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2022 National Veterans Law Moot Court Competition

by Solveig Frasch

Another National Veterans Law Moot Court Competition is in the books! The annual moot court competition is an invaluable opportunity for law students to hone their research and advocacy under the mentorship of expert practitioners. This year's competition boasted the highest turnout to date, with 30 teams from 26 different law schools participating.

Competitors received the problem in mid-September. This year's problem raised complicated questions about regulatory interpretation in the context of a 38 U.S.C. § 1151 compensation claim. In the hypothetical, a veteran enrolled in a college course as part of his VA Veteran Readiness and Employment (VR&E) program. He injured his wrist participating in an optional activity for extra credit in the class. On applying for compensation, he faced a barrier in the regulatory language of 38 C.F.R. § 3.361(d)(3), which only permits compensation for a disability incurred in the course of completing a "necessary component" of a VR&E program. The claim eventually advanced to the United States Supreme Court, where advocates were instructed to discuss two issues.

First, the advocates were asked "[w]hether the pro-veteran canon of construction applies to the *Chevron* analysis and, if so, at what stage of the analysis does it apply." Second, they were asked "[w]hether 38 C.F.R. § 3.361(d)(3)'s provision requiring an activity or function be generally accepted as a 'necessary component' of the Veteran's VA approved training or rehabilitation services is consistent with 38 U.S.C. § 1151."

The teams submitted their briefs for scoring in October. On the first weekend of November, their months of hard work and preparation culminated in four rounds of oral argument. The George Washington University Law School hosted the preliminary rounds and quarterfinals on November 5, and the Court of Appeals for Veterans Claims hosted the semi-final and final rounds on November 6. Chief Judge Margaret Bartley, Judge Amanda Meredith, and Judge Joseph Falvey heard the final round.

After final scoring, Bretagne Guempel and Tundun Oladipo from University of Richmond School of Law were named the overall champions. Second place went to Lance Felicien and Bradley Skerry from the South Texas College of Law Houston. Semi-

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finalists included Grayson Fusaro and Kaitlyn Iwanowski from The George Washington University Law School, and Kelly Aeschlimann and Rachel Dever from Regent University School of Law. Quarterfinalists included William Emery and Helen Schroeder from BYU J. Reuben Clark Law School, Charlie King and Rebecca Pierce from Campbell University School of Law, Erica Marrow and Carson Wienecke from St. Mary's University School of Law, and Andrew Hudlow and Amna Qamer from University of California, Hastings College of the Law.

(Pictured, from left to right: Judge Meredith, Chief Judge Bartley, Tundun Oladipo, Bretagne Guempel, Judge Falvey)

The prize for best oral advocate went to Paul Wood from NC Central University School of Law. Nancy Eriksen from Stetson University College of Law took second place. The award for best petitioner's brief went to Grayson Fusaro and Kaitlyn Iwanowski from The George Washington University Law School. Charlie King and Rebecca Pierce from Campbell University School of Law took second place. Finally, best respondent's brief went to Erica Marrow and Carson Wienecke from St. Mary's University School of Law. Bretagne Guempel and Tundun Oladipo from University of Richmond School of Law took second place.

Congratulations to all the winners, runners-up, and participants of the 2022 National Veterans Law Moot Court Competition. We hope to see many of you again next year!

Solveig Frasch is a staff attorney at the National Veterans Legal Services Program.

Message from the Chief Judge

Dear Colleagues,

Three years ago, in December 2019, the Court convened in ceremonial session at the E. Barrett Prettyman Courthouse on Constitution Avenue to celebrate the 30th anniversary of the creation of the Court, to recognize the achievements of Judges Davis and Schoelen, and to have Judge Davis ceremonially pass me the Chief Judge gavel. Since that time, the pandemic occurred and had a profound impact on our personal and professional lives.

With most of life now stabilized (although this is a fierce influenza season!), a sign of a return to normal is that in December 2022 the Court again convened in ceremonial session at the Prettyman Courthouse—this time, to celebrate the formal investitures of Judge Scott Laurer and Judge Grant Jaquith. Although they have been on the job as judges for over two years, the Court family was excited that Judges Laurer and Jaquith finally had the chance to publicly take their judicial oath in front of family, friends, and colleagues.

I congratulate both judges on the occasion of their investiture, feel blessed to have been able to work with them during the last few years, and thank them for their patience in waiting long years for their special event. I wanted each of them to have the opportunity to say a few words to CAVC Bar Association members, and so I now turn the column over to them.

Judge Scott Laurer:

After over 2 years on the Court, it's hard to believe that December 16 was the first time Judge Jaquith and I could join all the judges in-person on the bench during our investiture ceremony. And it was awesome!
As Judge Davis has noted, "Veterans law involves difficult statutory and regulatory interpretation and the evolution of both law and medicine." And while I gained relevant experience during my 30-year military career, the past 2 years have included a steep learning curve on a hard-working Court team.

Since I was commissioned in August 2020, the Court has received an average of over 7,800 appeals per year. My chambers team alone has issued 292 dispositive and nondispositive orders, written 264 single-judge opinions, and been assigned to 34 panel cases. Along with Judge Jaquith, we also co-authored the Court's only en banc opinion in 2021. And in 2022 after most pandemic restrictions lifted, my chambers team supported in-person educational outreach events at Penn State Law School and the University of Iowa College of Law. I also served on a panel with Chief Judge Bartley, Judge Greenberg, and Board of Veterans' Appeals representatives during the USCAVC 15th Annual Judicial Conference, where I had the pleasure of meeting many CAVC Bar Association members.

I'm privileged to serve in this position. Congress established the U.S. Court of Appeals for Veterans Claims to review adverse rulings on claims for veterans benefits issued by the Department of Veterans Affairs, an agency generally sheltered from independent judicial review before 1988. And as the son-in-law of a World War II veteran, the son of a Korean War-era veteran, the nephew of a Vietnam War veteran, and someone who served in the Gulf War and Afghanistan, it's hard to imagine a more satisfying way to keep serving our Nation.

In conclusion, thank you CAVC Bar Association members for everything you do to support deserving veterans, their families, and other beneficiaries. You're making a tremendous difference!

Judge Grant Jaquith:

Forty years ago – almost to the day – I was a first lieutenant in the Army Judge Advocate General's Corps reporting for my first active duty assignment at Fort Leonard Wood, Missouri, where I began providing legal assistance to soldiers, retired veterans, and their families. If there is a thought that connects my first steps following my admission to the bar with my 27 months on the Court, perhaps it was best expressed by Spanish writer George Santayana, whose 159th birthday was the day of our investiture: "Injustice in this world is not something comparative; the wrong is deep, clear, and absolute in each private fate."

It is a high honor to work alongside distinguished jurists and staff who are dedicated to securing justice in each case by doing the right thing in the right way for the right reason under the law. But that is easier to say than to do. The path of the law is not always smooth or clearly marked and each appellant is entitled to individualized adjudication. It has been thought-provoking and inspiring to be in the arena with the Court's titans of veterans law—and a lot of work. I have had the privilege of participating in cases involving fundamental principles, such as whether veterans have a right to fair process; foundational questions regarding the status and power of the Court; and the functional issues that arise when full court review yields such different perspectives that there are shifting majorities on whether there was error and, if so, whether it was prejudicial.

One thing I have learned from being in positions of leadership for so many years, and from being a parent and grandparent, is that I never have all the answers, so the likelihood that I will get it right hinges on having the humility to listen, be attentive to details, and learn. And the importance of that mindset in this work is underscored by the special solicitude for the service and sacrifices of veterans at the heart of the veterans benefits system. So, I will continue to ask a lot of questions, in court and in chambers, and benefit from the thoughtful, thorough briefs and arguments by the attorneys for the parties and the insights of my Court colleagues and staff. Thank you all!

Message from the President

Dear fellow CAVC Bar Association members,

The Bar Association has been busy this quarter. In October, the Law School Outreach Committee organized an administrative jobs panel, during which practitioners discussed their career paths. Panelists Catherine Mitrano of VA Office of General Counsel, Amy Borgersen of the National Veterans Legal Services Program, Javier Centonzio of Centonzio Law PLLC, and Sarah Garcia of the U.S. House of Representatives Committee on Veterans' Affairs provided their unique perspectives for students and new attorneys seeking careers in Veterans law. Student attendees were able to learn a lot about administrative law and different career paths, and we are grateful to the panelists for volunteering their time.

In November, the Bar Association co-sponsored the 2022 National Veterans Law Moot Court Competition with George Washington University Law School and the Court. Thirty teams from 23 law schools across the country competed in person at GWU Law School and the Court. This was the largest competitor pool for the NVLMCC in its 13-year history. I was on a team while in law school, have judged briefs in the past, and have coached a team myself, so to be on a panel of judges for the semifinal round of the competition was a real honor and a personal joy. Congratulations to the winners of the team and individual awards and to all the student competitors for your hard work and achievements. Special thanks also to all Court staff and Bar Association members who assisted in preparing, judging, and running the competition.

During this busy time of year, I know it can be easy for the days to fly by. This time of year is often consumed by frantic completion of briefs and memos, finalizing holiday plans, and, unfortunately, stress. I hope the end of the year is wrapping up smoothly for you and your families and wish you all a happy and healthy holiday season.

Best,
Jillian Berner

CAVC Bar Association Hosts Administrative Law Jobs Panel

by Morgan MacIsaac-Bykowski

On October 20, 2022, attorneys from the VA and private bar sat on a panel to discuss their careers in administrative law to educate members about the range of possibilities for law students and attorneys interested in this type of work.

The panel consisted of Catherine (Cathy) Mitrano, Acting General Counsel at U.S. Department of Veterans Affairs; Amy Borgersen of National Veterans Legal Services Program (NVLSP); Javier Centonzio of Centonzio Law PLLC; and Sarah Garcia, Acting Staff Director & General Counsel (Democratic Staff) at U.S. House of Representatives Committee on Veterans' Affairs. CAVC Bar Association President Jillian Berner moderated the panel.

Amy Borgerson discussed her transition from temporary attorney at the NVLSP to working for the Vietnam Veterans of America, then to private practice, and then back to the NVLSP. The focus of her career has been on Board and CAVC appeals.

Javier Centonzio, a veteran of the United States Marine Corps, discussed how he encountered difficulties with the VA after leaving service, leading him to pursue a career in veterans law. He took part in a veterans advocacy clinic while in law school, then interned at the VA Office of Regional Counsel, the Veterans Consortium Pro Bono Program and the NVLSP. After graduating from law school, Javier clerked for Judge Davis at the CAVC before establishing his own private law firm.

Sarah Garcia has been working as Congressional staff for about thirteen years between her roles on the U.S. House of Representatives Committee on Veterans' Affairs and the U.S. Senate Homeland Security and Governmental Affairs Committee. Before that, Sarah worked as a prosecutor in New Mexico. In law school, she was interested in both criminal and policy making and has had the opportunity to spend time in both areas.

Cathy Mitrano is a senior career attorney at the Department of Veterans Affairs, which currently employs about 800 attorneys. She has worked as a prosecutor at the Massachusetts Attorney General's Office, then at six different federal agencies before moving to her current position at VA. She has worked at the Federal Aviation Administration, the U.S. Postal Service, the U.S. Coast Guard, the Federal Communications Commission, the Department of the Army and was a founding member of the Department of Homeland Security after the attack on September 11, 2001. Cathy finds administrative law exciting and enjoys the freedom to be creative, which tends to be missing in other areas of law.

For Sarah, the transition to administrative law consisted of trial and error. She said that asking questions, a skill she learned as a prosecutor, helped her get her footing. She compared legal research to a treasure hunt, where digging in and knowing what to ask is crucial. Though her current position is mostly managerial, the goal of her committee is to look at VA's regulatory actions and implementations to determine potential impacts on policy. Sarah thinks that genuinely curious problem-solvers who can explain complex issues in a clear and simple way are great candidates for the type of work she does.

Javier considers his experience participating in an oral argument before the CAVC, which resulted in a favorable precedential decision, a rewarding one. He agrees with Cathy's opinion that administrative law is exciting and is happy to know that he advanced the positions of the veterans to whom that precedential case applies. He finds it necessary to approach VA work with an open mind. For anyone interested in opening their own firm, Javier suggested creating a business plan, utilizing their network, and potentially starting out by practicing other areas of law in order to build revenue while waiting on initial VA awards.

Cathy is currently focused on implementing the PACT Act and the Family Caregiver Program. She is also working with a contractor to successfully implement the Electronic Heath Record Modernization Program, which has been a challenge. She finds that making sure her employees are happy goes a long way for both the VA and the veterans it serves, so she works on the VA's relationship with its employees on a daily basis. She advises people who are interested in public service to look closely at the mission of the agency they are contemplating working with.

Amy discussed how important it is to have a good work-life balance when working in public interest. She finds that especially now that she works from home, it can be difficult to disconnect. For her, the biggest difference between working at a private firm and at a non-profit is the importance of "the bottom line." While working in private practice, she was required to meet a certain number of billable hours and pay attention to the financial aspect of the practice of law. She enjoys that with the NVLSP, she can focus solely on the goals of her clients.

Jillian Berner opened the floor for questions from attendees, which included both attorneys and law students. This resulted in thoughtful responses from the panelists regarding internships, non-legal agency work, and the importance of forming relationships with others in the field.

Morgan MacIsaac-Bykowski is an adjunct professor and staff attorney at the Stetson University College of Law Veterans Advocacy Clinic.

Bar Association Annual Meeting Assesses Recent Decisions and Announces New Board Members

By Eric Debus

This year's Annual Meeting of the CAVC Bar Association was held in a hybrid format. The meeting was accessible via Zoom and in-person in the CAVC library on September 14, 2022.

At the start of the meeting, then-outgoing President Jenna Zellmer initiated a panel discussion featuring James Ridgeway, Kenny Dojaquez, and Evan Deichert. The panelist discussion included a review of recent decisions at the Court, including an assessment of *Aviles-Rivera v. McDonough*, *Cowan v. McDonough*, *Frantzis v. McDonough*, and *Clark v. McDonough*.

Following the panel discussion, Jenna Zellmer introduced Chief Judge Margaret Bartley to provide an update on the status of the Court. Chief Judge Bartley relayed that the Court anticipates receiving around 7,400 appeals in FY 2022 and by the end of September, CLS had conducted 7,300 Rule 33 Conferences with a resolution rate exceeding 70%. The Court is also predicting an uptick in appeals based on the recent passage of the PACT Act. Money has been allocated for expanding the number of judges on the Court; however, the Court is still waiting for Congressional approval to implement these changes.

Bar members then viewed a video message prepared by then-incoming President Jillian Berner. The annual meeting concluded with President Jenna Zellmer congratulating the new 2022-23 Bar Association Board of Governors. The new Board members include Jillian Berner, President-Elect Ashley Varga, Secretary Christopher Casey, and Treasurer Tom Susco. The Board of Governors Members at-Large are Javier A. Centonzio, James Drysdale, Meghan Gentile, John Juergensen, Keith M. Krom, Kenneth Meador, Emma Peterson, Renee K. Reasoner, and Christopher Wysokinski.

Eric Debus is a third-year law student at Stetson University College of Law, where he is a Teaching Assistant for the Veterans Advocacy Clinic.

U.S. Supreme Court Considers Tolling Statute Setting Effective Dates for Disability Compensation

by Andrew R. Penman

Reporting on Oral Argument in *Arellano v. McDonough,* No. 21-432 (U.S. argued October 4, 2022)

From referencing ducks to a justice poking fun at his former work as deputy solicitor general, the oral argument at the U.S. Supreme Court in the matter of *Arellano v. McDonough* provided interesting discussion and perhaps insights into how the ruling will unfold.

