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 upon 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 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 Court's next Judicial Conference

Deadline:

- Submission deadline: **September 28, 2026 by midnight EST**
- Submissions should be emailed to 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 with any questions about the competition, and please share this information with any law students you know who may be interested in participating.

PRACTICE SERIES ARTICLE: Veterans' Advocate

The Last Word Matters: Writing Effective Reply Briefs Before the CAVC

by Courtney Smith, Gina D'Amico, Judy Donegan,
Samantha Farish, Lilah Avery, and Mary Benton

The Purpose of the Reply Brief

Every year, appellants lose potentially meritorious arguments because they leave the Secretary's response unanswered. Although a reply brief is optional under U.S. Vet. App. Rule 28(c), it is often the appellant's final opportunity to shape the CAVC's understanding of the issues before the case reaches chambers. A well-crafted reply brief does far more than respond to the Secretary; it refocuses the judge on the dispositive errors, clarifies the requested relief, and demonstrates why remand or reversal remains warranted.

However, merely rehashing the original arguments and failing to engage with the Secretary's arguments are unlikely to score many points in your favor when the case is submitted to chambers. You framed the argument with your initial brief and can reframe it for the judge while rebutting the arguments presented by the Secretary. You are already at a disadvantage because your client has lost their appeal before the Board of Veterans' Appeals (Board). Take advantage of every opportunity you can to explain why that decision was in error.

Below are some tips that can turn your reply brief into the most useful pleading on the docket.

Crafting an Effective Reply Brief

Respond Strategically. A great way to begin a reply brief is to identify the areas of common ground. If there are any issues the Secretary conceded, make it easy for the judge by highlighting those first. This is especially advantageous if the judge reads the reply brief first. Reviewing the pleadings in docket order can ultimately bury the lede if the Secretary has made concessions, so your reply brief can be the easiest way for the reviewing judge to assess which arguments are still in play.

However, be cautious with concessions. Perhaps the Secretary's brief agreed that a claim should be remanded, but for a different reason than you proposed. If that distinction would make a difference for your client on remand, then explain why the alternative basis for remanding is an insufficient remedy. Your reply brief should help the judge understand not only that remand is warranted, but why the scope of remand matters.

Effective reply briefs do not simply answer each argument in the Secretary's brief in order. Instead, they return the judge to the appellant's theory of the case. The Secretary may devote several pages to issues that ultimately do not affect the requested relief. However, that does not mean that you need to follow the white rabbit into Wonderland. Rather than following that roadmap, organize your reply around the legal error that matters and explain why the Secretary's response does not cure it.

For example, if your client's goal is to obtain a VA examination and the Secretary's brief focuses on why the elements of service connection are not met, at least a part of your reply brief should be spent clearing up that confusion. However, instead of following the outline set forth by the Secretary, your reply brief should return to your original argument and explain why the points raised by the Secretary do not bar obtaining an examination.

Keep your arguments as simple and clear cut as possible. Our cases are filled with interesting facts, wrinkles, and an ever-changing legal landscape, so do your best to make your argument the most straightforward and easy avenue for relief.

As you did with the Board's decision, read every case, regulation, and statute cited in the Secretary's brief. You may discover additional provisions, facts, or similarities that serve to strengthen and/or distinguish your case. In addition, do not run from bad facts/law. For instance, the Secretary's brief may reveal a nonprecedential case that does not support the relief you seek. In that instance, acknowledge it, emphasize that it is nonprecedential, and explain why your case warrants different relief. Similarly, be sure to explain why any "bad" facts do not prevent the relief you are seeking for your client.

Develop the Argument. A practitioner never wants to read through a memorandum decision from the CAVC and think that more could have been said or pertinent information was left out. Think back to the years of law school and follow the Issue, Rule, Application and Conclusion (IRAC) or Conclusion, Rule, Application and Conclusion (CRAC) method of properly developing your argument and ensuring your brief is not flagged for being underdeveloped.

The importance of adhering to this is paramount. Your reply brief is a tool to assist you with your argument, and proper development will help you get to your goals. When evaluating how to properly develop a reply brief after reviewing the Secretary's contentions, keep three things in mind.

First, refine your arguments rather than restating them. Second, when replying to the Secretary, avoid string citing case law. Instead, engage in and discuss the governing legal principles from those cases to the specific facts of your client's case—though certainly include those case citations so the judge can easily find your source. When applying law to the facts, you want to ensure this is done adequately and effectively. Balancing facts and law is vital. Lastly, if there is important reasoning flagged by the Secretary as underdeveloped, do not leave it unanswered.

Overall, the goal is for the CAVC to understand your argument and rationale. Proper development is a key tool to ensure your reply brief is fit to file.

Show Prejudice. The CAVC is required in every case to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). The burden of showing prejudicial error is not overwhelming, and you should always affirmatively show the prejudicial error in your case.

While the reply brief should not be the first time you discuss prejudicial error, it is your opportunity to engage with whatever errors the Secretary alleges were harmless. Ultimately, highlighting the prejudicial error in your case makes the judge's job easier and brings you one step closer to prevailing.

Judges should never have to infer why an error mattered. After identifying each legal error, ask yourself whether you have answered three questions:

1. What did the Board do wrong?
2. What should the Board have done instead?
3. How could that difference affect the outcome?

If your argument clearly answers those questions, you have not only demonstrated prejudice, but you

have also provided the CAVC with the analytical framework it needs to reject the Secretary's harmless-error argument.

Fortunately, prejudice is often easiest to articulate *after* reading the Secretary's brief because you now know exactly how the Secretary minimized the Board's errors. For example, you may be able to argue that the Secretary's reasoning falls into the category of a post hoc rationalization that cannot cure the Board's reasons-or-bases error.

The reply brief is therefore not just an opportunity to repeat your prejudice argument from the opening brief, but to refine it, rebut the Secretary's harmless-error theory, and explain why the identified error remains outcome-determinative.

Maintain Credibility. Although one of the most important roles of the reply brief is to focus on key areas of disagreement that are necessary to resolve the case, the way in which you do it is important. More specifically, you should think about the language you use when you describe the Secretary's brief.

For example, there is a difference between alleging that "the Secretary misunderstood the record before the agency (RBA)" and "the Secretary mischaracterized the RBA." By arguing that the Secretary misunderstood the RBA, you are explaining to the judge that there is more than one way to view the RBA, and your view is the better one. However, if you assert that the Secretary mischaracterized the RBA, you are in effect accusing the Secretary of knowing what the RBA states but presenting something to the CAVC that is not true. The latter approach is unnecessarily inflammatory and is likely to undermine your credibility.

Credibility is one of the advocate's most valuable assets. Reserve allegations that the Secretary misstated the RBA or ignored controlling authority for situations when the RBA clearly supports that characterization. More often, disagreements arise from differing interpretations of the evidence or governing law. Presenting those disagreements professionally strengthens your credibility with the CAVC and keeps the focus where it belongs—on the Board's legal errors.

As attorneys, we are doing our best to advocate in this uniquely pro-veteran system. We are all governed by the Rules of Professional Conduct and should strive to be zealous advocates for our clients while abiding by those professional guidelines. To maintain a well-kept reputation before the CAVC and your fellow practitioners, you should always show respect and professionalism in your legal practice.

The authors of this article are members of The Veterans Consortium Pro Bono Program's (TVC's) CAVC Litigation team.

More About the Writers: What is The Veterans Consortium Pro Bono Program?

TVC was created in 1992 at the request of the CAVC with congressional approval to provide free legal representation to veterans, their families, and survivors in appealing denials of VA disability benefits. TVC evaluates veterans' cases before the CAVC and provides qualifying appellants with free legal representation. It also trains, mentors, and supports volunteer attorneys and non-attorneys in veterans law.

Additionally, TVC operates an appellate helpline for unrepresented veterans at the CAVC and manages the CAVC's Rule 33 Limited Representation Program, which provides pro bono assistance for veterans at the Rule 33 Conference at the Court.

Interested in writing a practice series article or other content for the *Veterans Law Journal*?

Join us at our virtual quarterly planning meeting on October 21 at 3 p.m. EDT or reach out directly to editor-in-chief Megan Kondrachuk at megan@vetlawusa.com. A link to the meeting will go out to CAVC Bar Association members in the next few weeks.

NVLSP and White & Case Honor Sacrifices of America's Veterans at the Korean War Veterans Memorial

by Emily Woodward Deutsch



Against a hazy sky at the Korean War Memorial and the distinguished Field of Service, volunteers from NVLSP and White & Case gathered to honor veterans and wash the Memorial on July 18, 2026.

Early on the morning of Saturday, July 18, 2026, volunteers from the National Veterans Legal Services Program (NVLSP) and the international law firm of White & Case LLP paid tribute to veterans, past and present, by washing the wall and the adjoining sculptures that comprise the Korean War Veterans Memorial.

Located on the National Mall in Washington, D.C., the Korean War Veterans Memorial was dedicated in July 1995 to commemorate the tens of thousands of U.S. and allied troops that died during that conflict, which spanned from 1950 to 1953.

The sunrise event was the third annual Memorial Wall Washing organized by NVLSP, a national nonprofit veterans service organization. Since 1981, NVLSP has represented veterans wrongfully denied the benefits they have earned because of injuries or illnesses incurred as a result of their military service from every branch of the armed services before the VA and the federal courts.

This marked the third year that NVLSP was joined by attorneys and staff from White & Case, many of whom provide pro bono representation to veterans and their beneficiaries before VA and the CAVC.

For approximately 90 minutes, the volunteers meticulously washed the memorial, which bears the names of more than 43,000 fallen servicemembers, as well as the surrounding sculptures that depict 19 troops on patrol across the rugged Korean terrain.

At the close of the event, NVLSP executive director Paul Wright delivered remarks about his own father's service during the Korean War. He was then presented with a National Park Service Challenge Coin by park ranger James Pierce, who is himself a decorated Gulf War veteran.

Emily Woodward Deutsch is a senior appellate attorney at NVLSP.



Park Ranger James Pierce [right] presents NVLSP executive director Paul Wright [left] with a National Park Service Challenge Coin.

Events at a Glance

Sept. 29: CAVC Bar Annual Meeting and Panel Discussion

Oct. 21: *Veterans Law Journal* Planning Meeting

Oct. 27: CAVC Oral Argument at University of St. Thomas School of Law, Minneapolis, MN

Nov. 10: CAVC Oral Argument at University of Missouri School of Law, Columbia, MO

Nov. 14-15: National Veterans Law Moot Court Competition

TBD: *Veterans Law Journal* Writers and Editors Training

CAVC HISTORICAL SOCIETY ANNOUNCES UPCOMING ELECTIONS

The CAVC Historical Society will hold elections this fall for a new Board of Directors. The CAVC Historical Society is dedicated to preserving and promoting the history of the CAVC. The Board helps advance that mission by meeting every one to two months, planning and supporting an annual CAVC Historical Society event, supporting publication and continued development of the CAVC History Book, and archiving materials related to the history of the CAVC.

The Board is eager to invite new ideas and programing to support that mission and invites anyone interested in preserving the CAVC's history to consider participating in leadership. Interested individuals may submit inquiries and nominations to: info@cavchistory.org.

Federal Circuit Confirms That Effective Dates of Special Monthly Compensation Are Separate and Downstream Issues from Entitlement to Award Eligibility

by Jack Komperda

Reporting on *Davis v. Collins*, 176 F.4th 663 (Fed. Cir. 2026).

In *Davis*, the U.S. Court of Appeals for the Federal Circuit affirmed in part and dismissed in part a decision by the CAVC that dismissed an appeal of a June 2022 Board of Veterans' Appeals (Board) decision. The Board had concluded that U.S. Marine Corps veteran Leon Davis was entitled to additional, higher awards of special monthly compensation (SMC) due to frostbite injuries and also found that SMC based on a need for regular aid and attendance dated from November 2, 2009, "but no earlier." Mr. Davis' appeal to the CAVC focused on whether the Board was also required to assign effective dates for the award of additional SMC benefits granted in the Board decision or leave assignment of these dates for the regional office (RO) to determine in the first instance.

