VETERANS LAW JOURNAL

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

2025, Vol. II

CAVC Heads to Suffolk Law School

by John Leon

On March 27, 2025, the U.S. Court of Appeals for Veterans Claims (the Court) hosted oral argument in downtown Boston at Suffolk University Law School's moot courtroom in the combined cases of *Bilharz* and *Pinto* (No. 22-6158 and 23-7931). Chief Judge Michael Allen presided and was joined on the bench by Judge Grant Jaquith and Judge Joseph Falvey (remotely via Zoom). The argument was a lively discussion regarding fair process at the Board level under the AMA.

Located across the street from the final resting place of Paul Revere and Samuel Adams, Suffolk Law School is no stranger to court activity, as it supports the nearby Massachusetts Supreme Judicial Court with its oral arguments. After argument concluded, the judges answered questions from the law students in attendance. As with most travel arguments, the Court's judges were joined by a few law clerks and staff members. The afternoon was capped off by a reception in the law school's rotunda that was well attended by students, faculty, and alumni, followed by a CAVC Bar Association reception at Scholars American Bistro.

John Leon is the librarian at the U.S. Court of Appeals for Veterans Claims.

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Message from Chief Judge Allen

Colleagues,

These past few months have really highlighted for me the importance of community in the work that we do. I have witnessed numerous examples of groups coming together to achieve a common goal and support each other. Nowhere has that been more obvious than with the creation and implementation of our new docketing system, the Appellate Case Management System (ACMS). A dedicated group of Court staff continues to work tirelessly with our contractors to build a system that will take us into the future. This work has been undertaken in addition to their regular duties and has required participation from every corner of the Court: chambers, CLS, the Public Office, IT, and more. It is an involved and complicated process that will have a profound impact on our daily work as a Court and as advocates before the Court. I am grateful to our team for their continued efforts. I encourage you all to stay tuned as we move closer to launching this key project.

Working together is crucial at this time when the number of appeals filed continues to rise. I know that many of you have heard me repeat the historic numbers we've seen over the last few months, and I have more historic numbers to share with you now. In the month of April, the Court received 949 appeals—the most of any month in the Court's history! In fact, in six of the first seven months of this fiscal year, we received a number of appeals that surpassed the three-year average. The Court is almost certainly on track to surpass 10,000 appeals filed in fiscal year 2025. Our Court staff continues to successfully keep up with this incredible workload, and I am appreciative as always of their efforts.

In addition to keeping up with this workload, the Court has found several opportunities to gather and celebrate all that we have achieved together so far this year. In April, we held our first ever Spirit Week, and Court employees wore crazy socks, Court swag and represented their favorite sports teams. We had a great time seeing everyone's looks, and our week culminated with the Court's first annual Chili Cook-Off. As an official chili judge, I can report we have some excellent cooks at the Court! It was a wonderful opportunity to share lunch together and visit with one another. Our workdays can be busy, and we are often siloed in our own part of the Court's appeals process. Taking some time to join together and visit with one another as a Court community was such a treat.

We also gathered as a veterans law community for Bring Your Children to Work Day on April 23, 2025. Court staff brought their children, grandchildren, and other young relatives and friends to find out more about what we do here at the Court. For the first time, the Court invited members of the bar association to join us, and we had great participation. Judge Laurer provided a great introductory program and took photos with the kids, who also had the opportunity to dress up in a judge's robe complete with a gavel. The older children participated in a discussion of a real-life veterans law problem, and the younger children had a fun day of arts and crafts.

And of course, everyone got a tour of all the too cool equipment that our Court marshals use to keep us safe each day. It was a wonderful way to expand our community to the leaders of tomorrow.

I felt the strength of our community when I participated, along with Judge Bartley and Judge Laurer, in the Bar Association's *View from the Bench* event on April 29, 2025. We shared our tips and advice to practitioners for successful briefs and oral arguments. It is always wonderful to share ideas and improve our work through a dialogue with one another. Also at that event, the Court honored the great work of Mary Ann Flynn on the occasion of her retirement. She has been a key member of our community for many years, and she will be greatly missed. I wish her all the best in her future endeavors.

I also felt that community during the semiannual National Organization of Veterans' Advocates, Inc. (NOVA) conference in Minneapolis, on April 3-April 5. I was honored to present a State of the Court address to the attendees and had the opportunity to speak with many great advocates during the conference. The Court is also looking forward to hearing oral argument at NOVA's next conference in Washington, D.C., this September, another wonderful opportunity for our community to come together.

We continue to build and grow our veterans law community through our oral argument outreach efforts. On March 27, 2025, the Court held oral argument in the consolidated cases, *Bilharz v. Collins* (Docket No. 22-6158) and *Pinto v. Collins* (Docket No. 23-7931) at Suffolk University School of Law in Boston. As always, our trip to Suffolk provided a magnificent opportunity for my colleagues, law clerks, Court staff, and the practicing attorneys to engage with law students about veterans law. Thank you to everyone who made it possible, including Judge Jaquith who is the chair of the Court's Outreach Committee. I remain blown away by our community's commitment to outreach, and I am so appreciative of the hard work you all do to make our little corner of the law known broadly.

The work that we do each day is challenging. The stories of the veterans and their families that we see are so often difficult and tragic. This is why it is so vital to share a sense of community and lighthearted moments together when we can. I firmly believe that we better serve veterans when we work together and our connection to one another is strong. I always enjoy the time I spend with you all as colleagues, and I look forward to many more opportunities in the future.

I hope you all have a great summer!

Message from Bar Association President James R. Drysdale

Dear Fellow Bar Association Members,

The CAVC Bar Association offers various events to help our members connect. Thank you to those who joined us to greet an incoming Honor Flight at Reagan National Airport, in Washington, D.C., on Saturday, May 17, 2025. And thank you to those who joined us to volunteer to wash the Korean War Memorial on the National Mall in Washington, D.C., on Saturday, June 21, 2025. The CAVC Bar Association also recently hosted a reception in Boston following the Court's travel oral argument at Suffolk University School of Law. We also attended the National Organization of Veterans Advocates (NOVA) conference in Minneapolis as an exhibitor. This fall, we have a variety of events and programs planned, including our annual meeting and a joint

program with the CAVC Historical Society, so please take advantage of these opportunities to connect with your colleagues in the veterans law community!

In April, the Court graciously sought to partner with the CAVC Bar Association to include its members in the Court's annual Bring Your Children* to Work Day (*grandchildren, nieces, and nephews were welcome, too!). This new, family-friendly program was thoroughly enjoyed by those who were able to attend, and we sincerely thank the Court for including our members. Additionally, on April 29, 2025, the CAVC Bar Association presented the program, "A View from the Bench" with Chief Judge Allen, Judge Bartley, and Judge Laurer. Thank you to all those who attended, either in person or via livestream, and I would like to share a special "thank you" with the judges who participated in the panel discussion to share their time and wisdom with our membership. The panel provided insights that are directly applicable to practice before the Court and immediately practical for any practitioner. You can view this and other CAVC Bar Association programs from our website anytime by visiting https://cavcbarassociation.org/.

I would be remiss in not reminding everyone that, as a member-supported organization, the CAVC Bar Association uses annual dues and your generous donations to support our mission of improving the practice of law and the administration of justice in the U.S. Court of Appeals for Veterans Claims. This year we will again offer an exclusive members-only opportunity to participate in the CAVC Bar Association's group admission ceremony at the U.S. Supreme Court Bar on November 5, 2025. And, as a reminder, only current dues-paying members may run for office or vote in upcoming elections for the CAVC Bar Association. Therefore, if you have not yet renewed your 2025 membership, *please* do so now by visiting cavcbarassociation.org/planspricing to join or renew today. If you have any questions, please contact cavcbar@gmail.com.

On the topic of elections, although it may seem early in the year, I would encourage members to begin thoughtfully considering whether you may be of service to the CAVC Bar Association by running to be on the Board of Governors, either as an at-large member or as an officer. A call for nominations (including self-nominations) will go out soon. This year, the Board is in specific need of individuals with technological skills to assist with membership, marketing, database management, and website design and maintenance, etc. If you possess any of these skills and may be interested in serving on the Board of Governors of the CAVC Bar Association, please consider answering the call for nominations! If you have any questions about what service on the Board may entail, please contact cavcbar@gmail.com. As always, thank you for your support of the CAVC Bar Association!

James R. Drysdale is President of the CAVC Bar Association. He serves as Senior Appellate Counsel in VA's Office of General Counsel. Any views and opinions provided by Mr. Drysdale herein are made solely in his capacity as President of the CAVC Bar Association and do not represent the views of the Department of Veterans Affairs or the United States.

CLERK'S CORNER: Understanding Grievances Filed Against Practitioners

by Cary Sklar

Maintaining professional conduct is essential to preserving the public's trust in the legal system. The Court provides a grievance process to ensure standards of conduct are maintained and enforced, as well as to support early intervention and promote accountability among practitioners. This article outlines the standards of conduct, the essentials of the grievance process, the most common causes of disciplinary action, and the resources available to practitioners appearing before the Court.

Standards of Conduct: The Court applies two standards of conduct: the first is the ABA Model Rules of Professional Conduct (see Rule 4 of the

Court's Rules of Admission and Practice (A&P Rules); and the second is the Court's Rules of Practice and Procedure (P&P Rules). While the ABA Model Rules are designed to apply to attorneys, the A&P Rules apply them to all practitioners before the Court (see A&P Rule 1(e), defining "practitioner"). In this article, we generally refer to "practitioners" to encompass both attorneys and non-attorneys who are admitted to practice before the Court.

Professional misconduct, as defined by A&P Rule 4(b), includes any action or omission that violates the Court's disciplinary standards or any other disciplinary rules applicable to the practitioner; a failure to comply with any Court rule; or an act or omission that resulted in the imposition of discipline by another jurisdiction following a practitioner's admission to practice before the Court. To address potential issues before they escalate, the Court utilizes the Response Matrix. This internal tool tracks deficiencies in practitioner submissions by logging nonconforming notices and show cause orders. While these notifications are not considered disciplinary actions, repeated deficiencies can lead to a formal grievance if the issues persist. The Response Matrix is explained further on the Court's website under "Court Rules / Court Efforts to Ensure Compliance with Court Rules."

Common Causes of Grievances: Over the years, several recurring issues have led to meritorious grievances. Among the most common is failure to act with appropriate diligence. ABA Model Rule 1.3 requires practitioners to respond to Court orders in a timely manner, meet all deadlines under the P&P Rules, and avoid unreasonable delays in litigation. When practitioners fail to uphold these duties, they not only harm their clients but also risk compromising the integrity of the Court's proceedings.

Closely related to diligence is the requirement of competence under ABA Model Rule 1.1. Practitioners are expected to bring the necessary legal knowledge, preparation, and skill to their cases. This includes understanding specific Court rules and deadlines (e.g., P&P Rules 26, 27, 28, 31, 32) and keeping abreast of changes in the law and in relevant technology. Inadequate preparation or failing to meet procedural requirements can lead to significant consequences for clients—and potentially to disciplinary action against the practitioner.

Also, under A&P Rule 4(c)(1), which addresses "reciprocal discipline," attorneys are obligated to report certain adverse developments in their professional status. Within 10 days, a practitioner must notify the Clerk, their clients, and opposing parties if they have been publicly disciplined, administratively suspended, indicted or convicted of a serious crime, disbarred, or have resigned from another bar while under investigation. Non-attorney practitioners must also report the loss of sponsorship.

Grievances arise from additional issues as well. One of these is poor communication. Under the ABA Model Rule 1.4 standard, practitioners must keep their clients informed about major decisions and respond to their inquiries in a reasonable time. Some grievances have involved claims that practitioners did not return phone calls or emails or failed to notify clients about important developments in their case. Grievances also have alleged misappropriation of funds—such allegations generally arise from client confusion over the handling of EAJA fees. EAJA-related grievances, while not always meritorious, underscore the need for clear recordkeeping and transparency in financial matters, as well as clear communication with your clients.

Solo practitioners face additional challenges in maintaining standards of conduct. Per Comment 5 of ABA Model Rule 1.3, solo practitioners should have a contingency plan in the event of their death or disability. The plan should designate another competent lawyer to review client files, notify clients, and take immediate protective steps if needed. Failure to make such arrangements could lead to neglect of client matters and ultimately result in disciplinary review.

Grievance Resolution Procedure: Grievances may be filed by any person, as outlined in A&P Rules 6(a) and 7. Once a grievance is filed, the Court follows the procedures outlined in A&P Rules 2 and 6, which involve multiple components. The Court's Office of General Counsel conducts the initial review and makes a recommendation to the Chief Judge regarding whether there is prima face validity (PFV) in the grievance. If the Chief Judge finds PFV, the grievance is referred to the Standing Panel (a group of three judges), who determines whether the grievance should be dismissed or if a show cause order should be issued to the subject practitioner. If the grievance proceeds to the Committee on Admission and Practice (Committee), established under A&P Rule 2, a panel of three Committee members investigate the matter and make a resolution recommendation to the Standing Panel, including potential discipline. Disciplinary measures, as listed in A&P Rule 5(a), may include private or public reprimands, probation or suspension, disbarment, mandated CLE classes, or other sanctions depending on the severity of the misconduct.

Resources for Practitioners: The Court publishes a Compendium of Disciplinary Grievances summarizing activity from the prior five years. This record includes both original and reciprocal discipline cases; it's on the Court's website under "Information about Practitioners / Compendium of Disciplinary Grievances."

The best way to avoid entanglement in the grievance process is to maintain diligence, competence, and open communication with clients. Thus, familiarity with Court rules and ongoing professional development are key. We also encourage you to use available resources, including the ABA Model Rules, to stay informed and compliant. Please contact the Public Office should you have procedural questions about your client's case. Staying ahead of these issues protects both your clients and your professional standing.

Also, please feel free to direct any questions about the grievance process to the Office of General Counsel by email at grievanceprocess@uscourts.cavc.gov.

The Court's Office of General Counsel is composed of Cary Sklar, General Counsel; Shabnam Clinton, Associate General Counsel; and Amy Byrne, Associate General Counsel.

PRACTICE SERIES ARTICLE: The Bench

Sharpening Oral Argument at the U.S. Court of Appeals for Veterans Claims

By Judge Laurer, with support from Joshua Wolinsky, Samantha Higgs, Solveig Frasch, Makena Bonheim, and Ed McGugin

Oral argument is one of the few moments when we have all the important appellate players together: judges, counsel, judicial law clerks, chambers administrators, and occasionally appellants. The Court schedules arguments for just an hour, but it's the culmination of many hours of dedicated preparation from participants. Lawyers work as teams to develop theory, structure responses, and anticipate questions. After all, a good moot court is ruthless and tests advocates ahead of the cry "Oyez, Oyez, Oyez." Clerks discuss the case with their judges, test ideas, and refine what's unclear.

This practice series tip reflects that spirit of collaboration; it's not just from the judge but from the entire chambers team. We've wrestled with dozens of oral arguments together and learned that what separates an average advocate from an exceptional one often comes down to a few skills. This article addresses three of them. In case you want to learn more about oral arguments at the Court, watch a recording of the April 2025 "A View From the Bench" program hosted by the CAVC Bar Association at https://www.cavcbarassociation.org/general-8-1.

1. Know Who You're Arguing To

The veterans law universe is expansive but manageable. In most arguments, only a handful of cases really matter and affect the outcome. One of the most effective steps you can take is deceptively simple: Check who wrote those decisions.

If you're heavily relying on a particular case and the authoring judge of that decision is on your panel, that's something to plan for. Explaining to a judge what they meant in their own opinion is high risk. That judge remembers the precise legal concerns, the fact pattern, and the footnote language that took three edits to get just right. They'll remember the deliberative process. And they'll certainly remember what they meant—sometimes more clearly than the words reflect.

Since you're not going to get the case details or meaning perfect, the best tactic is to acknowledge a panel member's authorship. Knowing the authoring judge shows intellectual humility. You're displaying that you've primed for the case with care and respect for the Court's work. This small gesture signals that you've done your homework, paid attention to the details, and prepared beyond a shallow skim of the caselaw. That kind of preparation builds credibility and fosters rapport. The judge is more likely to let you continue to present your argument rather than switching instead to a correction that halts your momentum.

2. Know Your Answer

This may be the most important skill in an advocate's oral argument toolkit: Answer the question. Directly. Succinctly. And definitively.

When a judge asks a question that calls for a yes or no answer, start there. "Yes, with a qualification" or "No, because . . ." is always preferable to launching into an extended explanation before the basic answer. It shows clarity of thought and confidence in your position. So the best practice is to answer with a *yes* or *no* and then follow with a short sentence that focuses on your rationale.

Just as important is knowing how to respond when the question isn't one you anticipated. Ideally, you've diligently prepared—mooted the argument, identified its strengths and weaknesses, and anticipated likely hypotheticals. But when the unexpected happens, take a breath, listen closely, and analyze the question.

- If it's a "softball" question, take it. Occasionally a judge may offer an alternative theory that still results in a win for your side. Don't be so locked into your brief that you miss an easy chance to bolster your case and retain credibility.

- If the question is a critique, professionally accept it. Avoid defensiveness, the same way judges should refrain from arguing with counsel. Acknowledge the weakness as appropriate and then explain why your position stands.

- If the question exceeds your preparation, be honest. Acknowledge that it's a case, theory, or regulatory angle you haven't considered and offer to address it in supplemental briefing. This happens to even the most seasoned appellate advocates—and when handled candidly, this tactic builds trust.

Effective oral advocacy requires more than mastery of the record—it demands command of the moment. This means listening closely, answering precisely, and exercising sound judgment under pressure. The most persuasive oral advocates show up prepared, engaged, and ready to help the Court resolve the case.

3. Know Your Rule

Strong briefs lay out the controlling rule of law. But the best oral arguments do more than just repeat it. They address the rule with clarity, apply it decisively, and anticipate its implications.

First, ensure you can articulate the rule in plain language. Don't just pull a quote from an opinion—use your own words. Second, apply it to your case in a clear, frictionless way. Avoid going down "rabbit holes" or overcomplication. And third, offer broader context. How does this rule work generally? What future cases does it impact? What does a win on your theory mean for the veterans law practice?

Judges often explore these questions through hypotheticals. They're not meant to trap you—they're designed to test the boundaries of your proposed rule. Engage hypotheticals thoughtfully. If the hypothetical exposes a genuine tension in your position, acknowledge it. Explain why your approach is still preferable.

Remember: If a rule only works in your set of facts but collapses under others, that's a red flag. Part of your job is to help the Court see how your proposed outcome translates into a decision that doesn't create chaos with precedent, regulations, or statutes.

Final Thought: Study the Best

One of the most valuable habits you can develop is watching great oral advocates. Supreme Court arguments offer a masterclass in preparation, clarity, and adaptability. Even the less headline-grabbing administrative law cases afford an opportunity to learn. Watch how elite oral advocates build trust with the bench—by answering directly, conceding carefully, and framing their case in a broader structure of doctrine.

A plug for what's become an (unofficial) best practice: Plan to begin with a two-minute roadmap before taking questions. Although judges can pepper you with questions at any time, this approach provides a clear starting point and anchors the discussion that follows. Then, when the questions come—and they will—you're better positioned to respond effectively and strategically.

So the next time you're preparing for an argument, ask yourself:

Do I know who I'm arguing to?

Do I know my answer?

Do I know my rule?

If so, you're ready. And that's the most helpful oral argument—one where everyone at the podium and on the bench is at peak performance.

Judge Scott J. Laurer is a judge of the United States Court of Appeals for Veterans Claims.

Bar Association Program Recap: A View From the Bench

by Alyssa E. Lambert

Context. Cohesive arguments. Analysis. When asked to describe in a word or two the most important element of effective, persuasive briefs, those were the responses given at this spring's View From the Bench. Hosted by the CAVC Bar Association in late April and moderated by John Juergensen of Bergmann & Moore, Chief Judge Michael P. Allen, Judge Margaret Bartley, and Judge Scott J. Laurer addressed a hybrid audience of about 115 to 120 people, offering their perspectives on what parties should and should not do in their briefs and at oral argument.

Juergensen started by asking the judges for their initial reactions about appellants' briefs—what they look for and what appellants should focus on.

"Headings and subheadings are essential—that's where I start, and then I can jump to the part of the analysis that I want to read," said Judge Bartley. "The briefs that are lacking are either lacking in writing, organization, or the thinking."

"Lay out exactly what it is you're seeking, especially if you're requesting reversal. Second, there is no need to bog down the brief with the complete claim history. And don't include case cites without going through the work of explaining how it would control in your case," Judge Laurer added.

Chief Judge Allen noted that for him, a key is providing context. "You need to help us. For example, when I read the briefs in a case, in almost all circumstances, I will read the briefs before I give them to a law clerk, and so I look at the table of contents for all three briefs to give me context. So, anything you can do to give context to what we're reading is helpful."