In 2018, Adolfo Arellano appealed a 2017 Board of Veterans' Appeals decision denying him entitlement to an earlier effective date for compensation for service-connected mental disabilities. Mr. Arellano's representatives argued that the provision of 38 U.S.C. § 5110(b)(1) setting the effective date of entitlement to service connection as the day after discharge or release from service could be equitably tolled under certain circumstances. A deadly incident at sea while serving in the Navy had rendered Arellano unable to apply for benefits quickly enough to have the effective date begin retroactively from his date of discharge—in this case, back to 1981.

In 2019, the U.S. Court of Appeals for Veterans Claims ruled in favor of VA, affirming the Board's decision. The Court found that it was bound by the Federal Circuit's decision in *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003), in addition to the Court's decisions in *Noah v. McDonald*, 28 Vet. App. 120 (2016) and *Taylor v. Wilkie*, 31 Vet. App. 147,154 (2019), where the Court stated,"This Court and the Federal Circuit have considered whether section 5110

is subject to equitable tolling and have found that it is not." It declared Mr. Arellano's argument "doom[ed]", despite noting that, "If we were writing on a blank slate, [Arellano's] arguments would be worth exploring."

The U.S. Court of Appeals for the Federal Circuit affirmed the CAVC decision *en banc* but was "equally divided as to the reasons for its decision and as to the availability of equitable tolling with respect to 38 U.S.C. § 5110(b)(1) in other circumstances." Judge Chen authored a concurrence denying the availability of equitable tolling with respect to § 5110(b), and Judge Dyk authored a concurrence arguing that § 5110(b)(1) could be equitably tolled in certain circumstances.

The Supreme Court granted certiorari and held oral arguments on October 4, 2022. James Barney—a Navy veteran—of Finnegan, Henderson, Farabow, Garrett & Dunner argued on behalf of Mr. Arellano, and Sopan Joshi, from the Solicitor General's office, argued on behalf of the Secretary. In most respects, the two sides fashioned their arguments around the split concurrences from the Federal Circuit.

Is § 5110(b)(1) a statute of limitations?

This appears to be the threshold question. Mr. Arellano argued that the deadline of § 5110(b)(1) operates like a statute of limitations because if veterans do not file within the one-year window, they forever lose the right to the retroactivity of the section. He invoked the *Irwin* presumption of equitable tolling, arguing that it applies to this non-jurisdictional claims-processing rule in a statute for which Congress has waived sovereign immunity. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Supreme Court held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."

The Secretary argued that the *Irwin* presumption does not apply because § 5110 does not look like a statute of limitations, meaning Congress did not intend it to be a statute of limitations.

Justice Jackson, in a rather spirited tone, seemed quite doubtful that § 5110(b) was a statute of limitation as Arellano had characterized it. Her view of statutes of limitations is one of funnels—limiting the broader default circumstances of filing. She sees § 5110 as the reverse scenario because § 5110(a) sets the default rule—a limited set of circumstances—and then subsection (b) expands the rights of certain veterans.

Mr. Arellano agreed that subsection (a) set the default rule but disagreed that statutes of limitations cannot be in the form of exceptions to a general rule; they do not always have to funnel. He pointed to *Young* and the Supreme Court's finding there that the statute at issue was a statute of limitations. In *Young v. United States*, 535 U.S. 43 (2002), the Supreme Court held that a lookback period in the Bankruptcy Code "is a limitations period because it prescribes a period within which certain rights . . . may be enforced." He drew similarities in the rationale behind the statute in *Young*—incentivizing the government to act timely—to § 5110(b) and argued that it incentivized veterans to act promptly.

Justice Alito joined with Justice Jackson and questioned whether statutes of limitations typically result in a loss of an ability to prevail on a claim and not simply the loss of ability to obtain some kind of relief. Mr. Arellano went back to *Young* and its finding that the statute at issue was a statute of limitations even though it did not result in the loss of an ability to prevail on the claim.

Several justices indicated that the Supreme Court could decide the case by assuming for argument's sake that § 5110(b)(1) was a statute of limitations. They wanted to explore the next question.

Has the *Irwin* presumption of equitable tolling been rebutted?

Mr. Arellano argued that it had not. For starters, he reasoned that no other subsections of the statute would be rendered superfluous by an equitable tolling of subsection (b)(1). That was the rationale behind the court's ruling in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) (holding that an equitable exception did not exist in part because it would render the express exception superfluous).

Justice Kagan questioned whether the words "[u]nless specifically provided otherwise in this chapter" foreclose relief for Mr. Arellano because it

was not specifically provided? Counsel characterized "specifically" as a word of emphasis, and cited to *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015), for support that "specifically" did not bar a court from finding that the statute could be equitably tolled. In *Kwai Fun Wong*, the Supreme Court held that courts may toll the FTCA's limitations periods, despite "shall be forever barred" language in the statute.

Mr. Arellano pointed out that the government's argument regarding equitable exceptions only being present in other subsections actually strengthened his position because Congress' silence in subsection (b)(1) indicated its intent for the general rule of equitable tolling to apply.

Mr. Arellano responded to practical considerations by noting that: (1) prior to *Andrews* veterans could ask for equitable tolling and there was no "floodgate" problem of overburdening VA; (2) the existence of 38 C.F.R. § 3.109(b) has not created a floodgate problem; and (3) Article III courts have a general rule of equitable tolling and there is not a floodgate problem there. Mr. Arellano expects equitable tolling in cases regarding the effective dates of disability compensation to be applied sparingly if granted by the court.

Mr. Arellano further argued that the judges who authored the *Andrews* decision were not necessarily in agreement on its holding. He highlighted one of the judges' concurrence in *Butler v. Shinseki*, 603 F.3d 922, 927 (Fed. Cir. 2010), characterizing the equitable tolling issue as uncertain, and found that to be at least one reason why Congress had not stepped in to "correct" *Andrews*. Judge Newman, concurring in the result in *Butler*, had written, "The *Andrews* court did not hold that equitable tolling is never available for the time period in § 5110(b)(1)."

The Secretary argued that the *Irwin* presumption has been amply rebutted because of: (1) the text and structure of § 5110; (2) the text and structure of other statutes in the veterans' benefits area; and (3) practical applications.

The Secretary sees a veteran's application for benefits as distinguishable from filing a lawsuit in that filing for benefits is an element of the veteran's entitlement to benefits. Thus, the application date must be very important to Congress and unless it explicitly says otherwise the effective date is not earlier than the application date. The government believes the application is what triggers the agency's knowledge of these claims.

Justice Kagan disagreed with the government's characterization of the statute as one that did not meet the formal requirements of creating limitations. In a memorable moment, the Secretary argued, "If Congress writes something that doesn't walk and quack like a statute of limitations, then Congress is saying we are not implicitly authorizing . . . ." Justice Kagan interjected to quickly dismiss the analogy with, "I don't know what that means. . . . If it in fact *functions* like a statute of limitations . . . ." She said it was the function of the statute that controls, not the formal organization and wording of the statute, dismissing the government's assertion that it had to have the right "look" before it was considered a limiting statute.

Justice Jackson continued her strong presence in the debate by requesting clarification on the practical implementation of Mr. Arellano's prayer for relief. She wondered whether it would be an agency determination or a judicial determination to equitably toll § 5110(b)(1), and whether Mr. Arellano was asking the Supreme Court to order VA to promulgate a rule regarding how to equitably toll that subsection. Mr. Arellano argued that the agency already had the power to equitably toll and they were already engaging in the practice. In his view, this determination happens at the agency level. For example, when a veteran misses a deadline to file a Notice of Disagreement, there are VA regulations in place to allow the veteran to ask the agency or the court to extend the deadline. 38 C.F.R. § 3.109(b) reads: "Time limits within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision may be extended for good cause shown."

Justice Jackson then asked the government how it viewed an agency exercising equitable tolling. The government announced that it was confused as to how this would work too. The Secretary cited to *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), as an example of the court rejecting the notion that an agency, and not a court, would

equitably toll a claim. In *Auburn Regional Medical Center*, the Supreme Court held that the presumption in favor of equitable tolling did not apply to administrative appeals of the kind at issue in the case.

At one point, Justice Kavanaugh interrupted the Secretary to say that Congress could have been clearer in § 5110 and expressly written that equitable tolling did not apply—if that's what it wanted. The Secretary conceded that was a fair point, but it did not carry the day.

Justice Alito inquired about the Edgewood Amicus Brief, and the prospect of some veterans being forbidden from disclosing substantiating information because of rules regarding classified military information. The government responded that it believes there is no need to equitably toll claims based on classified information because VA Adjudication Procedures Manual M21-1 says that classified information can be requested from the central military records organization by the Regional Office and veterans can always reopen a claim with new and material evidence. 38 C.F.R. § 3.156(c)(3) provides: "An award made based all or in part on [previously unavailable service department records] is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim." Further, the Secretary believes that Congress, not the court, should handle the scenario encountered by the Edgewood veterans.

Justice Sotomayor questioned whether the government was essentially trying to say that no filing with an agency could ever be equitably tolled. She also questioned the government on whether § 5110 could be used against a claimant to bar a claim altogether. The Secretary indicated that he was not aware of any lower courts using time limits in § 5110 to bar a claim.

Justice Gorsuch said it was his instinct, like Justice Sotomayor, to refrain from interpreting the statute in a way that found Congress meant to distinguish between courts and agencies because the actual application of some of the statute's explicit exceptions could be described as equitable tolling. The Secretary seemed to concede that Congress had provided for some agency tolling to take place within the mandates of § 5110.

Chief Justice Roberts honed in on subsection (b)(4), characterizing it as Mr. Arellano's biggest hurdle. That subsection grants disabled veterans the ability to obtain a retroactive award of disability pension if applied for within one year of becoming permanently and totally disabled. Justice Roberts thought it odd that Congress would provide expressly for equitable tolling when it came to disability pensions but choose not to do so for service-connected compensation.

Mr. Arellano distinguished (b)(4) by pointing out that it was for a different benefit and implemented by a different Congress. He reiterated that silence in (b)(1) evinces an intent by Congress to have the "full" general rule of equitable tolling apply.

It became clear during argument that Justice Roberts has an interesting connection to the law underpinning Arellano's case—he argued *Irwin* over 30 years ago for the Department of Veterans Affairs during his time as Deputy Solicitor General, and though he did not explicitly mention his connection, he made light of it by saying VA might not have had a very good lawyer in that case.

He insinuated that the "plethora" of exceptions within § 5110 makes it seem unlikely that § 5110 should be strictly enforced. When the Secretary tried to counter with *United States v. Brockamp*, 519 U.S. 347 (1997), Justice Roberts quickly retorted that *Brockamp* dealt with the Internal Revenue Code, calling it a "whole different arena" than veterans law. In *Brockamp*, the Supreme Court held that courts cannot toll the statutory time limitations for filing certain tax refund claims for nonstatutory equitable reasons. Justice Roberts quipped that surely the government did not want the principles governing tax collection to apply "across the board." He emphatically asserted that the principle applicable here is: if Congress gives an inch, we should assume it gave a mile. He had a quote from *Irwin* ready to read to the government: "Once Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." In his

view, once the government waives, the situation becomes entirely different. He furthered questioned the logic of denying only applicants for service connection from the principle of equitable tolling.

Thirty years' worth of compensation for Adolfo Arellano awaits the Supreme Court's decision.

Andrew Penman is an appellate attorney for NVLSP.

Willful Misconduct May Be the Proximate Cause of Injury to Be Barred Under 38 U.S.C. § 1131

by Gillian Slovick

Reporting on *Carter v. McDonough*, 46 F.4th 1356 (Fed. Cir. 2022)

In *Carter*, the Federal Circuit ruled that 38 U.S.C. § 1131's bar of service connection due to willful misconduct included a bar to service connection for injuries that were the result of misconduct and the proximate cause of the injury.

By way of background, the appellant served on active duty in the Marine Corps. During his service, he was apprehended by military police (MP) for damaging a government vehicle. The appellant fought his apprehension and struck an MP. In response, another MP struck the appellant in the head with a night stick resulting in head injuries for which the appellant sought service connection.

The appellant argued that the U.S. Court of Appeals for Veterans Claims (CAVC) misinterpreted the standard for willful misconduct. He contended that his injury was not the result of his own willful misconduct, but rather resulted from the conduct of another person , the MP. He argued that the bar to service connection only applied to misconduct that was the *direct* cause of his injury.

Under 38 U.S.C. §§ 105(a) and 38 U.S.C. § 1131, service connection is barred when the injury or disability is the result of the veteran's willful misconduct. The Federal Circuit ruled that, together, "the statutes deny service connection for an injury if it is 'the result of the veteran's own willful misconduct.'" The court added that 38 C.F.R. § 3.1(n) "further requires that the misconduct be ''the proximate cause of the injury.'"

In addition, the Federal Circuit cited *Ollis v. Shulkin*, 857 F 3d. 1338, 1344 (2017), in support of its finding that proximate cause was "defined in terms of foreseeability so that liability extend[s] only to those foreseeable risks created by the negligent conduct."

Finding that the appellant's argument ignored proximate causation, the Federal Circuit noted: "[p]roximate cause does not require that the cause be the last link in the causal chain, nor is it necessarily extinguished due to the intervening acts of others." Again, citing *Ollis*, it ruled that responsibility was limited to but-for situations which were "closely connected with the result [such that] the law is justified in imposing liability." *Ollis* at 1344. Citing *Paroline v. United States*, 572 U.S. 434 (2014), the Federal Circuit held that the correct reading of 38 C.F.R. 3.1(n) required a determination as to whether the link between the appellant's arrest and his head injury was "so attenuated that the consequence is more aptly described as mere fortuity." As stated by the Board of Veterans' Appeals in the decision appealed to the Court, the injury instead was "a probable consequence" of the appellant's actions.

Finally, the Federal Circuit addressed the appellant's argument that CAVC's interpretation of the applicable statutes conflicted with the U.S. Supreme Court's interpretation of the phrase "results from," which required but-for causation. *Burrage v. United States*, 571 U.S. 204 (2014). Ruling that proximate causes are a subset of but-for causes, the Federal Circuit concluded that to the extent that *Burrage* applied, the appellant's striking of the first MP caused the second MP to strike the appellant. The Federal Circuit ruled that the initial strike by the appellant "[could not] reasonably be considered to have 'played a nonessential contributing role in producing' his head injury.*Burrage*, 571 U.S. at 212." Instead, the Federal Circuit held that the appellant's injury would not have occurred but for his initial action.

Gillian Slovick is counsel at the Board of Veterans' Appeals.

Diagnostic Code 5055 Applies to Total and Partial Knee Replacements

By Phillip Chalker

Reporting on *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs,* 48 F.4th 1307 (Fed. Cir. 2022).

In *National Organization of Veterans' Advocates, Inc.(NOVA) v. Secretary of Veterans Affairs,* the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), in a 2-1 decision, held that 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5055 applies to both partial and total knee replacements. The Federal Circuit found that the VA's interpretation that DC 5055 applied only to total knee replacements was arbitrary and capricious.

The Federal Circuit spent the bulk of the opinion deciding whether VA's interpretive guidance for DC 5055 is arbitrary and capricious. DC 5055, which was titled "Knee replacement (prosthesis)," allowed a 100% rating for "[p]rosthetic replacement of knee joint" for one year following implantation of prosthesis.

The majority and dissent relied heavily on *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016). A brief synopsis of *Hudgens* helps shed light on the *NOVA* Court's reasoning.

Mr. Hudgens appealed a U.S. Court of Appeals for Veterans Claims (CAVC) decision denying him benefits for a partial knee replacement. While the appeal was pending at the Federal Circuit, the VA issued a final rule in the *Federal Register*, Agency Interpretation of Prosthetic Replacement of a Joint, 80 Fed. Reg. 42,040 (July 16, 2015) (codified at 38 C.F.R. pt. 4), which the Federal Circuit termed "Knee Replacement Guidance." This document was intended to provide notice of the VA's "longstanding interpretation of DCs 5051 through 5056," which allowed a 100% evaluation only when a joint is totally replaced by a prosthetic implant, as opposed to a partial replacement. *Id.* The Knee Replacement Guidance also indicated that an "explanatory note" would be added to 38 C.F.R. § 4.71a, stating that the "term 'prosthetic replacement' in diagnostic codes 5051 through 5056 means a total replacement of the named joint." *Id.* at 42,041.