In April 2021, the Board granted Mr. Davis entitlement to TDIU based solely on his service-connected PTSD, effective from September 2009. That TDIU rating, in combination with Mr. Davis' other service-connected disabilities, entitled him to an additional award of SMC at the (s) rate. The Board also denied Mr. Davis' appeal seeking an earlier effective date for SMC based on the need for regular aid and attendance, as well as his appeal seeking entitlement to additional, higher SMC awards to compensate for his frostbite injuries and other conditions. Mr. Davis appealed the Board's decision to the CAVC, which resulted in a joint motion for partial remand (JMPR).

The Board was directed by the Court's remand to reconsider its denial of additional, higher SMC awards based on combinations of Mr. Davis' service-

connected disabilities, including his frostbite injuries. The Board was also directed to address its denial of an earlier effective date for the award of SMC based on the need for regular aid and attendance—specifically, whether the relevant appeal period dated back to August 2008 when Mr. Davis filed claims related to a back injury and migraine headaches.

In June 2022, the Board concluded that Mr. Davis was entitled to additional SMC(*I*) awards to compensate him for the loss of use of his hands and feet from frostbite. This finding then triggered the award of two additional dependent SMC awards: SMC(o) based on two or more SMC awards at the (*I*), (*m*), or (*n*) rates when no condition is considered twice and SMC(*r*), because he was then receiving the maximum SMC(o) rate, as well as SMC(*I*) based on the need for regular aid and attendance due to his service-connected PTSD.

Mr. Davis appealed the June 2022 Board decision to the CAVC under the limited argument that the Board erred when it did not assign initial effective dates for his new SMC(o) and (*r*) awards and left assignment of these effective dates to the RO to assign in the first instance.

In its October 2023 decision, the CAVC rejected Mr. Davis' assertions that he was entitled to the assignment of earlier effective dates of August 2008 for the awards in the June 2022 Board decision regarding additional SMC benefits based on the loss of use of his hands and feet from frostbite. The CAVC noted that in August 2008, Mr. Davis filed claims related to a back disability and headaches, which had no relationship to the new SMC awards that were premised on his frostbite injuries. The CAVC also found in its decision that the directive of the remand to address whether an earlier SMC(*I*) rating was available was in relation to the SMC award that was premised on his PTSD rather than to all possible future SMC awards.

The CAVC rejected the proposition that the Board was generally required to resolve effective dates at the same time it evaluated eligibility for new SMC awards, concluding that the effective date of an SMC award was a separate and downstream issue of whether a veteran was entitled to that SMC award.

The CAVC concluded that the Board was not required to decide the effective dates of the new SMC(o) and (*r*) awards granted by the Board in the June 2022 decision. Without a Board decision on the issue, the CAVC concluded that it was without jurisdiction to consider Mr. Davis' arguments, and it dismissed the appeal.

The Federal Circuit ultimately agreed that it lacked jurisdiction to consider Mr. Davis' argument that the undisputed facts showed that an April 2020 Notice of Disagreement and the JMPR that led to the Board's June 2022 decision generally put at issue the effective date of his SMC ratings from 2008 onward. The Federal Circuit noted that the CAVC reviewed and rejected Mr. Davis' arguments about the "August 2008 claim" and the JMPR's effective date language. Because of this, the Federal Circuit explained that it lacked the legal authority to review the CAVC's interpretation. The Federal Circuit dismissed this issue.

The Federal Circuit then addressed Mr. Davis' argument that the effective date of an SMC award is not a separate downstream issue distinct from entitlement to SMC. The Federal Circuit explained that this argument ignored the appellate function of the Board, which is only limited to reviewing specific issues on appeal. The Federal Circuit further stated that the Board does not err by reviewing the sole issue before it and leaving downstream issues for the RO to consider in the first instance.

The Federal Circuit concluded that the CAVC did not err in holding that the effective date of an SMC award is a downstream issue from that of entitlement to SMC. Thus, the Board's failure to decide effective dates for the new SMC awards and to instead remand that issue to the RO to decide in the first instance was not a determination sufficient to trigger the CAVC's jurisdiction. Accordingly, the Federal Circuit affirmed the CAVC's dismissal of this issue.

This case serves as a reminder that threshold entitlement to benefits and the assignment of effective dates are distinct issues that the Board is not required to address simultaneously even when the record arguably presents them.

Jack Komperda is counsel at the Board of Veterans' Appeals and a member of its Specialty Case Team. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Federal Circuit Confirms That VA's Voluntary Action Mooting a Mandamus Petition Does Not Establish Eligibility for EAJA Fees

by Shahin Mirzaei

Reporting on *Veterans Legal Advocacy Group v. Collins*, 177 F.4th 1188 (Fed. Cir. 2026).

In *Veterans Legal Advocacy Group v. Collins*, the U.S. Court of Appeals for the Federal Circuit held that an order requiring VA to submit affidavits confirming its voluntary actions to correct mailing addresses was solely to determine mootness and did not grant prevailing-party status under the EAJA to Veterans Legal Advocacy Group (VetLAG). Therefore, the Federal Circuit affirmed the CAVC's ruling and denied attorney fees to VetLAG.

In December 2020, VetLAG petitioned the CAVC for a writ of mandamus after VA continued to send correspondence to incorrect mailing addresses, even after VetLAG's attempts to update its information. VetLAG asked the CAVC to require VA to correct its addresses across all VA systems, send future correspondence to the correct addresses, and be required to pay \$1,000 for each item of future misdirected correspondence. After the petition was filed, VA stated that it had already corrected the addresses and would provide guidance regarding attorney address changes. In a November 5, 2021, Order, the CAVC required VA to submit affidavits confirming those actions to determine whether the petition was moot. VA submitted the requested information on January 11, 2022, and the CAVC dismissed the petition as moot on February 14, 2022.

VetLAG then sought EAJA attorney fees. The CAVC denied that request, stating that VetLAG was not a prevailing party under the EAJA because VA's actions were voluntary, and the CAVC did not issue an order requiring VA to correct the addresses. In doing so, the CAVC relied on *Cavaciuti v. McDonough*, 75 F.4th 1363 (Fed. Cir. 2023), stating that VetLAG failed to prove prevailing party status. Under *Cavaciuti*, VA's voluntary actions do not entitle its adversary to prevailing party status under the EAJA. The CAVC stated that there must be a court-ordered decision or other judicial actions that change the legal relationship between the parties.

VetLAG then filed an appeal to the Federal Circuit, arguing that *Cavaciuti* should not apply because the November 2021 order required VA to submit affidavits confirming its corrective actions and, therefore, changed the legal relationship of the parties. VetLAG cited *Lackey v. Stinnie*, 604 U.S. 192 (2025), and argued that the order had sufficient judicial imprimatur because it required sworn affidavits that could be enforced through contempt proceedings.

The Federal Circuit disagreed, stating that the November 2021 order did not materially alter the legal relationship between parties because the order only required VA to submit affidavits confirming the voluntary actions that it had already taken and only served a limited information-gathering purpose. Therefore, it lacked the judicial imprimatur required to establish prevailing party status under the EAJA. The Federal Circuit explained that the affidavit order only helped the CAVC to decide whether the petition remained live, not to decide whether VetLAG was entitled to any relief, and, therefore, did not materially change the parties' legal relationship.

For the foregoing reasons, the Federal Circuit affirmed the CAVC's holding that a court order requiring a party to confirm a voluntary action to determine mootness does not establish prevailing party status under the EAJA. Therefore, the Federal Circuit affirmed the CAVC's denial of VetLAG's application for attorney fees.

This case clarifies that when VA voluntarily resolves an administrative issue before the Court grants any relief, the petition may become moot, and EAJA fees

may become unavailable regardless of any judicial efforts to verify that such voluntary action has actually taken place.

Shahin Mirzaei is a recent first-generation law graduate from Penn State Dickinson Law. Her academic interests include veterans law, immigration law, and administrative law.

CAVC Vacatur of an Adverse Ultra Vires Board Decision Confers EAJA Prevailing Party Status

by Christina Zahara Noh

Reporting on *Greenidge v. Collins*, 177 F.4th 1376 (Fed. Cir. 2026).

In *Greenidge v. Collins*, the U.S. Court of Appeals for the Federal Circuit reversed the CAVC's determination that Mr. Marcos Greenidge was not a prevailing party for EAJA purposes, and the Federal Circuit remanded the matter for further proceedings.

Codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412, the EAJA allows parties to recover attorney fees and other expenses when they prevail against the federal government in certain cases. Under the EAJA, fees may only be awarded to the prevailing party in a "civil action" provided there is no finding that the government's position "was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

In this case, Mr. Greenidge was granted service connection for PTSD in a February 1993 rating decision issued by a VA regional office (RO). The RO assigned a 10% PTSD rating, effective May 1991.

In September 2019, the Board of Veterans' Appeals (Board) found clear and unmistakable error (CUE) in the February 1993 decision with respect to the effective date assigned for service connection for PTSD. Specifically, the Board determined that Mr. Greenidge was entitled to an earlier effective date of May 1983. The Board remanded the claim to the RO

to (1) implement its earlier effective date decision and (2) determine whether Mr. Greenidge was entitled to a higher initial disability evaluation based on CUE in the February 1993 decision.

On remand, the RO implemented the May 1983 PTSD effective date and issued a Supplemental Statement of the Case (SSOC) in which it found that the February 1993 decision did not contain CUE with respect to the initial PTSD rating.

Before Mr. Greenidge filed a notice of disagreement (NOD) in response to the SSOC, the Board preemptively denied a higher initial rating, finding that revision of the initial 10% PTSD rating based on CUE was not warranted.

Mr. Greenidge appealed to the CAVC. He asserted that the Board decision was ultra vires and that the Board therefore lacked jurisdiction when it adjudicated the claim. Mr. Greenidge asked the CAVC to vacate the Board's decision and remand the matter to the RO for issuance of a Statement of the Case (SOC) based on the jurisdictional defect. The Secretary agreed that the Board lacked jurisdiction to consider the claim due to the absence of a NOD, but he asked the CAVC to vacate the Board's decision and dismiss, not remand, the matter.

The CAVC vacated the Board's decision and dismissed the appeal. In so ruling, the CAVC emphasized that Mr. Greenidge had a separate, properly noticed appeal of the SSOC pending before the Board.

Mr. Greenidge then filed an EAJA application seeking attorney fees. He asserted that by issuing an ultra vires decision, the Board's position was not "substantially justified" and that he was therefore a prevailing party for EAJA fee purposes. The Secretary opposed the request, contending that the CAVC lacked jurisdiction to consider the fee application and that Mr. Greenidge was not a prevailing party under the EAJA.

The CAVC issued a split decision holding that Mr. Greenidge was not a prevailing party under the EAJA because he failed to secure a remand that either clearly called for further VA proceedings or materially altered his legal relationship vis-à-vis the

Secretary. The CAVC cited its decision in *Blue v. Wilkie*, 30 Vet. App. 61 (2018), to explain that prevailing party status requires a Court remand that (1) calls for additional agency action; (2) is predicated on agency error; and (3) does not retain jurisdiction in the CAVC. The CAVC reasoned that because there was no remand order, Mr. Greenidge could not be considered a prevailing party under the EAJA.

On appeal to the Federal Circuit, Mr. Greenidge advanced the principal argument that although the CAVC's vacatur of the Board's order and dismissal of the claim was not an actual remand, it functionally served as one because its practical effect was to allow his NOD-initiated appeal of the SSOC to advance, thus conferring him prevailing party status.