Chief Judge Allen also echoed what Judge Laurer said: "You have to tell us what you want and why you're entitled to it. So, when there are briefs that mix the difference between 'the Board didn't adequately explain why it relied on an opinion' and 'the opinion is inadequate'—which one are you asking us to do? Are you asking us to say the Board didn't adequately say why it relied on an opinion and then say the opinion is inadequate? Those are two different things."

All three judges also emphasized the importance of appellants tackling issues with their cases head on.

"As an appellant, you can go first and set the stage. If you have weaknesses in your case and you just decide you're not going to mention them, you're pressing your luck that the Secretary, the law clerk, or the judge won't find it. But you give up the ability to frame the issue if you wait until the reply. You can't bury your head in the sand," Chief Judge Allen said.

"The next step is anticipating counterarguments, even in the opening brief," said Judge Laurer. "As appellant's counsel, you will benefit from anticipating the counterarguments to the extent you can. It also helps frame the case and set the narrative."

Judge Bartley emphasized that acknowledging weaknesses and anticipating counterarguments "takes a lot of skill. You don't want to make the point for opposing counsel. I find there are a lot of nuances in writing—you do it [point out the weakness or counterargument] subtly and then you dismiss it."

Turning to appellee briefs, Juergensen asked the judges if they look for anything different from appellants' briefs.

"To me, noticeably, the Secretary's briefs are often shorter, which can be good, but sometimes they may be a little too short and not enough explanation," said Judge Bartley.

"Sometimes what I see is the Secretary not addressing head on things in the Board decision that are weird or pretending that something isn't odd. There was a Board decision in which the Board found the appellant's statements and four buddy lay statements to be not credible, and one of the things the Board said was they found their statements not credible because they have a financial interest in the outcome. It was whacky to say the four buddies had a financial interest unless there's something they are not telling me, and the Secretary's brief ignored that entirely," Chief Judge Allen said. "I also think sometimes the Secretary relies a little too much on the stock phrase that 'appellant is disagreeing with the weighing of the evidence.'"

Judge Laurer added that "if you're asking the Court to find issue exhaustion or abandonment, you must spell it out and not just rely on boilerplate."

Moving onto reply briefs, all three judges also noted the importance of filing reply briefs, although some appellants don't.

"I always take note when there's not a reply brief, and I often wonder why—particularly when I go into the briefing and the Secretary brings up case law or arguments that weren't in the opening brief," said Judge Laurer. "I can't think of a good reason why you wouldn't submit a reply. And if the appellant doesn't address something, you run the risk of abandonment."

"I think everyone should generally always file a reply brief, but a lot of people don't. If you have a good comeback, that's the place to put it, but it should be short and sweet. And a lot of times when we don't see replies, we're kind of left in the dark about what appellant has to say in response to the appellee," noted Judge Bartley.

"One of the underutilized advantages of reply briefs is to flag issues where there is agreement among the parties or an issue is not in dispute. A well-done reply brief can really crystalize those issues. But also, they are not useful if you're just rehashing arguments, which serves no purpose," added Chief Judge Allen. "Even in the situation where you think a reply brief isn't necessary, you want to seize every opportunity you have—as an appellant, you get to go first and last. I don't see why you wouldn't take that chance. Also, don't bring up new stuff in the reply."

Juergensen then noted that the judges "must be tired of seeing certain boilerplate cases, such as *Gilbert* [*v. Derwinski*]. How do parties walk the line between knowing the Court understands but also making your point?"

"A citation alone without the analysis really isn't helpful. You're asking the Court to sift through and apply it to your case. If you're not weaving in and doing the work of the analysis, I don't find it helpful. It's OK when it's a well-established principle, but you still need to take the extra step," said Judge Laurer.

The judges also fielded several questions, including one about post hoc rationalization and where the line is between rationalization and explanation.

"It's a very hard question, but for one thing, if you know there is something that is post hoc rationalization, call it out. Get out in front of it," said Chief Judge Allen.

The panel ended with a discussion about oral arguments, with the judges providing various viewpoints on what they get out of in-person arguments and what parties should focus on. And the message was clear that it is not effective for parties to merely present the facts and the law.

"You have the facts, and you have the law, but you need to fill in these details—what about those facts leads to a particular result under the law," said Chief Judge Allen. "You need to connect the dots for us."

To listen to a portion of the presentation, visit https://www.cavcbarassociation.org/general-8-1.

Alyssa E. Lambert is a legal editor at the U.S. Court of Appeals for Veterans Claims and a former member of the appellants' bar.

Honor Flights: Living Monuments To Freedom

by Jen M. Wagman

On a spring morning at Reagan National Airport (DCA), May 17, 2025, members of the CAVC Bar Association assembled to line the gateway with applause as 88 veterans disembarked a plane from Michigan. They came to greet an Honor Flight filled with veterans whose service spanned from World War II to the Korean War to Vietnam. As the veterans stepped off the plane, many in wheelchairs, and most wearing ball caps that noted their service branch and period of service, they were met by cheers, salutes, and the heartfelt presence of advocates who spend their professional lives fighting for veterans' rights.

The moment was both ceremonial and emotional but also deeply consequential. It was a reaffirmation that the connection between those who served and those who advocate does not end with the discharge papers. It evolves through civic participation, public gratitude, and—in rare but powerful instances—unified acts of national remembrance.

In fact, a similar gesture took place just weeks earlier, on April 27, 2025, when VA Deputy Secretary Dr. Paul Lawrence joined 151 veterans and guardians from Tallahassee, Florida, on their journey through Washington, D.C. Joining Deputy Secretary Lawrence that morning were a dozen U.S. Naval Academy midshipmen, who voluntarily gave up their Saturday to welcome the group.

"Welcoming the veterans from Florida to visit war memorials in the nation's capital was an incredibly moving experience," said Deputy Secretary Lawrence. "Witnessing these veterans being greeted with the respect and gratitude they deserve is a reminder to us all that honoring service isn't just about the past—it's also about supporting these heroes, now, through connection, benefits, and care."

These scenes are not isolated. They are the lifeblood of the Honor Flight Network, a nonprofit organization that has transported over 300,000 veterans to the nation's capital to visit the Washington, D.C., memorials built in their honor since 2005.[1] With 128 hubs in 46 states and thousands of volunteers working in medical, logistical, and emotional support roles,[2] Honor Flight has grown into a significant and sustained grassroots veterans recognition movement.

Originally founded by Earl Morse, a retired Air Force captain and VA physician assistant, Honor Flight began with two veterans flown in a private plane to the newly dedicated World War II Memorial in 2004.[3] What started as a personal act quickly spread through Ohio and, with the help of cofounder Jeff Miller, developed into a national movement. By 2006, Honor Flight was a formal 501(c)(3) charity, using commercial aircraft, expanding to include Korean War, Vietnam War, and terminally ill veterans from all eras.

Although the Honor Flight Network operates independently of the federal government, its mission often involves coordinating with the Department of Veterans Affairs, the Department of Defense, and local public agencies. For example, at events like the April 27 and May 17 flights, it is common to see uniformed military personnel, senior VA officials, and volunteer attorneys engaging together in a ritual of joint recognition.

One of the most visually striking components of many Honor Flight arrivals is the water cannon salute, a tradition rooted in longstanding aviation protocol. Originally used to mark the retirement of pilots, inaugural routes, or the return of military personnel, the salute involves airport fire trucks creating an arch of water over the aircraft as it taxis to the gate. In the context of Honor Flights, this gesture has been repurposed to honor the returning veterans—many of whom never received formal recognition when returning home from war. For Vietnam-era veterans, in particular, the water cannon salute functions as a belated ceremonial homecoming, symbolizing public gratitude and national respect. It mirrors a 21-gun salute in spirit, elevating what might otherwise be a routine arrival into a shared civic ritual of recognition and healing.

In recent years, some Honor Flight hubs have begun organizing all-female veteran flights, acknowledging longstanding disparities in recognition and care.[4]

Lawyers often encounter veterans in times of need: when claims are denied, discharges are contested, or benefits are delayed. But at these Honor Flights, the presence of members of the legal and Court community was a visual and moral statement that advocacy continues beyond the four corners of VA decisions and the like. It was a recognition that the law is not merely a mechanism for correcting injustice—it is also a vehicle for honoring sacrifice.

Jen M. Wagman, a veterans benefits attorney, is the president and founder of the 501(c)(3) nonprofit Veterans Service Organization GenVETS, Inc., and hosts a weekly podcast VET'ed. with Jen M. Wagman.

1. Honor Flight Network, "About Us," https://www.honorflight.org/about-us/ (last visited June 2, 2025).
2. *Id.*; see also Honor Flight Chicago, https://www.honorflightchicago.org/; Villages Honor Flight, https://www.villageshonorflight.org/ (last visited June 2, 2025).
3. Morse, Earl. Interview, Library of Congress Veterans History Project (2014).
4. U.S. Department of Veterans Affairs, Center for Women Veterans, "Commemorating Women Veterans," (2022).

Supreme Court Clarifies the Standard of Review for Court in Reviewing Benefit-of-the-Doubt Determinations

by Rebecca "Beck" Webster

Reporting on *Bufkin v. Collins*, 145 S. Ct. 728 (2025).

In *Bufkin*, the U.S. Supreme Court held that to take due account of the application of the benefit-of-the-doubt rule, the U.S. Court of Appeals for Veterans Claims (the "Court") must review legal issues regarding the benefit-of-the-doubt de novo and factual issues regarding the benefit-of-the-doubt for clear error. The Supreme Court additionally held that the Board of Veterans' Appeals' ("Board's") determination of whether the evidence is in approximate balance in applying the benefit-of-the-doubt rule is a predominantly factual determination and is therefore reviewed for clear error. Justice Thomas delivered the opinion of the Court joined by Justice Roberts, Justice Alito, Justice Sotomayor, Justice Kagan, Justice Kavanaugh, and Justice Barrett. Justice Jackson wrote a dissenting opinion joined by Justice Gorsuch.

The appeal before the Supreme Court included claims from two veterans, Mr. Bufkin and Mr. Thornton. Mr. Bufkin's appeal stemmed from a February 2020 Board decision in which the veterans law judge denied entitlement to service connection for posttraumatic stress disorder (PTSD). Mr. Thornton's appeal stemmed from a January 2019 Board decision in which the veterans law judge denied entitlement to a rating in excess of 50 percent for PTSD. Crucially, in each decision, the Board found that the evidence was not approximately balanced, and the benefit-of-the-doubt doctrine under 38 C.F.R. § 5107(b) did not apply.

In June and July 2021, respectively, the Court affirmed the Board's decision. In August 2023, the U.S. Court of Appeals for the Federal Circuit affirmed the Court's decision. Mr. Bufkin and Mr. Thornton subsequently petitioned for certiorari, which the Supreme Court granted in April 2024.

The question before the Supreme Court was whether the Court's duty to "take due account" of the Board's application of the benefit-of-the-doubt rule under 38 U.S.C. § 7261(b)(1) required de novo review. *See* 38 U.S.C. § 5107(b).

In relevant part, 38 U.S.C. § 7261(b) provides that "[i]n making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board . . . and shall (1) take due account of the Secretary's application of section 5107(b) of this title."

Mr. Bufkin and Mr. Thornton argued that with the phrase "take due account," Congress imposed a de novo standard of review on the Court in addressing the benefit of the doubt rule. *Id.* Alternatively, they argued that even if not explicitly required by section 7261(b)(1), the Board's approximate balance determination is a legal question subject to de novo review under section 7261(a).

In contrast, the Secretary argued that the Court's review of Board decisions is limited by section 7261(a), to include taking due account of the benefit-of-the-doubt rule, and that the Board's benefit-of-the-doubt determination is a predominantly factual question under section 7261(a).

Justice Thomas began with an analysis of the plain language of the text of section 7261(b)(1), noting that "the statutory command to 'take due account' of the VA's application of the benefit-of-the-doubt rule requires [the Court] to give appropriate attention to the VA's work." The Supreme Court held that the plain text of section 7261(b)(1) clarifies that "taking due account is not a freestanding task but rather an *aspect* of judicial review under subsection (a)" and that therefore the appropriate attention under section 7261(b)(1) is for "the Veterans Court to review the VA's conclusions of law de novo and its findings of fact for clear error." 38 U.S.C. § 7261(a).

The Supreme Court then addressed whether a challenge of the Board's determination that the evidence is not in approximate balance is a question of law reviewed *de novo*, or a question of fact reviewed for clear error. Justice Thomas noted that approximate balance determinations involve two steps: First, the Board reviews all evidence and assigns weight to each piece of evidence; and second, the Board evaluates the weight of the evidence as a whole and determines whether there is an approximate balance of positive and negative evidence on any material issue. Both parties agreed that step one is a purely factual question, and the analysis focused on step two.

The Supreme Court noted that step two of the approximate balance test includes both factual and legal components, and is at most a mixed question, which requires addressing whether answering the question entails primarily legal or factual work.

The Supreme Court then held that the second step of the approximate balance test involves primarily factual work because the determination "necessarily immerses the Board 'in case-specific factual issues.'" Justice Thomas reasoned that the Board's determination in both Mr. Bufkin and Mr. Thornton's case required individual consideration of the veteran's symptoms, their causes, and the credibility of each physician who assessed the veterans, and that these determinations are inherently fact dependent.

In his analysis, Justice Thomas additionally noted that there are instances in which legal questions involving the benefit-of-the-doubt exist, such as if the Board misunderstood the definition of "approximate balance" or applied the standard to the wrong party, and Justice Thomas distinguished these cases from the cases at issue, where the parties disagreed with the Board's approximate balance determination.

The Supreme Court ultimately held that section 7261(b)(1) is an aspect of judicial review under section 7261(a), and that benefit-of-the-doubt decisions are reviewed for clear error, because the Board's determination of whether the evidence is in approximate balance is a mixed question involving primarily factual work. Accordingly, the Supreme Court affirmed the judgment of the Federal Circuit.

Justice Jackson, joined by Justice Gorsuch, penned a scathing dissent reliant on legislative history and Court precedent. She explained that in the history of benefit-of-the-doubt determinations, the Court has at times given too much deference to the Board, and that section 7261(b) was enacted, in part, to remedy the "improper degree of deference . . . [the Court] was affording to VA's determinations." Justice Jackson also relied on the Supreme Court's precedent in *Shinseki v. Sanders*, 556 U. S. 396 (2009), in which the Supreme Court held that section 7261(b)(2) required the Court to apply the harmless error rule applied in civil cases rather than subsuming it under section 7261(a), as the Supreme Court did here. Justice Jackson emphasized that under the majority's view, Congress "intended to enact a do-nothing amendment," which is contrary to the Supreme Court's presumption that when Congress amends a statute, it is intended to have real, substantial effect.

Justice Jackson additionally dissented as to the majority's characterization of the approximate balance test as involving predominantly factual work. She noted that the standard for determining when evidence is in approximate balance may involve examining legal precedent in addition to the relevant factual determinations. She likened the application of law to the historical facts to other mixed questions of law and fact, including questions of whether probable cause existed to support a search or seizure under the Fourth Amendment, or whether evidence presented at trial is sufficient to support a verdict. In these examples, though both legal analysis and factual analysis are required, appellate courts review them de novo.

Justice Jackson concluded that "[t]he reading that the majority adopts today reduces that provision to a rhetorical flourish and all but ensures that [the Court] will continue rubberstamping the VA's application of the benefit-of-the-doubt rule."

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

Federal Circuit Confirms Asymptomatic Conditions May Be Preexisting Defects for Purposes of the Presumption of Soundness

by Phil Zarone

Reporting on *Amezquita v. Collins*, 135 F.4th 1369 (Fed. Cir. 2025).

In *Amezquita v. Collins*, the U.S. Court of Appeals for the Federal Circuit held that the presumption of soundness under 38 U.S.C. § 1111 does not apply when an asymptomatic preexisting condition is noted as a defect in a medical examination report upon service entry. The Federal Circuit also ruled that it lacked jurisdiction to address Mr. Amezquita's argument that his preexisting condition was resolved rather than asymptomatic, and the Federal Circuit dismissed that aspect of his appeal.

The Department of Veterans Affairs ("VA") presumes that veterans are of sound health when they enter active service "except as to defects, infirmities, or disorders noted at the time of the examination, acceptance and enrollment." 38 U.S.C. § 1111. If the presumption of soundness applies, VA must present clear and unmistakable evidence to show that an injury or disease that manifested in service was both preexisting and was not aggravated beyond its natural progression by service. On the other hand, if the presumption of soundness does not apply, the veteran has the burden of establishing that a preexisting condition was aggravated by the veteran's service.

Mr. Amezquita was involved in a motor vehicle accident in October 2002, nine months prior to joining the U.S. Navy. He suffered an injury to his left shoulder that required surgery. In June 2003, Mr. Amezquita underwent a service entry examination. In the "summary of defects and diagnoses" section of the examination report, the medical examiner noted that Mr. Amezquita had undergone left shoulder surgery and was "completely asymptomatic" with "no physical limitation." Consequently, Mr. Amezquita was cleared for service and served on active duty from July 2003 to March 2005.

Shortly before separating from active duty, Mr. Amezquita reported that he had recently felt his left shoulder pop while lifting a heavy object. He was diagnosed with a left shoulder sprain. Several months later, he filed a claim with VA for service-connection for a left shoulder disability.

In September 2005, VA denied Mr. Amezquita's claim for service connection. VA noted that Mr. Amezquita had undergone surgery on his left shoulder prior to entering active duty and that there was no evidence that his left shoulder disability had worsened due to his service. Mr. Amezquita appealed, and after several rounds of remands and appeals, in August 2021, the Board of Veterans' Appeals ("Board") denied his claim for service connection for a left shoulder disability.

The Board found that Mr. Amezquita was not entitled to the presumption of soundness under section 1111 because he had a preexisting left shoulder disability on entry to the service. The Board noted that, although Mr. Amezquita's left shoulder disability was asymptomatic, his condition had been identified as a "defect" in the report of his entrance medical examination. Therefore, the presumption of soundness did not apply, and the burden shifted to Mr. Amezquita to show that his preexisting left shoulder disability was aggravated by his active service. The Board concluded that Mr. Amezquita had not met this burden and denied his claim for service connection. He appealed to the

U.S. Court of Appeals for Veterans Claims (the "Court").

Mr. Amezquita argued to the Court that he should benefit from the presumption of soundness because his left shoulder disability had been asymptomatic at the time of his entry to the service. Therefore, he argued, his left shoulder disability did not qualify as a defect, infirmity, or disorder noted at the time of examination, acceptance, and enrollment in the service for purposes of section 1111.

The Court disagreed and affirmed the decision of the Board. The Court pointed to *Verdon v. Brown*, 8 Vet. App. 529 (1996), in which it held that an asymptomatic condition can qualify as a preexisting defect under section 1111. Mr. Amezquita appealed to the Federal Circuit.

The Federal Circuit affirmed, stating, "We see no error in the Veterans Court's interpretation that an asymptomatic condition can be noted as a preexisting defect under § 1111." The Federal Circuit noted that in *Terry v. Principi*, 340 F.3d 1378 (Fed. Cir. 2003), it had interpreted the term "defect" for purposes of section 1111 to mean a defect that "amounts to or arises from disease or injury," and that nothing in that statute or its implementing regulations limited "defects" to conditions that are symptomatic at the time of entry to the service.

Mr. Amezquita also argued that the Court erred when it ruled that a preexisting condition that is resolved can serve as a defect, infirmity, or disorder for purposes of determining the applicability of the presumption of soundness. He argued that the medical examiner's finding that his left shoulder disability was "completely asymptomatic" and that he had "no physical limitations" upon entry to active service meant that his left shoulder disability was resolved and that the presumption of soundness should therefore apply.

The Federal Circuit disagreed with Mr. Amezquita's characterization of the Court's holding and noted that "[t]he Veterans Court's interpretation did not involve resolved conditions." The Federal Circuit then ruled that it did not have jurisdiction to address Mr. Amezquita's arguments regarding the meaning of the medical examiner's statements because that would require it to review factual determinations of the Board in the first instance. Accordingly, the Federal Circuit dismissed Mr. Amezquita's appeal as to allegations that his condition was resolved rather than asymptomatic.

In *Amezquita,* the Federal Circuit endorsed the Court's holding in *Verdon* that asymptomatic conditions may be noted as preexisting defects so that the presumption of soundness under 38 U.S.C. § 1111 does not apply. To that extent, *Amezquita* does not break new ground. However, *Amezquita's* statement that the Court's opinion "did not involve resolved conditions" leaves open the possibility that the presumption of soundness may still apply if a resolved condition—as opposed to an asymptomatic condition—is noted in the medical examination upon service entry.

Phil Zarone is an Attorney Advisor at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Federal Circuit Affirms Denial of Retroactive Benefits Under 38 U.S.C. § 1151, Finding Failure to Obtain Informed Consent in 1980 Did Not Constitute Clear and Unmistakable Error

by Shahin Mirzaei

Reporting on *Hatfield v. Collins*, 135 F.4th 1362 (Fed. Cir. 2025).

