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Investiture of Judges Jaquith and Laurer

by Jenna Zellmer

More than two years after taking the bench in 2020, Judges Scott Laurer and Grant Jaquith received their formal investitures to the bench on December 15, 2022. They began the morning at the U.S. Supreme Court where Chief Justice John Roberts administered the oath of office. This was actually the second of three oaths they'd take overall. The first was the original working oath taken in 2020 and the final oath was administered by Chief Judge Bartley later that afternoon.

The investiture ceremony was held at the E. Barrett Prettyman Courthouse, where, after opening remarks by Chief Judge Bartley and an invocation by Pastor Matthew Hillyard, Judges Laurer and Jaquith were presented their presidential commission by Special Assistant to the President David E. White, Jr.

Those in attendance included the current active judges on the CAVC, Senior Judges Hagel, Moorman, and Schoelen, and Retired Judge Nebeker. Judges from the Court of the Armed Forces and the DC Supreme Court, as well as members of leadership from VA, NVLSP, and the American Legion were also present.

James W. Houck, a retired Vice Admiral in the Navy JAG Corps and Interim Dean of Penn State Law School, spoke on behalf of Judge Lauer, highlighting his dedication to service and emphasizing that his life experience would inform his judicial decisions and bring perspective to the bench.

Richard S. Hartunian, a partner at Manatt, Phelps & Phillips LLP and former U.S. Attorney for the Northern District of New York, lauded Judge Jaquith's lifelong commitment to public service and his ability to derive lessons from history.

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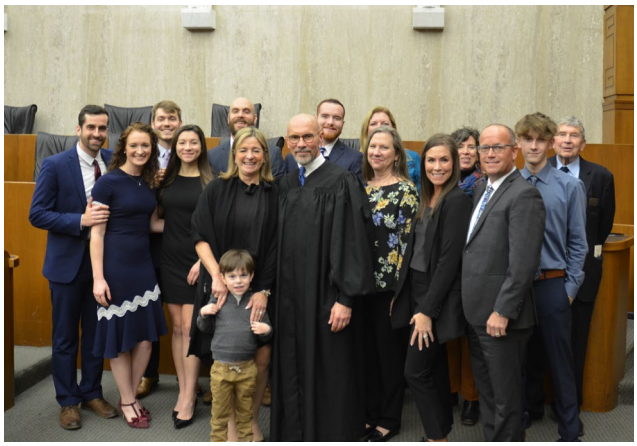
After taking their third and final oath from Chief Judge Bartley, Judges Laurer and Jaquith were presented their robes by their families. Each judge then spoke with humility about his commitment to service, his faith, and his gratitude for the many friends, family members, and colleagues who helped them on his path to the bench. They each emphasized how privileged they felt to ensure justice for our nation's veterans.



The official ceremony ended with a benediction from Pastor David Traynham and was followed by a reception in the atrium of the Prettyman Courthouse. Congratulations to Judges Laurer and Jaquith on a much-deserved, much-awaited investiture ceremony!

Jenna Zellmer is the immediate Past President of the CAVC Bar Association and a partner at Chisholm Chisholm & Kilpatrick Ltd.

Message from the Clerk

Greetings from the Clerk,

It does seem like spring is in the air here in DC, as confused trees and plants have started to bloom. Yes, the warm weather has been pleasant, but it hasn't distracted us from what continues to be a busy court docket. As the Court's soon-to-be-released FY 2022 Annual Report to Congress reflects, we are seeing numbers far in excess of those experienced just 5-7 years ago, although not reaching the peak numbers we experienced in FY 2020.

Tempering the impact of these numbers is the hard work so many of you put into the conferencing process, which continues to lead to resolution of a significant number of cases filed at the Court. Special thanks go to those of you who volunteered to be part of the Court's Rule 33 Pilot for pro se appellants. Our volunteer list now includes more than 70 attorneys and about one third of our pro se litigants continue to opt into the pilot, with almost half of those concluding their cases in the conferencing process. Please reach out to me if you would like to join our list of volunteers – qualifications continue to be 2 years membership in the Court's bar and appearances in at least 25 cases, or working under the supervision of a qualified attorney.

Here and around the country, we know that the influence of COVID lingers but although we've continued to hold remote and/or hybrid oral arguments, we've seen an increase in the number of arguments where all Judges and counsel are present. Similarly, we've seen individuals coming to the Court to attend CAVC Bar Association events, meetings, and orientations. Visitors have included the new BVA Chairman, new attorney staff from VA's CAVC Litigation Group, and even a local scout troop. If you would like to visit the Court, send me a note and we'll work something out.

Staffing at the Court remains a focus item, particularly as we have seen staffing authorizations increase at the Board of Veterans' Appeals and the CAVC Litigation Group. As some of you may have heard, the Court did receive funding necessary to increase the size of the Court from 9 to 11 active Judges, and legislation to authorize the two additional judgeships has been introduced. On the staff side, we've also experienced a significant change with the hiring of Mike Burnat as our new Chief Deputy Clerk in place of the irreplaceable Anne Stygles, who recently retired after 22 years with the Court. Anne's accomplishments and

contributions to the Court are legion – take a moment and read the ceremonial order (02-22) issued by the Court to honor her career at US Court of Appeals for Veterans Claims - Ceremonial Orders (cavc.gov). Like many of you who know Anne, we'll miss her terribly and wish her well in retirement while honoring her legacy by welcoming and helping Mike take on her challenging duties. Mike offered the following thoughts for me to share with you:

> "Having been at the Court for a number of weeks training with my predecessor, Anne Stygles, and now sitting in the seat, I had the opportunity to witness not only the volume of work that comes into the Public Office each day but how each member of the team contributes to the Court's operations. With over 1,400 appeals already filed in 2023, approximately 7,000 total active cases, and each case having potentially dozens of separate docket entries, there is a lot to accomplish every day and many deadlines to track, but the 24 dedicated individuals in the Public Office have all impressed me with their skill and professionalism.
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> I served as an Air Force JAG for 20 years and had the opportunity to lead several legal offices both here in the US and overseas, and I know that teamwork, communication, and a commitment to excellence are essential to any mission. I am proud to serve at the Court and look forward to working with staff and veterans law practitioners to ensure open access and helpful support to those seeking judicial review at the Court."

Someone I haven't mentioned in past columns is another important member of the Court staff, our librarian John Leon, who was hired to replace long-serving and ever-helpful Allison Fentress. John offered the following thoughts to share:

> "With the start of March 2023, I have now worked at the Court for six months. Considering my predecessor, Allison Fentress, worked at the Court for 15 years, this isn't too much of an accomplishment. However, it is a nice opportunity to reflect on how much I have learned in this time. Coming from an organization with thousands of librarians to work with – the Congressional Research Service - I found myself a little isolated working as a sole librarian. Thankfully, my colleagues (both inside and outside the Court) have taken the time to teach me how this small, but dedicated community operates.
>
> What is most striking to me is the importance of each individual. As a singular agency, the Court is untethered from larger parts of government. While many view government service as a bureaucracy with multiple redundancies, the Court is small and requires full participation and dedicated work from each and every person. Luckily for me, I get to work with Judges and Court staff on a large variety of efforts such as acquiring and updating research references, troubleshooting basic IT issues, performing legislative research, tracking down VA documents from the 1920s, and even taking amateur photographs at events all fall under my position. It's very exciting to have found a workplace where I can contribute in so many ways, while continuing to learn and grow as a law librarian."

As always, I appreciate hearing your thoughts about how we can make life easier for you and Court processes more efficient for everyone. We also welcome direct questions you may have related to the processing of any particular case you are working on. Please feel free to contact Mike Burnat or me personally, or our CLS Chief, Cynthia Brandon Arnold – we're all in the Court's by-name directory. As I already mentioned, we do expect to release our FY 2022 Annual Report in the near future. I also expect to reach out to the bar to seek input on experiences with the Rule 33 Pilot as the Board of Judges will take up the question of extending the Pilot in the next few months. Do contact me if you have thoughts to share.

Thanks for your continued support of the Court.

Greg Block

Message from the President

Dear fellow CAVC Bar Association members,

As spring approaches, when the days grow longer and the forecast grows warmer, we at the CAVC Bar Association are continuing to work on your behalf. From programming and educational opportunities to long-term planning, the dedicated volunteer members of the Board of Governors and other hardworking Bar Association members are here to serve you.

We are planning lots of programming for the coming months, including case law updates, in-person service opportunities like the memorial wall washing, and potential CLE opportunities. We are also working on another round of our popular mentorship program for law students and recent graduates, so keep an eye out for more information on those fronts.

To that end, it's a great time to make sure your Bar Association membership is current and active. If you've previously had your Bar Association membership covered by your employer and recently changed employment, aren't sure if you renewed your membership, or aren't sure about whether you're in the right membership tier, we can help you with that! Whether you are a Court employee, a longtime practitioner, a non-attorney, a law student, or a newly-admitted practitioner, we have a membership tier that fits your needs.

Members enjoy a wide variety of educational programming and professional networking opportunities. Most of the programming, events, and educational activities produced by the CAVC Bar Association are provided to our members at no additional charge. Our mission is exclusively supported by the annual dues paid by our members and we are appreciative of your support.

Over the past few months, the Bar Association has been beta testing a new membership portal, thanks to Board of Governors member James Drysdale's tireless efforts. Our newly redesigned website and membership portal allow members to establish their individual membership profiles and to purchase their renewals in one place. Going forward, the portal will help members track their membership status and purchase their renewals, putting members in control of their membership status. We are also excited about the new features on the website, including recordings of past programs, past issues of the *Veterans Law Journal*, and forums for discussion. I encourage you to check it out and take full advantage of your membership.

If you are not yet a member of the CAVC Bar Association, please join today. If you have not renewed your membership for this fiscal year, please be sure to renew today. You can join or renew here. If you aren't sure of your membership status, please feel free to contact me directly at berner.jillian@gmail.com and I can help you get squared away.

Please don't hesitate to reach out if you have any questions or concerns or if you'd like to become more involved in the Bar Association; you can email me personally at berner.jillian@gmail.com. I look forward to hearing from you!

Best,

Jillian Berner

CAVC Bar Association's Sixth Annual VA Update Panel

by Meghan Carter

The sixth annual update on the Department of Veterans Affairs, moderated by James Drysdale, recounted the changing landscape of different departments within the VA over the past year and previewed what is up and coming this year.

The first speaker of the session on February 2, 2023, was Mr. Richard Hipolit. Mr. Hipolit is the Deputy General Counsel for Veterans Programs and VA Office of General Counsel. His first remarks were regarding the General Counsel nominee. Because of a stall during the first nomination, the nomination was resubmitted to the new Congress. The nominee, Anjali Chaturvedi, "has a very extensive background on different aspects of the law," and Mr. Hipolit believes the earliest decision from Congress would be in March 2023. Mr. Hipolit has been filling in for the General Counsel in the interim. Josh Jacobs, the nominee for Undersecretary for Benefits, is also waiting for approval by Congress.

Mr. Hipolit then discussed how the implementation of the PACT Act provided additional funding through the Toxic Exposure Fund, which allows his department to hire more staff to meet the increase in workload. At the end of 2022, the Office of General Counsel had 830 employees, with a projected 913 employees by the end of the year. His department is looking to hire and increase the use of paralegals.

The Office of General Counsel is working with VHA to interpret the PACT Act and assess what measures are needed to implement it. Mr. Hipolit noted that the Secretary intends to pass on more benefits to veterans and include various underserved groups of veterans.

The second speaker was Ms. Mary Flynn, Chief Counsel for VA Office of General Counsel, Court of Appeals Law Group. Ms. Flynn started by acknowledging the recent move into the new office at 1100 First Street Northeast, which welcomed employees back in the office by early April 2022. The new in-office policy requires everyone to be in two days per pay period. This system is working well for the office comradery.

As will be a theme throughout this article, the PACT Act is also affecting the Court of Appeals Law Group. Ms. Flynn's office is a beneficiary of the increased funding for hiring due to the PACT Act. The office expects to double the number of full-time employees over the next two years, which works well for the larger office space. With the increased workload, the firm is looking to stand up two more litigation teams in addition to the existing thirteen.

Ms. Flynn shared that her office has updated how they store secure online files. The office was using Move.it and is now using Box.com. The new system reduces overall cost, and most importantly, it is more secure.

Regarding workload, there is a steady volume in case work and a slight reduction in the number of appeals, but the cases are increasingly complex and contain more issues of first impression. The Court of Appeals Law Group handled approximately 14,000 matters in 2022: 7,300 appeals, nearly 300 writs, and 6,500 Equal Access to Justice Act applications. Class action litigation has slowed down, which means less workload in that area.

The next speaker, David Barrans, Chief Counsel for VA Office of General Counsel, Benefits Law Group, started off discussing how two cases, *George* and *Arellano*, made their way to the Supreme Court, and he hopes that the Supreme Court recognizes the growing complexity of veteran's law.

Regarding the PACT Act, Mr. Barrans's office is working closely with VBA to develop regulations and answer questions about how to interpret it. He remarked that the collaboration across VA in implementing the PACT Act has been a remarkable feat.