In weighing that argument, the Federal Circuit explained that the EAJA does not define "prevailing party" in the veterans benefits context, and courts therefore rely on cases interpreting that term in the context of other fee-shifting statutes to provide a consistent interpretation. The "touchstone of the prevailing party inquiry" is whether there has been a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). For example, where a party secures an enforceable judgment on the merits, even if for nominal damages, or secures a court-ordered consent decree, that party is considered "prevailing." See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 604 (2001). In the context of veterans benefits claims, a court-ordered remand generally confers prevailing party status to an appellant for purposes of the EAJA. See *Blue*, 30 Vet. App. at 67.

Ultimately, the Federal Circuit rejected Mr. Greenidge's "functional remand" argument and found that because an actual remand order was not issued, the remand-specific prevailing party test was thus inapplicable.

Instead, the Federal Circuit found that in this case, a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute" occurred such that the

action conveyed EAJA prevailing party status to Mr. Greenidge.

The Federal Circuit reasoned that Mr. Greenidge's claim before the CAVC was that the Board exceeded its jurisdiction by taking up and deciding his claim without a jurisdiction-conferring NOD, and when the CAVC vacated the ultra vires Board decision, he succeeded on the merits of that claim. It concluded that by vacating an otherwise binding and adverse Board decision, the CAVC thereby effected the kind of material change in the parties' legal relationship contemplated by Congress in the EAJA.

The Federal Circuit acknowledged that the facts of this case were unique and its holding is similarly narrow. When the Board acts ultra vires in preemptively issuing an adverse decision before any jurisdiction-conferring NOD is filed and a veteran succeeds in obtaining vacatur of that decision, prevailing party status under the EAJA is conferred.

This precedential decision further clarifies the body of law that governs assessment of prevailing party status under the EAJA in the veterans benefits context. In such assessments, the court proceeding (i.e., the appeal before the CAVC) is considered separate from the underlying administrative proceeding (i.e., the issue(s) decided by the Board). The court proceeding is the "civil action" at which the EAJA fee applicant must prevail to obtain an award of EAJA fees. In this case, the CAVC awarded Mr. Greenidge the primary relief he sought in the civil action (vacatur of the underlying ultra vires Board decision), and therefore EAJA prevailing party status was conferred.

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Federal Circuit Clarifies What Constitutes a ‘Case’ Under 38 U.S.C. § 5904(c)(1)

by Dustin Kinnison

Reporting on *Jackson (Alexandra) v. Collins*, 179 F.4th 1323 (Fed. Cir. 2026).

In *Jackson (Alexandra) v. Collins*, the U.S. Court of Appeals for the Federal Circuit addressed whether an attorney could collect fees for representing a veteran prior to a favorable rating decision that culminated in an award of past-due benefits. The Federal Circuit ultimately determined that the EAJA did not permit this.

The long and complex procedural history of this case began when U.S. Army and Navy veteran John A. Lovier, Jr. filed an April 2007 claim for service connection for a bilateral hip disability. In March 2008, VA granted a noncompensable rating, which it subsequently increased to 10% for both hips in November 2009. Mr. Lovier pursued higher ratings, receiving remands from the Board of Veterans’ Appeals (Board) in September 2013 and November 2017.

Attorney Alexandra M. Jackson began representing Mr. Lovier in January 2018 under a 20% fee agreement. In December 2018, the Board denied Mr. Lovier’s claim for a higher initial rating for his left hip. Mr. Lovier did not appeal. That decision became final.

In February 2021, Mr. Lovier underwent left hip replacement surgery. Ms. Jackson assisted him in completing and filing a VA Form 21-526EZ in September 2021. On December 27, 2021, VA granted Mr. Lovier a 100% rating for the left hip, effective from February to August 2021 for the hip replacement, and a 30% rating thereafter. This resulted in an award of more than \$16,000 in past-due benefits.

VA considered whether Ms. Jackson was entitled to fees from these past-due benefits. On December 29,

VA concluded that because Ms. Jackson could only receive fees for work done *subsequent* to the December 27 rating decision, Ms. Jackson was not entitled to fees. Ms. Jackson filed a Notice of Disagreement (NOD), and in May 2022, the Board declined to award fees because it found the December 27, 2021, rating decision to be “an initial decision on an increased rating claim” and thus “the initial decision” in the matter.

On appeal to the CAVC, Ms. Jackson argued that she was entitled to fees under 38 U.S.C. § 5904(c)(1) because she provided legal services after the “initial decision . . . with respect to the case”—that is, after the March 2008 rating decision, rather than the December 2021 rating decision. She asserted this because, in her view, the September 2021 submission was not an initial claim for an increased rating but was instead a supplemental claim under the AMA. The CAVC rejected her arguments, and she appealed to the Federal Circuit, where she made two arguments.

First, she argued that a “supplemental claim” under 38 U.S.C. § 101(36) includes requests for increased compensation based on an already-service-connected disability. She contended that the Court’s holding in *MVA v. Sec’y of Veterans Affs.*, 7 F.4th 1110, 1118 (Fed. Cir. 2021)—that supplemental claims belong to the same “case” as the initial decision being reviewed, regardless of time of filing—supported reversal of the CAVC’s ruling. The Secretary countered that supplemental claims either are continuously pursued, preserving the original application date, or contest a prior decision, and that Mr. Lovier’s September 2021 claim did not satisfy either of these requirements. The Secretary further argued that because Mr. Lovier underwent hip surgery in February 2021, the September 2021 claim was premised on a different, dissimilar factual basis than the April 2007 claim, and thus was not a supplemental claim.

Secondarily, Ms. Jackson argued that even if Mr. Lovier’s request was not a supplemental claim, his September 2001 claim was still part of the same “case” as the April 2007 claim under 38 U.S.C. § 5904(c)(1), as both claims pertained to compensation for his left hip condition. The Secretary responded that Congress intended for the

settled understanding of “with respect to the case” in the context of that statute, which precluded an increased rating claim from being the same “case” as the initial claim, *see Cameron v. Shinseki*, 26 Vet.App. 109 (2012), to continue after the AMA. He also argued that the increased rating claim was not part of the same “case” because it relied on different evidence—that of the left hip replacement—than the original claim.

The Federal Circuit concluded that Mr. Lovier’s September 2021 claim and the resulting December 2021 rating decision were *not* part of the same “case” as his April 2007 claim and its resulting March 2008 rating decision.

The Federal Circuit surveyed several of its decisions to determine the scope of the term “case” as used in section 5904(c)(1). In *Stanley v. Principi*, 283 F.3d 1350 (Fed. Cir. 2002), the Federal Circuit ruled that an attorney could collect fees for work performed on a legacy reopening claim filed after a final agency of original jurisdiction decision only after the final decision in the reopening case, as the reopening proceeding was itself a different “case” than the initial proceeding. In *Carpenter v. Nicholson*, 452 F.3d 1379 (Fed. Cir. 2006), the Federal Circuit clarified that a “case” concerned issues—such as rating and effective date—emanating from the disability or injury that led to the claim. In *Jackson (Francis M.) v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009), the Federal Circuit found that a veteran’s original TDIU claim and a subsequent TDIU claim were different cases because the original claim did not include requisite evidence that the second claim did. In *Holstein v. Collins*, 166 F.4th 155 (Fed. Cir. 2026), the Federal Circuit affirmed the CAVC’s decision that a veteran’s PTSD claim was not part of the same “case” under section 5904(c)(1) as a contemporaneous claim for a neck injury because the evidence underlying the neck claim did not raise a PTSD claim, precluding any connection between the two.

Ultimately, the Federal Circuit concluded that “case” within section 5904(c)(1) is “defined by the evidence that is before the VA when it considers a veteran’s claim.” It therefore affirmed the CAVC’s reasoning that “case” in section 5904(c)(1) “means all the potential claims that could be raised by the evidence

before the VA during the processing of the claim in question.” Because Mr. Lovier’s 2021 claim relied on evidence not before VA in the 2007 claim—i.e., his left hip replacement—the claim and the resulting rating decision were part of a different “case” than the 2007 claim and the March 2008 rating decision.

Accordingly, as Ms. Jackson’s appeal did not present a claim for legal services provided after the initial decision on the matter, she was not entitled to fees.

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Federal Circuit Limits Immediate Appeals from CAVC Decisions Involving Remand

by Krishna Ramaraju

Reporting on *Limon v. Collins*, 181 F.4th 1213 (Fed. Cir. 2026).

In *Limon v. Collins*, the U.S. Court of Appeals for the Federal Circuit held that it lacked jurisdiction over U.S. Air Force veteran Frank Limon’s appeal of a 2024 CAVC decision, which affirmed the denial of an earlier effective date based on his initial August 2006 claim but remanded the claim for the Board of Veterans’ Appeals (Board) to consider whether the requested benefits should take effect in November 2011. The Federal Circuit held that the CAVC decision was not final because Mr. Limon could challenge the August 2006 ruling after completion of the remand and entry of a final CAVC judgment.

Mr. Limon sought service connection for Ménière’s syndrome with left ear hearing loss in August 2006. In March 2007, a VA regional office denied the claim, and Mr. Limon did not appeal. Then, in November 2011, he submitted another claim. VA denied that claim in January 2013, and he again did not appeal. In April 2021, Mr. Limon filed an additional claim for the same benefits, which VA granted, effective the date of its submission. At that time, the agency also combined Ménière’s syndrome

and left ear hearing loss into a single disability. Mr. Limon then challenged the assigned effective date.

After the Board declined to retroactively extend his benefits, Mr. Limon appealed to the CAVC. Specifically, he argued that August 2006 was the proper effective date because the Board misinterpreted 38 C.F.R. § 3.156(b) and failed to consider VA medical records generated after the March 2007 and January 2013 rating decisions. The CAVC affirmed the ruling as to the August 2006 claim but held that the Board did not assess medical evidence generated after the January 2013 rating decision. The Court then remanded the case for consideration of whether Mr. Limon was entitled to a November 2011 effective date. Mr. Limon moved for reconsideration, which the CAVC denied. He then appealed the affirmed portion of the decision to the Federal Circuit.

In its precedential opinion, the Federal Circuit explained that it generally does not review nonfinal CAVC orders such as remands. *Ravin v. McDonough*, 107 F.4th 1357, 1360 (Fed. Cir. 2024). However, the Federal Circuit acknowledged that, in *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002), it held that immediate review of a nonfinal CAVC decision is available when three conditions are met. First, the CAVC must clearly and finally decide a legal issue that is separate from the remand, governs the remand, or would make the remand unnecessary if reversed. Second, the ruling must adversely affect the party seeking review. Third, there must be a substantial risk that the issue will not survive the remand and will become effectively unreviewable. The Federal Circuit then proceeded to address only the third condition, which it concluded had not been met.

Specifically, the Federal Circuit rejected Mr. Limon's argument that the CAVC's ruling on the 2006 claim had become law of the case and, thus, would bind the Board on remand such that the issue might be mooted. The Federal Circuit explained that, even if the CAVC adhered to its earlier ruling after remand, that disposition would not control higher level appellate review since, under *Joyce v. Nicholson*, 443 F.3d 845, 850 (Fed. Cir. 2006), a veteran may challenge errors arising from both an original CAVC decision and the later final decision after remand.

The Federal Circuit then observed that, in the instant appeal, the Secretary had agreed that Mr. Limon could later argue that his effective date should be based on the August 2006 claim. And Mr. Limon himself had acknowledged that the availability of a later appeal would defeat jurisdiction over his present appeal.

Accordingly, the Federal Circuit unanimously held that Mr. Limon had not shown the substantial risk of mootness required by the third *Williams* condition, and the Federal Circuit dismissed the appeal for lack of jurisdiction. It did not address whether the CAVC correctly interpreted § 3.156(b), whether the August 2006 claim remained pending, or what effective date ultimately applied.

Ultimately, the Federal Circuit's holding confirms that a veteran who seeks to challenge an affirmed issue in a CAVC decision, which also remands another issue, generally must complete the remand process and obtain a final CAVC judgment before appealing to the Federal Circuit. The decision also underscores that, under *Williams*, the law-of-the-case does not, by itself, make a denied issue effectively unreviewable during the pendency of a remand.