In May 2025, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Hatfield v.*

Collins, affirming the decision of the U.S. Court of Appeals for Veterans Claims (the "Court") upholding the Board of Veterans' Appeals' ("Board's") denial of Ms. Pat A. Hatfield's motion to revise a 1980 Board decision for clear and unmistakable error (CUE). The Federal Circuit held that, under the law as it was in 1980, the Board did not commit clear and unmistakable error by failing to recognize that the Department of Veterans Affairs' ("VA's") failure to obtain informed consent from the veteran, Archie A. Hatfield, for radiation therapy constituted compensable negligence under 38 U.S.C. § 351 (now codified as section 1151).

The Federal Circuit emphasized that CUE is a specific and rare type of error that must be based on the record and the law that existed at the time of the prior adjudication in question. The Federal Circuit used this description of CUE in its ruling by indicating that in 1980, the text of 38 U.S.C. section 351 and section 4131 did not suggest that VA's failure to abide by section 4131's requirement of obtaining informed consent from the veteran amounted to a compensable negligence claim under section 351.

Mr. Hatfield served in the U.S. Army from March 1944 to May 1944 and was diagnosed with Hodgkin's lymphoma in 1978. He underwent radiation therapy at a VA medical facility. This treatment was successful in eliminating his lymphoma, but he developed severe pulmonary complications due to the treatment that he had received and eventually died in 1979. In the same year, his widow, Ms. Pat Hatfield, filed a claim for dependency and indemnity compensation (DIC) with the regional office (RO) under section 351, arguing that the Mr. Hatfield's death was caused by negligent VA care, specifically the failure to obtain informed consent for the radiation therapy. The RO denied her claim, stating that she failed to establish service connection.

Ms. Hatfield appealed to the Board, arguing that under section 351 and due to VA's negligence, she should receive DIC. The Board decided VA's care was not negligent and that the treatment side effect was a rare, yet well-known reaction, and therefore, it was not the result of an error. This decision, in the absence of an appeal to the Court, became final. In 2004, 38 C.F.R. § 3.361 (d)(1)(ii), which recognizes the absence of informed consent as a potential basis for compensation under § 1151, was enacted. Ms. Hatfield reopened her claim in 2010 and was awarded DIC benefits from August 1, 2010, based on VA's failure to obtain informed consent.

In September 2020, she filed a motion seeking retroactive benefits back to 1980, arguing that the Board had committed CUE by failing to recognize that the lack of informed consent constituted compensable negligence under section 351 and VA regulations in effect at the time, particularly section 4131, which required written consent for medical procedures. In 2021, her motion was denied on the basis that the law in 1980 did not establish that the absence of informed consent can be equal to negligence. This decision was affirmed by the Court as well.

Ms. Hatfield then appealed to the Federal Circuit, stating that the 1980 Board's failure to treat the lack of written informed consent as compensable negligence was CUE. The Federal Circuit began by establishing its jurisdiction over the case under 38 U.S.C. § 7292(a).

The Federal Circuit's analysis revolved around requirements for CUE and the law as it existed in 1980. The Federal Circuit also considered the legislative and regulatory history of sections 351 and 4131 in its decision. Ms. Hatfield argued that section 4131 required written informed consent and that the Board's failure to recognize the absence of such consent as negligence constituted CUE under section 351. The Federal Circuit reviewed whether the 1980 Board's decision involved CUE or not. The Federal Circuit ultimately held that CUE requirements were not met since the alleged error must be "undatable and outcome-determinative and that it must be based on the record and the law that existed at the time of prior adjudication."

The Federal Circuit then went through the legislative and regulatory history of sections 4131 and 351 and found that neither the statutory text nor the

legislative history of those sections in 1980 indicated that failure to obtain informed consent automatically equated to compensable negligence. The Federal Circuit noted that the legal framework for section 1151 claims in 1980 required a showing of "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" and did not equate a lack of written informed consent with negligence. Thus, the Board's 1980 decision did not involve an undebatable legal error.

This decision portrays how CUE claims are evaluated under the law and facts as they existed at the time of the original decision. It also underscores the difficulty of obtaining retroactive benefits through CUE motions based on legal theories or standards that have developed after the original adjudication. Furthermore, the ruling shows that for future CUE claims to be successful, they must demonstrate that the alleged error was undebatable under contemporaneous law, not subsequent legal developments. Finally, for practitioners, this case can be beneficial as it highlights the importance of carefully researching the state of the law at the time of any allegedly erroneous Board decision.

Shahin Mirzaei is a recent first-generation law graduate from Penn State Dickinson Law and is currently working as an advocate counselor providing services to victims of domestic and sexual abuse at Centre Safe.

Federal Circuit Upholds New Background Check Regulations but Invalidates VA's Authority to Inspect Attorneys and Agents Use of Remote Access to VA Systems

by Max W. Yarus

Reporting on *Military-Veterans Advocacy v. Secretary of Veterans Affairs,* 130 F.4th 965 (Fed. Cir. 2025).

In every veterans benefits claim, a claims file is created containing a veteran's service, medical, and financial records. These claims files are crucial tools for veterans' representatives, attorneys, agents, or Department of Veterans Affairs ("VA") recognized organizations to navigate the procedural history and litigate the substantive merits of a claim. For a variety of security reasons, VA has an interest in limiting who accesses their information technology (IT) systems, how they access the systems, and from where they access that information. Accordingly, approved representatives can review claims in three ways: (1) VA can produce paper copies for review, (2) a representative can request an electronic version on a CD or USB flash drive, or (3) online via one of two internal VA systems—Veterans Benefits Management System (VBMS) and Caseflow.

In *Military-Veterans Advocacy v. Secretary of Veterans Affairs*, Military-Veterans Advocacy (MVA) challenged two final rules promulgated by VA on June 24, 2022, each concerning the third avenue for reviewing claims files. *See* 87 Fed. Reg. 37,744 (June 24, 2022), Individuals Using the Department of Veterans Affairs' Information Technology Systems to Access Records Relevant to a Benefit Claim. Before issuing the final rules, VA noticed its intent to amend 38 C.F.R. §§ 1.600, 1.601, 1.602, and 1.603, which collectively address representatives' online access to claim files through VBMS and Caseflow. VA proposed adding the following language to a Background Check provision in 38 C.F.R. §1.601(a)(2), clarifying user requirements for accessing VA's IT systems:

> To qualify for access to VBA IT systems, the applicant must comply with all security requirements deemed necessary by VA to ensure the integrity and confidentiality of the data and VBA IT systems, which may include passing a background suitability investigation for issuance of a personal identity verification badge.

85 Fed. Reg. 9435, 9440 (proposed Feb. 19, 2020). Additionally, VA proposed maintaining the following language in an Inspection Provision,

stating that VA "may, at any time without notice . . . [i]nspect the computer hardware and software utilized to obtain access and their location." *See* 38 C.F.R. 1.602(c)(1); 85 Fed. Reg. 9440.

MVA participated in the notice and comment period and argued that the proposed regulations violated due process, violated the pro-veteran canon, and were arbitrary and capricious by placing burdens on would-be representatives of veterans. Regarding the Background Check Provision, VA responded that the requirement to implement personal identity verification badges to access VA's IT systems did not exclude VA-accredited representatives and attorneys. Regarding the Inspection Provision, VA responded that a similar provision had existed since 1994 and applied universally to anyone trying to access VA's IT systems. VA also insisted that there was no expectation of privacy when accessing VA IT systems and proceeded to implement the proposed rules.

After VA issued the final rules, MVA filed a petition to the U.S. Court of Appeals for the Federal Circuit for direct review of 38 C.F.R. § 1.601(a)(2) and 38 C.F.R. § 1.602(c)(1) under 38 U.S.C. § 502. Section 502 provides the Federal Circuit with jurisdiction to review rulemaking decisions issued by each agency including VA, in accordance with chapter 7, title 5 of the Administrative Procedure Act (APA). Such challenges go past the agency tribunal and the U.S. Court of Appeals for Veterans Claims (the "Court") and are heard directly, in the first instance, by the Federal Circuit.

The Federal Circuit held that it had jurisdiction under section 502 and then addressed MVA's standing. For organizational petitioners to maintain standing in a direct rulemaking challenge, there must be (1) an injury-in-fact, (2) a causal connection between the injury and offending conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. VA's sole argument against MVA's standing was that MVA could not establish injury-in-fact. However, organizational petitioners can establish injury-in-fact by showing a concrete and demonstrable injury to the organization's activities. Because MVA litigates, legislates, and educates on behalf of military members and veterans, the Federal Circuit agreed that lack of access to VA's online IT systems for failure to comply with the Background Check and Inspection Provisions of VA's final rules is "more than simply a setback to the organization's abstract social interests," but a concrete injury-in-fact sufficient to establish organizational standing.

Next, the Federal Circuit reviewed the merits of the challenge to the Background Check Provision in 38 C.F.R. § 1.601(a)(2). Initially, the Federal Circuit held that VA had authority to promulgate the Background Check Provision because VA is responsible for "[e]stablishing, maintaining, and monitoring Department-wide information security policies, procedures . . . and inspection requirements" under 38 U.S.C. § 5723(b)(1). VA is also responsible for "[e]stablishing standards for access to Department information systems by organizations and individual employees, and [denying] access as appropriate" under section 5723(b)(6). Additionally, 38 U.S.C. § 5722(a) provides similar authority to create rules to "establish and maintain a comprehensive Department-wide security program to provide for the development and maintenance of cost-effective security controls needed to protect Department information." According to the Federal Circuit, sections 5722 and 5723 collectively grant VA the authority to implement security requirements to access VA IT systems.

In assessing authority to amend § 1.601(a)(2), the Federal Circuit also emphasized that the Background Check Provision complies with section 5722's requirement that the Secretary ensure that the Department information security program policies and procedures are "based on risk assessments for VBMS and Caseflow." *See* 38 U.S.C. 5722(b)(2)(a). The Federal Circuit acknowledged the Secretary's brief citing a risk assessment for VBMS Cloud Assessing, including an explanation of the risks of remote access from separate devices, and a vulnerability summary relating to personal identity verification cards. It then indicated that because VA

created such reports in preparation to amend § 1.601(a)(2), the security policy was based on a risk assessment as required by section 5722.

Because VA promulgated § 1.601(a)(2) with authority, the Federal Circuit moved on to MVA's primary argument that the Background Check Provision was unreasonable. MVA specifically argued that because attorneys already underwent background checks to obtain their licenses, requiring additional background checks would be an unreasonable exercise of VA's authority. However, the Federal Circuit disagreed that § 1.601(a)(2) was limited in scope to just attorneys. Instead, it held that because the amended final rule expanded access to VBMS and Caseflow to staff members and paralegals, applied equally to attorneys and support staff alike, provided alternative methods to review claims files, and was based on a risk assessment, §1.601(a)(2) was "the product of reasoned decision making."

MVA also challenged the Inspection Provision in §1.602(c)(1), which states that VA "may, at any time without notice . . . inspect the computer hardware and software utilized to obtain access [to VA's IT systems] and their location." MVA first argued that the Inspection Provision was an unconstitutional search that violated the Fourth Amendment. But the Federal Circuit disagreed and pointed to VA's Rules of Behavior agreement, which requires users seeking remote access to VA's IT systems to expressly agree (1) to inspections, (2) to comply with security measures, and (3) that they do not have an expectation of privacy. According to the Federal Circuit, consent of this manner is an exception to the Fourth Amendment prohibition on unreasonable searches.

MVA next argued that VA lacked authority to promulgate the Inspection Provision. The Federal Circuit agreed for two reasons. First, the Federal Circuit observed the broad scope of § 1.602(c)(1), which extended beyond inspecting the hardware and software used to access VA IT systems to inspecting the location where the hardware and software are used. The Government argued that the provision is limited in scope and would not include "rummaging through attorneys' drawers and cabinets," but the Government conceded at oral argument that such an inspection could include a user's home and even their bedroom. According to the Federal Circuit, this is a "markedly different power than Congress likely envisioned" when granting VA the power to create IT security policies.

Second, the Federal Circuit held that the Inspection Provision exceeded VA's statutory authority because it was not based on a risk assessment as required by 38 U.S.C. § 5722(b)(2)(a). VA attempted to cite the same risk assessments it produced for the Background Check Provision as evidence that it complied with section 5722 when issuing the Inspection Provision, but the Federal Circuit found no link to "any risk to confidentiality of computer hardware and software utilized to obtain access to VA IT systems or their location." VA also argued that the Inspection Provision reasonably addressed the risk of disclosing sensitive personal information with remote access to VA systems, but the Federal Circuit held that the record failed to demonstrate a rational basis for VA to promulgate such a broad regulation to reach that goal.

In summary, the Federal Circuit held that the Background Check Provision in § 1.601(a)(2) was promulgated reasonably and with appropriate authority. However, the Federal Circuit invalidated § 1.602(c)(1) because the Inspection Provision was "untethered to statutory authority" and lacked a rational basis for its scope.

Max W. Yarus is an associate attorney at Swift, Currie, McGhee & Hiers.

Extraordinary Circumstances Remains the Correct Standard for Equitable Tolling of the Equal Access to Justice Act Filing Deadline

by Audrey Kirkley

Reporting on *Roseberry v. Collins*, 133 F.4th 1047 (Fed. Cir. 2025).

In *Roseberry v. Collins*, the U.S. Court of Appeals for the Federal Circuit affirmed a decision of the U.S. Court of Appeals for Veterans' Claims (the "Court"). It reaffirmed that the requirement that Equal Access to Justice Act (EAJA) applications be filed with 30 days of mandate is only subject to equitable tolling under extraordinary circumstances, and held that because the Court utilized this standard, its decision to dismiss Mr. Roseberry's motion for EAJA fees as untimely was not erroneous.

Initially, Mr. Roseberry appealed an adverse Board of Veterans' Appeals ("Board") decision to the Court, which then remanded his claim for further development and readjudication. The Court entered mandate on the docket on October 15, 2021 but clarified that "mandate is effective October 12, 2021." Mr. Roseberry's attorney submitted an application for EAJA fees on November 13, 2021, 31 days after mandate went into effect and 28 days after the Court's notification.

The Secretary moved to dismiss the application as untimely, noting that it was filed more than 30 days after mandate became effective. Mr. Roseberry's counsel explained that she had mistaken the date mandate entered and the effective date of mandate when calculating her deadline and conceded the Secretary's right to move to dismiss her application for untimeliness.

The Court maintained that equitable tolling is only warranted under extraordinary circumstances and found that Mr. Roseberry did not establish that the calendaring error was an extraordinary circumstance warranting equitable tolling. Judge Greenberg dissented, arguing that the majority's decision effectively imposed a categorical ban on equitable tolling in all cases where an attorney miscalculates an EAJA filing deadline.

The question before the Federal Circuit was whether the deadline to file an EAJA application could be subject to equitable tolling under a lower standard than "extraordinary circumstances." The Federal Circuit affirmed the Court's holding that it could not.

The Federal Circuit noted that neither the relevant EAJA provision at 28 U.S.C. § 2412(d)(1)(B) nor the Veterans Court Rule 39(a) reference "excusable neglect," and that while excusable neglect may waive the timeliness requirement for untimely notices of appeal, Rule 26(b) declines to extend that standard to EAJA applications.

The Federal Circuit did not address Judge Greenberg's contention that a calendaring error may constitute an extraordinary circumstance from the perspective of a veteran and found that Mr. Roseberry's late filing was due only to "garden variety" neglect. Accordingly, the Federal Circuit affirmed the Court's dismissal of Mr. Roseberry's application for EAJA fees as untimely.

Audrey Kirkley is an appellate attorney with Chisholm Chisholm & Kilpatrick.

Federal Circuit Outlines the Statutory Limits of Its Jurisdiction, Pursuant to 38 U.S.C. § 7292

By Christopher Finelli

Reporting on *Smith (Daniel) v. Collins*, 130 F.4th 1337 (Fed. Cir. 2025).

In *Smith*, the U.S. Court of Appeals for the Federal Circuit held that it lacked jurisdiction to decide an appeal that turned on the application of facts to the relevant legal standard, which was not permitted under its authorizing statute, 38 U.S.C. § 7292(d)(2).

The underlying case involved Daniel R. Smith's claim for service connection for an eye condition (retinitis pigmentosa). Mr. Smith filed his first claim seeking compensation for the condition in 1966; VA denied this claim, and Mr. Smith did not appeal. In 1973, he attempted to reopen the claim for service connection, but his petition was denied for want of new and material evidence.

In 1996, Mr. Smith submitted evidence of bilateral retinitis pigmentosa, but the regional office (RO) again denied reopening the claim. Mr. Smith appealed, arguing, in relevant part, that the evidence he submitted qualified as new and material. However, the Board of Veterans' Appeals ("Board") rejected that argument and declined to reopen the claim in a 2008 decision.

In 2010, the U.S. Court of Appeals for Veterans Claims (the "Court") set aside the Board's 2008 decision and directed the Board to consider whether Mr. Smith's 1966, 1973, and 1996 submissions constituted new claims for separate disabilities, rather than petitions, to reopen.

In an April 2011 decision, the Board found that the 1996 submission was a new claim for benefits and remanded it for further development, to include obtaining a VA examination. In a subsequent April 2012 examination, the examiner stated that Mr. Smith (1) entered service with 20/40 vision in each eye, without color vision, poor night vision, and retinal pigmentary changes and (2) separated from service the same way. The examiner also addressed questions relating to the two-step process for rebutting the presumption of soundness under 38 U.S.C. § 1111: (1) whether the disability clearly and unmistakably preexisted service and (2) did not increase in severity beyond its natural progression during service.

In addressing the preexistence prong, the examiner explained that retinitis pigmentosa is considered an inherited genetic trait and/or genetic defect present as early as conception. On the increase in severity prong, the examiner indicated that there was none in this case because Mr. Smith entered and separated from service with the same vision acuity.

In November 2012, the RO denied the claim. After a timely appeal, the Board affirmed the RO's denial in a September 2018 decision, finding that (1) the presumption of soundness applied, as the eye disability was not noted at entry but that (2) the presumption was successfully rebutted, as there was clear and unmistakable evidence showing preexistence and non-aggravation in service.

In May 2020, the Court remanded this matter so the Board could more robustly address the clear and unmistakable evidence standard. Specifically, the Court directed the Board to address why the April 2012 medical opinion, which answered a question using the "less likely than not" language, met the higher standard of clear and unmistakable evidence.

In response, the Board issued a 2021 decision, again finding that the veteran's retinitis pigmentosa clearly and unmistakenly preexisted service and was not aggravated by such. The Board concluded that even though the April 2012 medical opinion couched its language in the "as less likely than not" standard, the evidence discussed within "undebatably" indicated that the clear and unmistakable evidence standard had been met given the affirmative

evidence both pre and post service showing the same visual acuity.

Mr. Smith once again appealed to the Court, expressing disagreement with the Board's finding that his retinitis pigmentosa was not aggravated by service. The October 2022 Court opinion, which interpreted the veteran's argument that the Board failed to provide adequate reasons and bases for the decision, affirmed the 2021 underlying decision.

After Mr. Smith sought reconsideration, the Court withdrew its 2022 opinion and issued a new decision in April 2023. Specifically, the Court found no basis to disturb the Board's 2021 finding on whether the clear and unmistakable evidence standard on the worsening prong was met. The Court reasoned that the April 2012 opinion rose to that level given the veteran's same vision at entrance and exit, he was not in service long enough to experience the progressive effects of retinitis pigmentosa, and that studies demonstrated in-service sunlight exposure does not affect the progression of retinitis pigmentosa. In addressing Mr. Smith's argument that the April 2012 opinion relied on the absence of evidence, the Court held that this opinion was indeed based on affirmative evidence—i.e., a comparison of vision acuity at entrance and exit. Regarding the use of "less likely than not" language, the Court explained that it did not change the "essential character" of the medical opinion that Mr. Smith's vision did not change during service. Mr. Smith timely appealed this decision to the Federal Circuit.

Mr. Smith offered two arguments in support of his appeal. The first argument related to the merits of whether the 2012 medical opinion satisfied the "clear and unmistakable evidence" standard of 38 U.S.C. § 1111; the second was an assertion of a proposition of law that the same 2012 medical opinion "impermissibly drew an inference . . . based upon an absence of evidence," which "cannot, as a matter of law, rise to the level of clear and unmistakable evidence."

The Federal Circuit began its analysis by outlining its statutory jurisdiction under 38 U.S.C. § 7292(a). That provision states that the Federal Circuit has authority to review a Court decision "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." However, while the Federal Circuit can address "relevant questions of law that come within the foregoing language," it may not, in the absence of a constitutional issue, review (1) a challenge to a factual determination and (2) a challenge to a law or regulation as applied to the facts of a particular case. 38 U.S.C. § 7292(d)(2).

In addressing the first argument, the Federal Circuit reiterated that the Board "as finder of fact" assesses whether the evidence before it was clear and unmistakable as required by 38 U.S.C. § 1111, and the Court then reviews that finding. The Federal Circuit then reasoned that both the Board and the Court "expressly" applied this standard and determined that it was met even though the 2012 opinion used "less likely than not" language. The Federal Circuit rejected Mr. Smith's argument on the basis that it "is nothing but a request that we disagree" with the Board's and the Court's determination, which "is simply the application of the facts to the legal standard" of 38 U.S.C. § 1111, adding that "[w]e lack authority to review that determination," pursuant to 38 U.S.C. § 7292(d)(2).