The Federal Circuit in *Hudgens* held that DC 5055 applies to partial and total knee replacements. In rendering its decision, the *Hudgens* Court determined that the VA should not be afforded deference in its interpretation that DC 5055 only applied to full knee replacements. The Federal Circuit reasoned that *Auer* deference did not apply because (1) there were numerous rulings by the Board of Veterans' Appeals (Board), holding that partial knee replacements could be evaluated under DC 5055; (2) the Knee Replacement Guidance was a "*post hoc* rationalization"; and (3) Mr. Hudgens's interpretation of DC 5055 was reasonable, and therefore the pro-veteran canon had to be applied. *Hudgens*, 832 F.3d at 638 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997), for the rule under which courts must defer to how agencies interpret their own regulations).

Relying on *Hudgens*, the Federal Circuit in *NOVA* concluded that DC 5055 still applies to partial knee replacements and does not unambiguously exclude partial knee replacements for several reasons.

First, the explanatory note stating that "prosthetic replacement" means total replacement of the named joint is a circular argument. To find that guidance the only reasonable reading of DC 5055 because the guidance itself says so is incorrect. Moreover, the explanatory note is guidance, not a regulation. Agencies must use the same procedure to amend or repeal a rule that they used when issuing the rule in the first instance. In this instance, VA needed to use a notice-and-comment rulemaking procedure, just as it did when issuing DC 5055. The VA did not.

Second, as in *Hudgens*, *Auer* deference is not owed to the Secretary's interpretation of DC 5055. The Board has issued inconsistent rulings concerning

whether DC 5055 applies to partial joint replacements. Going further, the Federal Circuit added that Board decisions are the final decisions for the Secretary on matters affecting the provision of benefits, and Board decisions serve as persuasive authority for CAVC on how to interpret regulations. Therefore, Board decisions can engender reliance and foreclose application of *Auer* deference to conflicting guidance issued later. Lastly, deference is not owed because the text of DC 5055 was the same in *NOVA* as it was when *Hudgens* was on appeal. Therefore, the Federal Circuit followed *Hudgens*'s precedent by not affording deference to the VA.

Third, as in *Hudgens*, the Federal Circuit in *NOVA* applied the pro-veteran canon and deferred to the petitioners' interpretation of DC 5055 because the regulation does not unambiguously preclude partial replacements.

In the dissent, Judge Prost argued that *Hudgens* did not apply because *Hudgens* would have applied an explanatory note retrospectively, whereas the note at issue here was issued before the petitioners filed their claims. Thus, even though the regulation remains unchanged, different circumstances should lead to a different conclusion. While admitting that the regulation is ambiguous, Judge Prost contended that the Knee Replacement Guidance is not ambiguous, and that *Auer* deference should be afforded to the VA before the Federal Circuit applies the pro-veteran canon.

Phillip Chalker is an attorney at the Department of Veterans Affairs, Board of Veterans' Appeals.

Membership in Class Actions Limited by the Federal Circuit to Present Claimants Only

by C. Jeffrey Price

Reporting on *Skaar v. McDonough*, No. 2021-1757, 2021-1812 (Fed. Cir. Sep. 8, 2022).

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Skaar* vacated and remanded the decision by the Court of Appeals for Veterans Claims (Court) to certify a class. The Federal Circuit determined that the Court exceeded its jurisdiction by including as class members veterans who had not yet received a Board decision. The Federal Circuit further concluded that the Court correctly applied the equitable tolling doctrine when it excluded veterans who had received a Board decision but failed to timely appeal the decision.

Victor B. Skaar is a United States Air Force veteran who was exposed to ionizing radiation while participating in a cleanup operation in Palomares, Spain in 1966. Some thirty years later, he was diagnosed with leukopenia. He filed a claim with the Department of Veterans Affairs (VA) for service-connected benefits, which was denied based on the Board's reliance on radiation dose estimates provided by the Air Force. Mr. Skaar appealed the Board's denial, challenging the soundness of those radiation dose estimates.

As part of the appeal of his individual claim, Mr. Skaar filed a motion for class certification and sought to challenge the radiation dose estimates on behalf of all veterans who had participated in the Palomares cleanup operations. The Court certified a class, with Mr. Skaar serving as its representative, that included veterans who had not received a Board decision and that excluded veterans whose claims had been denied but not timely appealed.

During its analysis of potential class members, the Court considered five subgroups of veterans who were present at the Palomares cleanup, which included: (1) those who had filed a claim with the VA, but did not timely appeal the denial by the regional office (RO) (past claimants); (2) those who had filed a claim with the VA and appealed the RO's denial, but failed to timely appeal the Board's denial to the Court (expired claimants); (3) those who had appealed, or were still able to timely appeal the Board's denial to the Court (present claimants); (4) whose who had filed a claim that was still pending before the RO or the Board (present-future claimants); and (5) those who had developed a condition but have not yet filed a radiation exposure

claim with the VA (future-future claimants). In short, the "present claimants" are those who, like appellant Skaar, had filed a claim and obtained a Board decision that they timely appealed to the Court. The "past claimants" and the "expired claimants" also filed claims; however, they failed to timely appeal an agency decision. The "present-future claimants" and the "future-future claimants" are those who have not yet received a final Board decision (either because a claim had not yet been filed with the VA or the VA has not provided a final, appealable decision).

The Court certified a class whose members included those in Mr. Skaar's subgroup (the present claimants) as well as both future claimant subgroups (i.e., those who filed a claim with the VA and are waiting on a final Board decision and those who have not yet filed a claim with the VA.) But the Court excluded from the class definition both past claimant subgroups (i.e., those who failed to timely appeal an RO or Board decision).

The Secretary appealed to the Federal Circuit the part of the Court's decision that included in the class definition the future claimant subgroups, arguing the Court did not have jurisdiction over those claims. Mr. Skaar cross-appealed the part of the Court's decision that excluded from the class definition the past claimant subgroups, arguing the claims should be included under the doctrine of equitable tolling.

On appeal, the Federal Circuit agreed with the Secretary and vacated the Court's decision to include the past claimant subgroups in the class definition because the Court lacked jurisdiction. The Federal Circuit pointed out that the Court has only one source of jurisdiction, which is found in 38 U.S.C. § 7252(a). That jurisdictional statutes provides that the Court only has the power to affirm, modify, or reverse a decision of the Board.

Mr. Skaar argued that the Court can exercise jurisdiction over class members who have not received a Board decision because district courts routinely certify classes that include future claimants. The Federal Circuit rejected the argument, explaining that district courts have supplemental jurisdiction over such claimants under 28 U.S.C. § 1367, but no such express statutory supplemental jurisdiction applies to the Court. Therefore, the Federal Circuit held that the Court exceeded its jurisdiction when it certified a class to include veterans who have not yet filed a claim or had not received a final Board decision.

The Federal Circuit also rejected Mr. Skaar's cross-appeal argument that the Court should have applied the doctrine of equitable tolling to include past and expired claimants in the class definition. Specifically, the Federal Circuit disagreed with Mr. Skaar's contention that the Court misconstrued the standard and restricting its application only to challenges involving "secretive" policies. Rather, the Federal Circuit notes, the Court identified several examples of extraordinary circumstances for which tolling may be warranted, and those examples did not present an exhaustive list because there are no bright line rules in the equitable tolling context.

The Federal Circuit further noted that there were no grounds for equitable tolling because Mr. Skaar never alleged that past and expired claimants were precluded from timely filing appeals for any reason other than the VA's historical practice in adjudicating claims from Palomares veterans. Therefore, the Federal Circuit concluded that the Court did not err in declining to equitably toll the appeal period for the past and expired claimants and properly excluded them from the class definition.

Jeff Price is a sole practitioner.

An Appellant is Not Required to Personally Appear at a Board Hearing

Reporting on *Atilano v. McDonough*, No. 17-1428 (Vet. App. Nov. 3, 2022).

In *Atilano*, a per curiam decision of the U.S. Court of Appeals for Veterans Claims, a panel comprised of Judges Pietsch, Meredith, and Toth held that, pursuant to pertinent statutory and regulatory

provisions applicable to pre-Appeals Modernization Act (AMA) hearings that the Secretary cannot condition the right to a hearing, specifically, an appellant's right to elicit testimony from witnesses before the Board, on a claimant's attendance. However, in addition to the holding itself, this case is of interest because of the procedural history including prior decisions by the Court and the U.S. Court of Appeals for the Federal Circuit, and the different approaches these courts took in analyzing the pertinent statutory and regulatory provisions.

The relevant facts of this case pertain to Mr. Atilano's attempted hearing before the Board, rather than the merits of his underlying claim. Specifically, Mr. Atilano requested and was scheduled for an in-person hearing before a Veterans Law Judge (VLJ) of the Board. At the time of the scheduled hearing, Mr. Atilano did not appear but his representative and an expert witness were present. It was requested that testimony be given by the expert witness. The VLJ did not hold the hearing, concluding that Mr. Atilano's actual participation was required. In the subsequent Board decision in April 2017, it was stated that under the circumstances the Mr. Atilano's hearing request must be treated as withdrawn.

Mr. Atilano appealed to the Court, contending, that the Board's requirement that he be actually present to participate in the hearing was contrary to the relevant statutory and regulatory provisions.

The Court's initial decision in this case was *Atilano v. Wilkie*, 31 Vet. App. 272 (2019) (*Atilano I*), in which Judge Toth, writing for a panel that included Judges Pietsch and Meredith, held that the Board's reasoning aligns with the plain meaning of the statute. The Court further held that even if it were to find the statute silent or ambiguous, the pertinent regulatory provisions supports the Board's findings and was a reasonable construction of the statute.

Mr. Atilano appealed the Court's decision in *Atilano I* to the Federal Circuit. In *Atilano v. McDonough*, 12 F.4th 1375 (Fed. Cir. 2021) (*Atilano II*), Judge Stoll, writing for a panel that included Judges Lourie and Taranto, held that the pertinent statute does not unambiguously require the appellant personally participate in the hearing. Therefore, the Federal Circuit vacated the Court's decision in *Atilano I* and remanded the case for further consideration of the statute and the agency's related regulations.

The Court emphasized in its November 2022 *Atilano* decision that its holding was essentially dictated by the letter and spirit of the Federal Circuit's opinion in *Atilano II*. Therefore, it is essential to note the different approaches the Court and the Federal Circuit took in addressing the statutory provision.

The specific statute at issue in these cases is the pre-AMA version of 38 U.S.C. § 7107, particularly subsection (b) which provides, that the Board shall decide any appeal only after affording the appellant an opportunity for a hearing. In *Atilano I*, the Court found that this subsection, as informed by the surrounding provisions of the statute, answered in the affirmative the question of whether the appellant's participation was required. In pertinent part, the Court discussed provisions which allowed an appellant the choice of appearing personally in the presence of the VLJ or by participating remotely via video conference or other electronic means, but noted that there was no provision allowing an appellant to invoke the right to a hearing but decline to participate. The Court also referred to various dictionary definitions of "hearing" in its analysis.

The Court further found in *Atilano I* that even if the statutory language was ambiguous, the pertinent regulatory provisions do not allow an appellant to refuse to participate in a hearing under these circumstances and reflect a reasonable construction of 38 U.S..C. § 7107. The Court noted that Congress specifically gave the Secretary the authority to promulgate rules for Board hearings, and, thus, regulations governing Board hearings are valid unless they are an unreasonable interpretation of that statute. The Court quoted regulatory

provisions that noted that the purpose of the hearing is "that the appellant and witnesses, if any, will be present," and that a hearing will not normally be allowed just so that argument can be submitted.

Conversely, the Federal Circuit, in *Atilano II*, concluded that that 38 U.S.C. § 7107 does not unambiguously establish that a veteran must be present at his hearing to present expert testimony, and that the statute was at best silent on the point. In pertinent part, the Federal Circuit stated that nothing in the statutory language speaks to whether an appellant must personally attend his hearing or forfeit his right to that hearing; only that an "appellant" is afforded "an opportunity for a hearing." The Federal Circuit found that the law said nothing about who must attend the hearing. In ordinary legal usage, a party can be given a "hearing" solely for the party's counsel to argue or for presentation of testimony by a person other than the party, with the party not present but represented in person by counsel. The statute also did not distinguish between appellants who are physically and mentally capable of participating at a hearing and those who are not.

The Federal Circuit further found that other statutory subsections did not support the Court's holding in *Atilano I*; nor did the dictionary definitions cited by the Court. In addition, the Federal Circuit found that the overall statutory structure of Title 38 supports the view that an appellant may be represented by an agent or counsel, who may request a hearing to present non-party witness testimony under 38 U.S.C. § 7107. Finally, the Federal Circuit summarized the legislative history, and found that it fairly supported the interpretation of the statute to allow an appellant's representative to participate on the claimant's behalf by presenting witness testimony at a Board hearing even if the appellant is too disabled to attend. The Federal Circuit stated that, at a minimum, this history does not support an interpretation that would deny the fundamental right to a hearing to those veterans whose disability is so severe that they can-not attend the hearing.

In light of this analysis, the Federal Circuit found that the Court in *Atilano I* had erred as a matter of law when it held that the plain meaning of the statute's text requires an appellant's in-person or electronic participation. Rather, the language of 38 U.S.C. § 7107 does not unambiguously require a veteran to be present at his hearing for his legal representative to elicit sworn testimony from witnesses before the Board. However, the Federal Circuit stated that this was all that it was deciding. The Federal Circuit found that the relevant regulatory provisions warranted further analysis by the Court, and provided specific instructions for that analysis. Among other things, it did refer to the fact that the Secretary made a concession that at least one regulatory provision did not require the appellant to personally appear even though it was contended other regulations did require the appellant to personally appear.

As noted, the Court's recent decision in this case emphasized it was essentially dictated by the letter and spirit of the Federal Circuit's opinion in *Atilano II*, to include analysis of the regulatory provisions. Therefore, it is important to note that the Federal Circuit's analysis focused upon whether there was an explicit requirement of personal participation in the statute and/or legislative history, as well as general legal principles pertaining to hearings. The Federal Circuit also noted circumstances where an appellant may not be physically or mentally capable of personally participating in a hearing, but nevertheless evidence and argument could be present by an accredited representative. Such factors should be kept in mind when issues of statutory interpretation are addressed in the future.

Also of note in this case is the strongly worded concurring opinion by Judge Toth in the November 2022 decision. Acknowledging the critical nature of his concurrence, Judge Toth was noted that his comments were not "mere sour grapes," but rather a

comment on the unusual nature of the Federal Circuit's remand. He noted that as a higher tribunal, the Federal Circuit had the right to reach a different conclusion, and that such was a common occurrence in appellate caselaw.

However, Judge Toth questioned why the Federal Circuit did not resolve the legal issue in dispute rather than remanding it to the Court, particularly as the Federal Circuit's opinion dictated the outcome of this case. He noted that appellate courts remand matters to lower courts when the lower tribunal has authority to perform some action the higher court cannot. For example, an appellate court can reverse a legal ruling and remand a matter for a lower tribunal to carry out ministerial tasks, or it can remand when there are unresolved issues and the lower tribunal possesses an authority (e.g., fact finding) that the higher court lacks. In contrast, when an appellate court has authority to resolve an issue fully, there is no basis to order a lower court to reconsider a ruling it has already made merely to suggest the ruling come out differently. Judge Toth expressed the belief that the Court in this case had been essentially forced to "suppress our independent judgment to arrive at the conclusion the Federal Circuit all but ordered us to adopt."