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Federal Circuit Holds that the Board Is Required to Adjudicate Claims for Direct Service Connection Even When Such Benefits Are Available Presumptively

by Sarah "Sally" Battaile

Reporting on *Hepler v. Collins*, 184 F.4th 1343 (Fed. Cir. 2026).

In *Hepler v. Collins*, the U.S. Court of Appeals for the Federal Circuit reversed the CAVC's dismissal of an appeal of a Board of Veterans' Appeals (Board) decision. The Board had awarded service connection for hypertension on a presumptive basis but did not adjudicate service connection for hypertension on a direct basis. The Federal Circuit found that the CAVC erred by failing to order the Board to adjudicate the claim on a direct basis, and thus the Federal Circuit reversed the July 2024 dismissal and remanded the matter for further proceedings.

Procedurally, Mr. Hepler's 2011 hypertension service connection claim, based on increasing stress with each promotion in rank, was denied by a September 2013 rating decision issued by a VA regional office (RO).

Mr. Hepler eventually perfected an appeal to the Board and gave testimony at a Board hearing in October 2021. Prior to the Board's issuance of a decision, the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act) was enacted. This law expanded benefits and care for veterans who were exposed to toxic substances and other military environmental hazards during service, including the addition of hypertension to the list of presumptive conditions for Vietnam-era veterans, which includes Mr. Hepler, based upon exposure to herbicide agents.

In an August 2023 decision, the Board awarded service connection for hypertension on a presumptive basis under the PACT Act but did not adjudicate the claim on a direct basis. Rather, the Board stated for the RO's benefit that the evidence of record provided some indication that a relationship between Mr. Hepler's hypertension and his service might exist on a direct basis, which the RO should consider when it assigned an effective date for the establishment of service connection.

Mr. Hepler appealed the Board's decision to the CAVC, arguing that the Board failed to grant, deny, or remand the direct service connection benefits and that an award of service connection on a direct basis could result in benefits effective from his initial 2011 service connection claim. In July 2024, the CAVC

dismissed the appeal as moot because Mr. Hepler was awarded service connection under the PACT Act. After the CAVC denied Mr. Hepler's August 2024 motion for reconsideration or panel decision, he appealed the CAVC's July 2024 dismissal to the Federal Circuit.

Mr. Hepler argued that the CAVC erred when it determined that his claim was moot. The Secretary argued that the Board had remanded the direct service connection claim to the RO, thereby rendering the claim nonfinal. The Federal Circuit agreed with Mr. Hepler, noting that a case may be dismissed as moot "only if it is impossible for a court to grant any effectual relief whatever . . . assuming [the appellant] prevails." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 377 (2019). The Federal Circuit found that the CAVC did not find that the Board remanded the claim and rejected the Secretary's argument.

The Federal Circuit further noted that a "veteran's claim for benefits . . . is comprised of related but separate issues" including entitlement to service-connected benefits, a compensation rating, and an effective date. *Davis v. Collins*, 176 F.4th 663, 669 (Fed. Cir. 2026). Further, the PACT Act explicitly preserved direct service connection claims such as Mr. Hepler's. PACT Act, Pub. L. No. 117-68, sec. 407, 136 Stat. 1759, 1785.

The Federal Circuit found that the Board's failure to address the claim denied by the RO, i.e., the claim based on in-service stress, was an appealable denial which the CAVC could have affirmed, modified, reversed, or remanded, as appropriate. 38 U.S.C., § 7252(a); *Bean v. McDonough*, 66 F.4th 979, 989-90 (Fed. Cir. 2023).

Further, the Federal Circuit noted that in *Davis v. Collins*, 176 F.4th 663 (Fed. Cir. 2026), it recognized that to reach a "downstream" issue of a claim, such as an effective date, a claimant must first succeed on the "upstream" issue of the claim, i.e., that he or she is entitled to the claimed benefits. This means that because the Board did not adjudicate the claim on a direct basis, the RO did not have the authority to award benefits for direct service connection and could not assign an effective date for such benefits on remand.

The Federal Circuit held that Mr. Hepler's direct service connection claim, based on increasing stress during service, was separate and distinct from the PACT Act claim, which was based on his presumed in-service exposure to herbicide agents, that the Board was required to adjudicate the claim on a direct basis, and that the CAVC erred by failing to order the Board to do so.

Ultimately, this case illustrates that the Board's failure to address all applicable theories of entitlement may be appealed to the CAVC, which must then address whether the unexplained denial was proper, rather than dismissing the appeal as moot.

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Federal Circuit Affirms the Inapplicability of Equitable Estoppel to 38 U.S.C. § 5110 and Reiterates the Narrow Scope of *Taylor*

by Carly Banister

Reporting on *Ley v. Collins*, 184 F.4th 1361 (Fed. Cir. 2026).

In *Ley v. Collins*, the U.S. Court of Appeals for the Federal Circuit held that (1) equitable estoppel cannot be applied to override the claim-filing effective-date limits of 38 U.S.C. § 5110; (2) 38 U.S.C. § 7331 is not a statutory precondition to the enforcement of section 5110; and (3) section 5110 was not unconstitutional as applied in this case.

This case arose when U.S. Marine Corps veteran Richard Ley, who served in Vietnam in the 1960s, sought treatment for fatigue at a VA medical center in 2010 and was diagnosed with monoclonal B-cell lymphocytosis (MBL). Years later, he was diagnosed

with chronic lymphocytic leukemia (CLL), which is presumptively related to exposure to herbicide agents used in Vietnam. The treating provider who diagnosed Mr. Ley with CLL determined that the initial diagnosis of MBL was incorrect, as a pathology report from 2010 showed that the diagnostic criterion for CLL was met.

After receiving the CLL diagnosis, Mr. Ley filed a claim for service connection for that disease. The claim was granted effective January 29, 2016, in accordance with section 5110 based on the date VA received the claim. Mr. Ley appealed, seeking an effective date prior to the date of the claim because he asserted that VA doctors failed to inform him of his CLL diagnosis, which prevented him from filing a claim earlier. The Board of Veterans' Appeals (Board) granted an effective date of January 29, 2015, but not earlier.

On appeal to the CAVC, Mr. Ley contended that VA was equitably estopped from enforcing section 5110 and that section 5110 was unconstitutional as applied to him. The CAVC affirmed the Board's decision, determining that Mr. Ley's equitable estoppel claim was foreclosed by the Federal Circuit's decision in *Taylor v. McDonough*, 71 F.4th 909 (Fed. Cir. 2023)(en banc), and that his constitutional claim fell well short of the extraordinarily rare circumstance that could justify ordering the assignment of an effective date outside the parameters of section 5110.

In *Taylor*, a majority of the Federal Circuit held that equitable estoppel cannot be applied to override the claim-filing effective-date limits of section 5110. However, a plurality held that section 5110 was unconstitutional as applied to Mr. Taylor. In that case, Mr. Taylor's claim for disability compensation was based on injuries sustained during a government program that required participants to sign a secrecy oath prohibiting them from disclosing their participation in the program under threat of prosecution, without an exception for VA claims. The plurality concluded that under those "very rare set of circumstances," the claim-filing effective-date provisions of section 5110 were unconstitutional as applied to Mr. Taylor because the government interfered with his constitutional right of access to the VA adjudicatory system.

On appeal to the Federal Circuit, Mr. Ley asserted that the CAVC erred in determining that equitable estoppel was foreclosed by *Taylor* and that section 5110 was not unconstitutional as applied to him. Regarding the equitable estoppel claim, Mr. Ley asserted that *Taylor* was a plurality opinion and therefore not binding on the CAVC. He also asserted that he was entitled to equitable estoppel because VA violated its statutory duty under section 7331 to inform him that he had CLL.

The Federal Circuit affirmed the CAVC's decision. First, the Federal Circuit noted that Parts I through IV of *Taylor*, joined by 8 of the 13 Federal Circuit judges sitting en banc, constituted an opinion for the court. The Federal Circuit concluded that the part of *Taylor* that held equitable estoppel cannot be applied to override the claim filing effective date limits of section 5110 is binding precedent; therefore, the CAVC properly relied on that part of *Taylor*.

Next, the Federal Circuit rejected Mr. Ley's argument that he was entitled to equitable estoppel because VA violated its statutory duty under section 7331, which requires VA patient care to be carried out with the fully informed consent of the patient. The Federal Circuit acknowledged that if a statute establishes a duty VA must comply with as a precondition to enforcing the limitations of section 5110, and that precondition is violated, then enforcing those limitations would be contrary to the statute. However, the Federal Circuit indicated that the basis for such an award is a statutory violation and remedy analysis, not equitable estoppel. The Federal Circuit concluded that even assuming that Mr. Ley's argument was properly preserved and presented under the correct framework, section 7331 is not a statutory precondition to the enforcement of section 5110's effective-date limitations. The Federal Circuit reasoned that the statute does not provide any remedy for its breach, nor does it indicate that the Secretary's failure to abide by the statute justifies ignoring the unequivocal command in section 5110 that an effective date cannot be earlier than the filing of an application therefor.

Finally, the Federal Circuit rejected Mr. Ley's argument that section 5110 was unconstitutional as applied to him. The Federal Circuit explained that a right-of-access constitutional claim "asks whether

the government has, by affirmative conduct, unduly interfered with the individual's access to the adjudication offered by the forum." The Federal Circuit noted that "[a]lthough a CLL diagnosis may have served as additional motivation to file a claim . . . Mr. Ley was experiencing disabling symptoms, received a diagnosis, had access to his VA medical records, was free to obtain secondary medical opinions, and was never barred from filing a claim with the VA for those symptoms." The Federal Circuit concluded that Mr. Ley's situation did not amount to government interference and was not akin to the "very rare set of circumstances" presented in *Taylor*.

In sum, equitable estoppel cannot be applied to override the claim-filing effective-date limits of section 5110, and section 7331 is not a statutory precondition to the enforcement of section 5110. Additionally, this case underscores the narrow scope of *Taylor* and reiterates that a constitutional right-of-access challenge to section 5110 can only succeed in a "very rare set of circumstances" where the government has unduly interfered with the claimant's access to the adjudication offered by the forum.

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Federal Circuit Upholds Use of Statements Made While Seeking Medical Care in Assessing Credibility

by Donald M. Badaczewski

Reporting on *Hernandez v. Collins*, No. 25-1301 (Fed. Cir. Aug. 10, 2026).

In *Hernandez v. Collins*, the U.S. Court of Appeals for the Federal Circuit upheld a June 2024 CAVC decision that affirmed a July 2023 Board of Veterans' Appeals (Board) denial of service connection for

several disabilities. Specifically, the Federal Circuit held that, in making a negative credibility determination, the Board did not err in relying on the principle that “when people need medical care, they have great incentive to tell the truth.”

Mr. Hernandez served on active duty from 1985 to 1989. In 1987, he reported experiencing eye pain and was thereafter diagnosed with pink eye and ultraviolet keratitis. In 1988, his report of headaches eventually led to a diagnosis of acute gastroenteritis. In 2018, he claimed entitlement to service connection for tinnitus, an eye disability, and migraines. After his claim was denied, he appealed to the Board.

In denying the appeal, the Board found that private medical records, which revealed that the onset of Mr. Hernandez’s disabilities occurred well after service, were more probative than the statements that he made in the context of seeking compensation. The Board noted that “[c]ourts have recognized how medical history recounted in the course of medical evaluation and treatment is especially probative (trustworthy) because the declarant has inherent incentive to give the most accurate history to, in turn, receive the best or most appropriate medical care.”

Mr. Hernandez appealed to the CAVC, which affirmed the Board’s decision. The CAVC held that the Board did not err in its credibility determinations because it “relied on a valid and intuitive legal principle” from the Federal Rules of Evidence: “[W]hen people need medical care, they have great incentive to tell the truth.”