On the second argument, the Federal Circuit differentiated it from the first, as the former was "an assertion of a proposition of law, not an assertion about either a factual matter or a matter of application of law to fact." However, the Federal Circuit explained that in order to address this legal argument (whether 38 U.S.C. § 1111 precludes the absence of evidence from constituting clear and unmistakable evidence), a precondition must be met: the Court must have made a determination (either express or implied) on said legal issue either by making a "decision" on a "rule of law" or relying on a challenged statute or regulation or its interpretation. Ultimately, the Federal Circuit found

that no such express or implied determination had been made.

Specifically, the Federal Circuit found that the Court's decision "cannot be fairly viewed as expressly or implicitly treating an absence of evidence as itself constituting clear and unmistakable evidence." Rather, the Federal Circuit indicated that the Court treated the evidence in the opposite way that Mr. Smith suggests given that it "expressly ruled" that the April 2012 opinion was not based on a lack of medical evidence but was instead founded on affirmative evidence that there was no change in visual acuity during service. For this same reason, the Federal Circuit added that the Court did not implicitly deem an absence of evidence sufficient to rebut 38 U.S.C. § 1111, as the underlying Board decision "did not rest on the absence of evidence, but rather on affirmative evidence" of the same visual acuity both pre and post service.

In all, both of Mr. Smith's arguments were rejected on the basis that they would require the Federal Circuit to disagree with the Court on the application of law to facts in contravention of its authorizing statute. Given the lack of jurisdiction, the Federal Circuit dismissed the case and declined to rule on the validity of Mr. Smith's legal contentions.

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

Federal Circuit Limits Accrued Benefits under 38 U.S.C. § 5121(a)(6) to Amount Necessary to Reimburse Expenses for Last Sickness and Burial

By Krishna Ramaraju

Reporting on *Smith (Joshua) v. Collins*, 133 F.4th 1059 (Fed. Cir. 2025).

In *Smith v. Collins*, the U.S. Court of Appeals for the Federal Circuit held that under 38 U.S.C. § 5121(a)(6), Joshua Smith ("Mr. Smith"), a substituted party for Smith's deceased father, was only entitled to the veteran's accrued benefits up to the amount necessary to reimburse expenses for last sickness and burial. In light of this limit to payable benefits, the appeal concerning the requirement under 38 C.F.R. § 3.156(c) for the VA to reconsider newly associated service records in determining effective dates was moot.

Veteran George C. Smith ("Smith, Sr." or "veteran") served in the U.S. Army between 1969 and 1972, including seven months of service in Vietnam. Smith, Sr., first sought service connection for PTSD in 1986. In December of that year, a VA regional office ("RO") denied the claim, finding that the evidence showed the veteran had an adjustment disorder rather than PTSD. Smith, Sr., did not appeal at that time.

Then in September 2002, the veteran submitted a claim to reopen accompanied by a statement regarding in-service stressors. The RO again denied the claim in a March 2003 decision. The RO concluded that the new evidence was not material because it did "not bear directly and substantially upon the issue of a diagnosis of [PTSD] related to . . . military service." Again Smith, Sr., did not appeal at that time. In December 2003, the veteran began receiving treatment at a VA medical center for various health concerns.

In 2010, the veteran again sought to reopen the previously denied claim and asserted that he came under enemy fire and saw people killed during his service in Vietnam. Because these stressors were consistent with the circumstances of his service set out in personnel records, the RO requested a PTSD examination and opinion. A VA examiner diagnosed the condition and concluded that it was at least as likely as not caused by the veteran's Vietnam service-related stressors. As a result, in December 2010, the RO granted service connection for PTSD at a 10% rate, effective April 23, 2010, the date VA received the claim to reopen.

Smith, Sr., then appealed to the Board of Veterans' Appeals ("Board"), requesting an effective date prior to the date of the 2010 request to reopen. In 2015, the Board remanded the matter for the RO to obtain and review the complete record, because prior VA medical treatment records, which indicated an earlier PTSD diagnosis, were not in the claims file. On remand, the RO determined that the veteran's first PTSD diagnosis occurred in 2007, but the RO did not grant this earlier effective date because that diagnosis was for medical treatment purposes and not then part of the PTSD claim file.

Smith, Sr., again appealed to the Board, requesting an effective date prior to the date of the 2010 request to reopen. The veteran died in 2016, and the Board dismissed the appeal as moot. VA then granted a request by Joshua Smith, son of Smith, Sr., to substitute as the claimant.

In 2021, the Board granted an earlier effective date based on Smith, Sr.'s first PTSD diagnosis in 2007, holding that the entitlement arose on the date of diagnosis, not the date in 2010 when the VA received the request to reopen. The Board also decided that Mr. Smith, as an adult, was "only eligible for the accrued benefit necessary to reimburse expenses bore [sic] in relation to the last sickness or burial of the Veteran." The Board referenced the implementing regulation, 38 C.F.R. § 3.1010(g)(3), which provides that "[w]hen substitution cannot be established under any of the categories listed in §3.1000(a)(1) through (a)(4), only so much of any benefits ultimately awarded may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial."

Later in 2021, the RO implemented the Board decision and calculated the total accrued benefits. The RO "defer[red] a decision on payment of accrued benefits on development of evidence of expenses." The difference between the total calculated by the RO and payments already disbursed to Smith, Sr., under the RO rating decision from 2010 amounted to over $9,000. Mr. Smith then sent to the VA a "breakdown of funeral expenses" for Smith, Sr., amounting to a total of $1,143.

In 2022, Mr. Smith appealed to the U.S. Court of Appeals for Veterans Claims (the "Court"), requesting an even earlier effective date because, according to him, the Board misinterpreted the requirement to reconsider newly associated service department records under 38 C.F.R. § 3.156(c) and accordingly failed to increase the amount of benefits due the veteran, and ultimately payable to Mr. Smith. The Court affirmed the Board's decision and determined that the Board had properly considered all available evidence, including newly associated service department records under § 3.156(c), in concluding that the earliest possible effective date was that of Smith, Sr.'s first PTSD diagnosis in 2007. Mr. Smith then appealed the Court's decision, leading to the decision summarized herein.

The Federal Circuit panel unanimously agreed with the Secretary, finding the appeal moot. The Federal Circuit emphasized that 38 U.S.C. § 5121(a)(6) limits the benefits payable to substituted parties in "all other cases" to the expenses of last sickness and burial. In the Federal Circuit's view, Mr. Smith's status as a substituted party under § 5121A, coupled with the limitations of § 5121(a)(6), meant that any change in the effective date would not alter the amount of benefits Mr. Smith could receive. The Federal Circuit also rejected Mr. Smith's argument that § 5121A allowed recovery of all benefits due to the veteran, clarifying that § 5121A's eligibility requirements are determined by § 5121, which

restricts recovery to the expenses of last sickness and burial. The Federal Circuit dismissed the appeal with no costs awarded.

On May 16, 2025, Mr. Smith filed a petition for en banc rehearing by the full Federal Circuit. The petition focused on the implications of the *Loper-Bright* decision (decided after briefing was concluded for this case), which overruled *Chevron* and its deference to agency interpretations of statutes. The petition also focused on whether the panel mistakenly construed 5121(a)(6) to apply to past due benefits, as opposed to 5121A and 38 C.F.R. § 3.1010(a), which on their face contain no such limitation, so further action is possible in this case.

Ultimately, the facts of this case and the panel's holding underscore the importance of timely filing and appealing, as well as the need for veterans to consult competent counsel as soon as possible when benefits are denied.

Krishna Ramaraju is an Assistant General Counsel at Syngenta, a global agricultural company, where he specializes in environmental and regulatory law. He also volunteers pro bono, representing veterans through The Veterans Consortium. The author is writing solely in a personal capacity and any views expressed are his alone.

All Components of VA's Decision-Notice Requirements Can Be Satisfied Through Implicit Denial

by Max C. Davis

Reporting on *Steele v. Collins*, 135 F.4th 1353 (Fed. Cir. 2025).

In *Steele v. Collins*, the U.S. Court of Appeals for the Federal Circuit held that a Department of Veterans Affairs ("VA") decision may implicitly deny a claim where a reasonable person could understand VA's notice as identifying the denied claim and the reasons for that denial.

Mr. Steele applied for VA disability compensation in 1991 for a "head injury" that he attributed to a training incident in service. VA denied the claim, and in its notice, it acknowledged "some complaints of a headache" during service but said "[t]here were no further complaints of headaches during service" and granted service connection for a scar on the scalp "as the only residual of your head injury in service." Mr. Steele did not appeal that decision. Over 20 years later, service connection for headaches was granted based on a new filing, and Mr. Steele requested an effective date of 1991 based on his contention that because VA's notice in 1991 was insufficient, his first claim remained open. The Board of Veterans' Appeals ("Board") denied Mr. Steele's request, finding that the 1991 claim was implicitly denied because a reasonable person would have understood from the 1991 notice concerning the "head injury" claim that the claim for headaches was being denied. The U.S. Court of Appeals for Veterans Claims (the "Court") affirmed the Board's denial, and Mr. Steele appealed.

At the Federal Circuit, Mr. Steele continued to assert that VA's 1991 notice was insufficient. VA's notice obligations require that when a claim is denied, the notice must expressly identify the particular claim being denied, expressly state the reasons for that denial, and expressly provide notice of the right to appeal. *Ruel v. Wilkie*, 918 F.3d 939 (Fed. Cir. 2019). *See generally* 38 C.F.R. § 3.103. If notice is insufficient, the claim will be considered to remain pending and can serve as a reference point for assigning the effective date of a later-filed claim. *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009).

An express denial is not the only avenue for notifying a claimant of a decision. Under the implicit denial doctrine, VA's explicit notice adjudicating one claim may also provide sufficient notice that a related claim is being denied. Whether notice was sufficient to implicitly deny a related claim depends on whether the explicit notice "would reasonably be understood" to also notify the

claimant that the related claim was also being considered and denied. If so, the explicit notice is deemed to provide adequate notice of and opportunity to respond to the denial of the related claim. Because notice is deemed adequate, the implicitly denied claim is considered finally adjudicated, closing off the earlier claim as a reference point for a later-filed claim.

Mr. Steele's argument at the Federal Circuit distinguished between the first two elements of notice: identification of the particular claim being denied and the reasons for that denial. He conceded that the Federal Circuit's precedential decisions allow for implicit denial where VA's notice sufficiently identifies the particular claim being denied but contended that its precedents did not go so far as to allow implicit notice about the reasons for that denial. In his view, to satisfy its notice obligations, VA must always explicitly state the reasons for a denial. Unpersuaded, the Federal Circuit concluded that its prior precedents supported exactly that scope of implicit denial: "[T]he veteran receives sufficient notice of both the fact of the implicit denial and the reasons therefore when the stated reasons for the explicitly decided claim would reasonably be understood to also extend to the implicitly denied claim." As to the Mr. Steele's contention, the Federal Circuit remarked that "[i]t makes little sense to require an express statement of reasons separately addressing a claim that is not itself explicitly discussed."

In Mr. Steele's case, the Federal Circuit found that the Board correctly analyzed the 1991 notice by asking whether the explicit denial of the claim for a head injury could reasonably be understood as providing notice that the claim for headaches was also denied. The Federal Circuit therefore affirmed that the 1991 claim was implicitly denied and finally adjudicated in 1991.

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

Implicit Analysis of New and Material Evidence in Statement of Case Satisfies 38 C.F.R. § 3.156(b)

by Gerline R. Fleury Johnson

Reporting on *Williams v. Collins*, 131 F.4th 1325 (Fed. Cir. 2025).

In *Williams v. Collins*, the U.S. Court of Appeals for the Federal Circuit considered whether the U.S. Court of Appeals for Veterans Claims (the "Court") erred in determining that the Department of Veterans Affairs ("VA") met the requirements of 38 C.F.R. § 3.156(b) when a VA regional office (RO) issued a June 1979 statement of the case (SOC), such that the finality of a July 1978 rating decision was not impacted. The Federal Circuit held that the Court did not err in determining that the record showed that VA complied with the requirements of 38 C.F.R. § 3.156(b) in the June 1979 SOC.

In April 1978, the RO received Mr. Williams's claim of entitlement to service connection for schizophrenia and a hospital summary showing a diagnosis of possible schizophrenia reaction. In July 1978, the RO denied entitlement to service connection for schizophrenia. Mr. Williams filed a notice of disagreement in January 1979 and requested that VA obtain treatment records concerning his admission to a VA Medical Center in January 1979. In February 1979, VA received a copy of a hospital report, which showed a diagnosis of chronic schizophrenia, paranoid type; and a few months later, VA received an income net worth and employment statement indicating that Mr. Williams had stopped working due to nerves and was applying for Social Security benefits.

In June 1979, the RO noted that additional evidence had been received after the July 1978 rating decision,

and, finding that the hospital report was not new and material evidence for the purposes of service connection, the RO confirmed the previous denial of service connection in a confirmed rating decision, which was never sent to Mr. Williams. The next day, the RO issued an SOC that was sent to Mr. Williams, which listed and described the alleged new and material evidence, including the hospital report and the statement that the veteran had stopped working. The SOC also described the RO's June 1979 decision, stating that "[i]t was held this date that no change was warranted in the previous denial of service connection for schizophrenia and of his claim for nonservice-connected disability pension. This is the first notice to the veteran of this decision." Mr. Williams did not perfect his appeal to the Board of Veterans' Appeals ("Board").

Thereafter, on June 4, 2009, Mr. Williams submitted a claim to reopen his previously denied claim for service connection for schizophrenia, and by May 2021, he had received a 100 percent disability rating for his service-connected schizophrenia and special monthly compensation based on the need for regular aid and attendance, both with effective dates of June 4, 2009.

Subsequently, the Court affirmed a Board decision that denied Mr. Williams's claim of entitlement to an effective date earlier than June 4, 2009. The Court determined that Mr. Williams had failed to challenge the Board's finding that the June 1979 SOC considered all of the evidence then of record and had failed to demonstrate that the July 1978 rating decision's finality could possibly be vitiated under 38 C.F.R. § 3.156(b).

Mr. Williams contended that VA could not satisfy the requirements of 38 C.F.R. § 3.156(b) by issuing an SOC, and therefore, his April 1978 claim remained pending and he was entitled to an effective date prior to June 4, 2009.

The Federal Circuit noted that based upon its case law, 38 C.F.R. § 3.156(b) provides that VA must treat (1) new and material evidence (2) received prior to the end of the appeal period (3) as having been filed in connection with the claim that was pending at the beginning of the appeal period; and nothing in the language of the regulation stated that VA could not satisfy its 38 C.F.R. 3.156(b) obligations in an SOC as long as there was some indication that VA determined whether the submission was new and material evidence, and if so, considered the evidence in evaluating the pending claim.

The Federal Circuit distinguished Mr. Williams's case from *Bond v. Shinseki,* 659 F.3d 1362, 1369 (Fed. Cir. 2011), and *Beraud v. McDonald,* 766 F.3d 1402, 1407 (Fed. Cir. 2014), where there was no indication anywhere in the records that VA had considered additional evidence raised within one year of a claim denial in connection with that claim, noting that the July 1979 SOC listed the new evidence raised after the June 1978 denial of Mr. Williams's claim, and then stated that no change was warranted in the prior denial of service connection for schizophrenia and his claim. Thus, the Federal Circuit found that there was some indication that VA considered the evidence submitted and implicitly determined whether said evidence was new and material and considered it as appropriate in connection with Mr. Williams's pending claim.

Gerline R. Fleury Johnson is Counsel with the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

TDIU Application May Serve as Supplemental Claim Based on Specific Facts of the Case

by John Butcher

Reporting on *Chisholm v. Collins*, No. 22-7028 (Vet. App. Mar. 13, 2025).

In *Chisholm v. Collins*, the U.S. Court of Appeals for Veterans Claims (the "Court") reversed a November 2022 Board of Veterans' Appeals ("Board") decision that treated an application for a total disability rating based on individual unemployability (TDIU) as a new claim to deny a related claim for attorneys' fees.

In November 2019, the veteran, Mr. Sutton, sought higher ratings for his service-connected tinea pedis and right lower extremity radiculopathy. A Department of Veterans Affairs ("VA") agency of original jurisdiction (AOJ) denied the claim in a February 2020 rating decision. In January 2021, with the assistance of Mr. Chisholm, an attorney, Mr. Sutton requested higher-level review (HLR) of the February 2020 rating decision. In an April 2021 HLR rating decision, the AOJ continued its previous denial of the veteran's claim for increased ratings.

In November 2021, Mr. Sutton submitted a formal application for TDIU, citing all his service-connected disabilities as contributing to his inability to secure or follow a substantially gainful occupation. In an April 2022 rating decision, the AOJ granted increased ratings for tinea pedis and right lower extremity radiculopathy, assigning the November 2021 date of Mr. Sutton's TDIU application as the effective date.

At issue in the case was whether Mr. Chisholm was entitled to attorneys' fees in connection with the award of benefits in the April 2022 rating decision. Under the modernized review system known as the Veteran Appeals Improvement and Modernization Act (AMA), agents and attorneys may only charge claimants for representation provided after the AOJ issues an initial decision on a claim. 38 U.S.C. § 5904(c)(1). That is, attorneys' fees may not be paid for benefits awarded in an initial decision, but only for past-due benefits awarded in a subsequent decision.

In a May 2022 rating decision, the AOJ denied payment of attorneys' fees to Mr. Chisholm for past-due benefits awarded in the April 2022 rating decision. Mr. Chisholm appealed that denial to the Board, arguing that Mr. Sutton's November 2021 TDIU application was part and parcel of the increased rating claims denied in the April 2021 HLR rating decision. In a November 2022 decision, the Board denied Mr. Chisholm's claim, finding that the November 2021 TDIU application constituted a new, initial claim for increased ratings based on unemployability rather than continued pursuit of the increased rating claims for tinea pedis and right lower radiculopathy previously denied by the AOJ. The Board reasoned that, while TDIU may be inferred as part of an underlying disability rating claim, the reverse is not necessarily true; otherwise VA would have to guess which of multiple disability ratings a veteran wanted to appeal or be required to develop all the veteran's service-connected disabilities.

On appeal to the Court, Mr. Chisholm argued that when his client filed his TDIU application he effectively submitted a supplemental claim in pursuit of his tinea pedis and radiculopathy increased rating claims. As a supplemental claim, the TDIU application established continuous pursuit between the veteran's November 2019 claim and the April 2022 rating decision, rendering that decision a subsequent decision in the review process and thus making Mr. Chisholm eligible for fees. In response, the Secretary argued that Congress provided AMA claimants with three review options following an initial VA decision—an HLR, a supplemental claim, or a Board appeal—and that a TDIU application was not one of them. To support the position that the veteran's prior increased rating claim was a separate matter from his subsequent TDIU claim, the

Secretary cited the Court's decision in *Jackson v. McDonough*, 37 Vet. App. 277 (2024). The Secretary further argued that Mr. Sutton's TDIU application could not have been a supplemental claim because it was not submitted on the required form.

The Court sided with Mr. Chisholm, rejecting the arguments put forward by the Secretary as well as the Board before him. First, the Court was unpersuaded by the Secretary's reading of *Jackson*. *Jackson* affirmed that a claimant filing a supplemental claim must have "previously filed a claim for the same or similar benefits on the same or similar basis." 38 U.S.C. § 101(36). According to the Court, some subsequent claims are part of the same case and constitute supplemental claims because they come after a previously filed claim for the same or similar benefits on the same or similar basis. *See Perciavalle v. McDonough*, 101 F.4th 829 (Fed. Cir. 2024) (holding a service-connection "claim may morph and expand as an appeal, to include TDIU" and be eligible for attorneys' fees when it is "continuously pursued and never final"). Other subsequent claims, such as the veteran's increased rating claim in *Jackson*, are not part of the same case and do not constitute supplemental claims because they seek different benefits on a different basis. *See Jackson*, *supra* (finding that a VA Form 21-526EZ seeking an increased rating for a hip disability filed more than one year after a prior final denial of an increased rating/hip claim and after an intervening hip surgery constituted a new claim rather than a supplemental claim for attorney's fee purposes). Ultimately, it is the function of the claim, not its name or form number, that determines its status as a supplemental claim or a new original claim.

Citing *Phillips v. McDonough*, 37 Vet. App. 399, 401 (2024), the Court further noted that TDIU is not a separate claim but rather one way to get the appropriate rating for a disability. When a veteran is service connected for a disability and applies for a higher rating, VA must consider TDIU if there is evidence of unemployability. Contrary to the November 2022 Board decision, the Court explicitly stated that when a veteran requests TDIU based on service-connected disabilities, VA must "consider the impact of the service-connected disabilities" to determine if they prevent substantially gainful employment, and if the inquiry shows that "the veteran's schedular rating for those disabilities may need to be increased, [VA] needs to address that."