Mr. Barrans then discussed the increasing number of unaccredited individuals who represent veterans at VA and charge unreasonable excessive fees. If someone receives credible evidence that this is happening, Mr. Barrans's office will send a cease-and-desist letter. Because the VA does not have law enforcement authority, it will pass the information on to local and federal authorities.

Mr. Barrans discussed the Tribal Representation Expansion Project, which seeks to increase access to accredited representatives in tribal communities. Veterans in those communities tend to access their benefits at a lower rate. The office is engaged in outreach projects to those communities to encourage tribal members to pursue accreditation to

represent veterans at VA.

Lastly, Mr. Barrans noted that section 804 of the PACT Act—The Camp Lejeune Justice Act—is an avenue for tort claims, not VA benefit claims. The Government waived its sovereign immunity, and therefore individuals can now sue the Government for the harm they incurred. Veterans have had questions about how this will affect their VA benefits. Mr. Barrans stated that VA is not going to reduce VA benefits if a veteran files a tort claim. However, the U.S. District Court for the Eastern District of North Carolina could reduce the tort award if the veteran is already receiving disability benefits from VA.

The next speaker was Ms. Susan Blauert, Chief Counsel for VA Office of General Counsel, Health Care Law Group. The Health Care Law Group has three subgroups: Office of Regulatory Policy and Management, VHA's Medical Research Program, and the Health Care Team.

Ms. Blauert's office is implementing new programs and benefits. There are two new grant programs. The first is the Legal Services Grant, which targets homeless veterans, and the second is the Staff Sergeant Parker Gordon Fox Suicide Prevention Grant, which provides suicide prevention services. Another program is section 201 of the Compact Act, which authorizes VA to furnish, purchase, or reimburse for emergent suicide care. In reproductive health services, regulations made changes to the benefits through the ChampVA program to include abortion counseling and abortion services when the health of the mother is at risk.

Next, Mr. Kenneth Arnold, Vice Chairman of the Board of Veterans' Appeals, began by noting that the Board holds hearings, and the jurisdiction continues to expand, as does the workload. The Board issues approximately 100,000 decisions annually, almost double from 5 years ago. Most individuals are still choosing virtual hearings as opposed to in-person hearings. Currently, there are 200,000 pending appeals. Congress has been supportive in providing funding to increase hiring. The Board is hoping to add 200 new decision-writing attorneys, and by March 2023, there will be 130 judges.

The transition from legacy system to the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) has been difficult due to the amount of rework. Seventy to eighty percent of cases need to be expedited because they are remanded or advanced on the docket. There are still 35,000 legacy appeals that haven't been touched. For appeals requesting informal conferences with a higher-level review, the numbers went down from sixty to thirty-five percent. However, more than fifty percent of requested hearings weren't held, with approximately 4,000 no-shows. Mr. Arnold stated that the hearing process is a positive one from the veterans' perspective.

Lastly, Mr. Timothy Sirhal, Executive Director at the Veterans Benefits Administration's Office of Administrative Review, started by discussing how his office is producing more decisions, getting more cases in the door, and expecting to see more due to the PACT Act. His office will also be hiring due to increased funds from the PACT Act.

The Office of Administrative Review decided over 220,000 cases last year. There are 24,000 legacy appeals left in VBA. VBA is now almost fully integrated into AMA. Additionally, higher-level reviews were completed in an average of 36 days.

Overall, VA is going to see an increase in workload due to the PACT Act, and the various departments are preparing for that increase. We continue to see VA develop new programs that assist with the overarching goal of helping those who served our country.

Meghan Carter is a second-year law student at Stetson University College of Law.

U.S. Supreme Court Holds That Equitable Tolling Cannot Apply to the Determination of an Effective Date under 38 U.S.C. § 5110

by C. Jeffrey Price

Reporting on *Arellano v. McDonough*, 132 S. Ct. 543, (2023).

Arellano v. McDonough marks the second time in as many years the Supreme Court has weighed in on a veterans law issue. In *Arellano*, the Supreme Court unanimously held that the statutory framework for determining the effective date of a granted benefit does not allow equitable tolling. The Court determined that the key language, the detailed structure, and the substance of surrounding provisions all suggest that Congress intended that equitable tolling not apply to 38 U.S.C. § 5110.

The claimant, Adolfo Arellano, served in the Navy from 1977 to 1981. While serving, the aircraft carrier he was on collided with another ship. Mr. Arellano developed psychiatric disorders as a result of this traumatic experience. However, he did not apply for disability benefits until 2011. VA granted Mr. Arellano benefits and pursuant to the general rule found in 38 U.S.C. § 5110(a), assigned an effective date of June 3, 2011, the day the VA received his claim.

Mr. Arellano appealed the effective date, arguing that his disabilities prevented him from making a timely claim under 38 U.S.C. § 5110(b), so the doctrine of equitable tolling should apply. He asserted that he is entitled to 30 years of retroactive benefits because equitable tolling applies to Section 5110(b)'s deadline to file a claim within one year of discharge.

Both the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims rejected Mr. Arellano's equitable tolling argument. The U.S. Court of Appeals for the Federal Circuit issued an en banc decision affirming the lower court's decision. But, relevant to the appeal to the Supreme Court, the Federal Circuit was evenly split on its reasoning. Half of the judges took the position that equitable tolling can never apply to the one-year deadline in Section 5110(b), while the other half concluded that equitable tolling could apply in some situations, but that it did not in Mr. Arellano's case.

The Supreme Court granted certiorari to address this split. The Supreme Court's unanimous decision, penned by Judge Barrett, holds that, given the statutory scheme created by Congress, equitable tolling cannot apply when determining an effective date under Section 5110(b)(1).

The Supreme Court begins its analysis by acknowledging the presumption that equitable tolling applies to federal statutes. That presumption, however, can be rebutted if it would be inconsistent with Congress's intent, as manifest in the statutory scheme. If the presumption is rebutted, equitable tolling cannot apply, even for the most deserving claimant.

The Supreme Court then turns its analysis to the statutory scheme of 38 U.S.C. § 5110 to determine whether Congress intended for equitable tolling to apply. To make that determination, it reviews the text of the statute, the organizational structure, and the substance of surrounding provisions.

The Supreme Court begins with the text and quotes the key language of the general rule that the effective date is the day the VA receives the claim. Section 5110(a)(1) states that this default rule applies "[u]nless specifically provided otherwise in this chapter." This language suggests that Congress enumerated an exhaustive list of exceptions.

Next, the Supreme Court points to the structure of Section 5110 as additional evidence that Congress did not intend that equitable tolling apply. Specifically, it notes that the statute sets out detailed instructions explaining when a benefit can qualify for an earlier effective date. Indeed, the statutory scheme includes 16 separate exceptions to the default rule. Yet, equitable tolling is not one of them.

The final step in the Supreme Court's analysis of the statutory scheme concerns the substance of the related provisions allowing for an earlier effective date. Many of these exceptions reflect equitable considerations by Congress. For instance, Section 5110(b)(4), which applies to pensions as opposed to compensation, expressly accounts for and awards retroactive benefits under certain circumstances if the claimant's permanent and total disability prevented the veteran from applying earlier. The Supreme Court reasons that because Congress understood the possibility of a disability preventing a veteran from applying for benefits and refrained from addressing it as to compensation, it did not intend tolling to apply.

The Supreme Court thus concludes that the statutory scheme, as manifest by its text, structure, and substance, is strong evidence that Congress did not intend for equitable tolling to apply. Allowing equitable tolling in this case would be providing the case special treatment and would be inconsistent with the statutory scheme.

The Supreme Court acknowledges that applying hard and fast limits on retroactive benefits may create harsh results in some cases, but Congress has exercised its power to create rules that attempt to prioritize efficiency and predictability.

In a final footnote, the Supreme Court clarifies that its decision in *Arellano* does not address other equitable doctrines, such as waiver, forfeiture, and estoppel, and that it resolves only the applicability of equitable tolling to Section 51110(b)(1).

Given the nature of the Supreme Court's analysis, namely the emphasis on the entire statutory scheme for effective date determination, it seems a claimant will be hard pressed to successfully argue that equitable tolling should apply to any of the exceptions to the default rule that are enumerated in Section 5110. Indeed, when considering whether equitable tolling should apply to any of the deadlines found in Title 38, one should take into account the Supreme Court's analysis of the issue in *Arellano*.

Jeff Price is a sole practitioner.

Chevron Deference and Resuming Disability Payments After Leaving Active Duty

by Devin deBruyn

Reporting on the dissenting opinion on the denial of certiorari in *Buffington v. McDonough*, 143 S. Ct. 14 (2022).

In January 2022, Veteran Thomas H. Buffington filed a petition for a writ of certiorari asking the Supreme Court of the United States to consider whether invoking *Chevron* deference can allow a court to overlook the pro-veteran canon of statutory interpretation and whether *Chevron* should be overruled. The Supreme Court denied that petition in November 2022. Justice Neil Gorsuch dissented from the majority.

This case began nearly 20 years prior to the petition for a writ of certiorari. Although Justice Gorsuch's dissenting opinion focused almost exclusively on *Chevron*, a brief procedural history of the case is helpful. By way of background, Mr. Buffington served in the U.S. Air Force from 1992 to 2000. In March 2002, he was granted entitlement to service connection for tinnitus and received an assigned disability rating of 10 percent. He then served in the Air National Guard with active service from July 2003 to June 2004, November 2004 to July 2005, December 2009, and February 2016 to May 2016.

In 2003, the VA informed Mr. Buffington that it would suspend his disability benefits while he served on active duty. He agreed that this suspension of payments was proper under 38 U.S.C. § 5304(c), which allows the agency to suspend benefits payments "for any period for which [a service member] receives active service pay."

When Mr. Buffington left active duty in 2005, however, the VA did not automatically resume making his disability payments. When Mr. Buffington notified the VA in January 2009 that it had not issued him any payments from 2005 to 2009, the VA restarted payments but declined to issue retroactive payments any earlier than February 2008. As a result, Mr. Buffington did not receive approximately 3 years of payments.

The VA's basis for withholding 3 years of payments and declining to automatically restart payments when Mr. Buffington left active duty rested on 38 C.F.R. § 3.654(b)(2). This regulation provides that disability payments "will be resumed effective the day following release from active duty *if claim for recommencement of payments is received within 1 year from the date of such release*: otherwise payments will be resumed *effective 1 year prior to the date of receipt of a new claim*." 38 C.F.R. § 3.654(b)(2) (emphases added). In other words, if a veteran submits a claim to the VA to restart payments within 1 year of leaving active duty, the VA will resume payments "effective the day following release from active duty." If a veteran does not submit a claim to the VA to restart payments within 1 year of leaving active duty, as is the case here, the VA will resume payments "effective 1 year prior to" receiving the claim. Because Mr. Buffington did not notify the VA of his request to have payments resume until about 4 years after leaving his last period of active duty, the VA resumed making disability payments to him but made them retroactive only to February 2008, which was 1 year prior to his claim.

Appeals then followed to the Board of Veterans' Appeals, the U.S. Court of Appeals for Veterans Claims (CAVC), and the U.S. Court of Appeals for the Federal Circuit. In their decisions, the CAVC and the Federal Circuit invoked the doctrine of *Chevron* deference, found that 38 C.F.R. § 3.654(b)(2) was a proper exercise of agency discretion, and affirmed the VA's application of this regulation in deciding the effective date of resuming Mr. Buffington's disability compensation. *See Buffington v. Wilkie*, 31 Vet. App. 293, 304 (2019); *Buffington v. McDonough*, 7 F.4th 1361, 1367 (Fed. Cir. 2021). The CAVC and Federal Circuit decisions featured dissenting opinions by Judge Greenberg and Judge O'Malley, respectively.

As a refresher, the doctrine of deference taken from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires a reviewing court to defer to an agency's invocation of its own regulation so long as the court finds that the relevant governing statute is ambiguous or silent on the subject matter at issue (also referred to as a gap that the agency has discretion to fill) and the agency's interpretation or regulation is reasonable.

In its decision, the CAVC observed that Congress addressed the effective date of suspending benefits, but not the effective date of resuming benefits. Specifically, 38 U.S.C. § 5112(b)(3) provides that payments are to be stopped the day before a service member begins receiving active service pay. Because Congress did not legislate when payments may be resumed after leaving active service, the CAVC found that the statute was silent regarding the effective date for resuming payments, which was a gap the VA had discretion to fill. Applying *Chevron*, the CAVC further found that the VA's regulation establishing a process and effective date for restarting benefits after release from active duty was "necessary and appropriate to carry out the laws administered by the [VA]."

The Federal Circuit's reasoning mirrored the approach taken by the CAVC. The Federal Circuit found that the statute was silent regarding the effective date for restarting payments after release from active duty and that the VA's regulation served as an appropriate gap-filler. The Federal Circuit also observed that "Congress was silent regarding whether other conditions, such as timely filing of an application, could justify a later effective date for any recommencement of compensation." The VA's gap-filling measure "promotes the efficient

administration of benefits" and it is reasonable "to require timely reapplication."