Indeed, upon reading the Federal Circuit's opinion in *Atilano II*, it is difficult to discern how there could have been any other result in this case. As such, one must conclude it would have been more practical and advantageous for those who would be affected by this holding for the Federal Circuit have done so in *Atilano II* as opposed to the delay of waiting for the Court to officially make that holding.

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VA Must Read Claims Made Prior to March 2015 Under 38 U.S.C. §1151 Sympathetically to Include Informal Claims for Service Connection

by Grace Paul

Reporting on *Bonds v. McDonough*, No. 20-4899 (October 5, 2022).

In *Bonds,* the U.S. Court of Appeals for Veterans Claims (Court) issued a precedential opinion per curiam. Judges Allen, Meredith, and Toth ruled that VA must read claims filed before the institution of the March 2015 regulations under 38 U.S.C.§ 1151 ("1151 claims") sympathetically to include informal claims for service connection.

Jimmy C. Bonds, the appellant, is a Navy veteran who served honorably from 1988 to 1995. Within a year of discharge, Mr. Bonds was diagnosed with type 2 diabetes. In 2011, he developed a foot infection and sought treatment at a VA facility. His condition worsened, which ultimately led to VA physicians conducting a below-the-knee amputation of his right leg. Mr. Bonds subsequently developed depression due to the amputation and was referred for treatment.

In September 2013, Mr. Bonds filed an 1151 claim alleging negligent care at the VA facility for failing to properly treat the infection in light of his diabetes diagnosis. The 1151 claim remains pending at VA at the time of this decision. In 2017, Mr. Bonds filed a formal claim seeking service connection for diabetes and related residuals. VA granted the 2017 claims and assigned an effective date of August 30, 2016, which was the date the VA received an Intent to File. The veteran appealed, arguing that his September 2013 section 1151 claim constituted an informal claim for service connection.

The Board of Veterans' Appeals (Board) denied Mr. Bonds' claim for an earlier effective date, stating that it could not award a September 2013 effective date because only the 1151 claim existed at that time, and

not a claim for service connection.

The Court began its analysis by clarifying that the decision in the present case will only pertain to claims filed prior to the March 2015 regulations, which require that all claims must be made on standardized forms. The Court then noted the three requirements of a claim at the time of the veteran's filing: 1) an intent to apply for benefits; 2) an identification of the benefit sought; and 3) a communication in writing. The remainder of the analysis would focus on the second prong as the Court analyzed whether Mr. Bonds' 2013 claim sufficiently identified a benefit other than the 1151 claim.

Case law has established that VA has a duty to conduct a sympathetic reading of pro se filings. The Court cited the Federal Circuit's holdings in *Roberson v. Principi, 251 F.3d 1378 (Fed. Cir. 2001),* and *Szemraj v. Principi, 357 F.3d 1370 (Fed. Cir. 2004),* for the proposition that "whether a pro se pleading presents an informal claim is inherently factual in nature and can be distilled down to whether the filing identifies a benefit clearly enough to communicate an intent to apply for it."

The Court next turned to the standards set forth in *Shea v. Wilkie*, 926 F.3d 1362 (Fed Cir. 2019), and *Sellers v. Wilkie*, 965 F.3d 1328 (Fed. Cir. 2020), which provide boundaries for determining whether a pro se filing has sufficiently identified the benefit sought. *Shea* allows for a benefit to be sufficiently identified if the claim refers to medical records that contain evidence of the condition. *Sellers* places limits on *Shea's* broad standard by requiring some level of specificity between the benefit identified in the claim and the condition contained in the referenced medical records.

The Court then applied the aforementioned precedent to Mr. Bonds' September 2013 section 1151 claim, which requires VA to sympathetically read every pro se claimant's filing for potential informal claims within the boundaries set forth in *Shea* and *Wilkie*. The Court noted that it need not address the Secretary's argument that an 1151 claim can never encompass a claim for service connection because the VA is first required to identify each potential claim raised by a pro se veteran's filing. In other words, VA is required to ask whether the pro se filing sufficiently raised a claim for service connection *in addition to* the 1151 claim prior to determining the scope of the 1151 claim.

The holding set forth by the Court is a narrow one that does not address the question of whether an 1151 claim can ever contain a claim for service connection or whether an 1151 claim can encompass a claim for service connection based on the causal chain rule. The Court only clarifies that VA's duty to identify all reasonably raised claims by conducting a sympathetic reading of every pro se claimant's filing applies to claims made under 38 U.S.C. § 1151. Based on this decision, the Court remanded Mr. Bonds' claim for VA to conduct a factual inquiry of whether Mr. Bonds sufficiently raised an informal claim for serviced connection for his diabetes in 2013.

In a concurring opinion, Judge Toth agreed that the Court did not need to address the Board's argument that an 1151 claim cannot include a claim for service connection because of the difference between the scope of a pleading and the scope of a claim. Judge Toth explained that the scope of a pleading is determined when VA receives a claim and the medicals records that it refers to. Once VA determines the scope of the pleading, it then moves on to investigating the scope of the claim through evidentiary development. In sum, the question of whether the 1151 claim can encompass a claim for service connection can only occur after VA determines the number and identity of claims raised in the pleading.

Grace Paul is a student at the Stetson Law Advanced Veterans Advocacy Clinic.

Board Decision Finality

by Sarah "Sally" Battaile

Reporting on *Dojaquez v. McDonough*, No. 21-8261 (Vet. App. Aug. 23, 2022).

In *Dojaquez*, a panel of the U.S. Court of Appeals for Veterans Claims (Court) comprised of Judges Pietsch, Meredith, and Laurer, addressed whether a letter notifying Mr. Dojaquez that his appeal (1) was received by the Board of Veterans' Appeals (Board), (2) was subject to the procedures for contested claims, and (3), describing the Board's procedures for processing contested claims, was a final adverse Board decision over which the Court's jurisdiction was proper. The Court dismissed the appeal for lack of jurisdiction, finding that the letter was not a final decision for jurisdictional purposes.

Mr. Dojaquez and the veteran he represented, Phillip Poole, also an appellant in the case, entered into a valid direct-pay fee agreement, which provided that the Department of Veterans Affairs (VA) would withhold 20% of any award of past-due benefits and pay that amount directly to counsel, Mr. Dojaquez. In September 2019, Mr. Poole was awarded a 100% disability rating for a psychiatric disability, effective from August 2007. Mr. Dojaquez subsequently appealed the VA's calculation of the attorney fees via VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement). In February 2021, the Board remanded the matter to obtain additional documentation and to recalculate Mr. Dojaquez's fee. After the regional office (RO) notified the appellants in May 2021 that Mr. Dojaquez was not entitled to additional fees, Mr. Dojaquez and Mr. Poole filed separate decision review requests.

Mr. Poole asserted that he did not appeal the October 2019 fee decision, but rather identified the issue on appeal as whether the fee determination is a simultaneously contested claim. He asserted that the calculation appealed by Mr. Dojaquez was not disputed between him and Mr. Dojaquez, and that "the Board was obligated under 38 U.S.C. § 7104(d)(3) to make such a finding." Section 7104(d)(3) provides that each Board decision shall include an order granting appropriate relief or denying relief.

Mr. Dojaquez identified the issue on appeal as entitlement to attorney's fees authorized by 38 U.S.C. § 5904, governing recognition of agents and attorneys generally. He also claimed that the issue on appeal was not a simultaneously contested claim because Mr. Poole did not assert that he was "entitled to any of the funds allegedly owed to Mr. Dojaquez."

After receiving Mr. Dojaquez's decision review request, in August 2021, the Board sent a letter to him, explaining that his appeal was subject to the procedures for contested claims and that his appeal would be processed accordingly. The August 2021 Board letter did not contain an adjudication concerning whether additional attorney fees were warranted. This appeal ensued.

Mr. Dojaquez and Mr. Poole agreed that the Court has jurisdiction over only final Board decisions and made two supporting arguments. First, they argued "that the Court has jurisdiction over a Board denial regardless of whether the denial is of a 'benefit.'" In this regard, they cited 38 U.S.C. § 7252(a), (b) to support the contention that "Congress did not limit the Court's jurisdiction to Board decisions that grant or deny benefits." They further argued that the Board's choice of format (in this case, a letter) "to convey the denial does not affect the determination [of] whether the Board rendered a decision." Section 7252(a) and (b) address the Court's jurisdiction over Board decisions and the record for the Court's review, respectively.

In the alternative, Mr. Dojaquez and Mr. Poole contended that the determination of whether the attorney-fee matter constitutes a simultaneously contested claim is a "status," the denial of which was a denial of a benefit. The harm they alleged was that the Board's determination that the fee determination was a simultaneously contested claim drove "a wedge into their attorney-client relationship."

The Secretary filed a motion to dismiss, asserting the August 2021 Board letter was not a final Board decision that either granted or denied benefits, citing *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000), *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005), and *Tyrues v. Shinseki*, 732 F.3s 1351, 1355 (Fed. Cir. 2013).

The Secretary further noted that in December 2021, shortly after Mr. Dojaquez and Mr. Poole filed their joint Notice of Appeal, the Board issued a decision denying additional attorney fees related to the September 2019 rating decision, and that this December 2021 Board decision is a final decision regarding the benefit sought – additional attorney fees. The Secretary contended that the August 2021 letter merely provided notice concerning the options and procedures available before the Board. The Secretary also noted that because Mr. Dojaquez and Mr. Poole appealed the December 2021 Board decision, any arguments on status could be brought before the Court with that appeal. Therefore, the Secretary argued, the Court lacked jurisdiction to hear the appeal concerning the August 2021 letter.

Mr. Dojaques and Mr. Poole suggested that *Maggitt*, *Kirkpatrick*, and *Tyrues* do not limit the Court's jurisdiction to a decision that grants or denies a benefit. The Court explained, however, that the appellants failed to address the import of the Federal Circuit's conclusion as to what constitutes a decision of the Board, i.e., "the veteran must first present a request for a benefit to the Board, then receive a decision on that request." The final Board decision confers jurisdiction to the Court to "review the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b).

The Court compared the instant case to the recent *Clark v. McDonough*, 35 Vet. App. 314 (2022) decision, in which the appellant's argument that a denial of some sort is all that 38 U.S.C. § 7252(a) requires was rejected by the Court. In this respect, the Court explained that the August 2021 letter was not transformed into a final Board decision on the benefit sought because the parties disagreed "with the Board's characterization of the claim and included that argument in their respective decision review requests."

The Court concluded that the determination that the appeal of the attorney fees was subject to the procedures for contested claims does not satisfy the requirements of 38 U.S.C. § 7252(a) and the Court, therefore, dismissed the appeal for lack of jurisdiction.

Sarah "Sally" Battaile is Associate Counsel with the Board of Veterans' Appeals.

CAVC Denies Certification of Proposed Class of Claimants Whose Legacy Appeals Were Erroneously Closed

by Donald M. Badaczewski

Reporting on *Freund v. McDonough*, No. 21-4168 (Vet. App. Oct. 20, 2022).

In *Freund v. McDonough*, Ms. Freund and Mrs. Mathewson had pending appeals at the Board of Veteran's Appeals (Board) that were erroneously closed when the Department of Veterans Affairs' ("the VA") legacy appeals tracking system, VACOLS, incorrectly determined that the petitioners had not submitted a Substantive Appeal. Ms. Freund and Mrs. Mathewson jointly petitioned the U.S. Court of Appeals for Veterans Claims (CAVC) seeking an order directing the Secretary to reactivate their appeals and declaring that the closure of their appeals without notice violated fair process and 38 C.F.R. § 19.32 and constituted unlawfully withholding agency action within the meaning of 38 U.S.C. § 7261(a)(2).

The CAVC's rules do not expressly allow joint filings. As the Secretary did not oppose the petitioners' joint filing, and given the disposition of this matter, the CAVC proceeded on the basis that joinder was proper but emphasized that nothing in the order should be taken as adopting a particular test as to when joinder is appropriate.

Ms. Freund and Mrs. Mathewson filed a request for class action and class certification and proposed a class consisting of all claimants with a timely perfected legacy appeal: (1) that is an original (not previously remanded) appeal, (2) that the Secretary has closed, (3) that remains closed, (4) that appears in VACOLS, (5) for which a copy of the Substantive Appeal appears in VBMS, and (6) for which the VA

has not issued a rating decision regarding the Substantive Appeal's timeliness.

The CAVC denied the request for class action and class certification and dismissed the petition. The CAVC explained that either the petitioners lacked standing to make their requests for relief, or those requests are moot.

As an initial matter, the CAVC agreed with the petitioners that it could proceed under the All Writs Act with respect to their individual appeals. However, after Ms. Freund and Mrs. Mathewson filed their petition, the Secretary reactivated their individual appeals. The CAVC explained that while the "inherently transition" exception to mootness could possibly apply notwithstanding that the petitioners' appeals had been reactivated, this exception to mootness would only applicable if the CAVC certified a class.

The CAVC concluded that certification of a class action was not appropriate on two alternative grounds. First, the CAVC concluded that if the proposed class included an implicit requirement that its members were subject to the closing of an appeal without notice, then Ms. Freund and Mrs. Mathewson would be inadequate representatives. The CAVC explained that the petitioners were inadequate representatives because they were aware that their appeals had been closed at the time that they filed their petition.

Second, the CAVC concluded that if the proposed class did not include a requirement that a member was subject to closure of an appeal without notice, then Ms. Freund and Mrs. Mathewson had not presented common questions capable of class-wide resolution. The CAVC explained that although every member of the proposed class would have to have had an appeal closed after filing a timely Substantive Appeal, this only shows a common characteristic, but does not establish that there is any common answer to a common question that will allow the CAVC to resolve the dispute "in one stroke." The CAVC added that it was undisputed that if a claimant identifies a timely Substantive Appeal, the VA will reactivate their appeal without further action by the claimant or the CAVC.

The order included a discussion of VACOLS, the Veteran Appeals Control and Locator System, a database used by the VA to track and monitor legacy appeals. The appeals in this matter were erroneously closed by a sweeping function in VACOLS. If VACOLS does not reflect that a Substantive Appeal has been received, it automatically closes legacy appeals without notice on the first day of the month following 65 days after a Statement of the Case has been mailed or one year after notice of a decision by an Agency of Original Jurisdiction is mailed. During the pendency of this matter, the Secretary explained that there was a plan in place to identify and reactivate erroneously closed appeals. Therefore, the CAVC concluded that class certification was not proper under these circumstances and dismissed the petition.

Donald M. Badaczewski is Counsel at the Board of Veterans' Appeals.

Court Denies Motion to Substitute in Appeal for Specially Adapted Housing Benefits

by Yesenia M. DeJesús Torres

Reporting on *Smith v. McDonough*, No. 18-4730 (Vet. App. Oct. 17, 2022) (order).

In *Smith*, the Court of Appeals for Veterans Claims (Court) issued a panel decision (Judges Falvey and Allen, with Greenburg dissenting) denying a motion for substitution after the original appellant's death because it was determined that the substitute appellant did not meet any legal standard for substitution.

Two novel issues were before the Court in this appeal: (1) whether 38 U.S.C. § 5121A allows the Court to substitute parties for a one-time, lump-sum payment, as opposed to periodic disbursements, and (2) whether the Court can permit substitution under *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007), and its progeny.

Mr. Thomas Smith was an Air Force veteran who appealed a 2015 decision by the Board of Veterans' Appeals (Board) denying him reimbursement for specially adapted housing (SAH) benefits after he installed a therapy pool at his home to support his service-connected back disability after losing access to the VA pool.

Unfortunately, Mr. Smith passed away before the Court could consider the merits of his appeal. His adult daughter, Christine Hicks, filed a motion to substitute as the appellant. The Secretary opposed her motion because 38 U.S.C. § 5121A and *Breedlove v. Shinseki*, 24 Vet.App. 7, 21 (2010) (per curiam order), apply only to periodic benefits, but the original appellant sought SAH, which is not a periodic benefit.