The Court also rejected the Secretary's claim that VA required supplemental claims to be filed on a specific form. The Court analyzed the text of VA regulations defining supplemental claims and found insufficient evidence to support the Secretary's contention that VA intended to limit claimants to a specific form. The Court cited VA's intent to file and notice of disagreement regulations as evidence that in related contexts, VA made plain its intention to limit claimants to a specific form by explicitly doing so in the relevant regulation. *See* 38 C.F.R. § 3.155(b)(1)(ii) (requiring the "prescribed intent to file a claim form" for claimants seeking to submit an intent to file); 38 C.F.R. § 20.202(d) (stating VA will not "accept… a Notice of Disagreement… [if it] is submitted in any format other than the form prescribed by the Secretary, including on a different VA form"). Given VA's demonstrated ability to explicitly limit claimants to specific forms in other contexts, the Court declined to read an implicit requirement limiting supplemental claims to the VA Form 20-0995 into VA's existing regulations.

Based on this analysis, the Court held that while a supplemental claim needs to be filed on a form prescribed by the Secretary, it need not be filed on a supplemental claim form. Instead, because a request for TDIU is not a standalone claim but an attempt to obtain a higher rating, an application for TDIU may serve as a supplemental claim when filed after VA has already denied higher ratings for the disabilities at issue. The Court emphasized that different facts might warrant a different result and that its decision was not meant to apply to every instance in which a claimant filed a TDIU application. In a separate concurrence, Judge Toth stated that "[m]uch like the way something can be both a wave and a particle in quantum physics, TDIU has a way of defying all attempts at categorization," and stressed that "although [TDIU] can satisfy the definition of a supplemental claim… it

does not mean that every TDIU application should be treated as such."

The *Chisholm* Court's holding and its treatment of *Jackson* showcase a functional, flexible approach to veterans' claims over a strict, rule-based one and a focus on individual circumstances over administrative efficiency. Post *Chisholm*, the content of the form matters more than the form's name or number, and VA resources will be required to interpret and address that content. While such efforts are consistent with a pro-veteran process, the time and complexity they may add to claims and appeals processing are not. VA's benefits system is large, complicated, and susceptible to delay. In such a system, administrative clarity and efficiency may prove as pro-veteran as the focus on individual circumstances, a point central to the adoption of the AMA as the successor to the legacy system. In any event, post *Chisholm*, if VA wishes to limit a claimant to a specific form for the sake of clarity and efficiency, it should do so explicitly in the relevant regulation.

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

Class of Veterans and Dependents Alleging Unreasonable Delay in Docketing AMA Appeals of VHA Denials Certified

by Gina D'Amico

Reporting on *Gladney-Chase v. Collins*, No. 24-4472 (Vet. App. Apr. 24, 2025) (per curiam order).

The U.S. Court of Appeals for Veterans Claims (the "Court") in *Gladney-Chase* granted class certification for all veterans and dependents who filed a notice of disagreement (NOD) at the Board of Veterans' Appeals ("Board") within VA's modernized appeal system delineated in the Appeals Modernization Act (AMA) more than 180 days prior to March 18, 2025, in response to Veterans Health Administration (VHA) decisions and whose appeals remained on the Board's pre-docket queue as of March 18, 2025.

Veteran Anthony Gladney-Chase filed a petition for extraordinary relief with the Court, seeking a writ of mandamus, asserting that the Board unreasonably delayed docketing his multiple appeals stemming from denials by the VHA as well as a separately filed request for class certification and class action (RCA). On March 18, 2025, Mr. Gladney-Chase, through counsel, and counsel for Secretary Collins submitted a joint motion to certify a class and appoint class counsel (joint motion) identifying the terms of the agreed class. Specifically, the joint motion requested that the class consist of (1) all veterans and dependents who filed NODs at the Board stemming from appeals from VHA decisions, (2) whose NODs were filed more than 180 days prior to the date of the joint motion, and (3) whose appeals remain on the Board's pre-docket queue as of the date of the joint motion.

The Court noted that the joint motion did not detail the prerequisites for class certification outlined in Rule 23(a) of the Court's Rules of Practice and Procedure, so the Court undertook that analysis as those prerequisites were discussed in Mr. Gladney-Chase's RCA. The Court also noted that the class definition employed in the joint motion was so similar to that set forth in the RCA that the Court found that the parties implicitly asserted that their proposed class definition satisfied Rule 23(a). Those factors include numerosity, commonality, typicality, adequacy of representation, and that the requested relief affects the entire class. The Court also undertook an analysis on ascertainability, citing *Freund v. McDonough*, 114 F.4th 1371, 1377-78 (Fed. Cir. 2024), and whether class-wide relief is superior to the resolution of a matter through a precedential decision.

Analyzing the first factor, numerosity, the Court found that requirement satisfied, as the unrefuted information provided by Mr. Gladney-Chase indicated that the proposed class contained more than 10,000 members. As to commonality, the Court found in the parties' favor that resolving the class contention that VA unreasonably delayed in docketing VHA appeals would involve a common answer. For similar reasons, the Court found that the third factor, typicality, had been met, as the proposed class asserted the same injury. As to the fourth factor, adequacy of representation, the Court found that it had been met based on Mr. Gladney-Chase's averments that he was eager and able to vigorously advocate for the interests of the class and the Court's own finding that there was no indication that Mr. Gladney-Chase had any interest adverse to the class. Finally, as to the fifth explicit rule set forth in 23(a), the Court determined that it had been met, as the same injunctive relief would be appropriate for all class members, which would be directing the Secretary to transfer VHA files to the Board within a certain timeframe.

Consistent with *Freund*, the Court evaluated ascertainability and determined that it had been met, as the class was defined by objective criteria. Lastly, the Court evaluated the superiority prerequisite and whether a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis. In so doing, the Court cited *Skaar v. Wilkie*, 32 Vet. App. 197 (2019), for the non-exhaustive list of factors to be balanced on a case-by-case basis when considering whether the presumption against aggregate action has been rebutted. The Court found that this factor had been met because the challenge was collateral to a claim for benefits, the RCA contained sufficient facts to review the challenged conduct, and, most importantly, the RCA alleged sufficient facts regarding unreasonable delay suggesting the need for remedial enforcement.

The Court's order also appointed Yelena Duterte, Esq., as class counsel and directed that notice be issued to all class members within 30 days. The Court's order set forth all requirements to be included in the notice. A joint motion to approve a proposed settlement was also filed, detailing the terms agreed to by the parties to resolve the allegations of unreasonable delay. The Court has since scheduled a hearing for Thursday, July 10, 2025, at 10:00 am consistent with Rule 23(e)(2) to consider the proposed settlement.

Potential and notified class members and their counsel should review the terms of the proposed settlement and consider the agreed upon relief, as the notice allows for a period of objection. Certainly, if approved, the intention of the settlement is to provide relief to those veterans and dependents whose claims have been languishing in the Board's pre-docket queue for far too long.

Gina D'Amico is the Deputy Director of Litigation, CAVC Practice at the Veterans Consortium Pro Bono Program.

Beneficial Effects of Medication Must Be Discounted When Not Specifically Contemplated by the Relevant Musculoskeletal Diagnostic Code

by Sarah "Sally" Battaile

Reporting on *Ingram v. Collins*, 38 Vet. App. 130 (2025).

In *Ingram*, a panel of the U.S. Court of Appeals for Veterans Claims (the "Court") composed of Judges Pietsch, Bartley, and Laurer, addressed the denial of increased ratings for back and left ankle disabilities, and how to apply *Jones v. Shinseki*, 26 Vet. App. 56 (2012) (holding the Board of Veterans' Appeals is required to discount beneficial medication effects when relevant rating criteria do not specifically contemplate medication use), when evaluating musculoskeletal disabilities. The Court vacated the Board decision and remanded the matters, finding that the Board erred by not discounting beneficial

medication effects when assigning evaluations for the back and left ankle disabilities.

As pertinent here, in the November 2022 decision on appeal, the Board denied a rating greater than 20 percent for the back disability and denied a rating greater than 10 percent for the left ankle disability.

Throughout the appeal period, Department of Veterans Affairs ("VA") examination reports and VA treatment records showed that Mr. Ingram used medications for pain relief for both disabilities. Mr. Ingram gave testimony at a September 2017 Board hearing, stating that he used pain medication and wore back and ankle braces. Further, the VA examinations throughout the appeal period showed functional loss and impairment, including limited range of motion and pain on motion, including during frequent flare-ups, which were noted to be alleviated by medication.

On appeal, the Secretary conceded that a remand was warranted for the increased back disability claim because the Board failed to address certain favorable evidence. The Court agreed but noted that this did not resolve the parties' primary dispute regarding the meaning and application of *Jones* in evaluating musculoskeletal disabilities and whether the Board was required to discount the beneficial effects of medication when the relevant musculoskeletal rating criteria do not explicitly contemplate the use of medication.

In this respect, Mr. Ingram argued that the Board erred by failing to discount the beneficial effects of medication when evaluating both disabilities. He noted that the applicable diagnostic criteria under Diagnostic Codes 5237 and 5271 for his back and ankle disabilities, respectively, do not address the effects of medication. Therefore, he contended that the Board should have determined the beneficial effects of the medications and discounted them when deciding his increased rating claims.

The Secretary's argument was twofold. First, he quoted *Jackson v. McDonough*, 37 Vet. App. 87 (2023), for the proposition that the Board is prohibited from relying on factors outside of the rating criteria, including the use of medication, unless the use of medication is contemplated by the rating criteria. Second, the Secretary contended that *Jones* should not apply to musculoskeletal disabilities specifically because it would serve no purpose, as examiners were already required to provide range-of-motion estimates of impairment under the worst-case scenario of during flare-ups under 38 C.F.R. § 4.40 and *Sharp v. Shulkin*, 29 Vet. App. 26 (2017); *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011); and *DeLuca v. Brown*, 8 Vet. App. 202 (1995).

Mr. Ingram replied that the Secretary's interpretation of *Jackson* is in direct conflict with the Court's precedential cases of *Jones* and *McCarroll v. McDonald*, 28 Vet. App. 267 (2016) (en banc). In *Jones*, the disability at issue was irritable bowel syndrome (IBS), and the Court concluded that when relevant rating criteria do not explicitly contemplate the use of medication for symptom relief of a service-connected disability, as was the case for IBS, the Board must discount the beneficial effects of medication used in assessing the severity of that disability for rating purposes. In *McCarroll*, the disability at issue was hypertension, and the Court essentially reinforced its holding in *Jones*, concluding that the Board did not err when it considered the beneficial effects of medication because in that case, the relevant rating criteria specifically contemplated medication use.

The Court rejected the Secretary's argument that *Jackson* altered how the Board should consider medication use when evaluating a service-connected disability and made clear that *Jackson* had no negative or alternative impact on the holdings in *Jones* and *McCarroll*, which remain good law. In *Jackson*, the disability at issue was diabetes, and the Court concluded that because relevant rating criteria explicitly mention insulin medication, the Board did not err in relying on improvements from medication when evaluating diabetes. Further, in *Jackson*, the Court reaffirmed that VA may not rely on factors outside the rating criteria when evaluating a service-connected disability, such as the

beneficial effects of medication when not mentioned or contemplated by the rating criteria.

As to the Secretary's second argument that *Jones* should not apply to the evaluation of musculoskeletal disabilities, the Court noted that its holding in *Jones* complemented caselaw relevant to the evaluation of musculoskeletal disabilities because considering the beneficial effects of medication would not accurately portray the true worst-case scenario of the disability.

The Court held that *Jones* applied in the evaluation of musculoskeletal disabilities when the relevant rating criteria do not reference medication as a factor in evaluation, vacated the portions of the Board's decision that denied increased back and left ankle disability ratings, and remanded the matters for further development and readjudication. In doing so, the Court emphasized that in the musculoskeletal and other contexts, the Board must affirmatively discount the ameliorative effects of medication rather than passively not take account of their ameliorative effects.

Note: Several weeks after the decision, the Secretary filed a motion for panel reconsideration or, in the alternative, for full Court review, to state the points of law or fact the Secretary believed the Court overlooked or misunderstood. The Court found that it did not overlook or misunderstand any argument properly before it and denied the motion for panel reconsideration. The motion for full Court review was also denied.

Sarah "Sally" Battaile is Associate Counsel with the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Decision by VA Regional Office Does Not Divest the Board of Jurisdiction

by Robert Glenn

Reporting on *Johnson v. Collins*, No. 23-7589 (Vet. App. Mar. 26, 2025).

In *Johnson v. Collins*, the U.S. Court of Appeals for Veterans Claims (the "Court") held that where there is an appeal for service connection under the pre-Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022 ("PACT Act") provisions pending before the Board, a grant of service connection by a VA regional office ("RO") under the PACT Act does not resolve the pending Board appeal.

Mr. Johnson served in the U.S. Marine Corps from September 1972 to July 1974. His active-duty service included a deployment to Thailand from March 1973 to September 1973, where he served as a security guard at Nam Phong Royal Thai Air Force Base (RTAFB). In May 2016, Mr. Johnson filed claims for entitlement to service connection for diabetes mellitus, bilateral lower extremity peripheral neuropathy, and hypertension, asserting that he was exposed to Agent Orange while serving at Nam Phong RTAFB.

In February 2017, the RO denied the claims, finding no evidence of herbicide agent exposure during Mr. Johnson's service. Following the denial of his claims, Mr. Johnson timely perfected an appeal to the Board in April 2020.

On August 10, 2022, while Mr. Johnson's appeal was pending with the Board, the PACT Act became law. The PACT Act, in pertinent part, expanded the statutory presumption of herbicide exposure to covered veterans who served "in Thailand at any United States or Royal Thai base during the period beginning on January 9, 1962, and ending on June 30, 1976, without regard to where on the base the

Veteran was located or what military job specialty the veteran performed." *See* 38 U.S.C. § 1116(d)(2).

Following the enactment of the PACT Act, and while his appeal was still pending with the Board, Mr. Johnson filed a supplemental claim for entitlement to service connection for diabetes mellitus, bilateral lower extremity peripheral neuropathy, and hypertension. In a March 2023 decision, the RO granted service connection for the aforementioned disabilities based on the newly enacted presumptive provisions of the PACT Act and established an effective date of August 10, 2022, the date of enactment of the PACT Act.

In December 2023, the Board dismissed Mr. Johnson's pending appeal, finding that as the RO had granted the claims in the March 2023 decision, "there remain no allegations of fact or law for appellate consideration on the claim[s]." Mr. Johnson appealed the December 2023 Board decision to the Court, arguing that the Board had jurisdiction over the issue of whether he was entitled to service connection based on herbicide exposure on a non-presumptive basis.

The Secretary, on the other hand, argued that the only outstanding issue in Mr. Johnson's case was the "downstream issue" of the appropriate effective date for the grant of service connection. In making this argument, the Secretary relied on *Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997), and *Holland v. Gober*, 10 Vet. App. 443 (1997), which held that downstream issues, such as establishing an effective date or compensation level, are not considered in claims for service connection. The Court, however, found these arguments uncompelling, noting that Mr. Johnson raised arguments concerning exposure to herbicide agents and entitlement to service connection under the pre-PACT Act provisions.

The Court concluded that these arguments, which remained undecided, "indisputably" related to entitlement to service connection on a non-presumptive basis, and the Court thus concluded that Mr. Johnson was entitled to a Board decision addressing these questions. The Court also noted that accepting VA's argument would require similarly situated veterans to initiate an appeal to have VA address the same issue, which "would result in unnecessary delay, erect hurdles in veterans' paths, and result in a waste of administrative resources." Finally, the Court rejected VA's reliance on *Aviles-Rivera v. McDonough*, No. 2022-2084 (Fed. Cir. June 12, 2024) (nonprecedential per curiam order), which dismissed an appeal as moot in similar circumstances, as the opinion was nonprecedential and provided no analysis or reasoning supporting its dismissal.

The Court instead found that there are two separate and distinct claim streams in Mr. Johnson's case. The first stream stemmed from Mr. Johnson's pre-PACT Act May 2016 claim, which was appealed to the Board and ultimately dismissed as moot. The second stream began in October 2022, after the enactment of the PACT Act, and was granted by the RO based on the PACT Act provisions.

With this framework in mind, the Court held that the RO's grant of the October 2022 appeal stream did not resolve the Board appeal. In reaching this conclusion, the Court relied on *Warren v. McDonald*, 28 Vet. App. 214 (2016), and *Bailey v. Wilkie*, 33 Vet. App. 188 (2021). In *Warren*, a veteran appealed a claim of service connection for sleep apnea to the Board. While the appeal was pending, the RO granted service connection for sleep apnea. In light of the adjudicatory actions by the RO, the Board recharacterized the issue on appeal from entitlement to service connection for sleep apnea to entitlement to an earlier effective date for sleep apnea. However, the Court concluded that the Board erred in recharacterizing the claim, holding that the RO's grant of service connection in a separate claim stream could not resolve the sleep apnea appeal within the Board's jurisdiction. The Court therefore remanded the issue of entitlement to service connection for sleep apnea to the Board.

Similarly, in *Bailey*, the veteran argued that the Board erred in adjudicating a claim for an increased rating for prostate cancer by failing to address whether the veteran was entitled to service

connection for lymphedema as a complication of the veteran's prostate cancer treatment, which the RO later granted in a separate claim stream. *Bailey*, 33 Vet. App. at 193. The Court held that "the RO decision could not and did not divest the Board of jurisdiction over the veteran's initial appeal," and remanded the claim to the Board.

After reviewing the pertinent caselaw, the Court concluded that Mr. Johnson's case shared a key commonality, or as the Court put it a "salient factor," with *Warren* and *Bailey*. Namely, the cases involve situations where there are two distinct claim streams: an original claim stream that was appealed to the Board and was pending adjudication, and a later stream that the RO adjudicated. In *Warren* and *Bailey*, the Court found that the Board failed to adjudicate the appeal properly within its power to review and remanded the cases to the Board for adjudication. The Court concluded that Mr. Johnson's case should be handled similarly to the *Warren* and *Bailey* cases, and it therefore remanded Mr. Johnson's case to the Board so that his pre-PACT Act appeal stream could be fully adjudicated.

The Court additionally held that the Board failed to consider that the PACT Act is a liberalizing law. Generally, where there are multiple theories of entitlement to service connection, if the theories pertain to the same benefit for the same disability, the theories constitute the same claim. *See Roebuck v. Nicholson*, 20 Vet. App. 307, 315 (2006). However, claims based on liberalizing laws are "separate and distinct" from prior claims for the same disability, even where the claim is based on the same fact pattern. *Spencer v. Brown*, 4 Vet. App. 283, 288-89 (1993). As the PACT Act substantively changed the law by expanding the herbicide-exposure presumption to veterans who served in Thailand, it is a liberalizing law.

As applied to Mr. Johnson's case, the Court found that even though his pre-PACT Act claim was still pending, the pre-PACT Act and PACT Act claims were "separate and distinct" claims, as he based his PACT Act claim on a presumptive provision that was not available when he filed his initial claim. The Court thus held that the Board erred in failing to adjudicate the issue of entitlement to service connection for the claims under the pre-PACT Act regulatory scheme.

Robert Glenn is an Attorney Advisor at the Board of Veterans' Appeals. The views and opinions provided are the author's own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. The author is writing in a personal capacity.

Prior To Withholding DIC Benefits, VA Must Provide Adequate and Fair Process, Including Applicable Legal Authority and Proper Accounting

by Charity Rohlfs

Reporting on *Lorio v. Collins*, 38 Vet. App. 120 (2025).

In *Lorio*, the U.S. Court of Appeals for Veterans Claims (the "Court") considered whether the Department of Veterans Affairs ("VA") had legal authority to withhold dependency and indemnity compensation (DIC) payments to prevent concurrent receipt of Survivor Benefit Plan (SBP) benefits prior to the January 1, 2020, rollback of SBP-DIC offsets. The Court found that it was unable to address the issue, as the Board of Veterans' Appeals ("Board") erroneously relied on inapplicable legal authority to support its decision, thus denying fair process. The Court remanded the matter to the Board, requiring the Board to provide the legal authority for the withholding and to provide proper and fair process to Ms. Lorio. Additionally, the Court required the Board to address the impact of the evidence obtained by the Secretary and appended to his brief, as well as conducting a proper accounting of withheld benefits.

Ms. Lorio, the surviving spouse of Army veteran Milton Lorio, began receiving SBP benefits shortly

after Mr. Lorio died in January 1994. SBP provides annuity payments to military retirees' survivors and is partially funded and administered by the Department of Defense (DoD), with the Defense Finance and Accounting Service (DFAS) primarily responsible for managing the program. Originally, SBP required an offset if the surviving spouse was entitled to DIC. Ms. Lorio filed for DIC benefits in February 1994. Effective April 1, 2008, Congress required notice of recoupment of paid SBP benefits if it was later determined to be subject to DIC-SBP offset.