Following the CAVC and Federal Circuit decisions, Mr. Buffington appealed to the U.S. Supreme Court (the Court). In his petition for a writ of certiorari, Mr. Buffington presented 2 questions for the court to review. First, he asked the Court to consider "[w]hether the *Chevron* doctrine permits courts to defer to VA's construction of a statute designed to benefit veterans, without first considering the pro-veteran canon of construction." Second, he asked the Court "[w]hether *Chevron* should be overruled." The Court denied the petition for a writ of certiorari. Justice Gorsuch dissented from this denial.

In his dissenting opinion, Justice Gorsuch highlighted that Congress authorized the suspension of disability payments "*only* for periods when a veteran 'receives active service pay.'" (emphasis added). On this point, the CAVC and the Federal Circuit both noted that the statute does not include "only" and declined to read that word into it.

"Nothing in the statute," Justice Gorsuch emphasized, "requires a veteran to ask the agency to resume benefits it is already legally obligated to pay." It is worth noting, however, that Mr. Buffington did not dispute, and in fact agreed with the VA, that the agency may require veterans to notify the agency when a period of active duty ends before disability payments can be resumed. Continuing, Justice Gorsuch noted that the statute says nothing about "withhold[ing] overdue benefits," as the VA did to 3 years of Mr. Buffington's payments.

Although Justice Gorsuch appears to disagree with the unfavorable outcome of Mr. Buffington's claim to have his disability payments restarted, his dissenting opinion primarily focused on the lower courts' invocation of *Chevron* and his views on that doctrine. Justice Gorsuch asserts that the CAVC and the Federal Circuit abdicated their judicial duty by holding that *Chevron* required them to defer to the VA's regulation, rather than fulfill their duty to provide "a definitive and independent interpretation of the law Congress wrote."

Prior to *Chevron*'s issuance in 1984, Justice Gorsuch recounted, the rule was that courts acted non-deferentially in reviewing all questions of law raised by an administrative action. Ever since "the beginning of the Republic," the expectation has been that courts make decisions without favoring any party, including the Executive Branch. Even when this expectation was questioned in the 1940s as "the administrative state spread its wings," objections from influential figures—such as former Dean of Harvard Law School, Roscoe Pound—thwarted that trend. Then in 1946, Congress passed the Administrative Procedure Act (APA). The APA seemed to "unequivocally" direct courts to exercise independent review of questions of law and seemed to issue a "clear mandate" that administrative actions be reviewed by an independent court. This approach was followed for decades.

That began to change, however, when *Chevron* entered the scene in 1984. As Justice Gorsuch describes it, *Chevron* "overthrew all that came before and enshrined a new rule requiring courts to defer to Executive Branch interpretations of the law." To successfully defend an agency action in court, the new game plan inspired by *Chevron* was to simply highlight an ambiguity in the pertinent statute and to not be "egregiously wrong" in doing so.

But despite this "new" approach ushered in by *Chevron*, Justice Gorsuch highlighted that the *Chevron* opinion did not make any statements disagreeing with or overruling the long-standing rule that courts independently decide what the law means. In fact, *Chevron*'s reasoning, he stressed, was grounded on "well-settled principles" and cited sources that supported the traditional view that courts pay consideration, but not deference, to agency action. Any talk of deference in *Chevron* was merely "passing musings." Even the opinion's author, Justice John Paul Stevens, described the

Chevron holding as a "restatement of existing law." In the following term, the court considered 19 cases that presented a question about deferring to an administrative interpretation but cited to *Chevron* in only 1 of them. It seemed as though the decision was "'destined to obscurity.'"

The *Chevron* doctrine did not gain traction until Justice Antonin Scalia adopted the position in a 1987 concurrence that the case required deference to agency interpretations of law so long as they were "reasonable," and the statute contained an ambiguity or silence. *See NLRB v. Food & Commercial Workers*, 484 U.S. 112, 133-34 (1987). Justice Scalia further advocated for this approach in a 1989 law journal article. It was at this time that *Chevron*, in the words of Justice Gorsuch, "morph[ed] into something truly revolutionary."

Justice Gorsuch argued that this expansive (or maximalist) reading of *Chevron* is at odds with the ideal that disputes are to be resolved by independent and neutral magistrates, "not politically motivated actors." By invoking *Chevron* deference, the Judicial Branch "outsource[s]" the job of interpretating the law to Executive Branch agencies. "Rather than say what the law is, we tell those who come before us to go ask a bureaucrat." Doing so tips the scales in favor of the government over the individual. It also allows administrative agencies to be the judge of their own case, to the extent that their interpretation will always prevail so long as it is reasonable, and the statute is deemed ambiguous. Furthermore, it does away with traditional tools and methods of interpreting the law.

Justice Gorsuch further argued that the maximalist view of *Chevron* fails not just in theory, but also in practice. When is a statutory ambiguity "sufficiently ambiguous" to warrant application of *Chevron* deference? According to Justice Gorsuch, not even the federal government—the doctrine's "biggest beneficiary"—has an answer to that question. He pointed to oral argument in another case during which he asked an Assistant to the Solicitor General, "How much ambiguity is enough?" In response, the Assistant offered, "I don't think I can give you an answer to that question" and "I'm not sure anybody's answered that question." *See* Transcript of Oral Argument at 72, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114). As a result of this "ambiguity about ambiguity," the doctrine has generated varied approaches as well as exceptions. The result is "a wake of uncertainty."

In addition to creating uncertainty, Justice Gorsuch continued, *Chevron* incentivizes agencies to promulgate "ambitious" regulations with minimal statutory support. Deferring to an agency's reasonable interpretations incentivizes agencies to seek "to do what they might while they can" instead of striving for faithfulness to the law as written by Congress. Applied here, Justice Gorsuch observed that at one time the VA's regulation dictated that disability compensation "may be resumed the day following [a service member's] release from active duty if otherwise in order," which in his view was consistent with the statute. 26 Fed. Reg. 1599 (Feb. 24, 1961). Even though Congress did not enact any statutory amendment that affected this regulation, the VA amended it anyway to "make their own jobs easier." Justice Gorsuch expressed concern that *Chevron* incentivizes "self-serving gambits" such as this. And nothing prevents an agency from continuing to revise its regulations despite the absence of statutory amendments, which replaces fair notice with "vast uncertainty."

It is worth noting, however, that Justice Gorsuch's dissent does not mention that the current version of the regulation at issue was promulgated in 1962, 22 years before *Chevron* was decided. *See* 27 Fed. Reg. 11886, 11890 (Dec. 1, 1962). As the CAVC highlighted in its decision, this version of 38 C.F.R. § 3.654(b)(2) "has remained unchanged since 1962." While *Chevron* may incentivize agencies to frequently change their rules, as Justice Gorsuch argued, the VA's incentive to amend the regulation involved here could not have been motivated by *Chevron*. It is also worth noting, on the topic of fair notice, that

the VA informed Mr. Buffington in advance that he must notify the agency upon his release from active duty, otherwise the suspension of payments would continue.

In the face of uncertainty created by *Chevron*, Justice Gorsuch noted that some parties fare better than others. While individuals may be impacted negatively, "[s]ophisticated entities" can hire lawyers to navigate the continuously updated Code of Federal Regulations (which currently stands at about 180,000 pages) or lobby for regulatory reform that aligns with their agenda. Individuals, on the other hand, do not have the resources to adapt, predict, and influence the regulations they are subject to.

Despite their lack of resources, administrative law affects the lives of individuals all the same. Indeed, it "'touches almost every aspect of daily life.'" With respect to veterans, Justice Gorsuch observed that some former service members saw reinstatement of their payments effective the day after leaving active duty, while Mr. Buffington and other veterans did not—not because elected lawmakers changed the law, but because an administrative agency changed its mind. Unfortunately, Justice Gorsuch lamented, the broad interpretation of *Chevron* negatively impacts other individuals who rely on government services, such as retirement benefits, immigration matters, and health care benefits.
Perhaps due to the doctrine's theoretical and practical challenges that have become more noticed over the years, Justice Gorsuch observed that *Chevron* deference is fading into disuse. He noted that Justice Scalia, who once championed the idea, later changed course. The same can be said for other members of the court who have "expressly questioned *Chevron* maximalism." Not only has a broad reading of the doctrine lost favor with the court, the same is true of lower federal courts, state courts, and even courts in other countries, all of which have voiced concern for the doctrine's validity.

Justice Gorsuch further observed that the federal government rarely relies on the doctrine in litigation. To this point, it is worth noting that not long after Justice Gorsuch issued his dissent, the government pointed to the denial of certiorari in Mr. Buffington's appeal to argue against the court taking up the *Chevron* question in another case that also involves veterans law. *See* Brief for the Respondent in Opposition at 6, *Veteran Warriors, Inc*. v. McDonough, No. 22-360 (Jan. 18, 2023).

In light of this discussion, Justice Gorsuch wondered whether denying certiorari in Mr. Buffington's case made sense given that *Chevron* has declined into disuse without being formally overruled, making the Federal Circuit's decision "an outlier." "Maybe *Chevron* maximalism," he mused, "has died of its own weight and is already effectively buried." Even so, that is of no help to Mr. Buffington and other veterans. Justice Gorsuch concluded that granting Mr. Buffington's petition would have provided the platform to "acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."

Devin deBruyn is Associate Counsel at the Board of Veterans' Appeals.

Income Calculation for NSC Pensions Includes Unemployment Compensation

by Kate Frerking

Reporting on *Cooper v. McDonough*, 57 F.4th 1366 (Fed. Cir. 2023).

In *Cooper v. McDonough*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") held that state unemployment compensation payments are included in income when determining a veteran's non-service-connected (NSC) pension amount. Unpersuaded that unemployment compensation

payments are "donations" under 38 U.S.C. § 1503(a)(1), the court determined that such payments do not fall under the statute's exception for "donations from public or private relief or welfare organizations."

The Department of Veterans Affairs (VA) may grant an NSC pension to a veteran who served during a period of war and is "permanently and totally disabled from non-service-connected disability not the result of the veteran's willful misconduct." 38 U.S.C. § 1521(a); *see* 38 U.S.C. § 1521(j). The maximum annual rate of a veteran's pension is reduced by his or her annual income, although 38 U.S.C. § 1503(a) carves out exceptions for certain categories of payments. One exception is "donations from public or private relief or welfare organizations." *Id.* at § 1503(a)(1).

Mr. Cooper served in the United States Marine Corps for seven months in 1972 and three months in 1973. In 2008, VA determined that Mr. Cooper was entitled to an NSC pension. In 2014, VA informed Mr. Cooper of an overpayment. The alleged overpayment resulted from two years of unemployment compensation and totaled $13,094.

Mr. Cooper appealed to the Board of Veterans' Appeals (Board). He asserted that unemployment compensation payments should be excluded from his annual income for purposes of his NSC pension. The Board disagreed.

Mr. Cooper timely appealed to the U.S. Court of Appeals for Veterans Claims (CAVC), which affirmed the Board's decision. Mr. Cooper argued that unemployment compensation payments should be excluded from his annual income under the statutory exception in 38 U.S.C. § 1503(a)(1), which excludes "donations from public or private relief or welfare organizations" when calculating a veteran's income. Relying on the statutory language and dictionary definitions, the CAVC distinguished unemployment compensation payments from the payments described in § 1503(a). The CAVC reasoned that references in the statute to "donation," "relief," and "welfare" indicate payments premised upon a recipient's need, while unemployment compensation is related to a recipient's employment status, irrespective of need. The CAVC similarly rejected Mr. Cooper's argument questioning the rationale for including unemployment compensation payments from income while excluding payments from VA compensated work therapy (CWT) programs. Mr. Cooper appealed to the Federal Circuit.

The Federal Circuit began by analyzing statutory construction, along with the framework and design of state unemployment compensation programs. Agreeing with the CAVC, the Federal Circuit determined that unemployment compensation payments are not included in the plain meaning of "donations from public or private relief or welfare organizations" under 38 U.S.C. § 1503(a)(1). The court defined a "donation" as a voluntary transfer of property to another *without compensation*. Because unemployment compensation is available only to individuals who were previously employed and paid taxes to the government, receipt of such payments is contingent on prior compensation, and therefore, the payments are not "donations" according to the Federal Circuit.

The Federal Circuit also looked to the structure and design of unemployment compensation programs in determining whether such payments are "donations." In this regard, the court noted that either an employee or the employer pays payroll taxes during the individual's employment and that the individual subsequently collects unemployment compensation payments from the state in the event of unemployment without fault of the employee. According to the court, unemployment compensation programs, often referred to as "unemployment insurance," operate on the contingency of two prior conditions: an individual's previous employment and an individual's payment into the state's unemployment fund through payroll taxes. Thus, the Federal Circuit analogized unemployment compensation programs to insurance contributory programs and concluded that the resulting payments are not donations under the meaning of 38 U.S.C. § 1503.

In support of his position that unemployment compensation payments should be excluded from annual income in calculating a veteran's NSC

pension, Mr. Cooper made a series of six arguments. Each was rejected by the three-judge panel, and each is briefly reviewed here.

First, Mr. Cooper argued that unemployment compensation is not a contributory program for two reasons: (1) the "prior compensation" is often funded through an individual's employer rather than through the individual, and (2) unemployment compensation programs are similar to the noncontributory programs excluded from income in 38 C.F.R. § 3.262(f). The Federal Circuit rejected both reasons, noting that unemployment compensation payments are the result of prior contributions to the government, regardless of whether the advanced payments are made by the employee or the employer. Further, unlike the needs-based noncontributory programs specifically excluded from income in 38 C.F.R. § 3.262(f), unemployment compensation payments are based only on employment status rather than need.