On appeal to the Federal Circuit, Mr. Hernandez argued that the CAVC erred by adopting portions of the Federal Rules of Evidence, and in doing so, adopted a rule contrary to the benefit of the doubt rule. However, the Federal Circuit concluded that the CAVC did not err in applying the principle that “when people need medical care, they have great incentive to tell the truth.” The Federal Circuit noted that this principle came from the advisory committee notes to Federal Rule of Evidence 803, which lists exceptions to the rule against hearsay, including that statements made for medical diagnosis or treatment are generally admissible

despite being hearsay, at least in part due to “the patient’s strong motivation to be truthful,” which carries a “guarantee of trustworthiness.” Fed. R. Evid. 803 advisory committee notes. The Federal Circuit had previously explained that although the Federal Rules of Evidence are not binding on the Board, such rules may offer useful guidance, including for evaluating the probative weight of evidence. *See AZ v. Shinseki*, 731 F.3d 1303, 1316 (Fed. Cir. 2013). The Federal Circuit thus saw no error in the Board using this principle as guidance to give greater probative weight to certain evidence.

In addition, the Federal Circuit explained that the CAVC’s adoption of this principle did not violate the benefit of the doubt rule set forth at 38 U.S.C. § 5107(b), as the Board’s decision whether to apply the benefit of the doubt rule occurs after it has first weighed the evidence to determine if it is in approximate balance.

The Federal Circuit also rejected Mr. Hernandez’s argument that adopting this principle resulted in an inherent determination that statements relating to medical care were more probative than other lay testimony, explaining that there may be instances where, depending on the facts of a case, such statements may not be particularly probative, or other evidence may be more probative.

Ultimately, the Federal Circuit’s opinion underscores the role that general evidentiary principles—particularly those set forth in the Federal Rules of Evidence—continue to play in the adjudication of VA claims.

Donald M. Badaczewski is counsel at the Board of Veterans’ Appeals. The views and opinions provided are the author’s own and do not represent the views of the Board of Veterans’ Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

The Little Notice that Didn't: CAVC Denies Request for Class Certification and Rules that the Board Must Individually Decide Whether Appellant and Other Claimants Who Received Defective Notice of Their Predecisional Hearing Rights Were Prejudiced by that Error

by Trey Skinner

Reporting on *Hubbell v. Collins*, 39 Vet. App. 207 (2026) (per curiam order), and *Hubbell v. Collins*, No. 24-9605 (Vet. App. May 21, 2026) (mem. dec.).

In two related decisions from the same appeal, the CAVC addressed how to remedy a systemic defect in VA notice about the right to a predecisional hearing. On May 13, 2026, a panel denied appellant Anne S. Hubbell's request for class certification, concluding that the request was underdeveloped and that individualized prejudice defeated class treatment. Then on May 21, 2026, Chief Judge Allen, in a memorandum decision, set aside the Board decision and remanded the matters for the Board to determine whether Ms. Hubbell was prejudiced by a conceded notice defect.

Ms. Hubbell is the surviving spouse of U.S. Air Force veteran Monte Hubbell, who filed a 2022 claim seeking service connection for several disabilities, including hearing loss and tinnitus. Unfortunately, he died in 2023, and Ms. Hubbell was substituted as the claimant. In February 2024 and April 2024, a VA regional office denied service connection for tinnitus and hearing loss, respectively. Each rating decision enclosed a VA Form 20-0998 that did not tell Ms. Hubbell she had a right to a hearing if she submitted a supplemental claim. She filed a Notice of Disagreement and elected the direct review docket. In October 2024, in a separate claim stream, she received an updated VA Form 20-0998 stating that she was entitled to a hearing at any time in the supplemental claim process. In a November 2024

decision, the Board denied service connection for bilateral hearing loss and tinnitus.

On appeal to the CAVC, Ms. Hubbell sought certification of a class of claimants who received AMA decisions before August 2024 without notice of the right to a predecisional hearing and then appealed to the Board. Such notice is required under 38 C.F.R. § 3.103, which applies to modernized claims.

The CAVC panel first held that, in an appeal, it may certify only a class whose members all have final Board decisions. *See Skaar v. McDonough (Skaar II)*, 48 F.4th 1323 (Fed. Cir. 2022); 38 U.S.C. § 7252(a). The panel found the request underdeveloped because Ms. Hubbell addressed commonality and typicality in only one sentence each. More importantly, it held that the proposed class failed to satisfy the commonality and typicality requirements of U.S. Vet. App. R. 23(a) because prejudice from defective notice required a claimant-specific analysis. In this analysis, the CAVC must apply the rule of prejudicial error, section 7261(b)(2), and the party challenging the agency bears the burden of showing harm. *See Shinseki v. Sanders*, 556 U.S. 396 (2009). Because neither requirement was met, prejudice could not be resolved "in one stroke." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The panel also held that a class action was not superior to a precedential decision under *Skaar v. Wilkie (Skaar I)*, 32 Vet. App. 156 (2019), because a precedential decision would reach affected claimants, including those without final Board decisions, while preserving the opportunity for the Court to review individual claims for prejudice.

On the merits, the parties agreed that the February and April 2024 forms were defective. Ms. Hubbell argued that she lacked notice of her predecisional hearing right under § 3.103 and, with correct notice, might have chosen a different review lane. But the Secretary argued that she had actual notice through the October 2024 form and thus was not prejudiced, that she could have changed lanes under § 3.2500(e)(1), and that she could file a supplemental claim now.

In the May 21, 2026, memorandum decision, Chief Judge Allen reasoned that the Board's silence about

the notice Ms. Hubbell received, and her hearing right, rendered its reasons or bases inadequate, requiring remand for the Board to address prejudice in the first instance. However, Chief Judge Allen declined to decide whether correct notice in one claim stream can cure defective notice in another because the timing was unclear: the corrective notice letter was dated October 31, 2024; Ms. Hubbell alleged that she received it during the first week of November; and the Board issued its decision on November 7, 2024. Whether she had time to act was for the Board to resolve. Chief Judge Allen also rejected the Secretary's argument that a supplemental claim could cure the error, explaining that supplemental claims are not a panacea for AMA errors because they require new and relevant evidence. See *Loyd v. Collins*, 38 Vet. App. 234 (2025).

In summary, the Court denied class certification, set aside the November 2024 Board decision, remanded the matters for the Board to determine whether the defective notice prejudiced Ms. Hubbell, and denied the Secretary's motion to strike a due process argument as moot.

Read together, the decisions indicate that the Court will address systemic AMA notice defects through individual adjudication, and potentially precedential decisions, rather than class actions given the individualized prejudice analysis. A conceded notice defect will not alone secure relief; prejudice, including the timing and content of any later corrective notice, will be central on remand. Whether correct notice in one claim stream can cure a defect in another remains an open question.

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AMA Continuous Pursuit Does Not Apply to Final Legacy Board Decisions

by Eric Wilson

Reporting on *Boehringer v. Collins*, No. 23-7995 (Vet. App. Jul. 15, 2026)(en banc), *appeal docketed*, No. 26-2153 (Fed. Cir. Aug. 14, 2026).

This case considered whether a claimant can use the AMA's continuous pursuit rules to dispute a final effective date determination made by the Board in a legacy appeal. The CAVC ultimately answered that question in the negative in a 4-3 decision that has major implications for pending legacy appeals.

Under VA's legacy system, a Board denial reset the earliest possible effective date for the claim, and claimants could not file a freestanding claim for an earlier effective date. The AMA fundamentally altered that constraint by introducing the continuous pursuit rules, which by extension also allow claimants to dispute an effective date assignment by filing a supplemental claim.

Mr. Boehringer's appeal involved a claim for TDIU that he initiated in 2013. He did not opt in to the AMA after it became effective in February 2019, instead continuing under the legacy system. VA notified Mr. Boehringer that he could opt in to the AMA several times while that appeal was pending; he did not opt in.

Ultimately, in October 2021, the Board denied an effective date earlier than February 2016. Mr. Boehringer did not appeal that decision to the CAVC. Instead, he filed a supplemental claim in April 2022, noting the October 2021 Board denial as the decision for review.

The regional office denied that claim on the merits, and Mr. Boehringer again appealed to the Board. The Board dismissed the appeal, ruling that it impermissibly sought to revise the Board's final October 2021 legacy decision as a freestanding earlier effective date claim.

Mr. Boehringer appealed to the CAVC, arguing that because he filed a supplemental claim within one year of a Board decision, as contemplated by 38 U.S.C. § 5110(a)(2)(D), and the decision for the supplemental claim was issued after the AMA's effective date, the statute's features (including continuous pursuit) applied to the supplemental claim.

VA argued that the continuous pursuit rules did not apply and that only the limited legacy dispute options were available to revise the October 2021 decision. VA noted that Mr. Boehringer had not opted in to the AMA while his legacy appeal was pending notwithstanding multiple opportunities to do so.

The majority opinion, authored by Judge Laurer and joined by Chief Judge Allen, Judge Pietsch, and Judge Falvey, affirmed the Board's dismissal.

The CAVC acknowledged that the analysis began with the language of section 5110 but said that it must be considered in the context of the entire statutory scheme. Specifically, because Congress chose to allow the legacy and AMA systems to exist concurrently, the CAVC examined the interaction between the two systems and the methods Congress specified to allow a claimant to switch from the legacy system to the AMA. Because Congress provided concurrent, not overlapping procedures, the CAVC held that a claim stream could only be subject to one system at a time.

The CAVC described the continuous pursuit rules as "one of the most significant AMA features codified by Congress." And because all but one of the provisions of section 5110(a)(2) were creations of the modernized system, they were "*new* procedural options Congress afforded in the AMA." Therefore, while section 5110(a)(2)(D) refers to a Board decision generally, the CAVC stated that the application of section 5110(a)(2) is premised on a claim stream that is "*already in the AMA*." The Court emphasized that any other result would be absurd.

While the provisions of the AMA found in Pub. L. No. 115-55, sec. 2(x)(1) include opt-in measures that would have allowed Mr. Boehringer to change his

legacy appeal into a modernized one, he had not chosen to opt in while his claim was pending. Mr. Boehringer argued that he was not required to affirmatively opt in because the general rule in subsection 2(x)(1) states that, "[e]xcept as otherwise provided," the AMA applies "to all claims for which notice of a decision under section 5104" is provided by VA after the AMA's effective date. And because VA issued a decision on the supplemental claim after that date, the appeal was automatically under the AMA.

The CAVC rejected that argument, explaining that allowing his supplemental claim to automatically place his appeal in the modernized system would create what the CAVC termed an "opt-in loophole" that Congress did not intend. To hold otherwise would require the CAVC to find that the "initial decision" on his TDIU claim could shift to the post-AMA decision but that the "initial application for a benefit" was nonetheless tied to the prior, final legacy claim. Instead, the CAVC found that there were distinct claim streams: one under the legacy system and one under the AMA. Ultimately, the CAVC held that a claimant cannot use a supplemental claim under section (5110)(a)(2)(D) to continuously pursue an earlier effective date claim that became final under the legacy system.

Here, because Mr. Boehringer's legacy claim was denied in a final Board decision, and because the continuous pursuit rules could only go back to the initial application date for the AMA claim (i.e., after February 2019), his April 2022 supplemental claim could not preserve an earlier effective date for his legacy claim. Accordingly, the majority affirmed the Board's decision.

Senior Judge Bartley, joined by Judges Toth and Jaquith, dissented on the following grounds:

- (1) They could not assume "that the indefinite article 'a' [in section 5110(a)(2)(D)] refers exclusively to an AMA Board decision and excludes a legacy Board decision;"
- (2) The result of that reading "would [not] be absurd or at odds with Congress's intent"; and
- (3) Subsection 2(x)(1) of the AMA clearly applied and there was no conflict between it and subsection 2(x)(5), which provided the explicit

opt-in provision for pending legacy claims.