In December 2015, the VA regional office (RO) granted DIC, effective January 1, 1994. Prior to notifying Ms. Lorio of the DIC award, the RO submitted a phone transaction interface Veterans Affairs form to DFAS to request a review of the amount of SBP benefits to prevent overpayment of DIC. In April 2016, DFAS informed VA of an overpayment of $302,188.88. The Court clarified that Ms. Lorio was not paid both benefits. Rather, VA was withholding DIC benefits to prevent overpayment. Following DFAS review, the RO informed Ms. Lorio that her DIC claim was granted in full, but DIC withholding was proper due to prior receipt of SBP. In June 2016, Ms. Lorio appealed the retroactive DIC withholding to the Board, asserting that VA did not provide proper notice of the SBP overpayment and the DIC withholding. In January 2019, the Board remanded the withholding issue and agreed with Ms. Lorio that she was not properly notified prior to VA's withholding of DIC benefits. In October 2019 and January 2020, the Board again remanded, finding that proper notice of and an opportunity to dispute the withholding were not provided and that the RO had failed to comply with the Board remand directives.

In November 2021, the Board found that VA properly withheld and assigned to DoD the $302,188.88 of retroactive DIC benefits to satisfy the SBP overpayment. Additionally, the Board found that VA had authority to assign Ms. Lorio's benefits to DOD to satisfy the SBP overpayment under the Appropriations Clause of the U.S. Constitution and 38 U.S.C. § 5301, that VA properly afforded statutory and regulatory due process as well as fair process, that Ms. Lorio was not entitled to both DIC and SBP payments, that the overpayment was properly calculated, and that waiver through VA was not available, as the debt was to the DoD. Ms. Lorio appealed the November 2021 Board decision. In July 2023, after the November 2021 appeal, Ms. Lorio received an SBP refund check from the Department of Treasury for $12,105, along with paperwork indicating the check was a SBP refund and to direct any correspondence to VA.

Of note, the Secretary provided two documents to the Court that were not part of the Board's record. First, the Secretary appended Ms. Lorio's SBP application to his brief, asserting that this SBP application expressly authorized VA to repay DFAS for any SBP overpayment from DIC benefits, provided notice of withholding of benefits to recoup an overpayment, and that Ms. Lorio's recourse was with DOD if any procedural rights were denied. Second, the Secretary provided a detailed accounting of annuity payments by the branch chief for the Accounts Finalization Team within Retired Military and Annuitant Pay Operations at DFAS, Kara Lauver (hereinafter Lauver Declaration).

Examining the issue of VA's authority to withhold DIC benefits and its impact on due process, the Court found that the Board relied on inapplicable legal authority in withholding Ms. Lorio's DIC benefits and remitting them to DOD to offset SBP payments. The Court observed that the parties agreed that Ms. Lorio filed for SBP benefits in April 1994. The parties disagreed on the importance of the SBP application form as it pertained to Ms. Lorio's understanding of withholdings and procedural rights. The Court explained that the Board should have obtained the SBP application and discussed the relevant provisions of the M21-1 as part of its duty to provide adequate reasons for withholding. Additionally, the Court noted that in July 2020, Ms. Lorio informed VA that she could not find any consent to VA withholding in the record.

The Court reminded the Secretary that it is a court of appeals and must only conduct a review of the

record. Any documents, like the SBP application and the Lauver Declaration (purported accounting of annuity payments including tax consequences), which were not considered by the Board and thus not part of the record before the Court, cannot be reviewed by the Court.

The Court further explained that fair process and notice requires that the Board provide appellants notice and the opportunity to respond to the legal authority and evidence relied on to deny a claim. In this case, the Court detailed that the Board and the Secretary created a problem requiring remand by approaching the issue of fair process differently. Specifically, the Secretary requested that the Court uphold a Board decision based on incorrect legal authority and using new evidence that the Board had not considered. The Court found that Ms. Lorio was not provided notice and an opportunity to respond, yet VA still withheld benefits. The Court stated, it "will not accept that fair process has been afforded to Ms. Lorio where the Secretary urges the Court to 'cross out' most of the Board decision and decide an appeal in his favor based on evidence that was not before the Board and an acknowledgment that the Board did not understand the SBP-DIC offset issue when it rendered its decision to Ms. Lorio." The Court concluded that the Board's error was similar to *Roberts v. McDonald*, 27 Vet.App. 108 (2014) (relying on inapplicable authority deprives reasonable notice and fair process), and warranted remand.

The Court made it clear that VA is obligated to ensure a proper accounting for withholdings. Ms. Lorio asserted that the Lauver Declaration did not address the differing tax consequences between taxable SBP and nontaxable DIC, while the Secretary maintained that the SBP application detailed the recoupment possibilities and that accounting is a DoD function. The Court reminded the Secretary that accounting is a factual inquiry that was still being developed after the appeal and pointed out inconsistences in the DFAS notification timing, withholding amount discrepancies, and disagreement over tax consequence inclusion.

On remand, the Court directed the Board to provide fair process, including notice and an opportunity to respond. To accomplish this, the Board must provide the proper legal authority for the withholding and the process undertaken. Further, the Board must address the newly obtained evidence, i.e., the SBP application and Lauver Declaration, and the importance of this evidence. The Court further directed that a proper accounting be conducted and the Board address the parties' arguments regarding tax consequences. Finally, the Court ordered that the factual and legal issues raised to the Court by Ms. Lorio and the Secretary be addressed.

Lorio provides guidance for cases dealing with DIC withholding by VA. VA must provide adequate and fair process, which includes the proper legal basis or authority for the reduction or withholding of DIC benefits and an opportunity to challenge the reduction or withholding on the proper legal basis. Adequate and fair process also requires accurate accounting by VA, including addressing whether tax implications must be factored into the withholding accounting. Additionally, VA must do more than rely on a signed SBP application from 1994 when asserting adequate and fair process. Remand is appropriate when the Board's decision is based on improper legal authority preventing adequate and fair process. Likewise, on appeal the remedy for a Board decision based on improper legal basis preventing due process and lack of proper evidence, regardless of if new evidence not part of the appellate record and different legal basis are provided to address factual and legal issues raised by the parties, is remand.

Charity Rohlfs is the Chair of the Criminal Justice and Paralegal programs and an Associate Professor at Midland College.

New and Relevant Evidence Required to Readjudicate Claim on the Merits, Regardless of When Supplemental Claim Filed Following an Unfavorable Decision

by Grace Raftery

Reporting *Loyd v. Collins*, No. 22-5998 (Vet. App. May 8, 2025).

In *Loyd v. Collins*, the U.S. Court of Appeals for Veterans Claims (the "Court") affirmed a decision of the Board of Veterans' Appeals ("Board") that denied an application to readjudicate a claim of entitlement to service connection for a left eye disorder based on a lack of new and relevant evidence. The Court held that the law requires that when a supplemental claim is filed following an unfavorable decision of the agency of original jurisdiction (AOJ), the submission of new and relevant evidence is also required before VA may review or readjudicate the merits of a claim, regardless of whether the supplemental claim was filed within a year of the AOJ decision.

In August 1992, the Department of Veterans Affairs ("VA") AOJ granted Mr. Loyd service connection for hypertension. In April 2019, he had a stroke. Three months later, the AOJ granted service connection for a cerebral vascular accident (CVA) secondary to service-connected hypertension.

In August 2019, Mr. Loyd sought service connection for a bilateral eye condition secondary to his CVA. In September 2019, Mr. Loyd underwent a VA eye examination. Based on the examination findings, the AOJ issued a November 2019 rating decision, which granted service connection for a right eye condition but denied service connection for a left eye condition.

In November 2020, within one year of the November 2019 rating decision, Mr. Loyd, through counsel, filed a supplemental claim concerning the November 2019 decision and listed, among other claims, entitlement to service connection for a left eye condition. In December 2020, the AOJ notified Mr. Loyd that his supplemental claim was denied because he failed to submit new and relevant evidence. In November 2021, Mr. Loyd filed a notice of disagreement (NOD) with the December 2020 AOJ decision and selected the evidence submission docket.

In August 2022, the Board issued the decision on appeal, denying readjudication of Mr. Loyd's left eye claim because he had not submitted new and relevant evidence. The Board explained that Mr. Loyd's claim of entitlement to service connection for a left eye disability was previously denied in a November 2019 rating decision on the basis that the disability was neither incurred in service nor caused by a service-connected disability. The Board further explained that Mr. Loyd sought readjudication of the claim in November 2020 but had not provided any additional evidence, argument, or alternative theory of entitlement in support of his claim for readjudication. Therefore, the Board concluded that new and relevant evidence had not been received to warrant readjudication of that claim. Mr. Loyd appealed the Board's denial to the Court.

On appeal to the Court, Mr. Loyd argued that the plain language of section 5104C(a) meant that "regardless of whether the claimant seeks administrative review via a supplemental claim, higher []level review [(HLR)], or review by the Board within [1] year of the RO's initial decision on a claim, it is the *claim*—not the prior decision—that is under review." Mr. Loyd maintained that if a claimant submits a supplemental claim without new and relevant evidence within one year of an unfavorable AOJ decision, that claimant is entitled to the same review procedures as if an NOD had been filed following denial of the initial claim—that is, review of the merits of the claim by the Board. He asserted that his November 2020 supplemental claim and November 2021 NOD were both requests to review the 2019 initial left eye claim. He requested that the Court set aside the Board's decision and remand the

matter for the Board to adjudicate his left eye claim on the merits because he had a right to one review on appeal of the initial denial.

The Secretary argued that the Board's decision was consistent with the statutory and regulatory scheme under the AMA. The Secretary explained that the plain language of sections 5104C(a) and 5108, when read together, meant that "regardless of when a supplemental claim is filed, the Board cannot adjudicate the merits of the claim . . . until it determines new and relevant evidence has been submitted." The Secretary further contended that Mr. Loyd's position ran counter to the AMA's goals because it would require the Board to "unnecessarily address the merits of claims in which it statutorily is not permitted to adjudicate." Finally, the Secretary argued that there was no prejudice because Mr. Loyd could file another supplemental claim and be provided readjudication on the merits as long as he submitted new and relevant evidence, and, if successful on that claim, the effective date of the award would go back to the date of his initial claim if he continuously pursued the claim.

The Court agreed with the Secretary. It started its analysis by summarizing the law as it relates to the AMA, with particular emphasis on the role of supplemental claims. The Court explained that the plain language of the relevant statutes requires the submission of new and relevant evidence in connection with a section 5104C(a) supplemental claim. The Court discussed the concept of continuous pursuit of a claim under the AMA and how supplemental claims fit into that concept. Finally, the Court summarized its conclusions and explained why Mr. Loyd was not prejudiced by the Board's (or even the Court's) decision because he could continue to pursue his claim with no adverse effect on any effective date to which he may be entitled should he be awarded service connection.

Regarding Mr. Loyd's section 5104C(a) argument, the Court concluded that Congress had mandated the approach advocated by the Secretary. The Court found Mr. Loyd's argument to be "entirely divorced from the statutes that Congress enacted." It explained that section 5104C(a) provides three "actions" a claimant can take following an adverse initial AOJ decision, one of which is to file a supplemental claim; but Congress specifically provided that the supplemental claim is one "under section 5108 of this title." The Court found that this language clearly and unambiguously instructed to look to section 5108 for guidance if a claimant chooses to file a supplemental claim.

Turning to section 5108, the Court noted that the statute provides that "[i]f new and relevant evidence is presented or secured with respect to a supplemental claim, the Secretary shall readjudicate the claim taking into consideration all of the evidence of record." The Court read Congress's use of the conditional term "if" to plainly mean that VA must first determine that a claimant has submitted new and relevant evidence before taking action on the supplemental claim on the merits. The Court concluded that, considering the plain language of sections 5104(c)(a) and 5108, "Congress has mandated that when filing a supplemental claim, the claimant must submit new and relevant evidence before the AOJ can review or readjudicate the merits of the claim." The Court rejected Mr. Loyd's interpretation as negating what Congress expressly provided.

Regarding Mr. Loyd's argument that requiring the submission of new and relevant evidence in electing the use of a supplemental claim under section 5104C(a) infringes on his statutory right to one review on appeal, the Court explained that this simply was not true. The Court noted that Mr. Loyd had a "clear right" to seek review of the November 2019 rating decision on the merits, but he chose not to seek such a review and instead chose a different path—filing a supplemental claim under section 5108. When he chose that path, the AOJ was statutorily obligated to issue a decision that addressed whether new and relevant evidence had been submitted to complete the supplemental claim. The Court observed that Mr. Loyd's choice to file a supplemental claim came with advantages, including the opportunity to submit new and relevant evidence to substantiate his claim, but also

disadvantages, including making it more difficult—though not impossible—to obtain a merits review of the November 2019 rating decision. The Court emphasized that VA did not deprive Mr. Loyd of his right to one review on appeal of the November 2019 rating decision but simply respected his *choice* to take a different "action" under section 5104C(a).

Regarding Mr. Loyd's argument that requiring the submission of new and relevant evidence under section 5104C(a) before the AOJ could review the merits of an underlying claim ran contrary to the goals of the AMA, the Court found this argument not particularly persuasive given the clarity of the language Congress provided. Moreover, the Court emphasized that Congress created the AMA to reduce delay and accomplish efficiency-based goals by enhancing a claimant's choices. While not perfect, the situation in Mr. Loyd's case showed how the AMA could work as Congress intended—by allowing a claimant to respond to adverse VA actions in a manner they believe best suits the circumstances of their case.

The Court last addressed Mr. Loyd's argument that his continuous pursuit of his claim through the filing of a supplemental claim within one year of the November 2019 AOJ decision forestalled the finality of that decision. The Court disagreed with this argument on the basis that it misunderstood the concept of continuous pursuit under the AMA. The Court explained that continuous pursuit under the AMA is about preserving an earlier effective date for an award, and it highlighted the fact that the principle is mentioned only once in title 38—in section 5110, which sets forth the general rule for assigning effective dates of awards. The Court therefore indicated that it could not see how continuous pursuit concerned anything more than what Congress said—preserving an effective date. The Court discussed how the legislative history of the AMA supported its conclusion and concluded that it simply could not ignore the "congressional command" that the submission of new and relevant evidence in connection with a supplemental claim is a prerequisite to doing anything with respect to the merits of a claim.

Ultimately, the Court determined that the Board did not err when it only addressed whether readjudication of Mr. Loyd's left eye claim was warranted based on the submission of new and relevant evidence; therefore, it affirmed the Board decision on appeal.

Judge Jaquith dissented, stating that the majority's affirmance of the "uninformative" Board decision and embrace of the Secretary's litigation posture on supplemental claims consideration failed to fulfill VA's assurances to veterans "in favor of a forest of no return that cannot be what Congress intended."

Regarding the majority's conclusion that the submission of new and relevant evidence is required for a supplemental claim to be reviewed or readjudicated, Judge Jaquith noted that there is no statutory or regulatory support for such a limitation on the Board's review. Judge Jaquith noted that supplemental claims had a long history in veterans benefits cases, and that it was therefore unsurprising that Congress defined the term broadly in the AMA. Judge Jaquith noted that the Board is not mentioned in sections 5104C or 5108; rather, the Board's review of AOJ decisions is governed by section 7104(a), which requires consideration of all evidence and material of record. Judge Jaquith determined that in this case, Mr. Loyd, having filed, in succession, a supplemental claim within one year of the November 2019 AOJ decision, and then an NOD in November 2021, "unquestionably continuously pursued his left eye claim." He concluded that Mr. Loyd's appeal to the Board was "not seeking to overcome or vitiate the finality of a prior decision because there [was] not yet a final decision," and that the Board should have considered the merits of his appeal of the AOJ's denial of service connection for his left eye condition.

Judge Jaquith also took issue with the fact that there was "nothing in the winding road of notice VA provided that even hinted that the Board would not review [Mr. Loyd's] whole case and would not consider the evidence that was already part of his case—or that the Board would only address whether the veteran had submitted new and relevant

evidence." He explained that in "a nonadversarial system built on notice and the opportunity to be heard" and "governed by the due process clause of the Constitution," such inadequate and misleading notice was unacceptable.

Judge Jaquith suggested that the Court's holding seemed likely to be the "death knell" for supplemental claims following AOJ decisions. He further observed that the majority's conclusion that there was no prejudice to the veteran because he could always file another supplemental claim failed to appreciate "the realities of VA's system." Ultimately, he thought the case left "the supplemental claim seeking AOJ readjudication as a search too likely to be churning in a forest of no return," quoting from the lyrics of a song from the 1961 Disney musical film "Babes in Toyland" to make the point and helpfully providing a link to a YouTube video of the song.

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

VA Provision of Claims Forms– Paper vs. Digital

by Joan K. Schneider

Reporting on *Ripley v. Collins*, No. 21-0947 (Vet. App. Mar. 24, 2025) (en banc order).

In *Ripley v. Collins*, the U.S. Court of Appeals for Veterans Claims (the "Court") considered en banc whether 38 U.S.C. § 5102(a) requires VA to provide a paper copy of the claim form upon receipt of an intent to file (ITF). The Court held that Mr. Ripley did not have standing to bring the action and that he had not shown that he had exhausted his administrative remedies or that a class should be certified. Thus, the Court indirectly upheld the current VA practice of responding to ITFs with a notice providing information about how to complete the form on the VA website.

In February 2021, the original petitioner filed a petition for extraordinary relief for a writ of mandamus and a request for class certification. In November 2021, after the original petitioner passed away, Mr. Ripley filed a motion to join the present action as the named petitioner to represent the class.

Mr. Ripley submitted his ITF in October 2021, and received a VA response directing him to the VA website several days later. It was VA's practice to furnish a paper copy as soon as a veteran requested a paper copy, and VA did so after Mr. Ripley joined the action.

The Court majority determined that Mr. Ripley lacked standing because there was no injury in fact; a bare procedural violation alone is not sufficient to establish standing; and Mr. Ripley had not shown a lack of alternative means to attain relief. The Court pointed out that Mr. Ripley had not alleged that VA's method of providing forms personally rendered him unable to obtain the required form or be at risk of being unable to apply for VA benefits. The Court referenced the extraordinary nature of a writ of mandamus and declined to find that it was necessary.

Of the nine judges who considered this case, six joined in the opinion, and two dissented, Judges Jaquith and Greenberg.

In the dissent, Judge Jaquith relied on the "inherently transitory exception" to show standing because each individual claim is unlikely to persist long enough for adjudication of the class. The dissent noted that, while Mr. Ripley had been able to obtain a form, there was still an injury in fact because VA failed to provide something promised. It is a benefit for VA to furnish veterans with the necessary forms, saving the veterans time and effort. Judge Jaquith opined that the majority confused

mootness and standing. The dissent also noted that in the proposed class of represented veterans, a significant number lacked internet access and would incur additional cost to travel to a location where they could access the internet. 38 U.S.C. § 5102(a) requires that the claim form be provided "without cost."

Notably, the dissent also included the unpublished draft panel order which would have ordered the provision of a paper claim form under 38 U.S.C. §5102(a) upon receipt of a paper ITF (the order, not just the decision).

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

Court Determines It Does Not Have Jurisdiction Over Board Decision Denying Motion to Aggregate Claims or Certify a Class

by Nancy P. Jones

Reporting on *Skaar v. Collins*, No. 24-5887 (Vet. App. Apr. 29, 2025) (per curiam order).

In *Skaar v. Collins*, the U.S. Court of Appeals for Veterans Claims (the "Court") dismissed an appeal seeking review of a Board of Veterans' Appeals ("Board") decision that denied a motion to aggregate a class of all U.S. veterans who were present at the 1966 clean up of plutonium dust at Palomares, Spain. The Court determined it did not have jurisdiction because the Board's decision was procedural and interlocutory in nature rather than a decision that granted or denied a benefit or addressed an essential element of the claim.

Mr. Skaar is a U.S. Air Force veteran. In 1966, he and nearly 1,400 service members took part in the cleanup of radioactive plutonium dust after two thermonuclear bombs were destroyed in an aircraft accident in Palomares, Spain. He initially filed a claim for benefits in 1998 for leukopenia and skin cancer. After years of appeals to the Court and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), the Court remanded his claims to the Board. In a December 2023 decision, the Board granted his claim for leukopenia and remanded his claim for skin cancer.

The Department of Veterans Affairs ("VA") regional office denied Mr. Skaar's claim for skin cancer, and he appealed to the Board on June 13, 2024. Mr. Skaar then filed a motion with the Board to aggregate a class of all U.S. veterans who were present at the 1966 clean up of plutonium dust at Palomares, Spain. On July 31, 2024, the Board Deputy Vice Chairman issued a "Ruling on Motion" that denied the motion to aggregate because the Board does not have the legal authority to aggregate claims or certify a class of claimants. Mr. Skaar appealed this ruling to the Court.

In his motion to dismiss, the Secretary argued that the Court lacked subject matter jurisdiction because the Board's ruling was not a final decision. More specifically, the Secretary argued that it was a ruling on a procedural matter. Mr. Skaar argued that the aggregation of claims was itself a benefit, and the Board's decision was a dispositive action on that benefit.