Next, Mr. Cooper argued that the word "donation" implies giving something of value to help an individual in a time of need. The Federal Circuit, however, disregarded this argument by again distinguishing unemployment compensation programs as status-based rather than needs-based. The court noted that Congress expressly refrained from making unemployment compensation payments based on need or means.

Mr. Cooper's third argument entailed a series of hypotheticals aimed at persuading the Federal Circuit that failing to exclude unemployment compensation from the calculation of a veteran's income would produce disparate outcomes contrary to congressional intent. The court was not persuaded, however, and retierated that Mr. Cooper's arguments continued to improperly compare unemployment compensation to welfare programs.

The fourth argument, which Mr. Cooper made unsuccessfully to the CAVC, was similarly rejected by the Federal Circuit. He argued that substantive similarities between CWT payments and unemployment compensation payments made it "absurd" to exclude CWT payments from income calculation and not exclude unemployment compensation payments in the same manner. Congress, however, specifically excluded CWT payments by name and did not exclude unemployment compensation. That alone, according to the Federal Circuit, was determinative.

Mr. Cooper's final two arguments were acknowledged and dismissed quickly by the Federal Circuit. Mr. Cooper asserted that the pro-veteran canon applied, but the court found it inapplicable because the case was not one involving interpretive doubt. Additionally, in response to Mr. Cooper's argument that the CAVC improperly relied upon tax principles, the Federal Circuit found any such error either irrelevant or harmless.

Ultimately, the Federal Circuit rejected each of Mr. Cooper's arguments and held that unemployment compensation payments are not "donations" within the meaning of 38 U.S.C. § 1503. Accordingly, unemployment compensation payments are not excluded from the calculation of annual income for the purposes of calculating a veteran's NSC pension.

Kate Frerking is a second-year law student at the University of Missouri School of Law Veterans Clinic.

An "Other Than Honorable Discharge" is Equivalent to an "Undesirable Discharge."

by Danielle Ragofsky

Reporting on *Cranford v. McDonough*, 55 F.4th 1325 (Fed. Cir. 2022).

In *Cranford*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) addressed whether a discharge "Under Other Than Honorable Conditions" taken to avoid a general court martial was an undesirable discharge under 38 C.F.R. § 3.12(d)(1), which disqualifies a former service member for veterans benefits for that period of service.

While in service, Mr. Cranford was found in possession of a prohibited substance. It was then recommended that he be tried by general court martial. In response, Mr. Cranford asked that he be discharged in lieu of general court martial. At this time, he acknowledged that by accepting a discharge in lieu of general court martial, he would receive an other than honorable (OTH) discharge and would be ineligible to apply for VA benefits. He received an OTH discharge and was separated from service.

Mr. Cranford later filed for VA benefits, but his claim was denied by the Regional Office. He timely appealed to the Board. The Board denied the claim, finding that under 38 CFR. § 3.12(d)(1), Mr. Cranford was discharged under dishonorable conditions and was ineligible for VA benefits.

Mr. Cranford appealed to the Court of Appeals for Veterans' Claims (Court), arguing that the Board mischaracterized his discharge as being "in lieu of a general court-martial," instead of a summary court-martial and that § 3.12(d)(1) did not apply to him because he had accepted an OTH discharge, not an "undesirable discharge.

The Court upheld the Board's decision, finding that: (1) Mr. Cranford had been referred for a general court martial, and (2) an OTH discharge is equivalent to an undesirable discharge.

The question before the Federal Circuit is whether an OTH discharge is equivalent to an undesirable discharge, making a veteran ineligible for VA benefits.

In its decision, the Federal Circuit noted that at the time § 3.12(d)(1) was implemented, it listed five types of discharges that a veteran could receive upon separation, to include an undesirable discharge. In 1977, the VA began to use the term OTH discharge to describe those who would have received an undesirable discharge under VA law. However, at the time, § 3.12(d)(1) was not formally amended by the VA to reflect the change in terminology.

In 2020, the VA proposed to amend § 3.12(d)(1) by replacing "undesirable discharge" with OTH discharge. However, the law has not yet been formally amended.

The Federal Circuit first found that the VA's proposal to amend § 3.12(d)(1) and the comments that followed the proposal "recognize(d) that 'undesirable discharge' and 'OTH discharge' ha(d) been understood as equivalents for over four decades."

Second, the Federal Circuit explained that it was the service departments, not the VA, that issued discharge determinations. Therefore, the VA modeled § 3.12(d)(1) after the terms of art used by the service departments and defined undesirable discharge as "separation under conditions other than honorable." The Federal Circuit also noted that "when the service departments transitioned from the term 'undesirable discharge' to 'OTH discharge,' they did not change the class of individuals to which the terms refer(red)."

Because § 3.12(d)(1) had always applied to veterans who were separated under conditions other than honorable and Mr. Cranford had been separated under conditions other than honorable, the Federal Circuit found that Mr. Cranford's OTH discharge fell under the purview of § 3.12(d)(1) and was "equivalent to an undesirable discharge." Therefore, the denials of both the Board and the Court were affirmed.

Danielle Ragofsky is an Associate Counsel at the Board of Veterans' Appeals.

Remand Not Immediately Appealable if No Clear and Final Legal Decision

by Nivine K. Zakhari

Reporting on *Goffney v. McDonough*, Case 2022-1130, 2023 WL 355107 (Fed. Cir. 2023)

Judge Lourie wrote this nonprecedential decision for the panel with Judges Taranto and Stoll, finding the Federal Circuit lacked jurisdiction of an appeal of a remand order by the U.S. Court of Appeals for Veterans Claims (CAVC) where there "was not a clear and final decision of a legal issue."

Attorney Tara R. Goffney appealed a remand order from the CAVC for the Board to reconsider its

decision in her claim for attorney fees stemming from her representation of a veteran seeking both PTSD and Total Disability Individual Unemployability (TDIU) benefits. *Goffney v. McDonough*, No. 19-4394, 2021 WL 1096379 (Vet. App. Mar. 23, 2021)("*Decision*").

Goffney had been retained as counsel starting in 2010 and was paid for her work associated with a successful PTSD claim. However, the veteran dismissed Goffney before the TDIU claim had been awarded, and attempted to proceed *pro se* before hiring an accredited agent to see the claim through to award. At the time, the fee award of 20 percent went to the later appointed accredited agent.

The VA denied Goffney's claim for the 20 percent fee related to the TDIU award since she was not representing the veteran on the subsequent filing that led to the award. Goffney's appeal to the Board was also denied, finding the TDIU claim to be separate from the PTSD award she had already been paid for. There was also not a final Board decision regarding attorney fees for TDIU under 38 C.F.R § 14.636(c)(2).

Goffney appealed to the CAVC, where the Secretary agreed the Board was in error, and should have awarded attorney fees, but not necessarily the full amount of 20 percent. Accordingly, the CAVC remanded to the Board to "address the correct facts and law." *Decision* at 1. Goffney appealed to the Federal Circuit.

The Federal Circuit cited *Adams v. Principi*, 256 F.3d 1318, 1320 (Fed. Cir. 2001), particularly regarding remand orders, as they are "ordinarily not appealable because they are not final." While there are limited exceptions to the general rule not to review non-final orders based on *Williams v. Principi*, 275 F.3d 1361, 1364–65 (Fed. Cir. 2002), the Federal Circuit found this case did not meet the first criterion in *Williams* that the CAVC "issued a clear and final decision of a legal issue." 275 F.3d at 1364.

Failing the first prong of *Williams*, the court also did not find support for the remaining factors either, i.e., whether the decision adversely affects the party seeking review, and whether there is substantial risk the remand would moot the issue. *Williams*, 275 F.3d at 1364. "Thus, the remand decision did not decide any legal question regarding the standard of Goffney's claim for fees, and the Board is free, on remand, to entertain those issues in the first instance."

Goffney relied on *Caesar v. West*, 195 F.3d 1373, 1375 (Fed. Cir. 1999), where the Federal Circuit found a remand decision to be clear and final because appellant's issue remained unresolved. However, the court distinguished that case since the remand to the Board gave the legal issue at hand an opportunity to be resolved there. *Decision* at 2.

Although the Federal Circuit dismissed this appeal due to lack of jurisdiction, it invited Goffney to appeal again to the CAVC after the Board's final decision and, "if desired," once again to the Federal Circuit.

Nivine K. Zakhari is an Elder Law LL.M. candidate at Stetson University College of Law.

Applying 38 C.F.R. § 3.156(b) When the Underlying Claims Are Unrelated

by C. Camille NeSmith

Reporting on *Gudinas v. McDonough*, 54 F.th 716 (Fed. Cir. 2022).

In *Gudinas*, the Federal Circuit ruled that the Board of Veterans' Appeals (Board) is not required to explicitly determine whether a submission constitutes "new and material evidence" when the conditions underlying the prior and subsequent claims have no apparent connection.

At issue is the interpretation of 38 C.F.R. § 3.156(b), which provides as follows:

> New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed . . . , will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

Procedurally, in September 2005, the Department of Veterans Affairs (VA) granted the appellant service connection for post-traumatic stress disorder (PTSD) with a 50% disability rating.

On May 30, 2014, the appellant filed a claim for service connection for sleep apnea. In August 2014, VA denied the claim, and the appellant filed a Notice of Disagreement.

On October 26, 2015, the appellant submitted a claim for a total disability rating based on individual unemployability (TDIU), a supplemental claim for an increased rating for PTSD, and a letter expanding his sleep apnea claim to include as secondary to PTSD. Subsequently, VA denied the claim for TDIU and increased his PTSD rating to 100%, effective October 26, 2015 (the date the increased rating claim was received).

The appellant submitted a Notice of Disagreement as to the effective date for the 100% rating for PTSD. The appellant argued that under 38 C.F.R. § 3.156(b), he was entitled to an effective date of May 30, 2014, because his October 2015 submission constituted new and material evidence relating to his May 2014 sleep apnea claim. VA denied the claim for an earlier effective date, and the appellant appealed to the Board. The Board denied the claim and explained that the May 2014 sleep apnea claim did not mention a psychiatric condition or indicate that the appellant intended to file a claim for an increased rating for PTSD.

The appellant appealed the Board's decision to the United States Court of Appeals for Veterans Claims (CAVC), asserting that the Board erred by failing to address whether the October 2015 submissions were new and material evidence for the May 2014 sleep apnea claim. He argued that section 3.156(b) required VA to expressly assess whether a claim presents new and material evidence relating to a pending claim that was filed within the time limits described in the regulation, even if the two claims are unrelated. CAVC rejected the appellant's argument and affirmed the Board's denial, finding that "the law is clear that claims for secondary service connection are not claims for increased compensation and are not part and parcel of a claim for increased compensation for the primary condition." *Gudinas v. McDonough,* 34 Vet. App. 25, 37 (2021). CAVC further explained that the Board determined that section 3.156(b) was not triggered when it determined the nature of the May 2014 claim.

The appellant appealed the CAVC decision to the Federal Circuit and argued that his claim for an increased rating for PTSD should be considered as part of his claim for service connection for sleep apnea because 38 C.F.R. § 20.3(f) defines a "claim" as a "written communication requesting a determination of entitlement . . . to a specific benefit under the laws administered by [VA]" and both claims were seeking the same "benefit" of additional compensation. *See* 38 C.F.R. § 20.3(e).

The Federal Circuit disagreed with the appellant's arguments and noted that the appellant's claim differed from those addressed in *Bond v. Shinseki*, 659 F.3d 1362 (Fed. Cir. 2011), and *Beraud v. McDonald,* 766 F.3d 1402 (Fed. Cir. 2014), in which the Federal Circuit found that the Board erred when it failed to expressly determine whether a claim contained "new and material evidence" when the claim related to the same condition described in an earlier claim.

Additionally, the Federal Circuit explained that a previous nonprecedential opinion held that the Board is not required to explicitly determine whether a claim constitutes "new and material evidence" relating to a previous claim when the two claims are separate for effective date purposes and the conditions underlying the claims have no apparent connection to one another. *See Jordan v. McDonough*, No. 2021-1811 (Fed. Cir. July 13, 2022). The Federal Circuit agreed with the Board's factual finding that the appellant's May 2014 claim did not

mention a psychiatric disability or reflect an intent to file for an increased disability rating for PTSD.

In regard to section 20.3(f), the Federal Circuit explained that the terms "claim" and "benefit" do not suggest that a claim for secondary service connection should be treated as a claim regarding a primary condition just because they both seek additional compensation. The Federal Circuit noted that it previously held in *Manzanares v. Shulkin,* 863 F.3d 1374 (Fed. Cir. 2017), that there is nothing in the definition of "claim" in 38 C.F.R. § 20.3(f) suggesting that it includes secondary conditions or that it carves out a separate rule for secondary service connection.