The majority's denial makes clear that claimants with a pending legacy appeal seeking an earlier effective date remain in the legacy system at their peril. If the Board issues a decision denying their appeal, their only options are a timely appeal to the CAVC, a motion for reconsideration, or a motion for revision based on clear and unmistakable error (CUE). If a claimant cannot prevail under any of those options, they will have to use the date of a future AMA supplemental claim as the earliest possible effective date.

While the rules governing the effective dates of legacy and modernized appeals persist for now, their future remains uncertain. That is because Mr. Boehringer has opted to continue his own pursuit of retroactive benefits by appealing to the U.S. Court of Appeals for the Federal Circuit on August 14, 2026 (No. 26-2153).

Eric Wilson is an appeals attorney for the Virginia Department of Veterans Services.

CAVC Finds Federal Circuit's Reasons for Remand Instructive in Analyzing Prevailing Party Status for EAJA Fees

by Megan Kondrachuk

Reporting on *Stinson v. Collins*, No. 20-8342(E) (Vet. App. July 16, 2026) (en banc order).

Proceeding en banc, the CAVC withdrew a November 24, 2025, panel decision addressing Mr. Robert L. Stinson's entitlement to attorney fees under the Equal Access to Justice Act (EAJA), focusing largely on the concepts of prevailing party status and discretionary remands. Judge Falvey filed the opinion in which Chief Judge Allen, Judge Laurer, and Judge Jaquith joined.

This "labyrinth of false complexity," as stated by Judge Falvey, began when the Board of Veterans' Appeals (Board) denied Mr. Stinson's service connection claim for blastic plasmacytoid dendritic

cell neoplasm (BPDCN), and Mr. Stinson appealed to the CAVC. In a single-judge decision, the CAVC affirmed, and Mr. Stinson appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit found that the CAVC erred, and the Federal Circuit instructed it to remand the BPDCN service connection claim to the Board, which the CAVC did.

Mr. Stinson then filed his EAJA application, which is the subject of the present case. The VA Secretary contested both the amount of the EAJA application as unreasonable and Mr. Stinson's entitlement to EAJA fees generally under the statute, arguing he was not a prevailing party.

First, the CAVC addressed the Secretary's contention that Mr. Stinson was not a prevailing party because the Federal Circuit remanded Mr. Stinson's appeal for an error that was identified in the CAVC's analysis, not in the agency's handling of the case. A discretionary remand occurs when the CAVC chooses to consider a newly raised issue and decides to return the case to the Board as a result of that issue, but there is not necessarily a Board error that necessitates the remand.

To determine if the remand was discretionary, the CAVC analyzed the Federal Circuit's remand order. Ultimately, it found that though the Federal Circuit did not explicitly say that the Board made an error, the Federal Circuit identified evidence favorable to Mr. Stinson's appeal that the Board failed to address, and therefore, the remand was nondiscretionary. Further, "the [Federal Circuit]'s reasoning implied that the Board failed to discuss an issue reasonably raised by the record," which underscored that the remand was nondiscretionary.

The CAVC also found that the second prong of the prevailing party analysis—concerning whether there was a material alteration in the relationship between the parties—had been met and that the Secretary's position was unjustified at that administrative level, thus entitling Mr. Stinson to attorney fees under the EAJA.

Despite finding entitlement to attorney fees, the CAVC did find that reduction of the total amount of fees was necessary due to several factors, including seemingly duplicative entries of work by multiple

attorneys, excessive time spent on preparation for oral argument, and time charged for motions for extension of time to file pleadings. The CAVC ultimately reduced Mr. Stinson's total application of \$79,697.39 by 25%, resulting in a total fee of \$59,773.03.

Multiple judges filed concurring opinions, and Judge Toth dissented. In his dissenting opinion, in which Judge Pietsch joined, Judge Toth stated that he could not "sign onto a ruling that effectively divests this Court of the statutory authority that Congress reserved exclusively for it to exercise—namely, to review the factual determinations of the Secretary for purposes of assessing administrative error." He found no way to read the Federal Circuit decision as handing down a finding of administrative error, and therefore, no way to give Mr. Stinson prevailing party status.

Chief Judge Allen filed a concurring opinion, in which Judges Lauer and Jaquith joined. In the short opinion, he shared some of Judge Toth's concerns regarding the division of authority between the CAVC and the Federal Circuit but ultimately supported the majority's finding of Mr. Stinson's prevailing party status.

Judge Jaquith filed a concurring opinion to provide further illumination of his view of prevailing party status and agency error. He provided a straightforward analysis: "Obtaining a remand that affords the veteran a path to pursue the possibility of a favorable merits determination constitutes prevailing."

Judge Meredith filed an opinion concurring in part and dissenting in part. While she ultimately agreed that Mr. Stinson was the prevailing party, she did not agree with the majority's analysis of how he obtained that status. Her test for the prevailing party status seemed similar to Judge Jaquith's in its direct approach as she stated, "The appellant secured a remand for the [Board] to address whether evidence already of record could help him satisfy the elements for service connection and, because such a remand could not have been afforded in the absence of Agency error, he has prevailed." She dissented to the amount of attorney fees awarded, finding the award excessive in some respects.

While on its face this case deals with prevailing party status for EAJA applications, it also provides interesting insight into the CAVC's view of the division of authority between the CAVC and Federal Circuit.

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CAVC Issues Limited Remand That Presents Solution for Judicial Factfinding in the First Instance

by Martina Chesonis

Reporting on *Williams v. Collins*, No. 24-2592 (Vet. App. July 27, 2026) (order).

The CAVC issued a limited remand for the sole purpose of requiring the Board of Veterans' Appeals (Board) to make the factual determination of whether Mr. John Omar Williams' records reasonably raised the issue of entitlement to TDIU; the Court also retained jurisdiction over the appeal.

Mr. Williams was service connected for adjustment disorder in March 2009 with a 30% rating. After an increase to 50% in March 2010, Mr. Williams applied for another increase in August 2018. An October 2018 VA examiner noted that Mr. Williams experienced "[o]ccupational and social impairment with deficiencies in most areas" and "bouts of passive suicidal ideation." An additional VA psychiatric exam from December 2018 recognized Mr. Williams' struggles to remain employed. Despite the evidence from the VA examinations, the agency of original jurisdiction continued Mr. Williams' rating at 50% in June 2020. He filed a Notice of Disagreement in July 2020.

The Board issued its decision in February 2024, finding that Mr. Williams' adjustment disorder should be rated at 70% but not 100%. In making its finding, the Board analyzed Mr. Williams' depression symptoms and suicidal ideations but made no mention of his employment history. The

Board did not address Mr. Williams' entitlement to TDIU in this decision.

Mr. Williams appealed, arguing that the Board failed to provide an adequate statement of reasons and bases because it did not address whether the record reasonably raised entitlement to TDIU. The Secretary argued that the record did not raise entitlement to TDIU sufficiently to require the Board to address it.

In August 2025, a single judge ruled in favor of the Secretary, citing the Secretary's position. Mr. Williams then filed a Rule 35 motion, arguing that the CAVC inappropriately weighed facts in the first instance when it determined that the record did not reasonably raise entitlement to TDIU. The motion was denied, and the case was assigned to a panel. Notably, both Mr. Williams and the Secretary agreed that the Board made an implicit factual determination that the record did not reasonably raise a theory of entitlement to TDIU.

The CAVC addressed two questions: (1) Did the Board's silence equate to an implicit finding; and (2) if the Board's silence was not an implicit finding, how could the CAVC decide whether the record reasonably raised a theory of entitlement to TDIU without engaging in factfinding in the first instance (specifically in the context of recent caselaw from the U.S. Court of Appeals for the Federal Circuit)?

The CAVC answered the first question rather quickly, finding that the Board's silence did not equate to an implicit finding. While the CAVC recognized that the Board *can* make implicit findings, it found that the Board did not do so in this case. The CAVC found that to determine whether the Board's silence is an implicit finding, the CAVC must find some indication in the decision that the Board intended an implicit factfinding. The CAVC provided two examples of when the Board intends for an implicit finding: when the nature of the decision elicits factfinding (citing *Miller v. Wilkie*, 32 Vet.App. 249, 260-61 (2020)) and when there are contextual clues (citing *Walleman v. McDonough*, 35 Vet.App. 294, 307 (2022); *Mitchell v. Shinseki*, 25 Vet.App. 32, 43 (2011)). Here, the CAVC concluded that the Board provided no indication of an implicit finding because this case did not elicit

factfinding, nor were there any textual clues indicating an implicit finding.

Having decided that the Board did not implicitly find that entitlement to TDIU was reasonably raised, the CAVC addressed the second question: How could the Court address Mr. Williams' appeal without engaging in factfinding in the first instance, as prohibited in recent Federal Circuit opinions? The CAVC was clear that the determination of whether the records reasonably raised entitlement to TDIU is a factual determination. In this portion of the opinion, the CAVC provided significant context about *how* it was restricted with respect to making factual determinations in the first instance.

Using recent Federal Circuit caselaw as guardrails, the CAVC moved through detailed case analyses of *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir.2021); *Stinson v. McDonough*, 92 F.4th 1355 (Fed. Cir. 2024); and *Golden v. Collins*, 161 F.4th 1346, 1351-52 (Fed. Cir. 2025). However, the CAVC found the context of these cases either too narrow or without substantive guidance. Having done so, the CAVC recognized that it was unable to make a factual determination in the first instance.

Without additional guidance, the CAVC likened the range of its authority to a spectrum to determine whether the Board erred in addressing a reasonably raised issue. On one end, the CAVC may affirm that the record did not reasonably raise an issue when there is absolutely zero evidentiary support for the issue in question. On the other end, the CAVC may decide that the Board erred when the record provides such an overwhelming amount of evidence that there can be no debate that the record reasonably raised an issue. The CAVC placed this case somewhere in the middle of this spectrum—i.e., the CAVC was barred from determining whether the record reasonably raised entitlement to TDIU without making the factual determination that the record reasonably raised the issue.

Understanding the limits of its authority with a case in the middle of this spectrum, the CAVC decided to retain jurisdiction and issue a limited remand for the Board to make the factual determination of whether the record reasonably raised entitlement to TDIU. The CAVC referred to this action as a

discretionary “tool” to be used in place of an automatic reasons-or-bases remand until the Federal Circuit provides more detailed guidance.

The limited remand underscores the CAVC’s long-standing authority to devise interim procedural mechanisms in cases in which determining whether an issue was reasonably raised would itself require prohibited *de novo* judicial factfinding. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1992).

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CAVC Holds that 38 C.F.R. § 14.561 Affects the Provision of VA Benefits but Does Not Constrain VA’s Office of Inspector General

by Rakhee Vemulapalli

Reporting on *Rodgers v. Collins*, No. 23-7498 (Vet. App. July 29, 2026) (per curiam order).

In *Rodgers v. Collins*, the CAVC addressed the interplay and propriety of parallel VA administrative and criminal fraud proceedings in U.S. District Court. The CAVC determined that 38 C.F.R. § 14.561, which pertains to federal criminal prosecutions and provides that “[b]efore a submission is made to the U.S. Attorney in cases involving personnel or claims, the General Counsel . . . or Regional Counsel . . . will first ascertain that necessary administrative or adjudicatory . . . action has been taken,” does not apply to VA’s Office of Inspector General (OIG).

Veteran Timothy P. Rodgers filed a petition for a writ of mandamus to compel VA to reinstate benefits that he alleged were wrongfully reduced or severed based on allegations of fraud. He also filed a Rule 8 motion requesting that the CAVC direct VA to stop criminal proceedings against him. In his response, the Secretary explained that, based on evidence collected during a fraud investigation performed by OIG, a VA regional office (RO) had proposed in September 2022 to reduce Mr. Rodgers’ seizure evaluation from 100% to 40%, effective

August 22, 2018, and to discontinue special monthly compensation for aid and attendance benefits, effective October 6, 2014.