Ms. Hicks offered three possible grounds for substitution. First, she asserted that *Breedlove* allows for substitution in "'a claim for *any* benefit under a law administered by the Secretary,' 38 U.S.C. § 5121A (emphasis added), if the substitute-claimant is eligible to receive accrued benefits under 38 U.S.C. § 5121." In other words, § 5121A does not expressly exclude non-periodic benefits from substitution. She also claimed that 38 U.S.C. § 5121(a)(6) qualified her as an accrued-benefits claimant because she assumed responsibility for her father's last illness and burial expenses.

The Secretary countered, and the Court agreed, that because Ms. Hicks did not obtain a determination of eligibility from the Department of Veterans Affairs (VA) as an accrued-benefits claimant, she did not qualify for substitution. According to *Breedlove*, this determination is a fact-based inquiry that VA must make in the first instance and in accordance with 38 U.S.C. § 5121. 24 Vet.App. at 20-21. Furthermore, the majority applied a requirement from § 5121(c) that applications for accrued benefits be filed within one year of the original claimant's death.

Because she did not submit evidence of a VA determination of eligibility for accrued benefits within one year of her father's death, the Court concluded that she did not qualify for substitution, and the Court declined to consider the merits of substitution based upon this issue.

Second, Ms. Hicks asserted nunc pro tunc relief from *Padgett* and its progeny. To be eligible for nunc pro tunc relief, a movant must satisfy three elements: (1) that the veteran died after the case was submitted to the Court, (2) that the movant has standing to request substitution, and (3) that considerations of justice and fairness have been satisfied. *See Pekular v. Mansfield*, 21 Vet.App. 495, 500 (2007), *superseded by statute*, 38 U.S.C. § 5121A, *as recognized in Suguitan v. McDonald*, 27 Vet.App. 114, 118-19 (2014) (per curiam order); *see Padgett*, 473 F.3d at 1367-69.

Here, the Court concluded that Ms. Hicks failed to meet the first element because her father passed away before the parties submitted their briefs to the Court. At oral argument, her counsel countered that the first element is irrelevant because *Breedlove* essentially eliminated the "zone of no substitution." However, the Court was unpersuaded by this argument because no authority has determined that *Padgett* and its progeny are no longer good law.

Third, Ms. Hicks argued that she qualified for substitution under Rule 43(a)(2) of the Court's Rules of Practice and Procedure, which permits a personal representative of the deceased party's estate to be substituted as a claimant before the Court.

On this last point, the Court disagreed, stating that Rule 43 is a procedural mechanism that describes the manner in which substitution will occur at the Court; it is not a substantive standard that determines who qualifies for relief. Even if her argument for substitution had been proper, 38 C.F.R. § 36.4406(c) expressly requires that any request for reimbursement must occur within one year of the original claimant's death. Because she did not submit evidence that she applied to receive reimbursement of SAH benefits within one year, the Court held that she was an ineligible substitute claimant.

Accordingly, the Court vacated the Board's 2015 decision to deny SAH benefits, and the Court dismissed the appeal.

In his dissent, Judge Greenberg asserted that Ms. Hicks is an eligible substitute party under 38 U.S.C. § 5121(a)(6) because she bore the expenses of her father's last sickness. He criticized the majority for requiring a substitute-appellant to first qualify as an eligible claimant through a VA application when the motion to substitute that she filed directly with the Court timely notified the VA of her intent to seek substitution in the appeal. He also felt that the Court missed an opportunity to clarify its own precedent and that it should have considered her claim on the merits.

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Demonstrating an "Additional Disability" in 1151 Claims

By Karen McKenzie

Reporting *Stevenson v. McDonough*, No. 20-4870 (Vet. App. Oct. 4, 2022).

In *Stevenson*, a precedential decision of the U.S. Court of Appeals for Veterans Claims, a panel comprised of Judges Bartley, Toth and Laurer addressed the Board's denial of Mr. Stevenson's claim for compensation for an "additional disability" caused by surgical treatment at a VA medical center (VAMC). The Court reversed the Board's determination that the veteran had not demonstrated an "additional disability" under 38 U.S.C. § 1151 and remanded for readjudication of the claim to determine if the other elements of the statutory criteria were met

Generally, under 38 U.S.C. § 1151, compensation is warranted for a "qualifying additional disability" that is proximately caused by VA fault in furnishing surgical and other treatment.

In this case, Mr. Stevenson had gallbladder removal surgery at a VAMC in 2012. Later, he developed a painful scar at the incisional site. In 2014, his scar was treated at a VAMC with radiofrequency ablation (RFA). The Court noted that RFA uses heat induced by low frequency electromagnetic waves to destroy dysfunctional tissue. RFA is also used to manage pain by applying it to a small areas of nerve tissue to stop it from sending pain signals.

In 2014, Mr. Stevenson was seen at a VA clinic for swelling, bleeding, pain, and an open wound at the RFA site. A VA doctor noted wound dehiscence (that the wound had split open) and that it tested positive for Methicillin-resistant Staphylococcus aureus (MRSA). The veteran was prescribed antibiotics and home health nursing care for his wound, which included daily dressing changes.

In September 2014, Mr. Stevenson filed a section 1151 claim for compensation based on a painful abdominal wound from the RFA procedure. In the course of his appeal, his wound gradually improved and by 2015, the wound had completely healed. A VA Regional Office denied the claim; Mr. Stevenson appealed.

The Board denied his claim finding that he did not have an additional disability. Relying on a 2019 VA examiner's opinion noting no evidence of a current unhealed wound, the Board found that Mr. Stevenson had not established the presence of an additional disability. Mr. Stevenson appealed to the Court.

Mr. Stevenson argued that the Board improperly relied on a finding of no current additional disability at the time of his VA examination rather than at the time he filed his claim. He argued that the definition of disability, by analogy, is the same under 38 U.S.C. § 1110, the law pertaining to compensation for disability due to disease or injury in service, as under section 1151. In contrast, the Secretary argued that Thomas' condition prior to, and after RFA, was the same. Thus, as his condition resolved, he did not have an "additional disability" under § 1151.

In its reversal of the Board's decision, the Court analyzed the plain meaning of "additional disability," as it is not defined in section 1151. The Court found that that "additional" means "more or added." The Court also found that the term

"disability" means "functional impairment of earning capacity" as defined by the U.S. Court of Appeals for the Federal Circuit in *Saunders v. Wilkie*, 886 F.3d 1356, 1362 (Fed. Cir. 2018). The Court concluded that, as "disability" has the same meaning in section 1151 as in section 1110, the "additional disability" criterion of section 1151 is satisfied if there is additional disability when the claim is filed or at some point while the claim is pending on appeal, even if it resolves before the case is adjudicated. This conclusion is supported by *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007), in which the Court found that the current disability element of service connection is met if disability is present at the time of filing or while the claim is pending, even if it resolves prior to adjudication.

The Court thus held that the Board erred in finding that Mr. Stevenson had no additional disability, as an additional disability of a painful, infected, open wound was clearly demonstrated at the time of filing of the claim for compensation pursuant to 38 U.S.C. § 1151. Therefore, the Court remanded the claim to the Board to determine whether the requisite causation elements of section 1151 have been met, and to readjudicate the claim in the first instance.

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PACT Act Expands Presumptive Service Connection, Healthcare, and Federal Causes of Action for Veterans

by Marlene Myers, Capt, USAF,
and Claire L. Hillan Sosa

Reporting on the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 or the Honoring our PACT Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (Aug. 10, 2022).

On August 10, 2022, President Joseph R. Biden signed into law the PACT Act, expanding research, administrative processes, healthcare, disability compensation, and federal causes of action surrounding a number of veterans issues. As of October 27, 2022, the Department of Veterans Affairs (VA) has reportedly already received nearly 113,000 claims under the PACT Act.

Healthcare Provisions

The PACT Act has expanded healthcare coverage to include several new classes of veterans. The classes include: (1) veterans who participated in a toxic exposure risk activity while serving on active duty, active duty for training, or inactive duty; (2) veterans who performed active military, naval, air, or space service while assigned to a duty station in, including airspace above, Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Somalia, or United Arab Emirates on or after August 2, 1990, and veterans who performed active naval, air, or space service while assigned to a duty station in, including airspace above, Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan, or any other country determined relevant by the VA Secretary on or after September 11, 2001; and, (3) veterans who deployed in support of Operation Enduring Freedom, Operation Freedom's Sentinel, Operation Iraqi Freedom, Operation New Dawn, Operation Inherent Resolve, and Resolute Support Mission. Honoring Our Pact Act of 2022 Pub. L. No. 117-168, § 103, 136 Stat. 1759, 1762 (2022).

In addition, the PACT Act expands healthcare to the new, broader category of herbicide-exposed veterans of the Vietnam era (as detailed below).

The PACT Act also reopened the enrollment period for post-9/11 combat veterans to enroll in the VA healthcare system so they may gain access to care. The period for enrollment was previously five years after the veteran left service, but the PACT Act extends this period to 10 years post-service. For veterans who aren't post-9/11 combat veterans, there is an open enrollment period that began October 1, 2022, and will remain open for one year.

New Process for Creating Presumptions

The PACT Act puts in place a new process for developing presumptive service-connection policies based on toxic exposures in a portion known as the Toxic Exposure in the American Military Act of 2022, or the TEAM Act of 2022. Honoring Our Pact Act of 2022 §§ 201–04. Several new sections of U.S. Code set forth a process whereby the VA Secretary must establish a working group composed of VA personnel tasked with reviewing cases of toxic exposure among veterans and their families. Based on scientific literature, media reports, information from veterans, and information from Congress, the working group will recommend new presumptive service-connection policies. The TEAM Act requires the VA Secretary to formally evaluate the working group's recommendations, and to either promulgate presumptive regulations or explain reasons why presumptions are not warranted within 160 days of the working group's recommendation.

The TEAM Act also requires the VA Secretary to attempt to enter into a five-year agreement with the National Academies of Sciences, Engineering, and Medicine (NAS) to evaluate scientific evidence regarding possible presumptive conditions.

The VA Secretary must also provide annual notice and public-comment periods on the topic of military toxic exposures.

These provisions open a new, more transparent and accessible channel for policy advocacy. This could potentially include a wide range of issues, as the working group and new notice-and-comment processes are not necessarily limited to the pre-defined toxic-exposure activities set forth in the PACT Act.

For example, perfluorooctane sulfonate (PFAS), or so-called forever chemicals, have been a topic of much discussion in recent years. And the NAS reported in 2022 that there is sufficient evidence or limited/suggestive evidence that PFAS exposure increases risk for several disabilities and birth defects. National Academies of Sciences, Guidance on PFAS Exposure, Testing, and Clinical Follow-Up 142–43 (2022). Thus, we can expect this to be an early issue evaluated by the working group. Others might include the effects of anthrax vaccination or other medications, exposure to jet fuel fumes, and more.

Finally, the TEAM Act also requires the VA to reopen previously denied claims any time a new presumption for service connection is created for the claimed condition. Honoring Our Pact Act of 2022 § 203. The effective-date rules for liberalizing laws under 38 C.F.R. § 3.114 would likely apply to these reopened claims.

Right to Medical Nexus Examinations

The PACT Act creates a new statutory right to a medical nexus examination whenever a veteran claiming service connection submits evidence of any disability and of participation in a toxic exposure risk activity (defined as requiring entry into an exposure-tracking system or as otherwise set forth by the VA Secretary). Honoring Our Pact Act of 2022 § 303.

Thus, veterans who, for example, are entitled to entry on the Agent Orange Registry, the Open Burn Pit Registry, and so on, are now entitled to a medical examination as a matter of law any time they claim a disability they assert is related to their in-service exposures. This will give many veterans the ability to sidestep the third prong of the test set forth in *McLendon v. Nicholson*, 20 Vet. App. 79 (2006); they will no longer have to show an implication of an association to service to gain the benefit of the VA's duty to assist.

Nuclear Exposure Presumptions:

The PACT Act has expanded nuclear exposure presumptions to two new groups that participated in specific missions. The two groups include veterans who participated in the onsite response efforts (1) following the collision of a United States Air Force B-52 bomber and refueling plane that caused the release of four thermonuclear weapons between January 17, 1966, and March 31, 1967, in Palomares, Spain, and (2) following the on-board fire and crash of an Air Force B-52 bomber that caused the release of four thermonuclear weapons near Thule Air Force

Base, Greenland between January 21, 1968 and September 25, 1968. Honoring Our Pact Act of 2022 §§ 401, 402.

Expansion of Agent Orange Presumptions

Prior to passage of the PACT Act, Vietnam War era veterans were entitled to a presumption of exposure to herbicide agents only if they served during prescribed time periods (1) within the Republic of Vietnam or in its waters, (2) at or near the Korean Demilitarized Zone in an area where the U.S. Department of Defense acknowledges use of herbicide agents, or (3) in the Air Force or Air Force Reserve with regular and repeated operations on C-123 aircraft known to have sprayed herbicide agents. 38 C.F.R. § 3.307(6). Certain veterans with service in Thailand were also considered exposed to herbicide agents as a matter of internal VA policy.

The PACT Act expands presumptions of herbicide-agent exposure to additional Vietnam era veterans. The new classes of veterans presumed exposed to herbicide agents include those who served in:

- Thailand at a U.S. or Royal Thai base between January 9, 1962, and June 30, 1976 (notably veterans need not show they performed duties near the perimeter as previously required under VA policy);
- Laos between December 1, 1965, and September 30, 1969;
- Mimot or Krek in the Kampong Province of Cambodia between April 16, 1969, and April 30, 1969;
- Guam or American Samoa or their territorial waters between January 9, 1962, and July 31, 1980; and
- Johnston Atoll or on a ship that called at Johnston Atoll between January 1, 1972, and September 30, 1977.

The PACT Act also adds new disabilities for which presumptive service connection is awarded based on exposure to herbicide agents. They include monoclonal gammopathy of undetermined significance, and—anecdotally speaking, one of the most common previously non-presumptive claims—hypertension.

The PACT Act, on its face, attempts to side-step the mandates of the consent decree discussed in *Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846 (2007), and litigated at length since its execution. The Act states that "[n]otwithstanding any Federal court decisions or settlements in effect on the day before the date of the enactment of this Act, the Secretary of Veterans Affairs shall award retroactive claims" for hypertension "only to claimants for dependency and indemnity compensation."

Congress, therefore, has sought to give the VA statutory cover—in cases of service connection for hypertension—to avoid the decree requiring the VA to "pay benefits based on the date that a veteran filed his" or her initial, previously denied claim. *Id.* at 852. Under the PACT Act, effective dates for grants of presumptive service connection for hypertension would be the date of a claim to reopen, or perhaps under 38 C.F.R. § 3.114 the date the Act (as a liberalizing law) became effective. This raises interesting legal questions at the cross-section of separation of powers, administrative law, and the scope and interpretation of class-action settlements.

Persian Gulf Presumptions

The PACT Act includes several provisions expanding presumptions of service connection for veterans of the Persian Gulf era. Honoring Our Pact Act of 2022 § 405.

First, the PACT Act broadens the definition of a "Persian Gulf veteran," for whom service connection is presumed for undiagnosed illness or medically unexplained chronic multisymptom illness (MUCMI). Veterans with service since August 2, 1990, in Afghanistan, Israel, Egypt, Syria, and Jordan are now included among this class of veterans.

Anecdotally, the exclusion of veterans with service in Afghanistan in particular, as well as Syria and Jordan, seemed to be a glaring gap in coverage to some practitioners. The PACT Act corrects that

perceived oversight. However, it must be noted that the defined term "Persian Gulf veteran" is not used in the statutory provisions for burn-pit presumptions, which potentially apply to fewer veterans as detailed below.