The Federal Circuit also noted that even if the appellant's sleep apnea claim were considered secondary to his PTSD claim, the two claims would not be treated as the same claim for the purposes of determining their effective dates. The appellant argued that a secondary condition arising after the filing of an original claim would be entitled to an effective date earlier than the date the primary condition arose if the appeal relating to the primary condition were still pending. The Federal Circuit explained that the appellant's position was contrary to the holding in *Ellington v. Peake,* 541 F.3d 1364 (Fed. Cir. 2008), in which the Federal Circuit reasoned that 38 C.F.R. § 3.310(a) does not require VA to give a claim for secondary service connection the same effective date as an earlier claim for the primary condition because the "secondary conditions may not arise until years after the onset of the original condition."

Ultimately, the Federal Circuit upheld CAVC's decision that the appellant is entitled to an effective date of October 26, 2015, for his 100% disability rating for PTSD, not an effective date of May 30, 2014. Additionally, the Federal Circuit ruled that the Board is not required to explicitly determine whether a submission constitutes "new and material evidence" if, as in this case, the conditions have no apparent connection.

C. Camille NeSmith is Associate Counsel with the Board of Veterans' Appeals.

38 C.F.R.§ 3.344(c)'s "Long Period" Five-Year Stasis Requirement is a Definition, Not an Example

by Gillian Slovick

Reporting on *Hanser v. McDonough*, 56 F.4th 967 (Fed. Cir. 2022)

In Hanser, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that 38 C.F.R. §3.344(c)'s procedural requirements are necessary only when a rating has continued for five years or more.

38 C.F.R. § 3.344 dictates procedures when there is an indication that a longstanding disability has improved. Section (a) of the regulation states that, prior to a reduction, the RO must carefully review examinations supporting improvement and consider the certainty of lasting improvement. Section (b) states that if there is still doubt as to whether a disability has improved, the rating will continue, and later examinations will be scheduled.

Section (c), the section in question here, states that the procedures of the regulation apply "to ratings which have continued for long periods at the same level (5 years or more)."

In this case, Mr. Hanser was assigned 20 percent disability ratings for left leg and bilateral arm radiculopathy effective July 26, 2011. Following signs of improvement, the Regional Office (RO) proposed a reduction, and reduced his ratings to noncompensable in March 2016. Mr. Hanser's rating was in place for just under five years.

Following appeal, the Board of Veterans' Appeals found that the procedural protections of 38 C.F.R. § 3.344 were inapplicable because five years of continuous ratings had not elapsed. In a February 2021 Memorandum Decision, the Court of Appeals for Veterans Claims agreed.

On appeal to the Federal Circuit, Mr. Hanser argued that the five-years described in the regulation was a guideline rather than a requirement, and that the procedures of 38 C.F.R. § 3.344(a) and (b) applied to his reduction.

The Federal Circuit, however, found that the regulation clearly defined the length of time required to trigger review, thus providing a simple rule for VA adjudicators to implement. In so finding, the Federal Circuit considered the regulatory language in context, noting that if the five-year period was not definitional, VA would have to evaluate the ratings of millions of veterans on a case-by-case basis.

Additionally, the Federal Circuit explained that the lack of language such as "e.g.," or "for example" or other indications that the five years was "merely illustrative" supported its conclusion that the five-year requirement for additional review was definitional.

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

Appeals Modernization Act Rules do not Apply in the Legacy System

by Devin White

Reporting on *Mattox v. McDonough*, 56 F.4th 1369 (Fed. Cir. 2023).

In *Mattox*, the Court of Appeals for the Federal Circuit ruled that the notice requirements under the Appeals Modernization Act do not apply to claims that are adjudicated in the legacy system. The Federal Circuit also ruled that the Board properly assigned probative value to evidence when conducting a benefit-of-the-doubt-rule analysis pursuant to 38 U.S.C. § 5107(b).

Larry W. Mattox served honorably in the United States Navy. On July 21, 2015, he filed a claim for disability compensation for PTSD. The VA denied his claim on December 28, 2015. Mr. Mattox perfected his appeal to the Board of Veterans' Appeals on December 21, 2016. On February 19, 2019, the Appeals Modernization Act (AMA) went into effect, and § 5104(b) created enhanced notice requirements for "decisions by the Secretary."

Mr. Mattox did not elect to participate in the AMA. The Board denied Mr. Mattox's claim in an April 5, 2019 decision pursuant to the legacy system. Mr. Mattox appealed to the Court of Appeals for Veterans Claims, which affirmed the Board's denial. Mr. Mattox then appealed to the Federal Circuit.

Mr. Mattox's first argument was that the Board did not properly notify him of its decision. He argued that, regardless of the genesis of the claim, the AMA notice requirements apply to *all* Board decisions subsequent to February 19, 2019. According to the veteran, § 5104 does not contain any language that demonstrates that "Congress intended there be disparate treatment of 'legacy' cases in contrast to cases that originated after the effective date of the AMA." Therefore, "[n]o interpretation is reasonable other than . . . every decision made by the Secretary, which include[s] decisions of the Board, shall include all of the requirements specified in § 5104(b)."

In its analysis, the Federal Circuit found it relevant that Congress included a provision that allows a claimant to elect to participate in the AMA. "Mr. Mattox's interpretation of § 5104(b) ignores the context and plain language of the AMA as a whole [and] would mean that a legacy claim is automatically converted into an AMA claim upon the issuance of a VA decision after February 19, 2019." The Federal Circuit reasoned that this argument "would render irrelevant the framework set forth by Congress in which the legacy and AMA systems work concurrently, and in which a legacy claimant can, under certain circumstances, elect to participate in the AMA system." The Federal Circuit therefore affirmed CAVC's denial of Mr. Mattox's

first argument. Both CAVC and the Federal Circuit declined to address whether a Board decision constitutes a "decision by the Secretary" for the purposes of notification pursuant to § 5104(b).

Mr. Mattox's second argument was that the Board improperly weighed evidence when it accepted a VA medical opinion finding no valid diagnosis of PTSD over a private medical opinion diagnosing this disorder. Specifically, Mr. Mattox took issue with the Board's statement that "the benefit of the doubt doctrine is inapplicable where, as here, the preponderance of the evidence is against the claim for service connection." The veteran asserted that "conclusions [by the Board] concerning the probative value of the evidence, the credibility of the evidence, or the weight of the evidence" are improper. At oral argument, Mr. Mattox contended "I do not believe the role [of VA] is to be a factfinder in the adversarial context. They are not sitting as triers of fact." Rather, he argued, VA was required to give him the benefit of the doubt on the question of whether he suffered from PTSD based on the "numerically even" opinions.

Citing to *Lynch v. McDonough,* the Federal Circuit rejected this argument: "[E]vidence is not in 'approximate balance' . . . and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other." 21 F.4th 776, 781-82 (Fed. Cir. 2020). The Federal Circuit reasoned "[i]t goes without saying that it cannot be determined whether 'the evidence persuasively favors one side or the other' without assigning probative value to the evidence."

It is notable that neither CAVC nor the Federal Circuit took much issue with the Board's use of "preponderance of the evidence" in deciding not to apply the benefit-of-the-doubt doctrine. CAVC held "[b]ecause the Board found that the preponderance of the evidence weighed against appellant's claim, it was not required to apply the benefit of the doubt doctrine. . . [t]hus, *the Court finds no error* with the Board's finding that the evidence of record was not in approximate balance and that a preponderance of the evidence supported denial." *Mattox v. McDonough*, 34 Vet. App. 61, 75 (2021) (emphasis added). The Federal Circuit held "the Board did not apply the wrong standard of proof . . . The Board's erroneous reference to 'a preponderance of the evidence' did not affect the correctness of its overall analysis."

It will be interesting to see how CAVC and the Federal Circuit review VA's analysis when VA determines whether the benefit-of-the-doubt doctrine applies, given the Federal Circuit's decision to depart from the 'preponderance of the evidence' language in *Lynch*.

Devin White is Associate Counsel at the Board of Veterans' Appeals.

Federal Circuit Holds that VA is Statutorily Authorized to Withhold Alimony if Military Retirement is Waived in Lieu of VA Compensation

by Kenneth L. Meador

Reporting on *Rhone v. McDonough*, 53 F.4th 656 (Fed. Cir. 2022) (per curiam).

In *Rhone v. McDonough*, the Federal Circuit addressed the propriety of VA determinations regarding a longstanding decree from the state of Florida. The Agency was ordered to garnish a portion of Mr. Rhone's VA disability compensation because he had waived his military retirement pay in lieu of such compensation. Ultimately, in a per curiam opinion, the Federal Circuit determined that garnishment was proper, and the Federal Circuit affirmed the Court of Appeals for Veterans Claims ("Court") decision on appeal.

Guy C. Rhone retired from the U.S. Air Force after serving in the military for more than thirty years. In 1986, two years before he retired in 1988, he and his

spouse divorced in Hillsborough County, Florida. Mr. and Mrs. Rhone's divorce decree stated that Mrs. Rhone would receive forty percent of Mr. Rhone's retirement benefits. Mr. Rhone appealed the decree, which the appellate court upheld.

Mr. Rhone separated from the military due to disability, with a VA disability rating of sixty percent. His disability rating was increased to seventy percent, and Mr. Rhone waived a portion of his military retirement pay to receive disability compensation. He subsequently attempted to modify the divorce decree. The state court denied his motion and affirmed that Mrs. Rhone was "entitled to an amount equal to forty percent (40%) of the gross military retirement as periodic alimony." In August 1991, the Florida state court issued a writ of garnishment, directing the Air Force to withhold the appropriate amount from Mr. Rhone's military retirement. In November 1991, the state court issued an order to VA, indicating that the continuing writ of garnishment also applied to the VA.

In June 1996, Mr. Rhone renounced his right to VA benefits and, just a few days later, sought entitlement to individual unemployability. In February 1997, VA's regional counsel office in Florida opined that Mr. Rhone had the right to renounce his benefits. In March 1997, his benefits were renounced, and his request for TDIU was terminated. He disagreed with the termination of the TDIU request. In May 1997, VA's general counsel informed Mr. Rhone that the garnishments of his benefits were due to the state court's November 1991 order and were proper.

Mr. Rhone's ex-wife contacted VA in October and November 1997 and argued that she was entitled to garnishment of the disability compensation. Mr. Rhone was subsequently granted TDIU and was advised that he could request to reinstate his benefit. However, Mr. Rhone notified VA that he only wanted to do so if there would be no garnishment.

Over many years, VA sought multiple opinions from regional counsel and general counsel regarding the propriety of garnishing Mr. Rhone's disability compensation. Mr. Rhone continued to advise VA that he would only reinstate his benefit if no garnishment would occur.

In a January 2005 determination, VA's office of regional counsel finally determined that "VA must comply with the validly served Order awarding Jo Anne Rhone permanent alimony of 40% of the veteran's military retirement pay." VA notified Mr. Rhone of the decision and resumed the garnishment of his disability compensation. Mr. Rhone appealed, leading to multiple Board decisions and remands from the Court. Mrs. Rhone passed away in November 2005.

In February 2020, the Board found that the state court's November 1991 order was valid, that it provided for permanent periodic alimony, and that VA had legally garnished Mr. Rhone's disability compensation under 42 U.S.C. § 659(a) and (h)(1)(A)(ii)(V). The Board also found that it did not have the authority to review the garnishment order because review was within the province of state and federal courts, not VA.

Mr. Rhone appealed the Board's decision to the Court. He argued that military retirement pay is not divisible property and that VA lacks authority in all instances to garnish disability payments, even to satisfy a state court's order regarding alimony. Mr. Rhone argued that 10 U.S.C. § 1408, not 42 U.S.C. § 659, was controlling. He also argued that the Board's review of the state court's order was improper because the general counsel's opinion conflicted with section 1408, and therefore, it was improper for the Board to comply with it.

The Secretary acknowledged that section 1408 preempts states from treating retirement pay as community property, but he argued that it did not preclude states from subjecting such pay to alimony obligations. Accordingly, the Secretary defended the Board's decision, arguing that the Board properly concluded that VA had the authority under 42 U.S.C. § 659 to garnish Mr. Rhone's compensation pursuant to a valid state court order. The Secretary further asserted that VA had no jurisdiction to inquire into the underlying validity of the legal process and could not assume jurisdiction over challenges to state garnishment proceedings.

The Court agreed with the Secretary. The Court held that "because Mr. Rhone waived a portion of his military retirement pay to receive VA disability benefits, those benefits are not exempt from apportionment for the purpose of alimony payment under 38 U.S.C. § 5103A." The Court also held that VA lacked jurisdiction to decide questions of fact or law associated with a state garnishment order because garnishment is a matter of state law. Mr. Rhone appealed to the Federal Circuit.

The Federal Circuit noted that there are exceptions to the general rule under 38 U.S.C. § 5103A that VA benefits are generally exempt from any legal or equitable processes. Section 659 of 42 U.S.C. provides exceptions for alimony and child support. Citing the plain language of the statute, the Federal Circuit noted that the statute authorizes VA to withhold disability compensation when a veteran elects to waive a portion of retirement pay in lieu of disability compensation.

The Federal Circuit addressed Mr. Rhone's arguments that section 659 should be read in light of 10 U.S.C. § 1048, the Uniformed Former Spouses' Protection Act, and that the case should be governed by Supreme Court cases *McCarty v. McCarty*, 453 U.S. 210 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989); and *Howell v. Howell*, 581 U.S. 214 (2017).