In finding that the Board's decision was in fact procedural in nature and not a final appealable decision, the Court relied on its recent decision in *Heller v. McDonough*, 38 Vet. App. 75 (2024) (per curiam order). The Court leaned into its *Heller* analysis, noting that the Board's decision in *Heller* (involving advancement on the docket) did not involve granting or denying a benefit and did not address an essential element of the claim for benefits. The Court further framed the question of jurisdiction on whether VA acted on the underlying benefits at issue. In applying *Heller* to Mr. Skaar's

case, the Court held that the Board's action did not affect entitlement to the benefits sought, service connection for skin cancer. The Board's decision merely ruled on how the case would proceed.

Mr. Skaar argued that the Court's decision in *Cardoza* was persuasive in supporting the Court's jurisdiction over the Board's decision. In distinguishing its holding in *Cardoza*, the Court noted that the Board letter at issue on appeal in *Cardoza* denied the acceptance of the veteran's notice of disagreement, effectively denying Mr. Cardoza's benefit of entitlement to an earlier effective date.

Finally, Mr. Skaar argued that section 20.3(e) defines a "benefit" as "any payment, service, commodity, function, or status" for which entitlement is determined under the laws administered by VA. 38 C.F.R. § 20.3(e) (2024). Based on this definition, the Board's denial of class aggregation was the denial of a benefit that Mr. Skaar should be able to appeal to the Court.

In response to this argument, the Court seemed to rely on its decision in *Dojaquez,* which held that a Board letter informing a claimant that his case is subject to the procedures for contested claims did not constitute a decision on the benefit sought. *Dojaquez v. McDonough*, 35 Vet. App. 423 (2022). To support its analysis here, the Court stated that the *Dojaquez* Court rejected the veteran's argument that the letter conferred a "status" on the claim and therefore constituted a decision on the benefit sought under 38 C.F.R. §20.3.

The Court concluded that it did not have jurisdiction because the Board did not grant or deny a benefit or address an essential element of the claim. Therefore, the Court did not render a final decision over which the Court has jurisdiction. Finally, the Court declined to consider Mr. Skaar's argument under the All Writs Act because Mr. Skaar, through counsel, chose to file a notice of appeal instead of a petition for a writ of mandamus.

In a concurring opinion, Judge Jaquith agreed that the Court should dismiss the appeal because Mr. Skaar did not meet his burden to establish jurisdiction. However, Judge Jaquith expressed concern that the Court unnecessarily shrunk its jurisdiction by focusing its analysis of whether there is an appealable Board decision to instances where VA acted on the underlying benefits at issue. Judge Jaquith pointed out that *Heller* and other cited cases failed to address an important argument presented in this case, that the Court should define "benefit" more broadly as articulated in 38 U.S.C. § 511(a) and 38 C.F.R. § 20.3(e). Judge Jaquith summarized by stating that he did not believe the Court's jurisdiction was limited only to reviewing the Board's denial of claims but concurred that Mr. Skaar had not shown the Court had jurisdiction to review the Board's denial of his class certification motion at this time.

As of the writing of this summary, Mr. Skaar has filed a petition for writ of mandamus and requested a stay of the deadline to file a motion for reconsideration and en banc review pending a decision on the writ. The Court granted the stay. As Judge Jaquith raises valid questions with the Court's definition of "benefits" in contrast to the definition articulated in 38 C.F.R. § 20.3(e), a more robust discussion is warranted.

Nancy P. Jones is a Staff Attorney with The Veterans Consortium. The views and opinions provided are the author's own and do not represent the views of the Veterans Consortium.

Court Considers Standard a DRO Must Follow to Revise Decision to Negatively Affect a Claimant

by Keith M. Krom

Reporting *Westervelt v. Collins*, No. 23-0024 (Vet. App. Apr. 8, 2025).

The U.S. Court of Appeals for Veterans Claims (the "Court") in *Westervelt* reviewed the procedures the Department of Veterans Affairs ("VA") must follow when a decision review officer (DRO) revises a decision to be less favorable to a claimant. When a claimant seeks DRO review of a regional office (RO) decision, 38 C.F.R. § 3.2600(e) authorizes the DRO to reverse or revise the RO's decision on grounds of a clear and unmistakable error (CUE), even if the result is less favorable to the claimant.

Edward T. Westervelt served honorably in the U.S. Army from 2000 to 2004, including a deployment to Iraq. While performing tests on the weapons system of a Bradley Fighting Vehicle, he was standing atop the vehicle with his head close to the gun's barrel when the gun accidentally fired. As a result, he ultimately suffered a traumatic brain injury (TBI) and developed post-traumatic stress disorder (PTSD).

Mr. Westervelt filed a claim for these conditions in 2007. The RO granted service connection for TBI, evaluated at 10 percent, effective November 30, 2007, but denied entitlement to service connection for PTSD. The RO subsequently increased the TBI rating to 70 percent, effective April 21, 2009, making his combined rating 90 percent based on his TBI and other service-connected disabilities.

Mr. Westervelt again sought service connection for PTSD in March 2016. In support of his claim, he submitted a private examiner's opinion wherein the examiner opined that while it was not possible to separate his TBI and PTSD symptoms, it was possible to differentiate the portion of Mr. Westervelt's occupational and social impairment caused by the TBI. Mr. Westervelt underwent TBI and PTSD VA examinations again in May 2017. Both VA examiners opined that it was not possible to distinguish his TBI and PTSD symptoms because they were intermingled disorders.

In a July 2017 rating decision, the RO granted service connection for PTSD with an evaluation of 30 percent, effective March 30, 2016. This award did not affect his combined rating or his monthly compensation.

Mr. Westervelt filed a timely notice of disagreement (NOD) as to the evaluation of his PTSD and selected DRO review. In May 2018, the DRO found that the award of the separate rating for PTSD was CUE because awarding separate ratings for TBI and PTSD amounted to pyramiding. The DRO revised the decision, finding that while entitlement to service connection for PTSD was warranted, the PTSD should be evaluated with TBI, and the DRO continued the assigned 70 percent rating. VA issued a statement of the case (SOC) explaining that the 2017 rating decision's separate evaluation of 30 percent for PTSD was CUE. Mr. Westervelt filed his Form 9, appealing to the Board all of the issues in the SOC. He explained that VA failed to consider the private medical opinion. He also submitted an NOD listing the 2018 DRO decision.

In a 2019 decision, the Board found that Mr. Westervelt's PTSD and TBI symptoms were indistinguishable, making a separate rating for PTSD unwarranted. The Board also denied a rating higher than 70 percent. However, the Board did not discuss the DRO's CUE determination.

On appeal, in a single-judge opinion, the Court found that the Board applied the wrong standard in reviewing the DRO's CUE decision and should have restricted its review to only the evidence that was on file at the time of the 2017 rating decision. On remand, the Board issued the decision at issue, agreeing with the DRO that the assignment of the separate 30 percent rating for PTSD in the 2017

rating decision was CUE because it violated the rule against pyramiding.

Mr. Westervelt submitted another judicial appeal, arguing that the Board erred in conducting a de novo review of the record evidence and in not applying the more restrictive CUE analysis. In response, the Secretary argued that the Board did not reweigh the evidence but rather explained the reasons and bases for its findings. In a single-judge opinion, the Court agreed with the Secretary and in applying the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard of review, found no error.

Mr. Westervelt sought reconsideration or, alternatively, a panel decision suggesting that the standard the Court applied was not the correct standard for VA-initiated CUE determinations. The case was referred to a panel, which sought supplemental briefing on the correct standard to be applied for VA-initiated CUE determinations. After new counsel entered appearances for Mr. Westervelt and the Secretary, both parties argued that answering the question of which standard should apply is not necessary because the Board should not have addressed CUE in the first place.

In his supplemental brief, Mr. Westervelt argued that the Board lacked jurisdiction to review the DRO's CUE determination since the NOD was filed in response to the 2017 denial of a rating higher than 30 percent for PTSD, making the PTSD rating the sole issue on appeal. However, on the eve of oral argument, he argued that the 2018 DRO decision was a new decision that, as a matter of law, replaced the 2017 rating decision, thereby ending the appeal of the 2017 rating decision. Mr. Westervelt argued that the NOD submitted to the 2018 DRO decision initiated a separate appeal that obligated VA to issue an SOC, and since no SOC was issued, the appeal remains pending. In response, the Secretary argued that the DRO's CUE determination was not on appeal because the DRO decision revised the 2017 rating decision granting service connection for PTSD with TBI with a 70 percent evaluation, as of the date it was issued. The Secretary argued that since Mr. Westervelt did not raise CUE or the DRO's determination in his Form 9, the Board was not required to address CUE.

In its latest decision, the Court found that Mr. Westervelt's 2018 NOD form did not initiate a new appeal because, as the Court has long held, a claimant need not file an NOD to a DRO's decision to continue the appeal or prevent finality. Here, VA issued an SOC after the DRO decision. The Court held that based on the Board's established duty to address all material issues of fact or law before it, whether raised explicitly by a claimant or reasonably raised by the record (citing 38 U.S.C. § 7104(d)(1) and *Robinson v. Peake*, 21 Vet. App. 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009)), the record showed that the issue of the DRO's CUE determination was before the Board. In response to Mr. Westervelt's argument that since his 2017 NOD was filed in response to his being denied a separate rating greater than 30 percent that only an SOC addressing that specific issue would be valid, the Court disagreed and held that when the DRO revises a prior RO decision for CUE, it is effective as of the date of the original erroneous decision. Mr. Westervelt's NOD expressed disagreement with his rating for PTSD. The DRO's decision merely recharacterized the issue.

The Court ruled that the Board's decision was incomplete because the Board failed to address the propriety of Mr. Westervelt's PTSD rating, which was specifically raised by the 2017 NOD. The Court remanded the case for the Board to assess all issues before it, including whether there was CUE in the 2017 rating decision and to conduct a de novo review of Mr. Westervelt's entitlement to a higher rating for his PTSD. The Court found those two issues inextricably intertwined and emphasized that the Board's ultimate conclusions could impact or obviate the need for the Court to review the Board's CUE findings.

The Court also found that Mr. Westervelt's additional arguments—specifically, that the DRO improperly revised the 2017 rating decision because CUE is only initiable against final decisions and that

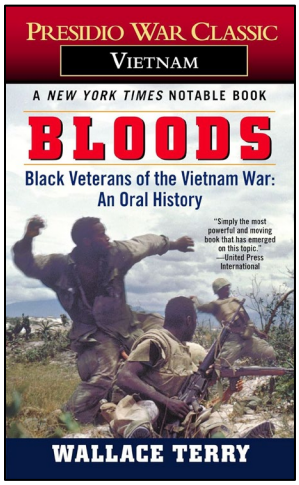
VA failed to afford him his procedural rights under 38 C.F.R. § 3.105(e)—were rejected by the Court's holding in *Young v. Wilkie*, 31 Vet. App. 51 (2019). There the Court held that 38 C.F.R. § 3.2600 expressly provides for CUE-based revision of non-final decisions and that the procedural protections in 38 C.F.R. § 3.105(e) do not apply when a DRO revises a prior decision to be less favorable.

Because the Court ordered the Board to conduct a de novo review of Mr. Westervelt's entitlement to a higher evaluation for his PTSD, it never addressed the merits of the DRO's CUE determination. The Court also left to a future case the determination of what standard of review should apply in cases of VA-initiated unfavorable CUE proceedings.

Keith M. Krom is Senior Staff Counsel at The Veterans Consortium Pro Bono Program.

Book Review of *Bloods: Black Veterans of the Vietnam War: An Oral History*, by Wallace Terry

Review by Holly L. Christian



Presidio Press, New York City, 2006, $8.99 (paperback). 301 pages.

Bloods is a powerful first-hand account of the first Black Marines in Vietnam, often referred to as "bloods." The book weaves together stories straight from mouths of these Marines, oscillating between important historic and cultural context through heartbreaking introspection and details of jaw-dropping events.

The author, Wallace Terry, beautifully paints a picture of the last military branch to fully integrate, with each veteran's story as a different brush stroke. Terry depicts the entire servicemember experience through these first-hand accounts, from being drafted and fighting racism from fellow marines in bootcamp, to experiencing devastating losses and moral injury in Vietnam, through their return to a country upturned by war and racial tension during the Civil Rights Movement. The author takes his time with each chapter, focusing on a different veteran, their experience, and their story over 20 chapters.

What began as a *Time Magazine* cover story on the role of the Black soldier in Vietnam grew into, as the author puts it, "the story of the sacrifice of such young black men and others in the rice paddies of Vietnam, 10,000 miles from the heartbreak of American poverty and discrimination and injustice."

Terry begins with an introduction that centers the reader in the context of Vietnam-era America, where Black Americans made up 11 percent of the U.S. population and 23 percent of combat fatalities in the early years of the Vietnam War. This leads into a discussion of the public outrage, personal struggles, and particularly cruel treatment faced by Black Vietnam veterans returning home. Black veterans faced double the rate of unemployment than white veterans after the war. As Private First Class Reginald "Malik" Edwards accounts, "I had left one war and come back and got into another one."

After the introduction, readers are thrown into vignettes of the lives of various Marines, changing each chapter. In a particularly intense chapter, Specialist Harold "Lightbulb" Bryant describes how a proud Ku Klux Klan member within his unit

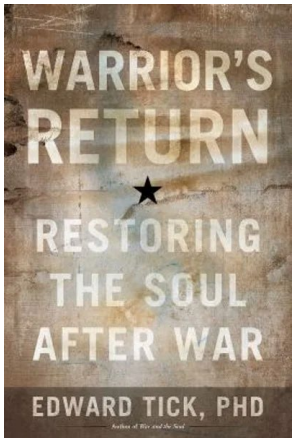
proclaimed that he "changed his perception of what black people were about" when a Black Marine dragged him to safety after being trapped during a firefight in the rice paddies of Vietnam. This devastatingly common and connecting experience of racism and discrimination is evidenced in every story told throughout the book, regardless of whether the servicemember was enlisted or an officer, drafted or recruited, stationed stateside or deployed overseas. As the author states, "[t]he loyalty of the black Vietnam War veteran stood a greater test on the battleground than did the loyalty of any other American soldier in Vietnam; his patriotism begs a special salute at home."

This book serves as a special salute and would make an impactful and insightful read for veterans, veterans' advocates, Vietnam history enthusiasts, or anyone who seeks to gain an understanding of the Black veteran experience during the Vietnam era. *Bloods* would be appropriate for optional or recommended reading for college or law students studying the Vietnam War, military or veterans law, or related history subjects, especially for cultural context. Readers should be aware that the author does not censor the stories of these Marines, so details about death, injury, and sexual assault are included throughout the book. Although difficult to read at times due to the heavy nature of the topics covered, this is an important and true account of "bloods," the Black veterans of the Vietnam War.

Holly L. Christian is an assistant professor of law and director of the Veterans Law Clinic at the University of Detroit Mercy School of Law.

Book Review of *Warrior's Return: Restoring the Soul After War*, by Edward Tick, Ph.D

Review by Hannah W. Katz, J.D.



Sounds True, Boulder, CO, 2014. $19.99 (hardcover). 261 pages, excluding notes.

Dr. Edward Tick is a holistic psychotherapist, educator, and consultant who has been working to heal the invisible wounds of veterans for decades. Dr. Tick is a cofounder of the nonprofit Soldier's Heart, Inc., with his wife, Kate Dahlstedt, which offers homecoming, reintegration, and post-traumatic growth to veterans and their families. He is also the author of other books dealing with psychological healing. For more information about Dr. Tick, visit soldiersheart.net.

"War wounds are inevitable," Dr. Tick explains in his profound, gritty, and painstakingly authentic book, *Warrior's Return*. Dr. Tick authored *Warrior's Return* to provide a comprehensive, healing approach to those treating invisible war wounds in veterans and their families. It is written so that family members, caregivers, and returning veterans can better understand how combat affects the warrior's healing. It is worth noting that Dr. Tick uses rather complex and scholarly language

throughout the book, which may not be accessible or understood by all readers.

The first part of *Warrior's Return,* "The War After the War," explores the archetype of the warrior, the types of feelings (or non-feelings) warriors endure, traumatic manifestations of those feelings, and the impacts invisible wounds have on warriors and their families. In this section, Dr. Tick tells of veterans who draft poetry, become numb from killing, return to empty homes, and suffer from depression and PTSD. He also highlights the unfortunate reality that some soldiers, after returning home, may never heal—sometimes succumbing to suicide or wrongful death. Part two, "Bringing Our Warriors Home," contemplates the necessary skills that caregivers should implement while assisting in the healing and reintegration of warriors. This section focuses on the developmental tasks that must be taken at each step of the warrior's transformation, particularly by restoring "social disorder" through community participation.

Although *Warrior's Return* is frequently emotional, a particularly impactful part of the book is Dr. Tick's explanation of how civilians often misunderstand the role of the warrior and the nature of his or her acts. Pointedly, Dr. Tick points out that a warrior's actions, while "protect[ing] us[,] simultaneously counteract our most cherished civilian values[.]" This conflict raises an interesting moral divide between the warrior and the civilian, which caused me to contemplate what the civilian's role is: a person still in need of protection, or a moral equal, prone to judge a warrior's indiscretions. Further, Dr. Tick explains how veterans are most likely to trust those who "get it"—people who have been in a kill-or-be-killed situation and are forever changed by that encounter. According to Dr. Tick, warriors may not trust even the "best-intentioned helpers" because, without personal experience, they will never fully understand the world of combat the way a warrior does.

Those who read *Warrior's Return* may find that Dr. Tick has identified effective, holistic means to heal warriors' invisible wounds. One of the primary ways to restore the warrior soul, he writes, is to encourage the warrior to pour out his or her haunted secrets and traumas—a difficult task. Therefore, I would recommend this book to anyone seeking to assist veterans with invisible wounds. This book is especially recommended to healers who struggle with insecurities in their treatment methods or an inability to fully empathize with warriors.

Hannah W. Katz is a graduate of Penn State Law and a judicial clerk for the Honorable Michael J. Koury Jr. at the Northampton County Court of Common Pleas in Pennsylvania.

My Brother's Keeper: In Search of a Simple Solution to Prevent Overpayments to Fiduciaries of VA Beneficiaries

by Anna Kapellan

I am a slow walker, but I never walk back.
– Abraham Lincoln

"As flies to wanton boys are we to th' gods," lamented the Earl of Gloucester in Shakespeare's *King Lear*. Regretfully, some VA fiduciaries end up sharing this somber sentiment even though the intentions of VA's fiduciary program are undisputably noble. Positioned at the intersection of VA law, common law, and probate law, the VA fiduciary program is complex. But being merely people, VA fiduciaries struggle with the complexities of the VA fiduciary program, and technology and accounting issues often exacerbate their struggles.

Admittedly, to prevent fraud, VA needed to create a fiduciary program that had to be at least somewhat complex.[1] However, when fraud is absent, the intricacies of the VA fiduciary program might strike an independent observer as unnecessarily complex. Indeed, while collecting a $500,000 debt might be worthy even if the process costs $150,000, collections

of ten $50,000 debts are far less attractive if each individual collection process costs $49,000 and takes years, and the task of collecting 100 of such $5,000 debts is facially not worthy if each collection process costs $6,000, even though the combined amount of such 100 debts is still the same $500,000. Accordingly, the most effective methods to reduce the unfortunate incidence of overpaying taxpayers' funds might not necessarily be those that involve complex, often less-than-intuitive online application programs because simple preventative steps might yield, at least temporarily, a better solution if these simple steps are tailored to the key characteristics of VA's typical actors. Regretfully, this basic principle of behavioral management, reiterated by such titans as J.B. Watson, H. Fayol, G.E. Mayo, F.W. Taylor, H.L. Gantt, F.B. Gilbreth, and P.F. Drucker,[2] might have been overlooked when VA modernized its system of reporting requirements applicable to VA fiduciaries.

While incapacity to administer one's financial affairs could strike a person at any age, it is a fact of life that such incapacities become more frequent as people grow older, and the statistical ages of VA beneficiaries feed this concern. In 2023, veterans comprised only 3% of the U.S. population under 35 years old, but they were 8% of the 35-to-54-year-olds, 13% of the 55-to-64-year-olds, 24% of the 65-to-74-year-olds, and a whopping 42% of those who were 75 or older.[3] Thus, while no statistical analysis has been conducted as to the age of those in need of VA fiduciaries, it is logical to presume that the bulk of fiduciary services are needed to assist elderly VA beneficiaries. The same logic dictates that not only the spouses of such beneficiaries but also their siblings and friends are elderly, and even their children are unlikely to be spring chickens.