Second, the existing presumptions for undiagnosed illness and MUCMI are expanded to remove the prior requirement for manifestation to a compensable degree. Veterans with qualifying service are thus now entitled to presumptive service connection for an undiagnosed illness or MUCMI even when it has not risen to a compensable degree—which will surely expand coverage for those with disabilities frequently given 0% ratings, such as skin conditions. The law also permanently removes the time limit for manifestation.

Third, the PACT Act requires the VA to provide Persian Gulf veterans with Gulf War Illness disability benefits questionnaires anytime they present with any of the symptoms associated with Gulf War Illness (most likely as set forth at 38 C.F.R. § 3.317(b)—though the Act does not specify these symptoms).

Fourth, the PACT Act codifies the previously promulgated presumptions of particulate-matter exposure (including from burn pits) for certain veterans of the Persian Gulf War era. Persian Gulf veterans with service in the Southwest Asia theater of operations and veterans with service on or after September 19, 2001, in Afghanistan, Syria, Djibouti, or Uzbekistan were already entitled to a presumption of exposure to particulate matter under 38 C.F.R. § 3.320. The PACT Act expands the presumption of exposure to include post-9/11 service in Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan, or any other country determined relevant by the VA Secretary.

As indicated above, the burn-pit presumption applies to a slightly different class of veterans than the undiagnosed illness and MUCMI Gulf War Illness presumption. The differences are easy to miss:

The Gulf War Illness presumption now includes all veterans who served (1) on or after August 2, 1990, in Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations; or (2) on or after August 2, 1990, in Afghanistan, Israel, Egypt, Turkey, Syria, or Jordan (with no mention of airspace). *See* 38 U.S.C. § 1117(f); 38 C.F.R. §§ 3.317(e), 3.2(i). The burn-pit presumption, on the other hand, includes veterans defined in 38 U.S.C. § 1119(c), which remains unchanged by the PACT Act and covers service (1) on or after August 2, 1990, in Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Somalia, or United Arab Emirates, or the airspace above these locations; and (2) on or after September 11, 2001, in Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan, or any other country determined relevant by the VA Secretary, or the airspace above these locations.

Thus, as it stands there is no explicit presumption of service connection for Gulf War Illness for veterans with airspace-only service above Afghanistan, Israel, Egypt, Turkey, Syria, or Jordan. Nor is burn-pit exposure presumed for Gulf War veterans with pre-9/11 service in Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan. However, the VA Secretary is authorized to fill these gaps.

Finally, the PACT Act codifies an enormous list of disabilities presumed service-connected based on exposure to particulate-matter. These include broad categories of cancers and respiratory illnesses.

Although the PACT Act set forth a phased-in timeline for burn-pit presumptions with effective dates pushed out as far as October 2025, the VA's website indicates that it considers all conditions within the PACT Act presumptive on the date the bill became law (August 10, 2022). *The PACT Act and Your VA Benefits*, https://www.va.gov/resources/the-pact-act-and-your-va-benefits/#getting-benefits (last updated Oct. 26, 2022) ("Can I apply now?").

Camp Lejeune Justice Act

The most widely publicized portion of the PACT Act is the *Camp Lejeune Justice Act (CLJA)*. Many

veterans receive compensation for their illnesses related to water from Camp Lejeune, but the *CLJA* enables veterans to bring suit and collect damages from the government for their Camp Lejeune-related illnesses. The *CLJA* creates a federal cause of action for any "veteran… or the legal representative of such an individual, who resided, worked, or was otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, to water at Camp Lejeune, North Carolina, that was supplied by, or on behalf of, the United States." Honoring Our Pact Act of 2022 § 804.

After a multitude of studies, the federal government has conceded that "trichloroethylene (TCE), tetrachloroethylene (PCE), vinyl chloride (VC) and benzene contaminated some drinking water sources at Camp Lejeune." Agency for Toxic Substances and Disease Registry, *Camp Lejeune North Carolina: Chemicals Involved* (Jan. 16, 2014). There is sufficient evidence for causation in people exposed "occupationally or environmentally" to the chemicals detected in the drinking water at Camp Lejeune and known health effects. Agency for Toxic Substances and Disease Registry, *Camp Lejeune North Carolina: Health Effects Linked with Trichloroethylene (TCE), Tetrachloroethylene (PCE), Benzene, and Vinyl Chloride Exposure* (Jan. 16, 2014). The *CLJA*, for the first time, is allowing veterans to bring suit for certain illnesses from the contaminated water.

The essential elements a veteran must meet to bring suit under the *CLJA* are location, dates, duration, and condition. First, the veteran must have been at Camp Lejeune, or otherwise exposed to the water from Camp Lejeune. The most significant aspect of the location requirement is that the veteran may not have to prove he or she was at Camp Lejeune, but only that he or she was at a location where the veteran was exposed to the water from Camp Lejeune. This can include other smaller airfields and outposts where the water supply was transported from Camp Lejeune; however, the burden is on the veteran to demonstrate the connection between the location and the Camp Lejeune water.

Second, the veteran must have been exposed to the water at Camp Lejeune between August 1, 1953, and December 31, 1987. Third, the veteran must have been at the specificized location for 30 days or more during the specified time period. It is notable that the 30-day requirement does not have to be continuous and could be 30 or more total days from temporary duty assignments. Finally, the veteran must have suffered a harm from a condition related to the contaminated water.

Two of the less publicized aspects of the *CLJA* are the standard of proof and the statute of limitations. The veteran must prove either that there is sufficient evidence to conclude that a causal relationship exists, or that it is "at least as likely as not" that the water at Camp Lejeune caused the harm from which the veteran is suffering. The presumptive conditions for service connection include (1) kidney cancer; (2) liver cancer; (3) non-Hodgkin's lymphoma; (4) adult leukemia; (5) multiple myeloma; (6) Parkinson's disease; (7) aplastic anemia and other myelodysplastic syndromes; and (8) bladder cancer. Honoring Our Pact Act of 2022 § 804. This standard of proof is the same standard that veterans bear when making their VA Benefits claims. Additionally, veterans have until October 1, 2024, to bring suit under the *CLJA*. This is a relatively short period of time, so veterans should begin pursuing a suit if they qualify.

A final note that may not be widely understood among veterans is that bringing suit under the *CLJA* is separate from the VA Benefits amount that a veteran receives each month. Any damages that a veteran receives as a result of a successful *CLJA* suit will be offset by any VA, Medicare, or Medicaid benefit the veteran receives.

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Book Review: *Veterans Law, Cases and Theory*, Second Edition, by James D. Ridgway

by Mary Tang

The evolution and history of veterans law makes this an intricate and interesting area of law in which to practice. Therefore, creating a foundational casebook in this area of law is no easy feat.

In teaching law, the author of a good casebook aims for the perfect trifecta: historical background, the breakdown within each area of the law at-hand through cases and theories, and thought-provoking questions to engage the reader. In the second edition of his casebook, Professor Ridgway succeeds in this endeavor by explaining the historical evolution of veterans law, showing how history and case law have shaped current veterans law, and engagingly demonstrating the importance of understanding this process. In addition to educating a law student in veterans law, the casebook also has the added bonus of reading like a hornbook. Thus, this volume should be on a seasoned practitioner's bookshelf as a go-to guide in a pinch.

Professor Ridgway attempts to cover a massive amount of ground in conveying the essentials of veterans law, yet this subject is so vast and intricate that in a sense he merely scratches the surface. The casebook breaks down into five parts: An Introduction to the Veterans Benefits System; Disability Compensation; Evidence and the Duty to Assist; The Agency Adjudication Process; and Review of Decisions.

Each part is broken down into chapters that illustrate various aspects of the subject, with historical background (much of it provided by Professor Ridgway's law review articles), some explanatory materials, and case law reflecting the application of the principles to specific factual scenarios. Each decision appears to be carefully selected and edited for readability and flow, as well as to showcase its significance. Familiar topics are covered, such as the basic elements of a service connection claim; alternative theories of service connection rating disabilities; the duty to assist imposed upon the Department of Veterans Affairs (VA) and the evidence needed to prove a claim; the VA's adjudication process; and appellate review by the Board of Veterans' Appeals, the United States Courts of Appeals for Veterans Claims, and the Federal Circuit. Professor Ridgway goes even further in providing a visual context of commonly used VA forms in the book's Appendix so that students, legal clinics, and/or a new practitioners may familiarize themselves prior to diving into this field.

Perhaps the most significant change since the first edition of the casebook is the passage of the Veterans Appeals Improvement and Modernization Act (AMA), which has overhauled the VA's traditional and linear adjudication process with one geared toward veterans choice, allowing a veteran to choose from among several different types of review. Professor Ridgway concisely summarizes the law and the problems the AMA was designed to alleviate.

More generally, in this iteration, Professor Ridgway added and subtracted some parts and sections from the first edition. He also provided some updated cases, most notably expanding the discussion about rating orthopedic disabilities. Most poignantly, Professor Ridgway notes the withdrawal of the last troops from Afghanistan and the how that event's impact on veterans law and future policies is currently unknown.

The casebook is thorough and informative throughout. The history of veterans law, which predates the inception of the United States, reflects an evolution in theories and policies attempting to carry forth and sustain the VA's mission as initially articulated by President Lincoln: "To care for him who shall have borne the battle."

Interesting facts abound throughout the text, including:

- the VA benefits system pays nearly $100 billion annually to more than 5.5 million veterans;

- the second most commonly used quotation in writing about veterans benefits, George Washington's statement, "The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive veterans of earlier wars were treated and appreciated by this country," is apocryphal;

- the first time the word "compensation" was introduced to categorize benefits was 1919;

- the patchwork manner in which administering veterans benefits was shuffled under various federal agencies before the VA was created in 1930.

While its target audience is law students, the casebook is dense and not easily digestible without complementary lectures or supplemental materials. On their own, the casebook's materials may be too sophisticated and, in some instances, perhaps even too overwhelming or time consuming for a law student. For example, the questions often refer to other outside sources, which might require a student to spend extra time to locate to understand why the question was asked in the first place.

Overall, veterans law is very lucky to have a historical archivist in Professor Ridgway. His depth of insight is superb, his dedication to this area of law is evident, and he makes every aspect of this broad subject area interesting. To have this knowledge memorialized in a casebook is value added to this field for those wishing to learn more about it, as well as for those already practicing in this area. Although the second edition will almost certainly not be the last of this casebook, given the constant evolution of veterans law, it is a worthy gem that merits a read.

The second edition of Professor Ridgway's *Veterans Law: Cases and Theory* is now available through West Academic Publishing.

Mary Tang is an attorney at the Board of Veterans' Appeals.

A Glimpse into James Ridgway: Practitioner, Professor, Textbook Author, and Veterans Law Historian

by Mary Tang

The interview below, conducted via Zoom, accompanies the review of the second edition of Professor Ridgway's textbook on veterans law. Portions of the interview have been reorganized, condensed, and edited for flow.

Professor Ridgway, what prompted you to write the first edition?

For a long time, the [U.S. Court of Appeals for Veterans Claims (Court)] was interested in developing Veterans law as a law school class and an area of academic study. At the time, there had been a couple of folks taking a stab at a draft, but they were academics—law professors trying to write textbooks about stuff that they didn't know about. I got to see a couple of the drafts and they were not practical, with a very "fun house mirror" focus.

So, when I was at the Court, [during] my second go-around with Judge [Alan] Lance, one of the things that I thought I might do after my second clerkship was to try to get a job as a law professor. I had written a handful of early law review articles, and the judges of the Court were very aware of that. The first thing was an analysis of the Court's decisions. Then of course, all the Court's judges took note of that and were aware of what my interests were.

What happened was that once the Court partnered with [The George Washington University Law School] (GW) to take over the moot court competition, through Judge [Mary] Schoelen's connections there, one of the first things GW did was to invite Judge [William] Greene to teach a class on Veterans law. And Judge Greene reached out to me to coteach with him.

By way of background, Judge Greene started when I was a clerk for Judge [Kenneth] Kramer, and his chambers were next to ours. So, I had been in his chambers since day one for him at the Court, helping his original law clerks get set up. We had known each other since the very beginning of his time at the Court. I didn't have the résumé to be invited to teach, but he knew that this was going to be an opportunity. Even at that point, one of the things that occurred to me was, "Okay, these materials could turn into a textbook," because we looked at what was available and there was just nothing useful in existence at the time.

We were essentially building all the materials ourselves, and luckily, Dean Lisa Schenck was the dean in charge of the adjunct program. She was a veteran, like a lot of the faculty at GW. Dean Schenck had written a textbook on national security law with West [Academic Publishing, part of Thomson Reuters], and she was able to connect me with them. She showed me her book proposal, what it looked like, how to do market research, and walked me through the process. That was how I got the contract to do publish the first edition. It worked out okay—a couple of years teaching at GW, with just a collection of cases that we were trotting out, and that turned into the first edition of the textbook.

I love that backstory. Did the first edition take longer than you thought it would? Was it harder to actually put it together or was it relatively easy because it was stuff you were preparing for the class?

Putting together the textbook was definitely harder than I thought. It took longer, over a year. But that was kind of what the contract with West said. They knew better than I did.

Cutting the cases was not that hard. The hard part was all the notes and all the research for every case used in the textbook. I felt like, okay, I needed at least three notes for discussion after the cases, maybe more, for each case.

Backstory: I had an email list that I started back when I was at the Court, which I called "food for thought." I had started writing a lot of law review articles with the idea of becoming a law professor after the Court. There was a lot of interesting stuff and I had lots of interesting conversations with people, with a lot of folks who were interested in thinking about this area. This list grew to be about 70 or 80 people that I would send law review articles, news articles, books, podcasts, etc., on topics I thought could be informative about veterans law.

From this list exchange, I had a collection of material, but the amount of work to come up with notes and cites for all of them was just enormous. I spent a lot of very late evenings and sleepless nights putting all of that together for the first edition.

Did the sections seem to fit into patterns that made it easy to organize?

My recollection was that the overarching structure of the textbook was not that hard, and a big part of that was my mental framework as to what veterans law is: a collection of torts, evidence, and administrative laws; civil procedure, and attorney's fees.

When I thought about the law that way and then borrowed from resources like the Veterans Benefits Manual from the [National Veterans Legal Services Program] (NVLSP), I organized the law into structural buckets for the textbook.

Why start with Brammer, and not with a case that first establishes the three elements of service connection?

One of the things I learned through teaching, trainings, and events, is that it is so much more effective to start where people are. *Brammer* [*v. Derwinski*, 3 Vet. App. 223, 225 (1992) (requiring "proof of a present disability" to establish service connection),] is a case that goes right to people's instincts.

Generally, people think of combat veterans when they think of veterans law, and that is who VA is taking care of. Starting with *Brammer* and contrasting that with *Groves* [*v. Peake*, 524 F.3d 1306 (Fed. Cir. 2008) (finding clear and unmistakable

error in a VA decision that denied service connection even though psychosis was diagnosed in and after service, meeting the criteria of service connection for a chronic disease under 38 C.F.R. § 3.303(b)),] really gets people to stop and think and then be open minded about how veterans law actually works. This method is more effective than starting with some case that establishes the three core elements of service connection.

When did you decide to write the second edition, and did you think it would be 15 years between them?

For the first six or seven years after the first edition, the law was pretty stable. By 2016, I was starting to feel that this was getting a little bit long in the tooth, but with so much happening with the appeals modernization process, I was on Capitol Hill and answering questions there to get that moving. The second edition was an idea for a while, but I didn't have time for it. Then in late 2017 or 2018, West reached out and asked, "Don't you think it's about time for a new edition?" And I said, "Yeah, you're right. Probably."

Initially, I waited to get a little meat on the appeals modernization since a new edition that has nothing on the new process has a limited shelf life.

But once a contract for delivery was set for the end of 2020, then COVID happened. The deadline then turned into 2021, and in the meantime, a whole bunch of appellate action started to happen.