The Federal Circuit starkly noted that Mr. Rhone's reliance on section 1408(d)(1) ignored that section 1408 and section 659 were statutes directed at different departments and different sources of money. Title 10 governs the Armed Forces and authorizes the respective Secretaries of each branch of the military to deduct child support, alimony, or community property from a service member's disposable retired pay. Title 42 authorizes the Secretary of VA to garnish a member's disability compensation in response to a court order. Accordingly, the Federal Circuit held that because section 1408 is entirely consistent with section 659, Mr. Rhone's view that section 1408 supersedes section 659 was without merit. The Federal Circuit also drew upon the legislative history to establish that congressional intent was for the statutes to work in tandem to provide two parallel methods for enforcing alimony obligations.

The Federal Circuit then determined that the Supreme Court decisions relied upon by Mr. Rhone were not inconsistent with the statutes because the decisions addressed community property, not alimony, and did not address section 659's impact on disability compensation.

Finally, the Federal Circuit addressed Mr. Rhone's argument that the Board was obligated, under 38 U.S.C. § 511(a), to review the state garnishment order for alimony and that the Board's failure to do so violated his due process rights. The Federal Circuit held that because garnishment of alimony is a matter of state law provided by state courts, section 511(a) does not entitle a veteran to a second opportunity to adjudicate that matter within the VA system. Section 511(a) only allows the Board to review a decision by the Secretary. In conclusion, the Federal Circuit affirmed the Court's decision that Mr. Rhone was not entitled to have VA adjudicate the merits of the garnishment order and that VA lawfully withheld a portion of his disability compensation payments pursuant to a state court order for alimony payments.

Kenneth L. Meador is an Appellate Attorney with the National Veterans Legal Services Program.

Limits on Education Benefits for Veterans with Multiple Periods of Service and Eligibility under Multiple Programs.

By John Kitlas

Reporting on *Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022)

In *Rudisill*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) holds that, pursuant to the unambiguous language of 38 U.S.C. § 3327, a veteran who switches from the Montgomery GI Bill to the Post-9/11 program is

limited to a total of 36 months of education benefits. This decision is unique for several reasons. The first is the fact that it concerns the area of education benefits which is not a common topic addressed in veterans law cases. This is particularly true in comparison to topics such as service connection and disability evaluations.

Another notable aspect of *Rudisill* is that it is an en banc decision vacating the panel decision in *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021). Such decisions are certainly not common.

Indeed, the Federal Circuit's own website states that "[e]n banc consideration is rare." https://cafc.uscourts.gov. It is further stated that because each merits panel may enter precedential opinions, a party seeking en banc consideration must typically show that either the merits panel has (1) failed to follow existing decisions of the United States Supreme Court or Federal Circuit precedent, or (2) followed Federal Circuit precedent that the petitioning party now seeks to have overruled by the court en banc.

The website also references Federal Circuit Internal Operating Procedure #13 for a list of several reasons why it may consider a matter en banc, as well as Federal Circuit Rule 35 (Petitions for Hearing or Rehearing En Banc) for additional information and filing requirements. A full recitation of these rules is beyond the scope of this summary, but this reflects the unique nature of en banc decisions.

Turning to the merits of this case, it concerns a veteran who had multiple periods of service, which made him eligible for education benefits under both the Montgomery GI Bill (MGIB) and the Post-9/11 GI Bill. Both programs have their own specified benefits, to include specified limits on the time and total amount of which an eligible veteran may receive.

The specifics of MGIB are governed by 38 U.S.C., Chapter 30, while Post-9/11 GI Bill is governed by 38 U.S.C., Chapter 33. Relevant to this case is the fact that both programs provide a maximum of 36 months of aggregate benefits. The issue in *Rudisill* concerned the applicability of 38 U.S.C. § 3327(d)(2), which provides limits on the number of months of entitlement to educational assistance for veterans who switch from the MGIB program to Post-9/11 program without first exhausting their MGIB benefits. In pertinent part, this statutory provision limits the amount of Post-9/11 GI Bill benefits to the amount of unused benefits under MGIB.

The *Rudisill* decision was an appeal from the case of *BO v. Wilkie*, 31 Vet. App. 321 (2019) in which the appellant contended, in essence, that the limits of section 3327(d)(2) did not apply because the veteran had multiple periods of service and, thus, qualified for MGIB under one period of service, and qualified for Post-9/11 GI Bill benefits under a separate period of service.

A divided panel of the United States Court of Appeals for Veterans Claims (Court) held that section 3327(d)(2) did not apply to veterans, such as the appellant, with multiple periods of service; and were allowed to receive entitlement under both programs subject to a 36-month cap on utilization of each of the two separate programs and a 48-month cap overall.

Prior to addressing the merits of the case, both the original panel decision and the en banc decision in *Rudisill* addressed whether the government had timely appealed the Court's decision and answered that question in the affirmative.

With respect to the merits of the case, the original panel decision authored by Judge Newman, joined by Judge Reyna, upheld the Court's decision. Judge Dyk dissented regarding the majority's interpretation of the relevant statutory provision.

The en banc decision that is the focus of this appeal, was authored by Judge Dyk joined by Chief Judge Moore and Judges Lourie, Proust, Taranto, Chen, Hughes, Stoll, Cunningham, and Stark. Judges Newman and Reyna filed dissenting opinions. The majority opinion held that the plain language of section 3327(d)(2) applies to veterans with multiple periods of service and reversed the Court's decision.

In interpreting the provisions of section 3327(d)(2), the majority found that the plain language showed

the appellant in this case was the type of individual for whom its provisions were intended to apply. Specifically, that he made the type of election specified under section 3327(a)(1)(A). Regarding the appellant's contention that section 3327(d) was only intended to apply to veterans with a single period of service, the majority found there was no such limit in the language of the provision, nor any suggestion in its legislative history that the section is so limited. It was noted that neither sections 3332(d) nor 3327 mentions periods of service. It was also noted that the only related section that distinguishes veterans with a single period of service from veterans with multiple periods of service is 38 U.S.C. § 3322(h), which was enacted after the provisions at issue here and was intended to prevent veterans from being able to exhaust entitlement to 36 months of training under MGIB and subsequently enroll and receive an additional 12 months of entitlement under the Post-9/11 GI Bill based on the same period of service.

The majority further noted that, under the appellant's interpretation of the statute, veterans with multiple periods of service would not be able to avail themselves of the benefits of sections 3327(f) and (g). It was noted that subsection (f) provides additional assistance to veterans who make the section 3327(a)(1)(A) election and who have previously made contributions toward the MGIB program. Subsection (g) allows veterans making the section 3327(a)(1)(A) election to retain their recruitment incentives for critical skills. The majority noted that there was no indication Congress intended to limit these benefits to veterans with a single period of service.

The majority also addressed the appellant's contention that 38 U.S.C. § 3695(a)'s limitation of 48 months of aggregate benefits for veterans eligible under more than one education program is the only limit that should apply here. However, the majority noted that prior caselaw read this provision as "not a source of veterans benefits" but rather an additional limitation on a veteran's use of education benefits from multiple programs. The majority stated that there is nothing unusual about having multiple benefit limitations in a single statute. Moreover, the majority found that section 3695 does not state or imply that the plain language of section 3327(d)(2) is inapplicable to veterans with multiple periods of service.

Finally, the majority addressed the appellant's contention that the pro-veteran canon of interpretation supports the result he favors. The majority acknowledged this cannon, but found it played no role where the language of the statute is unambiguous, which was the case here. Stated another way, the majority found that the pro-veteran canon of statutory interpretation is applicable only after it has first been determined that the statute is ambiguous. Of note, the dissent authored by Judge Reyna, would have found that the pro-veteran canon applies to the initial question of whether an ambiguity exists.

John Kitlas is an attorney with the Board of Veterans' Appeals.

Dissenting Opinion: En Banc Hearing in *Skaar* Should Have Been Granted

By Yesenia DeJesús Torres

Reporting on *Skaar v. McDonough*, 57 F.4th 1015 (Fed. Cir. 2023) (en banc order).

In *Skaar v. McDonough*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) denied a combined petition for panel rehearing and rehearing en banc in response to a previous Federal Circuit decision from September 8, 2022. In the previous decision, the Federal Circuit vacated a class certification by the U.S. Court of Appeals for Veterans Claims (Court) because the Court did not have jurisdiction over every member of the class.

Judge Dyk, joined by Judges Reyna, Stoll, Cunningham, and Stark, dissented from the denial of the petition for an en banc rehearing, stating that

the September 2022 panel decision effectively eliminated class action lawsuits for veterans claims, thus contradicting precedential case law from the Supreme Court of the United States.

Background

In December 2019, the Court granted a class certification to veterans seeking disability compensation in connection with the cleanup effort of a radioactive disaster near Palomares, Spain that occurred in 1966. *Skaar v. Wilkie* (*Skaar I*), 32 Vet. App. 156, 201 (2019) (en banc order). The class representative, Victor Skaar, filed a claim with the Department of Veterans Affairs (VA) after a physician told him that exposure to ionizing radiation can cause leukopenia, a blood disorder he was diagnosed with 30 years after his exposure to radioactive materials. After various procedural motions, he timely appealed to the Court.

The Court defined three categories of claimants for inclusion in the certified class: (1) present claimants who had appealed or were still able to timely appeal their adverse Board decisions; (2) present-future claimants who had filed a relevant claim that was still pending either before the regional office or the Board; and (3) future-future claimants who have developed a relevant condition but have not yet filed a claim.

Present claimants were clearly in the Court's jurisdiction because they have already received a Board decision. The Court's sole jurisdictional statute, 38 U.S.C. § 7252, specifies that the Court has exclusive jurisdiction to affirm, modify, reverse, or remand Board decisions, and that the Secretary cannot seek review of these decisions. Therefore, individuals who had appealed or were still able to timely file an appeal were deemed eligible for the class.

Additionally, the Court excluded all claimants who failed to timely appeal adverse decisions from the VA regional office or the Board to the higher authority. Since those individuals had not exercised due diligence in pursuing their claims, they were excluded from the certified class.

Present-future and future-future claimants, however, created a jurisdictional gray area for the Court. They did not have Board decisions in hand but could still eventually benefit from a favorable decision. The Court ultimately concluded that section 7252 does not expressly limit its jurisdiction to claimants with Board decisions, and the Court included them in the certified class.

VA appeals to the Federal Circuit

The Secretary timely appealed to the Federal Circuit because some members of the certified class were not currently within the Court's jurisdiction. This is an unusual action because according to section 7252(a), the Secretary is statutorily prohibited from requesting review of the Court's decisions.

However, the Secretary was challenging whether the Court had jurisdiction to issue a decision in the first place. The Secretary argued that the Court has jurisdiction over only those claimants who had already received decisions and were currently eligible for judicial review by the Court; he argued that the Court should not be able to exercise jurisdiction over claimants with unadjudicated claims.

Mr. Skaar cross-appealed to the Federal Circuit, asserting that the certified class should be more broadly defined to include all claimants, including those who did not have Board decisions and those who had not diligently pursued their claims.

On September 8, 2022, the Federal Circuit agreed with the Secretary, holding that the Court had exceeded the limits of its jurisdiction when it certified a class that included claimants that the

Court did not have current jurisdiction over. *Skaar v. McDonough* (*Skaar II*), 48 F.4th 1323 (Fed. Cir. 2022). The Federal Circuit vacated the class certification and remanded the matters back to the Court for further proceedings. On remand, the Federal Circuit also limited the scope of the Court's decision to the merits of Mr. Skaar's claims and stated that if the Court reconsiders a class certification in this case, it should confine the proposed class to veterans who have already appealed their Board decision or are still able to do so timely.

Dissenting opinion

Mr. Skaar submitted a combined petition for panel rehearing and rehearing en banc to the Federal Circuit, which denied both petitions. *Skaar v. McDonough* (*Skaar III*), 57 F.4th 1015 (Fed. Cir. 2023) (en banc order). Five judges signed a dissenting opinion that analyzed flaws in the panel's decision and advocated for class action as an appropriate legal mechanism for Mr. Skaar's appeal. *Skaar III*, 57 F.4th at 1016 (Dyk., J., dissenting).

First, the dissent took issue with the panel's assertion that class members are required to have final Board decisions. Judge Dyk stated that the purpose of class actions is not just to consolidate similarly situated claimants but also to aggregate claims not yet filed into a singular action. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310-11 (3d Cir. 2011) (en banc) (recognizing that a class action can include plaintiffs who have not filed cases).

The dissent also pointed to the All Writs Act, 28 U.S.C. § 1651, as a means to reach future claims over which jurisdiction has not yet been perfected but would be perfected in the future. *See Roche v Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (stating that a circuit court's authority can extend to cases that are within its appellate jurisdiction even if the appeal has not yet been perfected).

Third, Judge Dyk challenged the panel's interpretations of the Social Security benefits class action case of *Weinberger v. Salfi*, 422 U.S. 749 (1975), and its progeny to establish the Court's jurisdictional boundaries. The panel cited the unnamed plaintiffs in *Weinberger* in order to exclude the *Skaar* claimants without a Board decision from a certified class at the Court.