In his petition, Mr. Rodgers sought the CAVC’s assistance to obtain access to all records used to sever his benefits, including the OIG file received by the RO; to remove from his claims file a threat letter written by another veteran with the same name that was used against him in criminal proceedings; to notify the criminal tribunal that the letter was misfiled; and to direct VA personnel to stop cooperating with the criminal proceedings and then take corrective action.

The CAVC dismissed the portions of the petition requesting access to evidence and correcting the claims file as moot after determining that Mr. Rodgers had already received the relief requested.

With respect to his request that the CAVC direct VA personnel to stop cooperating with the criminal proceedings and take corrective action, Mr. Rodgers argued that VA failed to comply with the requirement set forth in 38 C.F.R. § 14.561 that the Office of General Counsel (OGC) ensure that necessary administrative or adjudicatory actions are completed before cases are referred for possible criminal proceedings. He argued that § 14.561 requires that VA must ensure that all necessary administrative and adjudicative actions have taken place before referring matters for criminal prosecution. He further asserted that, to preserve his Fifth Amendment rights to silence and due process, he would have to forgo his administrative appeal, depriving the CAVC of its prospective jurisdiction. Mr. Rodgers also maintained that the CAVC’s exclusive jurisdiction to address disputes over benefits under laws administered by VA affords it the authority to order VA personnel to suspend cooperation with criminal proceedings.

In response, the Secretary argued that Mr. Rodgers’ reliance on § 14.561 was misplaced because the plain language of the regulation applies to criminal referrals from OGC, but not OIG, which is independent of OGC. In this case, the referral originated from a tip directly to OIG and not from an OGC referral. The Secretary further argued that the criminal and administrative proceedings were

substantively different, and therefore the CAVC would not be deprived of jurisdiction. The Secretary acknowledged that a factual finding of fraud could be associated with the administrative appeal record and affect a merits consideration, but the outcome of the criminal proceedings would not necessarily be dispositive in administrative appeal proceedings and therefore would not deprive the CAVC of jurisdiction. The Secretary also acknowledged that parallel criminal and administrative proceedings could implicate Mr. Rodgers' Fifth Amendment rights, but the Secretary asserted that Mr. Rodgers' concerns would be better addressed by seeking a stay of his administrative proceedings.

In its analysis, the CAVC first addressed whether it had jurisdiction to consider Mr. Rodgers' request. After discussing 38 U.S.C. § 511, it determined that to make such a determination, it must decide whether § 14.561 is a law that affects the provision of VA benefits. The CAVC concluded that § 14.561 meets the requirement of such a law considering that if Mr. Rodgers were found guilty of benefits fraud in a criminal tribunal before completion of administrative proceedings, that judgement would be outcome determinative as to administrative proceedings challenging fraud and debt creation.

After considering the regulatory structure of the "Prosecution" heading, under which § 14.561 falls, along with the accompanying regulations under that heading, and considering the plain language of the text of § 14.561, the CAVC concluded that § 14.561 governs the role of OGC and regional counsel but puts no constraints on the role of OIG. Therefore, the CAVC determined that a writ was not warranted, and it denied that portion of the petition.

The CAVC also denied Mr. Rodgers' Rule 8 motion and granted the Secretary's motion to strike grand jury testimony that was subject to a protective order.

Ultimately, this case illustrates that the plain language of § 14.561 does not carry VA-wide implications even in situations where pending federal criminal proceedings are likely to affect the administrative provision of veterans benefits.

Rakhee Vemulapalli 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 Board of Veterans' Appeals, the Department of Veterans Affairs or the United States. The author is writing in a personal capacity.

CAVC Clarifies the Contours of the Official Record and Holds that the Constructive Possession Doctrine Applies in Modernized Appeals

by Joan K. Schneider

Reporting on *Edwards v. Collins*, No. 24-6641 (Vet. App. August 4, 2026).

In *Edwards v. Collins*, a three-judge panel of Chief Judge Allen and Judges Falvey and Jaquith considered when constructive possession applies in the AMA and found that the National Academy of Sciences' Agent Orange Updates (NAS AOU) were in VA's constructive possession.

The panel held that independent reports contained within prior Board of Veterans' Appeals (Board) decisions, which are submitted during a temporal window when evidence may not be introduced in a modernized appeal, are still subject to review under the constructive possession doctrine.

The appeal arose when veteran Robert O. Edwards—who was exposed to herbicide agents during service and thereafter diagnosed with squamous cell carcinoma—filed a November 2019 claim. Attached thereto were two prior Board decisions from unrelated veterans. Both decisions granted service connection for squamous cell carcinoma based on private medical opinions.

In one of these unrelated Board decisions, a private provider cited the 2010 NAS AOU and found that herbicide agents may increase susceptibility to an infection in the oral cavity leading to the development of squamous cell carcinoma.

A VA regional office denied Mr. Edwards' claim without reference to the 2010 NAS AOU. He appealed to the Board in May 2021 on the direct

review docket. The appeal brief discussed the 2012 NAS AOU, which repeated the same theory as the 2010 NAS AOU. Mr. Edwards argued that the potential nexus described in the NAS AOU was sufficient to show a need for a new VA medical opinion.

An August 2024 Board decision denied service connection, explaining that unrelated Board decisions did not trigger the predecisional duty to assist because they were “too general and conclusory” to establish a nexus. The Board found that the two unrelated decisions were not probative, and it distinguished them by noting that no private opinion had been submitted for Mr. Edwards. The Board also found that it could not consider the 2012 NAS AOU because it was first presented in the appeal brief, outside of the evidentiary window. Mr. Edwards appealed.

Before the CAVC, Mr. Edwards asserted that VA had constructive possession of the 2012 NAS AOU before the claim was denied at the agency of original jurisdiction (AOJ).

The CAVC agreed. Quoting *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021), the CAVC noted that “evidence that is ‘within the Secretary’s control’ and ‘could reasonably be expected to be part of the record before the Secretary and the Board’ is constructively part of the record.” In applying this, “[t]he correct standard . . . is relevance and reasonableness.”

The Secretary argued that allowing the Board to consider newly received evidence would be incompatible with the direct review docket selection. The CAVC disagreed, finding the constructive possession doctrine “harmonious” with the command that “the evidentiary record before the Board shall be limited to the evidence of record” at the time of the rating decision. Constructive possession only applies to evidence already before the AOJ when the evidentiary window closes.

The Secretary argued that Congress intended to restrict evidence, as shown by 38 U.S.C. § 7113(a)’s dictate limiting Board review. However, the CAVC explained that the evidence was before the AOJ, so the reference in the brief was not “additional

evidence.” The Secretary also cited 38 U.S.C. § 5103A(e), limiting the duty to assist, and argued that the notice provisions of 38 U.S.C. § 5104(b) reflect the AMA’s limited record. But the CAVC rejected the theory that the record was limited to evidence listed on the decision, as the word “evidence” in the statute included qualifiers. Statutory requirements to summarize evidence in the decision did not require the AOJ to identify all evidence considered.

The Secretary further argued that the availability of supplemental claims under 38 U.S.C. § 5108 removed the need for constructive possession. But the CAVC did not find that relevant to the question of whether the evidence was constructively before the Board in this specific case.

The CAVC ultimately took a narrow view of 38 C.F.R. § 3.103(c)(2)(iii), which dictates when VHA records are considered constructively received, concluding that this regulation did not remove the constructive possession doctrine from the AMA. The CAVC also rejected the Secretary’s argument that 38 C.F.R. §§ 20.1403(b)(2), 3.2601(g), and 20.802 removed constructive possession from the AMA.

Additionally, the CAVC noted that 38 C.F.R. § 20.1303 states that unrelated Board decisions are binding only as to the specific case decided but may be cited to the extent that they relate to another case. And while unrelated Board decisions are insufficient to satisfy *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006)—unless they are based on sufficiently similar facts and reasoning—nothing in 38 C.F.R. § 20.1303 prevents the Board from considering evidence within such decisions.

The CAVC observed that whether the reference to the 2010 NAS AOU was contained in an unrelated Board decision or another format is irrelevant. Because the submitted document identified the report and the way the report applied generally to cases concerning squamous cell carcinoma, its submission had the same effect as submitting the 2010 NAS AOU. In ignoring the reference to the 2010 NAS AOU in the submitted document, the Board applied 38 C.F.R. § 20.1303 too narrowly.

Judge Jaquith concurred in the judgment but differed regarding the majority’s description of *Bell*

v. Derwinski, 2 Vet. App. 611 (1992), as based on common law principles. Judge Jaquith instead argued that *Bell* correctly interpreted “the record of proceedings before the Secretary and the Board” in 38 U.S.C. § 7252 to include constructively possessed documents. He described the NAS AOU as “constructive possession royalty” because they came from congressional mandate.

Ultimately, the CAVC vacated the decision on appeal and remanded the matter for the Board to consider the NAS AOU and any other relevant evidence in the unrelated decisions to determine whether there was a predecisional duty-to-assist error.

Joan Schneider is an attorney with 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.

Federal Circuit Reiterates That Pending, Unadjudicated VA Claims Should Be Pursued at the Regional Office

by Max C. Davis

Reporting on *Stiles v. Collins*, No. 24-2252 (Fed. Cir. June 23, 2026) (nonprecedential).

In a nonprecedential decision, the U.S. Court of Appeals for the Federal Circuit held that when a claimant applying for VA benefits believes that he or she has a pending, unadjudicated claim, the appropriate procedure is to pursue resolution at the VA regional office (RO) rather than seek the intervention of the Board of Veterans’ Appeals (Board).

Veteran Mark Stiles applied for VA disability compensation for nasal sinus septoplasty. In his appeal of the denied claim, he commented that he was experiencing vertigo. In a February 2013 decision, the Board granted service connection for chronic sinusitis and allergic rhinitis. Included in its

decision was a remark that Mr. Stiles’ medical records showed a diagnosis of sleep apnea.

After the RO assigned initial disability ratings, Mr. Stiles again appealed to the Board, this time expressly asserting that there were pending claims for vertigo and sleep apnea that VA had not adjudicated. The Board remanded the underlying increased rating claims to the RO in a decision that did not mention either vertigo or sleep apnea.

Mr. Stiles appealed the Board’s decision to the CAVC, requesting that it order the Board to refer the vertigo and sleep apnea claims to the RO for adjudication. The CAVC concluded that it did not have jurisdiction because, under 38 U.S.C. § 7252, its jurisdiction extends only to a Board “decision”—meaning a grant or denial of a benefit—and the appealed Board decision, which remanded the matter, was not a decision. Mr. Stiles appealed the CAVC’s ruling that it did not have jurisdiction to the Federal Circuit.

The Federal Circuit began its review by remarking that Mr. Stiles had not made a persuasive argument that the CAVC erred in its jurisdictional analysis. Because the Board remand “did not itself decide either the merits or even the existence of such asserted unadjudicated claims,” it was not a “decision” over which the CAVC had jurisdiction under 38 U.S.C. § 7252.

But the Federal Circuit stopped short of “reach[ing] a definitive conclusion about the jurisdictional issue,” instead ultimately ruling that any potential error would be harmless. It had recently considered a similar fact pattern in *Batson v. Collins*, No. 23-2408 (Fed. Cir. May 14, 2025) (nonprecedential), and its nonprecedential decision in that case was that the appellant could use the already-established procedure for securing adjudication of a pending, unadjudicated claim: pursuing resolution of the claim at the regional office. This route for relief, the Federal Circuit said, “has long been recognized” by the CAVC, and, compared to the requested relief of an order to the Board to refer the claims to the regional office, using the established procedure would not impair an appellant’s interests. *Batson*, No. 23-2408, at *5 (citation omitted).