If you look at the textbook, you will see how many cases from 2019, 2020, and 2021 worked their way in. The second edition project really did expand dramatically from the time the contract was signed to the time of delivery.

Do you think the same amount of time will pass between now and the next edition?

I don't think it'll be that long before the next edition. I feel like once we've got some more [Veterans Appeals Improvement and Modernization Act of 2017] (AMA) case law, that will justify revisiting the textbook. I already have a list of things since the second edition came out that should make it into a textbook supplement.

I feel like post-*Kisor* [v. *Wilkie*, 139 S. Ct. 2400 (2019) (clarifying the circumstances under which a court must defer to an agency's interpretation of its regulations)], there will be some stuff that changes how we think about *Chevron*[, *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (explaining the circumstances in which a court must defer to an agency's interpretation of the statutes it implements),] and the whole *Chevron*-[*Brown v. Gardner*, 513 U.S. 115 (1994) (resolving interpretive doubt in favor of the veteran),] question that should be addressed on the appellate level.

Did you poll friends and colleagues on the cases that should be used in your textbook?

When I was teaching with Judge Greene, I showed the draft table of contents to most of the Court's judges and some law clerks for the first edition.

For the second edition, I sent a redline to eight to ten people, including Judges [Michael] Allen and [Robert] Davis, fellow professors, friends, and practitioners.

I polled practitioners because I really wanted to hear which of the cases were used in practice that they felt really needed to be in this edition. A lot of their suggestions made it into the notes, but I was pretty glad that I was more or less on the same wavelength with them about what is important in veterans law.

What was the most significant change between the two editions?

One of the biggest changes between the first and second edition is that this edition is much more practice focused. This was driven both by my own experience and also by feedback from the practitioners.

The more profound change since moving from the [Board of Veterans' Appeals] (Board) to private practice was to have a whole lot more of this edition devoted to disability ratings. From how you rate an orthopedic condition to what is VA's duty to get an

exam triggered for the severity of the service-connected disability, to *Sharp* [*v. Shulkin*, 29 Vet. App. 26 (2017)], or what is an adequate exam [for rating purposes] and including examples of a disability benefits questionnaire (DBQ) form in the textbook. These were driven by the recognition of how many law schools have a veterans law clinic and not a doctrinal class setting. That was the biggest change in focus for the second edition.

Finally, there are fewer parts in this edition since some of the parts broke down a little bit differently. Some of the parts that used to be two parts are now lumped together into a bigger one, such as discussing the Board and the Court together.

What was the most difficult topic to leave out of the second edition?

The hardest cut was the [Equal Access to Justice Act] (EAJA) chapter. EAJA doesn't generate much litigation, but I feel like it still exerts a lot of gravity on the practice of veterans law. It is definitely good to know how attorney's fees work since there's a lot about how the Court behaves and which arguments get made, which makes more sense if you understand about the core of EAJA fees. So that was the hardest cut.

Bit of trivia: For a while, the first part on the history of veterans law wasn't going to make it back in since a criterion for this edition was to keep it the same page limit as the prior edition. But then I realized I was going to have enough space to keep that. My editor also talked me into keeping this section.

What was the most significant legal development between the two editions?

The AMA is the most significant development in the law and only makes a guest appearance in this edition.

The most significant legal development is the big administrative law questions. The whole *[Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs. (NOVA)*, 981 F.3d 1360 (Fed. Cir. 2020) (en banc), referred to 48 F.4th 1307 (Fed. Cir. 2022),] [along with] *Kennedy v. McDonough*, 33 F.4th 1339 (Fed. Cir. 2022), on the role of guidance documents [such as VA's Adjudication Procedures Manual], the *Kisor* iterations, in terms of review of regulations and the pro-veteran canon—that was the most significant change.

When would you estimate it would be time for the third edition, and what general direction do you see veterans law going in in the interim?

The third edition will be sooner—in six or seven years. The yardstick will be how fast case law on the AMA gets adjudicated. The secondary consideration is on the overarching administrative law stuff that drives statutory and regulatory interpretation.

But as soon as enough material is available for a good AMA chapter, then there should be enough ancillary stuff to justify a third edition.

What do you think will be the most significant legal development in the near future?

I think something about the relationship of the role of pro-veterans canon interpretation can happen easily in the near future. Another significant change would be defining the terms such as in [*Chavis v. McDonough*, 34 Vet. App. 1 (2021),] and what to do when terms start getting definitions.

The dark horse issue is saying that nobody is happy with the resolutions of issues for which there is no good evidence either way. Fundamentally, VA still does not do a great job gathering evidence. And at some point, that will come to a head since currently, VA does a poor job of soliciting information from the veteran about symptom history.

Which CAVC judge has had the greatest impact on veterans law?

There's absolutely no way for me to answer this in an unbiased manner. I was inside the Court for two generations. I think one of the things my clerkship experience really taught me is just how much the name on the opinion isn't the reliable indicator of where the words are coming from. It's certainly true more often than not, but there are times that a reader familiar with the Court would say, "That

paragraph was not written by that judge and came from this other judge on the panel." And I think one of the things that I saw inside the Court was how often the key language—and that's what other judges comment on—comes up in circulation and is suggested by somebody from outside the panel altogether or gets workshopped by the judges as a group.

I certainly don't think you could make that judgment by just saying, "Oh, the big cases are X, Y, and Z, and most of them are written by this judge or that judge." So obviously, my long stint at the Court was with Judge Lance, and I'm insanely proud of a lot of the stuff that came out of our chambers during that time period. I think that, and I'm biased toward seeing the mentions of the cases that were most salient to me from the inside. I've definitely talked to other judges and clerks about cases that they think about. And oftentimes, they'll talk about cases that came out of their chambers or were written by their judge, and they see all the citations and they pick up on things that just fly by me.

So, I cannot answer that question [with reference to the impact of individual decisions and their authors, but] I think actually the judge who had the greatest impact on veterans law was Judge [Bruce] Kasold. And not necessarily because of what he wrote, but his willingness to send issues to panel during the second generation.

If you look at how many cases he wrote, he wrote a lot more I think, than pretty much most of the other judges. And a lot of it was just because he would see an issue and send it to panel. A lot of other judges with pet issues didn't send them to panel nearly as much. They did a lot by single judge. So, I give him a lot of credit for his decisiveness and his willingness to say, "Yeah, this should be decided by panel." Sometimes he ended up in the dissent, and sometimes what came out was not the clearest standard that set the world on fire and changed how things were decided. But they definitely helped push the law in one direction or another. And I can say that having no direct connection with him [laughs].

Why do you think the law seemed pretty stable for a while and then a lot more change occurred?

I feel there was definitely a generational effect. The transition from the first to second generation at the Court led to a bunch of big important cases, which then answered things in veterans law.

It's clearly the way "practice" existed for them.

For the first generation, the judges were from outside the adjudication process. The Court had a whole group of people who had been involved in VA policy but did not know veterans law at all. The first generation was intensely self-reliant. The bulk of the precedents was their collective knowledge based on the judges' conversations, and they were very internally focused. By the end, they had a lot of momentum and had a collective opinion on many parts of veterans law.

Then, all of a sudden, the Court had a generation change. The new judges came in like the first generation—as in not much Board or VA experience.

However, there was now a much bigger veterans law practice community. Thus, when oral arguments occurred before the second generation, and advocates were telling the judges things they didn't know, the judges became more aware of what they didn't know. The second generation had a greater appetite to understand what was happening. This led to more of the current structure.

You've had several different positions in the Veterans law community: Court law clerk, chief counsel at the Board, and partner at a law firm. Which do you think has been the most rewarding? Which has been the most impactful?

The most impactful position was being the chief counsel for policy and procedure at the Board.

The AMA happened when I was introduced to the right-hand person of VA's Deputy Secretary at a meeting at the VA Central Office in October 2014. And by happenstance, the Washington Post ran an article discussing the worst backlog within the Federal Government at the Social Security

Administration. Based on that article, I sent an email to the right-hand person, laying out the Board's backlog at the time. That email resulted in a request from the Deputy Secretary for a white paper on the backlog, which, in turn, led to a request from VA's Budget Office to figure out the cost to resolve the appeals problem within five years.

The review of these documents led to a meeting around January 2016 with all the [veterans service organizations] (VSOs) that turned into a three-day lockdown. AMA features were proposed and resulted from, which would not have happened unless I was in the right place at the right time, with the right article that came out to take the shot that finally brings attention to the problem.

This was a pretty rare opportunity where everybody on all sides was in support of the AMA. Everybody could see that the current appeals system was just fundamentally not healthy.

The other impactful act was to get the Board's data out there. Knowing so much about the Board and working with David Ames[, former chief of quality assurance at the Board,] to get that data out there to talk about has been really impactful to this practice.

The most rewarding position I've held, hands down, was being on the Board of Governors of the CAVC Bar Association for five years. During my tenure, I was recruited as editor of the Veterans Law Journal, which, at that time, hadn't been published in almost a year. The Board of Governors was a really good group that brought the CAVC Bar Association back to full strength and regularity. I got to be involved in more frequent programming and write a whole bunch of articles on different things.

As president-elect, I reached out and partnered with the Federal Circuit Bar Association that led to our Bar Association membership becoming more national.

And really, that was how I ended up moving from the Court to the Board—it was these relationships I built. The most rewarding thing has been for me to see this field go from feeling so siloed to moving all around within the veterans law community, a healthy community, which is good for the field.

If there was one lesson you would like a reader to take from the casebook, what would it be?

Veterans law is built upon problems that are seen elsewhere; it isn't this "unique snowflake," but rather an amalgam of administrative, torts, and evidence law, and civil procedure. There are lessons to be learned in each of those areas of law. I think the textbook's message is that these are known problems that occur in the other areas of law, which are worth thinking about: what has been tried elsewhere, has it worked, and is this area of law the different or the same?

And given that context, do we want to do things the same or differently in veterans law, depending on what is trying to be accomplished in each case.

Which of the sections is the one that you feel would be most valuable to the readers of the Veterans Law Journal?

I feel like we should be spending more time thinking about guidance documents than we do. Even though a lot of practitioners or readers of the Veterans Law Journal know the elements of service connection, the part of administrative law that they could dig deeper on is really the guidance documents.

Finally, the history of veterans law—that section is also valuable to the readers. Practicing this area of law is much, much harder without historical context and evidence-based theories, but of course, I am biased since I was a history major.

Without knowing history, the case law regarding scope of claim or the Board's duty to sympathetically read a veteran's claim—if you don't understand that much of it was developed in a world where [a total disability rating based on individual unemployability (TDIU)] was thought to be a different claim.

The law exists to help human beings solve problems and to work collectively as a community. The lessons learned from history of what worked, what

was tried, and why it was tried are just as important as learning about solutions that have a good chance of working now.

Mary Tang is an attorney at the Board of Veterans' Appeals. She thanks Jon Hager for his invaluable time and guidance in shaping this book review and in conducting the interview.

Book Review of *Service Denied*

by Solveig Frasch

In *Service Denied: Marginalized Veterans in Modern American History*, editors John M. Kinder and Jason A. Higgins compile a series of essays exploring veteran histories across the past century. The book is divided into four sections, with each covering a different period of American military history. Each section, in turn, presents a selection of essays featuring particular groups of veterans who faced marginalization within those historical periods.

Some of the featured veteran communities suffered discrimination based on intrinsic characteristics, such as race, sex, ethnicity, and sexual orientation. For example, one essay highlights the experience of African American veterans in the interwar period of the 1920s. Another discusses the history of LGBT veterans. Yet another explores the experiences of female veterans since the Vietnam War.

Other veteran communities faced inequities based on extrinsic characteristics, such as the nature of their injuries or their type of service. For instance, one essay discusses how the military historically discharged servicemembers dealing with enuresis (bed-wetting), particularly from World War II into the Vietnam War era. Another essay probes the more recent history of National Guard and Reserve members facing harsh financial inequities after deploying in support of military operations in the Middle East.

While each essay presents a fascinating story, *Service Denied* could be critiqued as lacking a cohesive narrative, but perhaps this is the editors' point. The sheer diversity of stories shared in these essays makes a compelling case that historians have left too many veterans' stories unheard.

Kinder and Higgins not only confront the legacy of historians who traditionally failed to investigate and preserve the stories of marginalized veterans, but they also offer research ideas for future scholars. For this reason, *Service Denied* is a worthwhile read and a valuable contribution to a broader conversation about the breadth and depth of diversity within the veteran community.

Solveig Frasch is a staff attorney at the National Veterans Legal Services Program.

Back to the Future: Unapparent Shortcomings of VA Form 21-8951-2 Used as an Instrument to Charge a VA Overpayment

by Anna Kapellan

The present changes the past. Looking back, you do not find what you left behind. – Kiran Desai, "The Inheritance of Loss"

"The best way to predict the future is to create it," observed Abraham Lincoln. Regretfully, Lincoln's wisdom about the relation between the present and the future, same as Desai's philosophical observation about the ability of the present to put the past in a very different perspective have been overlooked in VA Form 21-8951-2. The form is structured as if it were envisioning a veteran's ability to prevent VA overpayments, but instead seems to have the effect of creating overpayments. The type of overpayments VA Form 21-8951-2 aims to address relates to military training assemblies (TAs).

Indeed, VA overpayments may ensue from, *e.g.*, concurrent receipts of VA compensation benefits and military pay (*i.e.*, the funds paid by the Defense Finance and Accounting Service (DFAS), an agency that operates, *inter alia*, as the payroll arm of service departments within the Department of Defense (DoD)). While TAs come in many forms, they are, with a very narrowly carved exception, compensable activities essential to maintaining the readiness of the National Guard, Reservists, and former career military personnel capable of service. Since TAs are often – but not always – conducted on weekends, this mere logistical fact gave rise to a popular misnomer commonly used for TAs: drill weekends.

Often, but not always, there are two TA periods in a single calendar day, meaning that, more often than not, there are four TAs in a single weekend, even though a veteran may be scheduled to execute just one, or two, or three TA periods during a weekend. However, a single TA period corresponds to a full pay-day for VA's calculative purposes, meaning that two TA periods executed during a single calendar day are deemed as two separate days of payment. Notably, a VA compensation beneficiary is eligible to receive his/her VA compensation *and* his/her TA-based pay from DFAS. However, the concept of eligibility is qualitatively different from that of entitlement. Therefore, if a veteran receives a VA disability compensation and also DFAS TA-based payment for the same "calculative" period of time, the veteran is deemed overpaid because 38 U.S.C. § 5304 and implementing regulations prohibit concurrent receipts of duplicative, *i.e.*, redundant benefits. Therefore, a veteran eligible to monetary benefits under more than one legal provision must choose the benefit he/she prefers (in light of his/her financial circumstances) and waive those benefits that qualify as redundant. Neither VA nor DFAS may second-guess a veteran's election, and he/she may change his/her election(s) as to any new round of TAs if the veteran's financial preferences change. Critical, while the prohibition on redundancy has a few exceptions, none of them is applicable to the redundancy based on a veteran's execution of TAs.

Accordingly, under § 5304(c) and 10 U.S.C. § 12316, a veteran who is a VA compensation beneficiary and plans to execute or has already executed TAs should choose between his/her DFAS TA-based pay and VA compensation and waive, *i.e.*, conclusively forfeit, the other. If the veteran forfeits a financially more lucrative benefit, he/she is not paid the difference (as it might be the case with other DFAS payments unrelated to TAs that still create a redundancy with VA benefits). Therefore, it is hardly surprising that, at first glance, VA Form 21-8951, updated three years ago into VA Form 21-8951-2, could create an impression that it was designed to operate as a legal instrument a veteran may use to ensure that he/she would not be overpaid. Indeed, VA Form 21-8951-2, titled "notice of waiver of VA [benefits in order] to receive military pay and allowances," seemingly hints at a prevention of a TA-based overpayment. Unfortunately, this optimistic hint does not reflect the realities of VA Form 21-8951-2.