Here, Judge Dyk distinguished *Weinberger* because the unnamed plaintiffs had never even filed claims with the Agency and were unknown to any court for jurisdictional purposes. A year after *Weinberger*, the Supreme Court issued a decision in *Mathews v. Eldridge*, 424 U.S. 319, 329 (1976), stating that the complaint in *Weinberger* had been "jurisdictionally deficient" because the unnamed plaintiffs had never filed any claims.

Judge Dyk also cited *Califano v. Yamasaki*, 442 U.S. 682 (1979), a Social Security case in which the Supreme Court approved classes that involved both claimants who had not filed claims but would in the future, as well as those who had filed but had not yet received a decision from the Secretary. In this decision, the Supreme Court rejected the notion that Congress intended for Social Security's statutory jurisdiction to be incompatible with class action remedy.

Lastly, the dissent disagreed with how the *Skaar* panel interpreted supplemental jurisdiction in 28 U.S.C. § 1367. The panel stated that district courts can exercise jurisdiction over future claimants because Congress expressly conferred supplemental jurisdiction to encompass future claimants in section 1367 (a).

However, the dissent explained that class action lawsuits with future claimants were commonplace before Congress codified section 1367 in 1990. This statute was intended to address situations where a

court lacked subject matter jurisdiction over the claimants.

Conclusion

The dissenting opinion submitted that the Federal Circuit should have granted Mr. Skaar's petition for an en banc review. The judges advocated for class action litigation as a mechanism that facilitates efficiency and fairness. The panel's decision in September 2022 effectively excluded classes of claimants that have historically been included in class action lawsuits and therefore contradicts Supreme Court case law.

Yesenia DeJesús Torres is a 2L at George Washington Law and is interning this summer at the Court of Appeals Litigation Group at the Department of Veterans Affairs

Absent Additional Language, the Term "Furnish" Encompasses VA Payment for Care at Non-VA Facilities

by Nancy Eriksen

Reporting on *Van Dermark v. McDonough*, 57 F.4th 1374 (Fed. Cir. 2023).

The Federal Circuit held in *Van Dermark v. McDonough* that, for purposes of 38 U.S.C. § 1724, the word "furnish" has a broad meaning encompassing payment or reimbursement for care provided by non-VA facilities.

Section 1724 prohibits the VA from furnishing medical care outside the United States. The rule has several exceptions, including a carve-out permitting care abroad for service-connected disabilities. Sections 1725 and 1728 permit the VA to pay for emergency care at non-VA facilities. *Van Dermark* addressed the interaction of these laws.

Veteran Peter Van Dermark received emergency medical care in Thailand for a cardiac condition that was not service-connected. He subsequently sought VA reimbursement. Mr. Van Dermark argued that the court should narrowly interpret "furnish" to encompass only care provided by the VA or by facilities under contract with the VA. This interpretation would circumvent section 1724's general prohibition and allow VA payment for emergency care outside the United States. But it would also restrict the VA's ability to provide non-emergency care abroad for service-connected disabilities.

The Federal Circuit declined to adopt the narrow interpretation, instead affirming the holding of the U.S. Court of Appeals for Veterans Claims that "furnish" encompasses VA payment for care at non-VA facilities.

After noting that neither the pro-veteran canon nor the ordinary meaning of "furnish" were dispositive, the panel focused most of its analysis on context.

The panel first looked to section 1724's "specific context," i.e., its purpose and history. Noting that section 1724's goal is to "enable veterans abroad to get treatment for service-connected disabilities," the panel concluded that a broader reading of "furnish" best accomplishes that purpose. Additionally, the legislative history of section 1724 references reimbursement and care provided "at VA expense." These terms support defining "furnish" to include payment.

Next, the panel considered the overall statutory scheme. It reasoned that when Congress wants to narrowly define "furnish," it does so with additional language. For example, section 1703 uses "furnish" broadly to refer to payment for care at non-VA facilities. Later in that section, and in section 1703A, additional language describes furnishing care through contracts. Since section 1724 lacks such additional language, it makes sense to read "furnish" broadly in that section.

Finally, the panel noted that the VA's actions over time support a broad reading of "furnish" in section 1724. The VA has a longstanding practice of denying payment for emergency treatment received abroad but paying for care outside the United States for service-connected disabilities.

Mr. Van Dermark argued that section 1724 conflicts with sections 1725 and 1728. But the panel concluded that all three sections could be harmonized. While the VA can pay for emergency care at non-VA facilities in some situations, that option is not available abroad if the emergency medical condition is not service-connected.

Van Dermark limits veterans' ability to receive VA-funded emergency treatment abroad for conditions not service-connected. But it maintains a broad reading of section 1724's exceptions, including for care related to service-connected disabilities. Either interpretation of "furnish" would have restricted care for some veterans.*Van Dermark* rejects those interpretations and maintains the status quo.

Nancy Eriksen is a third-year law student and participant in the Veterans Advocacy Clinic at Stetson University College of Law.

Court Denies Petition for Extraordinary Relief

by Sarah "Sally" Battaile

Reporting on *Prewitt v. McDonough*, 36 Vet. App. 1 (2022).

In *Prewitt*, a panel of the U.S. Court of Appeals for Veterans Claims (Court) comprised of Judges Pietsch, Falvey, and Jaquith, addressed Mr. Prewitt's pro se petition asserting that structural constitutional problems prevented the Board from adjudicating his previously remanded case. The Court denied the petition because, whether liberally construed as a writ or as a request for the Court to recall its mandate, Mr. Prewitt did not show he is entitled to either relief. Judge Pietsch issued the opinion of the Court, and Judges Falvey and Jaquith each issued separate concurring opinions that address, in part, the merits of the arguments raised in Mr. Prewitt's petition.

In July 2019, Mr. Prewitt appealed an April 2019 Board of Veterans' Appeals (Board) decision that denied various elements of several disability claims. Mr. Prewitt argued that the VA had violated his rights under the U.S. Constitution's Due Process and Takings Clauses. In July 2020, the Court issued a single-judge decision affirming the Board decision in part, dismissing in part, and setting aside in part, and remanded the set-aside matters, but declined to address Mr. Prewitt's constitutional arguments. Mandate for the Court's single-judge decision issued in September 2021.

Mr. Prewitt appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit dismissed his appeal because the constitutional challenges were inextricably intertwined with the matters the Court had previously remanded to the Board.

In June 2022, Mr. Prewitt filed the instant petition, in which he asked the Court to take jurisdiction and decide questions of constitutional law he claimed prevented the Board from hearing his case on remand.

Citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004), the Court noted the three conditions that must be met before a court may issue a writ: (1) the petitioner must lack adequate alternative means to attain the desired relief, thus ensuring the writ is not used as a substitute for an appeal; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted.

Additionally, the Court noted that pursuant to Rule 21(a), a petition for an extraordinary writ must, among other things,

> (1) state the precise relief sought; (2) state the facts necessary to understand the issues presented by the petition; (3) state the reasons why the Court should grant the petition, including why the petitioner has a clear and indisputable right to the writ and why there are inadequate alternative means to obtain the relief sought; [and] (4) to include an appendix containing copies of any order or decision or any other documents necessary to understand and support the petition.

U.S. VET. APP. R. 21(a).

Noting Mr. Prewitt's petition did not address the conditions that would warrant the issuance of a writ of extraordinary relief, nor did he comply with Rule 21, the Court found that, in any event, Mr. Prewitt failed to show entitlement to extraordinary relief.

The Court found that nothing about the proceedings of this case was exceptional, noting that both its single-judge decision and the Federal Circuit's dismissal of Mr. Prewitt's appeal directed the Board to address his constitutional challenges, a routine and accepted practice. The Court also noted that the Board's inability to invalidate the VA's adjudication process on constitutional grounds would not make it futile for the Board to address this issue, because the Board could provide information and analysis useful to the resolution of constitutional arguments by the Court. Further, it is possible the Board could find another basis to rule in his favor. But even if the Board rejected his arguments, Mr. Prewitt could appeal that decision to the Court. Therefore, Mr. Prewitt has adequate alternative means to obtain the desired relief. The Court was thus not convinced that issuance of the writ was warranted given the circumstances.

The Court next addressed the petition as a request to recall mandate. It noted that it may do so only for good cause or to prevent injustice, and only when unusual circumstances exist sufficient to justify modification or recall of a prior judgment. Unusual circumstances for recalling mandate include fraud, the correction of clerical errors, or judicial oversight. The Court concluded that here Mr. Prewitt had not demonstrated good cause or unusual circumstances for a recall of the Court's mandate.

Judges Falvey and Jaquith wrote separate concurring opinions. Judge Falvey believed a fuller explanation of the Court's rejection of the construed motion to recall mandate, as it relates to Mr. Prewitt's structural constitutional argument. He argues, in essence, that the Board members' appointments violate the Appointments Clause of the U.S. Constitution and, therefore, the Board is unconstitutionally structured and cannot render a valid decision on his benefits claim.

Specifically, Judge Falvey found that a crucial element of Mr. Prewitt's Appointments Clause argument, which the majority declined to address, is the contention that the Court is part of the judicial, not executive, branch, contrary to *United States v. Arthrex, Inc.* 141 S. Ct. 1970, 1984 (2021). Judge Falvey engaged in an explanation of why the Court wields executive power under Article II, and not the judicial power of the United States under Article III. And, because the judges of the Court are principal officers of the executive branch, appointed by the President and confirmed by the Senate, the Court's review of Board decisions prevents violations of the Appointments Clause, and is the ground on which Judge Falvey would reject Mr. Prewitt's motion to recall mandate.

Judge Jaquith concurred separately to address Judge Falvey's view that the Court is part of the executive branch, exercising executive power. Judge Jaquith, instead, believes this would weaken, even nullify, the basic protection of review of agency decisions in the independent judicial branch provided to veterans and their dependents and survivors.

Judge Jaquith wrote at length, addressing the supposed constitutional defect that the Secretary's appointment of Board members violates the Appointments Clause and providing in-depth discussions on the VA's and the Court's structures, powers, and functions. Judge Jaquith states that the "supreme importance" and complexity of the issue signifies that it was inappropriately addressed in the

context of Mr. Prewitt's petition. Judge Jaquith expressed the view that the question of whether there is an Appointments Clause problem should be answered in a case where the decision depends on the answer, is preceded by robust briefing and oral argument, and accounts for the Court's prior precedential decision rejecting an Appointments Clause challenge to Board action when the Court found that the Secretary appoints Board members – inferior officers – in the Secretary's capacity as "Head[] of Department[]." *See Henderson v. West*, 12 Vet. App. 11, 16 (1998) (quoting U.S. Const. Art. II, § 2, cl. 2).

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Back to the Future, Part II: Apparent Shortcomings of VA Form 21-8951-2 Used as an Instrument to Calculate a VA Overpayment

by Anna Kapellan

The distinction between the past, present, and future is only a stubbornly persistent illusion. – Albert Einstein

"On the road from the City of Skepticism, I had to pass through the Valley of Ambiguity," noted Adam Smith, known as the Father of Economics. Smith's description of his intellectual journey was perhaps a somber prediction of what would become the task of calculating a veteran's overpayment debt created through VA Form 21-8951-2, a document obstructing the calculative process and inevitably generating accounting errors.

The errors derive from a conflict of time systems underlying the calculations – a conflict that cannot be resolved even through Lorentz's invariance or covariance elaborations on Einstein's $E = mc^2$ formula: since VA's timelines should but do not change homogeneously when shifted from one set of temporal coordinates to another. Placed at an "absolute disadvantage" long predicted by Adam Smith, veterans are the primary casualty of the VA time machine. Further, VA itself is also an unexpected victim of the time systems VA is required to juggle.

This is so because VA must operate in three different temporal systems superimposed upon VA. The first is the usual 12-month calendar used as the secular calendar by almost all countries in the world (except Afghanistan, Iran, Ethiopia, and Nepal). This time system, known as the Gregorian calendar, was introduced by Pope Gregory XIII in October 1582 upon designating every fourth calendar year a leap year to better approximate the length of a solar year (the period of the Earth's revolution around the Sun) than the attempt of its predecessor, *i.e.*, the Julian calendar adopted by Julius Caesar on January 1, 45, B.C.

The second time system underlying VA's operations is familiar to all U.S. federal employees: this system is the fiscal year (FY) pursuant to which an FY does not begin on January 1st; instead, it begins on October 1st of the preceding calendar year. This concept was adopted relatively recently, *i.e.*, 53 years ago, when Congress passed the Budget and Impoundment Control Act, changing the process of promulgating the annual federal budget. As part of the change, the Act moved the beginning of an FY from January 1st of the calendar year having the number corresponding to that of the FY to October 1st of the prior calendar year to allow political officials who took office in January to partake in the process of formulating the federal budget during their first year in office. Since the calendar year that gives the number to the FY only starts three months after its co-numbered FY began, an FY operates as an accounting time machine tool during the last three months of every calendar year.