These elderly and aging groups comprise the bulk of VA's current fiduciaries because of VA's order of preference when appointing VA fiduciaries. The preference begins with the spouses of beneficiaries, then progresses to other relatives (mainly, siblings and children since parents of such beneficiaries are often deceased and grandkids rarely have the time or ability to act as fiduciaries due to studying in colleges, building their careers, caring for their own small children, and often residing hundreds of miles away from their helpless grandparent-beneficiaries). Thus, only if none of the aforesaid options is available, VA turns to commercial fiduciaries rendering service en masse.[4] The rationale of VA's order of preference is financially understandable: commercial fiduciaries are paid for their service by a fee of up to 4% of the amount of the benefits that they are administering.[5] In addition, VA's order of preference is relatable emotionally and legally since it derives from the Latin concept of *jus tertii*.[6] However, the upshot of VA's order of preference is the fact that the segment of the population most commonly acting as fiduciaries is composed of 50-to-75-year-olds who did not grow up with a laptop or a cellphone in their hands. A very tiny percentage of them are CPAs, MBAs, or financial auditors,[7] and an even smaller share has familiarity with the thickets of VA law or states' probate law.[8] Thus, many current VA fiduciaries who encounter VA's online accounting system, titled "FAST" and launched in August 2000,[9] feel paralyzed rather than "fast" because the system poorly fits the needs of elderly VA fiduciaries with minimal financial literacy.

Correspondingly, such fiduciaries prefer to invest their time and energy into care for their beloved VA beneficiaries and avoid grappling with accounting and legal information. The psychology of such avoidance is understandable since fiduciaries tend to be certain that—if they were to act in good faith—sooner or later all the reporting requirements would somehow sort themselves out on their own. Unfortunately, the realities of bureaucracy rarely, if ever, take care of themselves. And when fiduciaries are bewildered and contact VA for help, VA representatives often can offer only limited assistance since the representatives seek answers from VA manuals that focus on fraud prevention and do not address good faith confusion.

Therefore, it is hardly surprising that well-meaning fiduciaries, if elderly and untrained, make mistakes. VA, however, often responds to these mistakes by simply reclaiming overpayments without analyzing

the complex relationship between the habits of elderly fiduciaries and the complex reporting systems VA utilizes. Perhaps, if VA would take temporary measures to simplify the system, VA would be able to not only avoid causing unnecessary distress but also save taxpayer dollars from overpayments.

An overpayment of VA benefits might arise from a myriad of scenarios. However, negative impacts of those overpayments that implicate fiduciary services are most often associated with the beneficiaries who are VA pensioners. Short of a handful of incidents of brazen fraud or bad faith, most such pensioners become overpaid due to circumstances that, to a layperson, appear benign and unlikely to trigger overpayments. Indeed, VA pensioners have a relatively small amount of liquid assets, and their monthly incomes are either nonexistent or very modest since they fall below the maximum annual pension rates (MAPRs). Therefore, overpayment debts of such beneficiaries typically arise in three scenarios: (1) a beneficiary is moved from a nursing home to a private residence; (2) a beneficiary sells his/her place of residence to move to a nursing home; and (3) a beneficiary who had been awarded a VA pension applies for Social Security Administration (SSA) benefits and has his/her fiduciary appointed while the SSA is processing the request.

The point unifying these three scenarios is that the VA pension scheme is a financial counterpart of John Rawls's veil-of-ignorance theory.[10] An entitlement to a VA need-based pension requires a showing that the applicant's assets are below the capping maximum. In addition, an entitlement to a VA pension turns on the calculation of the pension amount. The calculative process requires a reduction, on a dollar-for-dollar basis, of the applicable MAPR by the amount of pensioner's family's non-VA income. However, that non-VA income must first be decreased by the amount of the pensioner's family's unreimbursed medical expenses downwardly adjusted by 5% of the MAPR. Hence, if a pensioner's family's non-VA income is $0 (or his/her non-VA income is fully offset by his/her unreimbursed medical expenses adjusted by 5% of MAPR), and his/her assets fall within the set limit, (s)he could receive a VA pension equal to his/her entire applicable MAPR. In contrast, if the pensioner's non-VA income reduced by the so-adjusted unreimbursed medical expenses is, e.g., $1 less than MAPR, then his/her VA pension is $1.

Moreover, if a pensioner's assets are above the limit set for the year at issue, the amount of his/her non-VA income would not matter, and (s)he would be required to keep spending his/her own assets in good faith until the asset amount falls below that limit.[11] Critically, the same rules apply to VA pensioners awarded VA need-based pensions. This explains the genesis of the three above-noted most common scenarios where VA beneficiaries are overpaid while in the care of fiduciaries.

The first scenario derives from the unfortunate fact that, nation-wide, nursing facility care is typically so expensive that its costs, qualifying as unreimbursed medical expenses, fully offset a VA pensioner's non-VA income even after these costs are reduced by 5% of MAPR. However, VA pensioners who become incapable of managing his/her finances often have his/her child appointed as the fiduciary. Upon the appointment, the child often moves the pensioner to the child's home to provide nursing-home-like care. Unfortunately, left unnoticed in this scenario is the fact that the costs of the nursing facility disappear on the last day of the month when the beneficiary moves into the house of his/her fiduciary-child. With that, the offset of the pensioner's non-VA income reduces to the costs that were paid during those months that were spent at the nursing facility during the year at issue. Thus, if a VA pensioner moves out of a nursing facility at the beginning of the year, this offset tends to be rather small. Correspondingly, by the end of the year, this small offset is often insufficient to reduce the pensioner's non-VA income enough to prevent an overpayment. This is why it is critical for the pensioner and his/her fiduciary to notify VA immediately. However, the complexities of the reporting process disincentivize the fiduciaries.

Correspondingly, fiduciaries keep putting the task off without realizing that they are increasing the debts of their beloved beneficiaries every month. By the end of the year (or, sometimes, a few years down the road), when VA finally learns that the beneficiary no longer has those unreimbursed medical expenses arising from the nursing home residence, it is way too late. Therefore, the beneficiary not only loses his/her VA pension but is also charged with a debt. With that, his/her fiduciary ends up caring for the now-former beneficiary on the fiduciary's own dime, all while litigating the beneficiary's overpayment debt.

The second scenario is a mirror-image of the first since it involves moving to a nursing home. In such a scenario, the health of a VA pensioner typically deteriorates to such a degree that (s)he sells his/her house and enters a nursing home, while his/her still-independently living spouse rents a place to live and becomes the VA pensioner's fiduciary. Usually, the proceeds of the sale of their house are intended to operate as the nest egg for the still-independent spouse who hopes to initially use a portion of the nest egg to pay his/her rent and then use the remainder for a nursing home for himself/herself when his/her own health deteriorates. However, the impact of these seemingly benign changes is devastating.

The proceeds of the sale of the house convert into the VA beneficiary's assets since his/her home was excluded from the asset count while the pensioner was residing there with the now-fiduciary spouse. In contrast, the proceeds of the sale know no such exclusion. Therefore, the pensioner ends up not entitled to any future VA pension until these proceeds become sufficiently reduced, effectively leaving the still-independent fiduciary-spouse with nothing but small leftovers of his/her now-scrambled nest egg.

The third scenario, where SSA benefits follow an award of VA pension, is even more common. The sequence of VA-pension-first-then-SSA-benefits often includes an appointment of a VA fiduciary (typically, the pensioner's child) wedged between two events: it comes after a VA pension was already awarded and after the pensioner applied for SSA benefits but before the SSA benefits became payable. However, since fiduciaries are not involved in the process of filing the claim for the beneficiary's VA pension or for SSA benefits, they operate on the understandable presumption that all recalculations of VA pension in light of SSA benefits had already been done. Therefore, they do not report the onset of SSA payments and become bewildered when they receive VA's notification letter showing that their beneficiaries were overpaid. And, same as in the two prior scenarios, this overpayment is not recoupable from a future VA pension: there is no future VA pension for at least a period of time, if not forever.

Needless to say, any additional factual wrinkles make these three scenarios even more complex. For instance, if an incapacitated elderly VA pensioner gets married so not to spend his/her last years alone, and the spouse's child assumes the role of a fiduciary, the child rarely realizes that (s)he must now report to VA any income that the child's parent makes. However, this parent's salary, unemployment benefits, SSA benefits, etc. qualify as the VA pensioner's family's income. Accordingly, the failure to report necessarily yields an overpayment (unless such a parent's unreimbursed medical expenses, adjusted by 5% of the pensioner's MAPR, fully offset such a parent's income from all sources).

And, as if the foregoing were not complex enough, in all these scenarios, VA issues proposal and final action notices to the fiduciaries while charging the VA pensioners-beneficiaries with debts, keeping this financial duality until the beneficiary passes away. Once the beneficiary dies, VA qualifies the fiduciaries as persons materializing the estates of deceased VA beneficiaries. Moreover, VA manuals offer VA officers very limited guidance as to how to navigate the universe of probate laws that are unique to every U.S. state. Indeed, because VA manuals are not meant to be hornbooks on probate law, these manuals focus on the claims of deceased claimants (that, sans substitution, extinguish upon

death). However, actions for collection of a debt do not cease upon the debtors' death because VA, a juridical entity, exists in perpetuity. Therefore, while there is a possibility that debtors' estates exist, VA's actions for collection must endure.

This, in turn, prompts VA to keep sending demand letters to the fiduciaries of deceased VA debtors due to VA's belief that at least some form of estates of these debtors should exist and that a collection from such estates is feasible. However, the reality is often to the contrary. In many U.S. states, if the beneficiary owned no real estate at the time of death, and the remainder of the estate was valued below $100,000 (or, in some U.S. states, below $50,000), no probate is required, and the decedent's heirs simply distribute the estate upon obtaining a small estate affidavit. In other words, VA manuals that recommend VA officers to monitor probate courts for issuance of letters of testamentary and letters of administration misdirect the efforts of VA officers since such letters might never be issued. Moreover, even if the letters are issued, the fiduciary of the deceased might not be the administrator or administratrix or the executor/executrix of the estate.

In fact, the fiduciary might not even be a beneficiary of the estate. And, to top it off, the assets of an estate might be distributed without any estate ever coming into existence. This scenario arises when the deceased's assets are subject to distribution under quasi-testamentary instruments, such as payable-on-death and transfer-on-death accounts, IRAs, 401(k)s, and annuities (if they bear a beneficiary designation), tenancies by entirety and joint tenancies, including joint bank accounts, as well as such postmortem vehicles as trusts, life insurance policies, and so on. When VA hits such roadblocks, VA's strategy often reduces to peppering the now-former fiduciaries with demand letters, essentially hoping that the fiduciaries would become unnerved and repay the deceased beneficiaries' debts just to stop the constant stream of VA demand letters.

However, the usual result of this unfortunate strategy is the scores of fiduciaries' appeals to the Board that are accompanied by heartbreaking lay statements and pleas for waivers of the recoupment of these debts. Unfortunately, the elements of the equitable waiver analysis do not lend themselves to a scenario where VA qualifies a fiduciary of a VA debtor (or a former fiduciary to a deceased VA debtor) as an actual debtor to VA.

The "equity and good conscience" standard applicable to the waiver analysis recommends assessing such considerations as whether the debtor's fault is outweighed by VA's fault in terms of causing the creation of the overpayment (the balance-of-fault element), whether his/her failure to make restitution would result in unfair gain (the unjust-enrichment element), whether the debtor has changed his/her position for the worse in reliance on the VA benefits (the reliance element), whether the recoupment would deprive him/her of basic life necessities, such as basic food, shelter, and clothing (the financial-hardship element), and whether the recoupment would nullify the objectives of VA benefits underlying the award (the nullification element), etc.[12]

However, it is dubious at best that a fiduciary can be faulted for, e.g., a VA pensioner's receipt of SSA benefits if the pensioner had applied for SSA benefits before the fiduciary was appointed. Analogously, it is hard to fault a fiduciary-spouse (of a VA beneficiary who sold their house to enter nursing home care) for failure to report the proceeds of the sale because the house was exempt from the calculation of assets while the VA pensioner and his/her spouse-fiduciary used to reside there (often, for decades). The same applies to a child who becomes a fiduciary and removes his parent-beneficiary from a nursing home facility. Indeed, such a child often does not know that (s)he is required to report not an income but a reduction in expenses because, financially, these two concepts have the same effect.

Moreover, in a fiduciary scenario, the waiver inquiry becomes absurd when an adjudicator reaches the

typically misunderstood element of unjust enrichment. This element inquires whether the debtor was the one who received/made use of the funds at issue or whether the funds were usurped and spent by an unrelated third party.[13] However, in a fiduciary setting, the person technically "enriched" by the funds is the VA pensioner (unless the fiduciary misappropriated the funds). It would require quite a stretch of imagination to conclude that a VA beneficiary (the very person who was incapable of making any decisions as to his/her enrichment) was "unduly enriched" by, e.g., eating an extra slice of pizza or an extra topping on a hamburger that the fiduciary fed him/her. By the same token, it is also a stretch to conclude that this fiduciary was "unduly enriched" by feeding the beneficiary that extra slice of pizza or that extra topping on the hamburger.

A fortiori, if the funds at issue were used for care-related purposes, it would be anomalous to find that a postmortem estate, that is, a juridical entity, was "unjustly enriched." Not a penny was added to the estate as a result of the actions taken in vivo by the now-deceased beneficiary, e.g., the estate could not have been "enriched" by the deceased eating an extra slice of pizza.

The reliance element looks at whether the debtor gave up any opportunities or incurred any incrementally payable non-VA obligations (other than revolving credit obligations, e.g., credit cards, since active credit cards are not true incrementally payable obligations) while acting in bona fide reliance on the stability of his/her VA stream of income. However, the reliance element is also facially inapplicable to an incapacitated debt: the very fact that the debtor was placed in fiduciary care implies his/her inability to make any financial-reliance decisions. Analogously, the reliance element is inapplicable to the fiduciary since a noncommercial fiduciary typically performs services for free (unless she is paid an aid-and-attendance fee). Therefore, the fiduciary could not possibly rely on the stream of income that was not coming: none was coming. And it goes without saying that the reliance element is inapplicable to an estate since a postmortem estate was not even in existence at the time when the funds at issue were disbursed.

In the same vein, the inquiry into whether the recoupment of a debt would cause financial hardship to the estate of a deceased beneficiary (in the sense that the estate of the deceased would be denied food, shelter, clothing, and other basic life necessities) turns the waiver analysis into a mockery of VA law. To top it all off, the same applies to the nullification element since the goal of the VA benefits program, including the goal of a VA need-based pension, is to offer VA beneficiaries a minimal lifestyle comparable to that of a median person residing in his/her community. However, this standard, by definition, cannot apply to a fiduciary and, *a fortiori*, to the estate of a deceased beneficiary since the wealth and lifestyles of fiduciaries and the "health" of the estates are not matters that VA law could concern itself with.

In sum, for all practical purposes, a waiver request filed by a fiduciary, either on his/her own behalf or on the behalf of the estate, is likely to be denied. With that, an overpayment to an incapacitated beneficiary in fiduciary care could have only two outcomes. Both outcomes are unfortunate. In the first outcome, the incapacitated beneficiary temporarily or permanently loses his/her VA pension and might even be discharged from his/her nursing facility literally onto the streets. In the second outcome, the debtor's fiduciary assumes a heavy financial burden and spends years litigating the debt until the beneficiary dies and—upon recasting the fiduciary into a personification of the estate—VA would finally write this debt off, de facto charging the debt to taxpayers.

Hence, the need for a simple solution preventing overpayments to fiduciaries cannot be overstated. Indeed, like many VA programs, the noble program of VA fiduciary care is publicized predominantly by word of mouth, and every story about a bad fiduciary experience only increases the shortage of persons willing serve as VA fiduciaries.

Given that the VA fiduciary system contemplates an often-petrifying-to-an-average-fiduciary end-of-year accounting via VA's online FAST system, and the system requires uploading a slew of financial documents in addition to completion of a maze of online pages, it is time for VA to retailor the process of fiduciary reporting by correlating it to the capabilities of VA's *current* audience. This audience consists of those fiduciaries who are 50 and older and who do not excel at finance, accounting, law, or IT.

Therefore, a basic check-the-box form, available in hard copy and online, might be an easy temporary solution preventing life-tormenting debts and years of litigation. Moreover, such a basic form could direct fiduciaries to VA pensioners (as well as independent pensioners) to file a *monthly* or, at the very least, a *quarterly* report, i.e., to simply list all of the pensioner's family's monthly non-VA income (including the spouse's salary, unemployment and SSA benefits), his/her family's new assets (including those resulting from a sale of the real estate that used to be the pensioner's place of residence), and all monthly changes in the family's unreimbursed medical expenses (including commencement or termination of residence in a nursing home). If nothing else, a mere filing of such a form would truncate the debt period, thus leading to a substantial reduction of the recoupable portion of the debt under 38 U.S.C. § 5302B(a)(B), as elaborated in VBA's Temporary Timeliness Instruction (Dec. 22, 2023). And, in the event VA officers promptly act on these reports, such a form would lead to significant reductions in written-off funds while imposing smaller or less frequent debt obligations on VA pensioners in fiduciary care.

While there is no doubt that the FAST application will eventually be widely used, the application is ahead of its time since VA's current fiduciaries are battling the generational gap and need the comfort of familiar, simple tools that they can use with ease. After all, Shakespeare's Friar Laurence noted well over 400 years ago, "Wisely and slow; they stumble that run fast," and some words of wisdom are eternal.

Anna Kapellan is a counsel to the Board of Veterans' Appeals with the Specialty Case Team, Overpayment and Waiver Group. The views and opinions provided by Ms. Kapellan are her own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States; rather, Ms. Kapellan is writing in her personal capacity. *She would like to thank Professor Judy A. Clausen, the Legal Skills professor and director of the Veterans and Servicemembers Legal Clinic at University of Florida, for thoughtful comments and editing.*

[1] FIDUCIARY PROGRAM MANUAL (FPM), pt. I, ch. 1, § A; FPM, pt. I, ch. 4, § C.

[2] John Broadus Watson was the founding father of behaviorism, a school of psychology emphasizing observable behavior and rejecting introspection as a valid method of study. Henri Fayol was the founding father of the modern management theory that identified stages and functions of management, i.e., planning, organizing, commanding, coordinating, and controlling, and key principles of effective management, such as division of work, authority, responsibility, and discipline. George Elton Mayo pioneered the studies of human relations as social and psychological factors that affect the workplace. Frederick Winslow Taylor, in turn, pioneered scientific management that he defined as a systematic approach to improving efficiency and productivity. Henry Laurence Gantt developed the renowned Gantt chart, a visual project management tool, and advocated for motivation of employees through incentives. Frank Bunker Gilbreth pioneered the studies of how to reduce the negative impact of monotonous tasks that breed inefficiency and fatigue. Peter Ferdinand Drucker was a true visionary who transformed the field of management by focusing on human-driven enterprises and management by objectives.

[3] *Percentage of the U.S. Population Who Were Veterans in 2023, by Age and Gender*, STATISTA, https://www.statista.com/statistics/250366/percentage-of-us-population-who-are-veterans/ (last visited May 29, 2025).

[4] 38 C.F.R. 13.100(e) (2024).

[5] 38 C.F.R. 13.220(b)(1) (2024).

[6] The concept of "next friend" was elaborated upon by the Supreme Court in *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990), where the Court observed that "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf [(s)he acts, and, therefore, the] 'next friend' must have some significant relationship with the real party in interest."

[7] *Accountants & Auditors*, DATAUSA, https://datausa.io/profile/soc/accountants-auditors (last visited May 9, 2025).

[8] *Estate Lawyers & Attorneys in the US-Number of Businesses (2004-2029)*, IBISWORLD, https://www.ibisworld.com/united-states/number-of-businesses/estate-lawyers-attorneys/4807/ (last updated Sept. 2024).

[9] *Fiduciary Accountings Submission Tool (FAST)*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/fiduciary/fiduciary_FAST.asp (last updated May 9, 2025).

[10] *Veil of Ignorance*, UNIV. OF TEXAS, https://ethicsunwrapped.utexas.edu/glossary/veil-of-ignorance (last visited May 9, 2025).

[11] *See, e.g.*, *Past Rates: 2019 VA Pension Rates for Veterans*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/pension/veterans-pension-rates/past-rates-2019/ (last updated Nov. 6, 2024) (from 12/1/2018 to 11/30/2019, the limit was $127,061).

[12] 38 U.S.C. § 5302; 38 C.F.R. § 1.965(a) (2024).

[13] *Cf. Shephard v. Shinseki*, 26 Vet. App. 159, 162, 167-68 (2013). In *Shephard*, upon the veteran's release from confinement, she testified that her former spouse had declared bankruptcy after withdrawing and spending the entire $63,749.21 that VA had erroneously deposited into their joint bank account, hence leaving the veteran solely with the debt and without an opportunity to have any benefit of VA deposits. The veteran had repeatedly notified VA that she was unable to remove her former spouse from their joint bank account while being held in confinement, and he ignored her many requests not to withdraw VA funds.

If you are interested in contributing to the Veterans Law Journal, either as an author or editor, please reach out to Jeff Price, our Editor-in-Chief, at Jeffrey.Price@nvlsp.org.

Special thanks to Jon Hager for his help with the Veterans Law Journal. His contributions were made in his personal capacity and not on behalf of the government.