Likewise in Mr. Stiles' case, he had "not identified any concrete, non-speculative way in which he would be worse off following that procedure than he would be with the referral he seeks." He could pursue the claims at the RO and then, if he desired, seek Board review of the RO's decision. Any error in the CAVC's jurisdictional ruling was thus harmless, and the Federal Circuit therefore affirmed the CAVC's dismissal of the appeal.

Max C. Davis is counsel 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.

Distinguishing *Chavis*, Complications Do Not Always Remain Part of the Underlying Claim

by Joan K. Schneider

Reporting on *De Hart v. Collins*, No. 21-6249 (Fed. Cir. June 26, 2026) (nonprecedential).

In *De Hart v. Collins*, a nonprecedential opinion upholding the CAVC affirmance of a Board decision, the U.S. Court of Appeals for the Federal Circuit agreed that once neurological abnormalities associated with a spine condition have been separately addressed and adjudicated, they do not remain part of the claim for a higher rating for the spine.

This legacy appeal began with a December 2008 rating decision that granted service connection for a lumbar spine disability and assigned a noncompensable rating effective February 1, 2008. Ms. Mai De Hart submitted a February 2009 Notice of Disagreement (NOD), seeking a higher rating for the lumbar spine disability.

During the time the appeal was pending, VA increased the spine rating first to 10%, effective April 2016, and later to 20%, effective March 2019. VA also granted service connection for radiculopathy of each

leg and assigned separate 20% disability ratings, effective the date of the March 2019 VA examination.

Ms. De Hart appealed the rating for the spine and in a June 2021 decision, the Board upheld the spine rating assigned. The Board noted that "the RO assigned separate ratings for right and left lower extremity radiculopathies in a September 2019 rating decision related to the lumbar spine disability. The evidence of record does not indicate the presence of any additional objective abnormalities for which a separate rating is warranted." The Board did not further discuss Ms. De Hart's radiculopathy.

Before the CAVC, Ms. De Hart argued that the issue of an earlier effective date for the radiculopathy ratings was before the Board as part of the appeal for an increased spine rating. The primary support for this argument was based on *Chavis v. McDonough*, 34 Vet. App. 1 (2021). However, the CAVC distinguished *Chavis*; *Rice v. Shinseki*, 22 Vet. App. 447 (2009) (per curiam); and *Bailey v. Wilkie*, 33 Vet. App. 188 (2021); focusing on the principles of claim construction and initial adjudication to find that an appeal as to an upstream issue cannot place a downstream issue into appellate status. The CAVC cited *Gudinas v. McDonough*, 34 Vet. App. 25 (2021), *aff'd*, 54 F.4th 716 (Fed. Cir. 2022), for the principle that a secondary service-connected condition is not part and parcel of the underlying (primary) condition.

Before the Federal Circuit, Ms. De Hart changed tactics and relied on two VA regulations, 38 C.F.R. § 4.71a and 38 C.F.R. § 4.25. Regarding section 4.71a, the Federal Circuit discussed that Note (1) required neurological abnormalities to be separately rated and found that because Ms. De Hart conceded that her radiculopathy was a separate condition, not just a symptom of her spine disability, once service connection for radiculopathy was granted, radiculopathy assumed its own adjudicative identity and a separate NOD was required.

Similarly, the Federal Circuit noted that 38 C.F.R. § 4.25(b) requires that "disabilities arising from a single disease entity . . . are to be rated separately as are all other disabling conditions." Thus, if radiculopathy is considered a separate disability

from the spine condition, rather than simply a symptom, it must be rated separately.

Ms. De Hart also argued that the CAVC had overturned *Chavis* and *Bailey*. The Federal Circuit did not agree, and as the CAVC had done, distinguished *Chavis* from the facts of the present case. Specifically, the CAVC in *Chavis* addressed an increased rating claim, and the present case involved an initial determination of eligibility for benefits. The Federal Circuit concluded that because Ms. De Hart did not indicate disagreement with any agency determination relating to her radiculopathy, that issue was not placed into appellate status by the 2009 NOD. Therefore, the CAVC correctly decided that if Ms. De Hart wished to challenge the 2019 rating decision on her radiculopathy, she needed to file a timely NOD that expressly raised that issue.

While nonprecedential, the Federal Circuit's reasoning reinforces the CAVC's prior holding that an appeal as to an upstream issue is insufficient to place a separate downstream issue into appellate status.

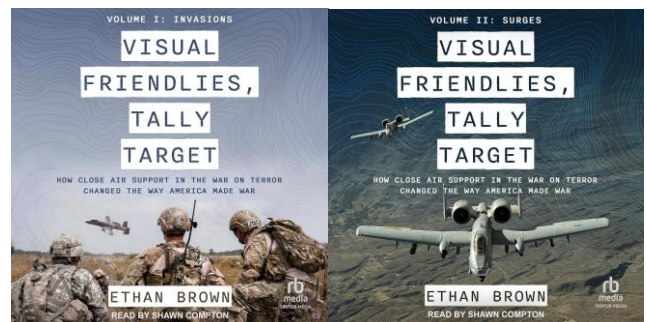
Joan Schneider is an attorney with the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

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

Join us at our virtual quarterly planning meeting on October 21 at 3 p.m. EDT or reach out directly to editor-in-chief Megan Kondrachuk at megan@vetlawusa.com. A link to the meeting will go out to CAVC Bar Association members in the next few weeks.

Book Review of *Visual Friendlies, Tally Target: How Close Air Support in the War on Terror Changed the Way America Made War, Volume I (Invasions) & Volume II (Surges)*, by Ethan Brown

Review by Elena Tharp



Audiobook narrated by Shawn Compton.

Tantor Media, 2025 & 2026. \$21.94 & \$22.22 (audiobooks). 12 hours and 14 minutes & 13 hours and 32 minutes.

Visual Friendlies, Tally Target is a trilogy detailing the experiences of joint terminal air controllers (JTACs) during the Global War on Terror (GWOT). This review covers the first two volumes of the trilogy—the third volume has yet to be released on audiobook.

Author Ethan Brown is a former tactical air control party who spent most of his 11-year career in the Air Force as a JTAC working with the 75th Ranger Regiment, 3d Battalion (3/75). When I attended my first Ranger Ball with my now-husband, I remember asking him who the people in the non-Army uniforms were. He told me they were the “Air Force guys,” and I didn’t think much of it until I listened to these books.

JTACs are those responsible for calling fire on the battlefield—they are the ones who give the final clearance to drop munitions. While they can come

from any branch of service, most JTACs hail from the Air Force and are embedded with Army units—including units within the 75th Ranger Regiment, hence the men in Air Force uniforms attending the Ranger Ball—to provide close air support.

This trilogy tells the story of this specialty through a series of interviews with JTACs who served, accompanied by an introduction detailing important context before the start of each interview. Throughout these interviews, readers are left with a palpable sense of what JTACs experienced throughout the first 12 years of the GWOT.

In the first volume, Brown emphasizes how the JTAC community developed during the early GWOT years, learning hard-won lessons in the new battle spaces of Afghanistan and Iraq as the community transitioned out of decades spent preparing for a Cold War engagement. Brown does a masterful job at describing the invasions of Afghanistan and Iraq through the experiences of the JTACs he interviewed. In addition, due to my married-into allegiances, I tended to perk up when the interviews involved stories from JTACs embedded with Ranger units, including the Haditha Dam operation and the rescue of Private First Class Jessica Lynch, a prisoner of war.

The second volume discusses the surges in Iraq in 2007 and Afghanistan in 2010-11. Unlike the first volume, this volume shares the experiences of non-American JTACs who served alongside Americans. Throughout the volume, Brown details how the lack of clearly defined strategic objectives derailed the wars in Afghanistan and Iraq, with many interview subjects providing their own personal takes on the growing quagmire that forces found themselves in as the wars dragged on.

While also discussed in the first volume, the second volume emphasizes the power that JTACs commanded over the battle space, in both Afghanistan and Iraq. Brown details stories of missions where JTACs made the decision to both drop fire and to hold off, emphasizing how JTACs were often forced to make difficult moral calls in the heat of battle because they were the ones ultimately responsible for calling in the fire. Along this vein,

Brown emphasizes the psychological effect that controlling that much firepower has on a person.

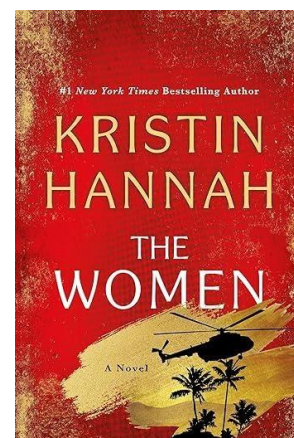
This book's audience is wide ranging—from veterans of the GWOT, to those interested in learning more about the war and a little-discussed specialty that played a crucial role. As someone with minimal technical knowledge of the world of close air support, this book is surprisingly readable—Brown ensures that readers are not overwhelmed by acronyms and technical jargon.

I recommend this book to anyone who wants to gain a wide-ranging overview of the GWOT from a unique perspective. In particular, the author interviewed JTACs with a wide range of experiences, telling stories about their time working alongside special operations, conventional military forces, and allied forces across Afghanistan and Iraq. This book is also a must read for anybody interested in learning more about the world of close air support or the role that JTACs played in the GWOT.

Elena Tharp is a recent graduate of the University of Florida Levin College of Law, where she was a member of the Veterans and Servicemembers Clinic.

Book Review of *The Women: A Novel*, by Kristin Hannah

Review by Briana Tellado



St. Martin's Press, New York, 2024. \$14.99 (ebook).
273 pages.

When a Naval Academy graduate tells Frances (Frankie) McGrath that "women can be heroes too," she becomes inspired to join the military. As a young nurse, and the main character in *The Women*—a work of historical fiction by bestselling author Kristin Hannah—McGrath decides to join the Army. Unlike the other armed services, the Army will deploy her to Vietnam where she can put her nursing skills to work immediately after initial officer training. But when she learns that her brother has been killed in action, her parents beg her not to go. She goes anyway, having already committed to serving. While in Vietnam, she rises to the rank of first lieutenant.

In many ways, this book is like other stories of Vietnam service. It portrays one person's time in country, doing the same job day in, day out. Sleeping in a hooch, eating at the chow hall, and unwinding at the officers' club. Because phone calls home were rare—unheard of, even—the book is interspersed with letters from McGrath to her parents. And when her two good friends, who are also nurses, leave Vietnam before she does, Frankie's letters to them are also featured. The correspondence between the young women illustrates what turns out to be a lifelong friendship.

As a nurse, McGrath doesn't see combat, but she hears the MEDEVAC dustoffs every time they bring new casualties to the helipad outside the operating room. She feels the vibrations every time her base camp is mortared. She can even smell the odor of her patients' burning flesh after a napalm attack on a nearby village. And every day, she sees the horrors of combat: amputations, gunshot wounds, burns, and explosions.

The first half of the book follows McGrath's two years in Vietnam. She felt like she was making such a difference that she signed up for a second yearlong tour. The second half of the book follows Frankie's time back home, trying to adjust to her new life as a civilian nurse and a veteran. She doesn't understand why civilians are calling her a "baby killer" when all she did during her service was save lives. She struggles when her father reveres her brother's service but is ashamed of hers. She still grieves the losses she experienced in Vietnam. She is unlucky in love and unlucky in her civilian nursing jobs. She

drinks too much, takes too many pills, and ultimately, ends up in inpatient rehab.

After two unsuccessful attempts to get help from VA with her PTSD symptoms, Frankie identifies an unmet need: therapy for the female veterans of Vietnam. She resumes her work as a civilian nurse and takes on a new role—offering equine therapy and talk therapy for other female veterans.

I don't usually enjoy reading fiction, but I thoroughly enjoyed *The Women*, which reads like a biography. The imagery used and the description of the characters—their hairstyles, facial expressions, and clothing—added credibility to the story. I would recommend it to anyone interested in the experiences of nurses during and after Vietnam.

Briana Tellado is a U.S. Army veteran and a legal editor at the CAVC.

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

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