VA Form 21-8951-2 is a two-page legal instrument. On its first page, right after a veteran's personal information, is Section II, titled "Training Pay Information" referring to the TAs that are at issue and, thus, it allocates spaces to enter the number of these TAs and the fiscal year (FY) when these TAs took place. Notably, if a veteran schedules his/her execution of TAs and notifies the VA agency of original jurisdiction (AOJ) administering his/her VA compensation benefits of the veteran's upcoming TAs but, when the time comes, he/she cannot execute these TAs in actuality, the veteran is not penalized by VA for the early notice followed by a change in his/her circumstances. Rather, upon informing VA of the change, the veteran receives VA benefits for the period that could have been but was not affected by TAs.

However, the second page of VA Form 21-8951-2 demonstrates that the caring and efficient image of VA Form 21-8951-2 is, unfortunately, just an illusion at this juncture. This is so because the second page begins with Section III, "Election Notice," that includes paragraphs eight and nine. Paragraph eight

offers a veteran two choices, *i.e.*, to agree or disagree with the fact of his/her execution of the number of TAs during the FY stated on page one. Since the concepts of agreement and disagreement imply, by definition, a response to an already-made statement, this retrospective stance of paragraph eight begins to cast doubt on the overpayment-preventing image of VA Form 21-8951-2 by *de facto* indicating that an AOJ, and only an AOJ, may enter the FY and the number of TAs into page one, and no veteran has a role in making these initial statements.

Paragraph nine of Section III solidifies the image of VA Form 21-8951-2 as a debt charging instrument, albeit doing it in a problematic fashion. Specifically, paragraph nine offers a veteran three options to choose from, but the options are drafted as if they differ in terms of their timeframes since the first two connote a present-day decision made as to a future choice (the first one reads, "I . . . waive VA benefits for the days [corresponding to my TA periods] to retain my [TA-based DFAS] pay," and the second option, being a mirror-image of the first one, reads, "I elect to waive [my TA-based DFAS] pay . . . to retain my VA compensation"), but the third option unambiguously uses a past-tense verb implying only a reflection on a past fact (reading, "I received no military pay . . . during the [FY] indicated on page 1 of this form"). Between the two choices of paragraph eight and three options of paragraph nine, a veteran ends up choosing one of five responses to an AOJ's proposal to charge him/her with an overpayment.

These five choices could be subdivided into three groups. The first group has just one option, *i.e.*, it applies only if a veteran claims that he/she executed no TAs whatsoever during the FY stated by the AOJ on page one, *i.e.*, that no recoupment by either VA or DFAS should be allowed since there has not been any overpayment. The other two groups have two options each and differ only in terms of the choice how to recoup the overpayment. Correspondingly, these two groups have the same two options (the veteran either concedes executing the AOJ-stated number of TAs during the FY at issue or concedes execution of TAs during this FY but contests the number of TAs) and differ only in terms of whether the veteran wishes to be deemed overpaid by VA (and such an election results in VA's recoupment of the debt) or he/she elects to hold on to VA benefits (and his/her TA-based pay should be recouped).

Two of the three groups, *i.e.*, the group containing a single option and one of the groups containing two options are, regretfully, plagued by unapparent accounting and legal deficiencies. Specifically, the group with two options inaccurately suggests that a veteran could always elect DFAS recoupment of his/her already disbursed TA-based pay. The group with a single option is plagued by superfluousness that unduly leads veterans to inaction in a scenario where their action would be financially critical.

First, the two-option group *de facto* promises that a veteran's TA-based pay may be remitted to DFAS at any time, no matter how long ago DFAS made these payments. True, there are certain forms of DFAS payments remittable to DFAS at any time, even many decades after these payments were made. A common example of such a remittance arises if a veteran's DFAS-paid military severance disbursed many years ago is recouped by VA and remitted to DFAS because the veteran was awarded VA compensation benefits. However, for the purposes of such a remittance, the VA Debt Management Center (DMC), an agency operating within VA, executes the recoupment by incremental withholdings from the veteran's recurrent and/or past-due VA compensation benefits and transfers the recouped funds to VA: for VA's remittance to DFAS. Upon receipt of such a remittance, DFAS qualifies it, for accounting purposes, as VA's debt to DFAS and, on this specific basis, forwards the funds to DoD, which repurposes the funds for DoD's other programs. However, this simple process is based on legal provisions that qualify VA compensation benefits equal to a veteran's military severance as the funds overpaid by VA. Therefore, DMC, acting

as an arm of VA (since DMC is a government agency operating under the umbrella jurisdiction of VA) may execute the recoupment, and VA may qualify the recouped funds as the funds that VA owes to DoD and, on this ground, facilitate DoD's receipt.

However, if a veteran elects to give up his/her DFAS TA-based pay, DFAS (and DoD) become the entity that wrongly paid the funds at issue. Therefore, VA has no role in this overpayment equation: only DFAS may execute the recoupment of its prior TA-based payments. Moreover, DFAS cannot recoup its prior TA-based payments by incremental withholdings from a veteran's VA benefits; rather, DFAS should resort to other measures of debt collection open to a government agency that acts as a creditor. Plus, even if the many legal and logistic complexities of the recoupment that DFAS faces are factored out, DFAS, acting on behalf of DoD, often finds itself without any financial incentive to undertake any recoupment tasks. This is so because, in a scenario where TA-based payments were made a substantial number of years ago, DoD is often barred by rules of accounting from any use of such recouped funds.

To a layperson or private business, such a possibility may appear peculiar since, if a person or a private business is remitted funds that he/she/it has unduly expended in the past, the person or business would likely have little, if any, problem repurposing and using the funds upon designating them as incoming liquid assets. However, even a layperson may relate to the legal and accounting conundrum arising, *e.g.*, in a scenario where a person sets an unregistered charitable fund within a jurisdiction permitting receipt of donations only by registered charities. Such a charitable fund would, eventually, become depleted upon the use of its entire corpus, hence prompting the charity to unwind and cease to exist. If, after the unwinding is complete, a certain amount that the charity had spent years ago is remitted, this amount cannot be remitted to the charity that is no longer in existence.

Similarly, governmental programs in general and DoD's programs in particular, operate as *de facto* fiscal entities since they are financed by budgetary allocations assigned to these programs. Therefore, similar to the charity in the aforesaid example, such a program is financed by budgetary injections only during its lifetime (and may only receive remittances of recouped funds until the program ends, *e.g.*, being superseded by another program that might have an identical purpose in terms of the supporting the agency's mission but funded by its own incremental budgetary allocations). Simply put, there is no such a program as an eternal concept of upholding DoD's military readiness through TAs. Rather, DoD funds to compensate TA participants are distributed into multi-year programs factored into the budgetary needs of the service departments that run TA programs. Since most DoD programs are budgeted for a period under seven years, an acceptance of a remittance of TA-based funds is typically impossible in the event it comes after the program from which the funds were paid has already closed. Consequently, even if DFAS wishes to engage in the cumbersome process of debt recoupment, the DoD has no incentive to invest DFAS financial and human recourses into the task of recoupment of funds that DoD would be unable to repurpose upon a proper receipt.

And yet, VA Form 21-8951-2 keeps offering veterans the choice that *de facto* promises the veteran that DFAS would perform a function that DFAS might not be willing to perform: given that VA had no legal authority to direct DFAS recoupment of DFAS's own funds. And while the reader might be tempted to hope that such occurrences are extraordinarily rare,the realities of time are not on the side of VA Form 21-8951-2 which is often issued by an AOJ long after the TAs at issue were executed.

Admittedly, the multi-year gap in VA's actions is not entirely the fault of VA. Indeed, to generate a VA Form 21-8951-2 operating as a *de facto* proposal notice informing a veteran of VA's intent to charge him/her with a debt arising from a TA-based

overpayment, an AOJ needs to have information about the number of TAs that a particular veteran had executed during a particular FY: to enter this information on page one of Section II of the form. However, VA depends on DFAS for receipt of such information and has no independent access to any records that could enable VA's speedier actions. And, to further complicate the matters, DFAS, being the finance and accounting arm of DoD, receives this information through a lengthy chain of reports made by other agencies operating under DoD's umbrella jurisdiction. Specifically, DFAS receives this information from the Defense Joint Military Pay System, Reserve Component (DJMC/RC), which too is not the original source of information. Rather, the relevant information should be distilled by DJMC/RC from the mass of information coming from the Reserve Command (RC) within its service department. The RC, in turn, utilizes the department's access to the Total Personnel Database of the Record Component (TPDB/RC) of the U.S. Human Resources Command (HRC) to obtain information as to those veterans who were not only scheduled but also executed TAs in actuality. Given the DFAS-DJMC/RC-RC-TPDB/CR-HRC chain of information mining that resembles the "House That Jack Built" nursery rhyme in terms of its multi-layer complexity, DFAS's tendency to supply VA with TA information upon a delay that might be well over a year is understandable. Moreover, these delays, being compounded with delays caused by VA being a government bureaucracy addressing thousands of claims a day, often result in AOJs mailing veteran's VA Forms 21-8951-2 operating as proposal notices many years after the TAs at issue were executed.

Therefore, it is common for a veteran to suddenly receive a flock of VA Forms 21-8951-2 proposing to charge him/her with a slew of overpayments that, jointly, yield a substantial debt which, if recouped, may translate into a substantial financial burden. Moreover, after three to seven years from the actual execution of TAs, it is often hard for a veteran to remember how many TAs did he/she execute during the FY at issue: since veterans rarely retain records of their TAs, and the process of obtaining payment records from DFAS is lengthy, *i.e.*, no veteran may complete it in the 60 days that AOJs allow veterans to respond to their proposals to charge veterans with overpayment debts. Thus, veterans often find it emotionally and logistically easier to choose the path of least resistance, *i.e.*, to agree with an AOJs' statements as to the FY and the number of TAs.

However, by the time AOJs actually charge veterans with TA-based overpayments, veterans often find themselves in financially tight circumstances very different from those experienced years ago, when the TAs were executed. For instance, years after his/her Tas, but prior to an AOJ charging him/her with an overpayment, a veteran may purchase a real estate property, expect a child, have family members requiring expensive medical treatments, etc., and a debt resulting from a TA-based overpayment might be so substantial to qualify as lifestyle changing, even if the veteran is not shown to be entitled to a waiver of recoupment of his/her overpayment debt. Being understandably concerned about DMC withholding their monthly VA benefits toward recoupment of such debts (since veterans, more often than not, substantially depend on VA benefits to maintain their lifestyle), a rather substantial portion of veterans elects to complete their VA Forms 21-8951-2 by retroactively waiving their DFAS TA-based pay simply to preserve their receipt of VA benefits.

Upon receipt of VA Forms 21-8951-2 with such elections, AOJs forward them to DFAS. Regretfully, such forwarding yields either a rare DFAS response (typically stating that it is too late for DFAS to take any recoupment action because the underlying TA program already closed) or no response at all. With that, VA's options become reduced to three equally unappealing scenarios. On the one hand, the AOJ could continue pestering the debtor in the hope to prompt him/her to forfeit VA benefits instead of TA-based pay, essentially making the choices offered by VA Form 21-8951-2 unattainable. Plus – fortunately on rare occasions – AOJs ignore veterans' election to

forfeit their TA-based pays and act as if the veterans elected to forfeit their VA benefits, *i.e.*, converting VA Form 21-8951-2 into an instrument of misrepresentation, thus, triggering litigation.

The third scenario that, unfortunately, is the most common is where an AOJ acts as if it is unaware of DFAS's inability to recoup the TA-based funds at issue. In such a scenario, VA subjects U.S. taxpayers to permanent loss of funds that were indisputably overpaid. And, if the foregoing was not concerning enough, there is also the group consisting of only one option offered by VA Form 21-8951-2 which, as noted *supra*, is problematic in a different way.

This option essentially creates an undue impression of superfluousness of VA Form 21-8951-2, suggesting that it could be ignored if a veteran wishes to retain DFAS TA-based pay, waiving his/her VA benefits. The harmful shortcomings become clearer upon reviewing VA Form 21-8951-2 through the prism of VA's due process obligations related to charging a VA beneficiary with an overpayment. To properly charge a debtor with an overpayment, VA is required to inform him/her of the facts and of law underlying the proposed debt, plus afford the debtor an opportunity to reply (usually, 60 days, although this period is prudential and not mandated by any statutory or regulatory provision, or a binding precedent). However, VA's traditional proposal notices usually include a clear, express clarification that – based on VA's facts and law that would be read by VA through the prism of the proposed debtor's reply – VA would take final action by charging him/her with an overpayment (which would trigger DMC's recoupment by either incremental withholdings from the debtor's VA benefits or, if the debtor is not entitled to any future VA benefits, by other means of collection available to a government agency acting as a creditor, *e.g.*, garnishment of wages or SSA benefits, withholding of the debtor's IRS tax refunds, putting liens on his/her private property, foreclosing the debtor's real estate, etc.).

Therefore, a VA proposal notice is a very serious document that makes it sufficiently clear to a proposed debtor that it should not be ignored. And yet, VA Form 21-8951-2 does not include even such words as "overpayment" or "debt," or "recoupment." Worse over, while – on page two – the form requests a veteran to "[c]omplete the appropriate box below, sign this form, secure the signature of [the] unit commander . . . and return the completed form to VA within 60 days," later on – but still on the same page two – VA Form 21-8951-2 informs the veteran, in a rather nonchalant fashion, that – if VA does not "receive [this] waiver [form] from [the veteran – VA would] assume that [he/she] wish[es] to waive VA [benefits] for the number of [TAs] printed [by the AOJ] on the [first page] of the form."

Simply put, VA Form 21-8951-2 *de facto* equates a mere *passim* reference to "60 days" to a due process opportunity to reply, but by no means makes it clear to a veteran that his/her complacent failure to file VA Form 21-8951-2 would necessarily yield an AOJ's charge of an overpayment yielding an enforceable debt obligation that would be based exclusively on the AOJ's Information (even if this information is not true) and, in addition, trigger withholdings from the veteran's VA benefits or even more serious and financially severe debt collection actions by DMC (unless the debtor would later apply and be granted a waiver of DMC's recoupment of his/her debt).

To top it off, since veterans rarely have easy access to commanders who may certify the number of their TAs, the unduly nonchalant impression created by VA Form 21-8951-2 essentially capitalizes on this difficulty, thus amplifying the enticement to ignore an AOJ's mailings of VA Form 21-8951-2. However, the so-induced complacency often comes at a high price when the benign illusion disappears upon the AOJ's issuance of a final action notice stating that the veteran had already been charged with a debt.

In light of the foregoing, it might be time to admit that a basic traditional proposal notice achieves all the current goals of VA Form 21-8951-2 without

having any unapparent deficiencies built into the content of VA Form 21-8951-2, given that a traditional proposal notice is more efficient for VA's purposes and also spares unnecessary torments to veterans. That said, it does not mean that VA Form 21-8951-2 should be abandoned. Rather, it might be quite useful if, upon minor alterations of its content, VA Form 21-8951-2 is repurposed into a legal tool allowing debt-prevention, *i.e.*, if veterans could use it to notify AOJs of their scheduled, upcoming TAs. Indeed, such preventive filings, if made sufficiently in advance to allow AOJs actions, would allow VA to withhold compensation payments. In addition, veterans would be able to avoid placing DFAS into an accounting trap if a new form VA Form 21-8951-2 clarifies that any withholdings of DFAS TA-based pay should be arranged between veterans and DFAS either prior to or immediately after DFAS TA-based payments since VA is highly likely to become unable to facilitate such arrangements by the time when VA would learn of TA-caused overpayments.

And, as to VA Form 21-8951-2 in its current format and usage, perhaps it is time to admit that – while it was an interesting and well-meant experiment – the experiment brings to mind Tomas Edison's famous exclamation, "Results? I have gotten lots of results: I know several thousand things that won't work!"

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