The third time system and another accounting time machine tool arises from the Congressional Act of 1974, which adopted the cost-of-living-adjustment (COLA) system for the use of the Social Security Administration (SSA). The concept of COLA was

needed to allow annual cost-of-living increases for inflation that eroded the purchasing power of a U.S. dollar as reflected by the Consumer Price Index (*i.e.*, the annual increases in prices paid by an average urban consumer for a market basket of goods and services). Just like the VA monetary benefit system and an ordinary payroll system, the SSA payment system utilized post-accrual distribution in the sense that payments are made for the pay period that has just ended, same as a paycheck is paid for the pay period that has just ended. Thus, SSA found it warranted to start each of its COLA years on December 1st of a calendar year to ensure that, on or about January 1st of the next calendar year, recipients of SSA benefits entitled to a COLA increase would receive upwardly adjusted amounts. Obligated to use the SSA COLA percentage to adjust disbursements of its monetary benefits, VA had to use SSA's COLA year concept, thus adopting a COLA year running from December 1st of a given calendar year to November 30th of the next calendar year.

But, unlike an FY that has its number correspond to the number of the calendar year that would begin three months *after* the co-numbered FY, a COLA year is co-numbered with the calendar year during which the COLA year begins to run, *i.e.*, a COLA year is co-numbered with the calendar year during which the December 1st inflation-based increase takes place, even though 11 months of this calendar year have already expired by the time when the COLA year begins. Therefore, 11 months of a COLA year fall within a calendar year that has the number that follows the number of the COLA year. (Effective December 2018, VA tried to change this designation system and numbered the COLA year that began on December 1, 2018, as the COLA year 2019. However, unfortunately, this experiment created a unique duality effect because, on its webpage reflecting historic COLA rates, this year is still designated as the COLA year 2018, *see*, *e.g.*, https://www.benefits. va.gov/COMPENSATION/ resources_compo114.asp (providing links to COLA years at the bottom of the webpage), but – on its webpage reflecting current and recent COLA rates, the very same COLA year is designated as COLA year 2019, *see* https://www.va.gov/disability/compensation-rates/veteran-rates/ (providing links to recent COLA rates at the bottom of this webpage). Needless to say, this duality did not eliminate and only proliferated the confusion.)

When these three time-systems, *i.e.*, a calendar year, an FY, and a COLA year, are juxtaposed, they yield a complete time-travel accounting effect because, from October 1st to November 30th of any calendar year, the number of this calendar year differs from both the FY and COLA years that runs during this period. And, to make the matters even more confusing, the FY number differs by two years from the COLA year number. To illustrate, from October 1st to November 30th of 2017, the FY number was 2018, but the COLA number was still 2016, *i.e.*, during any given day from October 1st to November 30th, VA was living in 2016 COLA-wise, 2017 Gregorian-calendar-wise, and 2018 FY-wise, placed in three parallel time systems.

Regretfully, VA Form 21-8951-2 builds on this three-parallel-time-systems time machine. The Form is used by VA to charge veterans with overpayments arising from their military training assemblies (TAs) and periods of return to active duty. Both TAs and active duty are military activities compensated by the Defense Finance and Accounting Service (DFAS), an agency that operates, *inter alia*, as the payroll arm of service departments operating within the Department of Defense (DoD). However, any concurrent receipts of VA monetary benefits and DFAS' active-duty- or TA-based payments are prohibited, meaning that a veteran who receives VA and DFAS' benefits for the same period of time becomes overpaid. Moreover, while one day of active duty always corresponds to one day of VA monetary benefits for VA purposes, each TA period corresponds to a one-day pay for VA purposes. TAs are often conducted on the two-TAs-per-calendar day basis; however, a veteran may partake only in one TA during a day when two TAs were

administered. Therefore, a veteran who executes two TAs during a single calendar day and is paid his/her VA benefits and DFAS' military pay, is overpaid for two calendar days for VA accounting purposes, even though the TAs he/she executed took place during a single calendar day. (This creates an even more complex fourth dimension of VA time system that often catches veterans off guard since they often cannot understand how could they be overpaid by VA for two days if they executed their TAs within only one calendar day: since this fourth dimension is nothing but an accounting fiction.)

To illustrate, if a veteran executed two TAs a day during each calendar day of the month of April and was paid his/her DFAS' military pay for these 60 TAs and, in addition, received his/her VA benefits for the month of April, the veteran is deemed overpaid by VA during 60 days, even though the month of April has only 30 days. In contrast, if the veteran executed only one TA period per day during the same month of April, he/she is deemed overpaid only for 30 days. Self-evidently, any combination of one and two TAs per calendar day would result in a number from 31 to 59. And, if days of active duty are added in the mix, all these active-duty days would add one overpaid VA day per each active-duty day, as if they were TAs executed on the one-TA-a-day basis, even though each of these active-duty days lasts, hours-wise, the same period of time or longer than two TAs.

Therefore, the issue of how many days of active duty and how many TAs did a particular veteran execute during particular dates is nothing short of critical for VA's accounting purposes to determine the exact amount of his/her VA overpayment. Unfortunately, while DFAS reports the amounts of active duty days and TAs a veteran executed to VA (to enable VA's charge of the veteran with an overpayment and recoup the overpaid VA funds), DFAS' reports: (a) are habitually sent at least a year – and, often, many years -- after the veteran executed his/her TAs and/or active duty; (b) often contain an incorrect number of TAs and/or active duty days; and (c) state only the number of TA periods and/or active duty days the veteran executed during a given FY, *i.e.*, without specifying the actual dates when these TA periods of active duty days were executed.

A DFAS report to that effect prompts VA's issuance of VA Forms 21-8951-2 to veterans and, understandably, it states only the number of VA days overpaid during a particular FY. In conjunction with stating the number of days of the alleged overpayment during a particular FY, VA clarifies that, to calculate the amount of a veteran's VA overpayment, VA would use the daily amount of his/her VA benefits received on the last day of this FY. The rationale of VA's use of a veteran's daily VA benefit amount paid on the last day of the FY is obvious. This is so because DFAS usually omits to report to VA the exact dates when each TA or day of active duty was executed. Indeed, even if VA would request DFAS to specify these dates, VA could hope, at most, that DFAS would furnish VA with the veteran's UH022-2405 History Report, a document used by DFAS to disburse military pay because Section 7 in the History Report, titled "Calendar Data," provides information that VA might use to extract the amounts and dates of TAs and active-duty dates. However, a UH022-2405 History Report often turns into an unexpected accounting trap.

To start, a UH022-2405 History Report is hard to decipher because, in the first left column, it designates the months and, in the second, the calendar year These columns create the grid of the chart jointly with the top row designating the dates within each month of the calendar year. Accordingly, to extract information about a particular FY, VA needs UH022-2405 History Reports for two consecutive calendar years to piece together the three-month period of the first calendar year and the nine months of the second calendar year. Moreover, a UH022-2405 History Report uses digital designations in lieu of abbreviations, but the Report itself has no legend to help the reader to decipher the Report and figure out that the designation "22" is not one designation.

Instead, it has the same meaning as two designations, one "20" and another "02" because "20" means a TA period executed in the morning, while "02" means a TA executed in the afternoon, and "22" means that both TA periods were executed during the same calendar day, because a zero means a TA period that has not been compensated by DFAS. However, the digital designation "50" has no meaning ascribed to its zero because the entire "50" has only one meaning, *i.e.*, a date of executed active duty. If one is to add other digital designations, such as, *e.g.*, "99," an entirely unique "nonexistent day" (*i.e.*, the "31st" day of a calendar month that has only 30 or less days), the History Report quickly transforms into a riddle.

To make the matters even more complicated, DFAS frequently mistypes designations of the calendar years after different months. If such typos take place, a History Report leaves the reader to wonder, for instance, whether the months of January, February, and March were misnumbered as those of the calendar year 2004 but, in reality, they were part of the calendar year 2005, or if the months of April to December were misnumbered as belonging to the calendar year 2005, but – in reality – they were part of the calendar year 2004, An example of a poorly readable History Report with this type of issue is shown at the end of this article.

Because VA, understandably, has no desire to imitate Dr. "Doc" Emmett Brown (who, in the first movie "Back to the Future," tried to use a "thought reading" machine when Marty McFly knocked on his door upon going back to 1955 and, after unsuccessfully guessing that Marty "came to sell . . . a subscription to the Saturday Evening Post" or ask for a "donation to the Coast Guard Youth Auxiliary," exclaimed, "Do you know what this means? It means that this damn thing does not work at all!"), VA does not attempt to guess anything. Rather, VA clarifies to veterans that it would calculate their VA overpayments by using the daily amount of the veterans' VA benefits that they were receiving on the last day of the FYs during which their overpayments occurred.

However, VA's indiscriminative use of the amount paid to veterans on the last day of the FYs at issue is highly likely to lead to incorrect results, even if the DFAS reports correctly give the number of TAs or active-duty days executed during these FYs. In fact, such calculative errors based on VA's use of amounts that veterans were paid per day on the last day of the FYs at issue often have financially dire impacts.

To illustrate, assume that a married veteran with two minor children applied and was awarded service connection for disabilities (yielding a combined 20 percent rating effective August 2020) but continued executing TAs. Further assume that, in October and November 2020, the veteran executed a total of 36 TAs, *i.e.*, two TAs each Saturday and each Sunday -- a very common scenario. Let's further assume that, on December 1, 2020, he/she was called to active duty but, upon experiencing an injury on December 30, 2020, the veteran was honorably discharged on December 31, 2020, and immediately applied for service connection based on residuals of this injury and for upward adjustments based on his/her spouse and minor children because a veteran in receipt of a combined disability of 30 percent or higher is entitled to a spousal and children-based upward adjustments. Assuming the veteran's claims were granted by VA in summer 2021 and raised his/her combined rating to 100 percent effective January 1, 2021, thus triggering the spousal and children-based upward adjustments, the daily amount of his/her VA benefits on the last day of FY 2021 would become dramatically different from the actual daily amount of VA benefits he/she had been receiving during his/her TAs and active duty. The actual daily VA amount of the veteran's overpayment based on each of his/her TAs was only $9.22 ($281.27 x 12 / 366) since he/she had only a 20 percent combined rating and was not entitled to an upward adjustment based on his/her spouse and children. Plus, even though VA rates were upwardly

adjusted on December 1, 2020, he/she was overpaid by VA based on his/her active duty only at a daily rate of $9.37 ($284.93 x 12 / 365). Therefore, the actual amount of the veteran's VA overpayment based on all his/her TAs and all active-duty days was $622.39 ($9.22 x 36 + $9.37 x 31).

However, since the veteran's combined rating was raised to 100 percent and he/she was awarded spousal and children-based upward adjustments effective January 1, 2021, VA's use of his/her daily VA amount as of the end of FY 2021 would yield a much higher daily overpayment of $116.30 (($3,450.32 + $87.17) x 12 / 365), meaning that VA would arrive to a total overpayment amount of $7,792.10 ($116.30 x 67), thus overcharging the veteran a whopping sum of $7,169.70 ($7,792.1 – $622.39). Therefore, the actual dates of a veteran's return to active duty, as well as the dates of his/her execution of TAs, are critical.

Unfortunately, most veterans do not retain records of the dates of their TAs and active duty. Years later, when they get charged with VA overpayments (calculated based solely on the daily rate of their VA benefits received at the last day of the FY at issue and the total number of TAs and active duty days), natural deficiency of human memory begins playing tricks on these veterans who habitually believe that they were in fact overpaid that much and put little, if any, resistance to collection of debts created by VA not viciously but because of the deficiencies of VA's accounting time machine. At most, a doubting veteran might ask VA to obtain his/her UH022-2405 History Report but, as noted above, such a History Report might only add to the confusion, leading to years of litigation. Therefore, not many veterans are willing to put a formidable argument based on facial inconsistencies of UH022-2405 History Reports. Brave in combat, many a veteran have no stamina to fight the reality of bureaucracy. And VA officers, overwhelmed by the ever-rising tide of paperwork that mounts on their desks, understandably often lack the stamina to plow through pages and pages of inconsistent, confusing records, and tend to just accept the final number stated by DFAS having no luxury to thoroughly review inconsistent dates that result in inexplicable calculations. Hence, it often falls on the Board to sift through pages of History Reports and remand veterans' challenges to VA for further inquiries to DFAS that, going through these

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cyclical chains, commonly, result in years of legal back-and-forth that often feels like a stalemate.

This unfortunate reality victimizing both veterans and VA officers begs for a cure. While VA Forms 21-8951-2 might have, at some point, appeared to be a viable solution to the task of calculating a TA-based or an active-duty-based overpayment, participants of the currently existing system ended up walking the mental road of Adam Smith backwards: through the Valley of Ambiguity into the City of Skepticism.

Perhaps, it would be primitive but more efficient for DFAS to automatically forward to VA all portions of History Reports on a monthly basis, as they get generated for each veteran who, after his/her first tour of active duty, either begins to execute TAs or returns to active duty since this basic solution would enable VA to respond promptly to the DFAS reports and address just a page or two of records when veterans' memories are still fresh. Admittedly less elaborate than the current system of DFAS reports that yield dateless numbers of TAs and active-duty days or long compilations of many years of History

MON	YR	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	UTA	SGLI	SSLI	HFP
JAN	05			50	50	50	50			22	22																						00	2	0	00
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MAR	05					22	22																										00	2	0	00
APR	04			22	22																										99	00	2	0	00
MAY	04	22	22																														00	2	0	00
JUN	04																										22	22				99	00	2	0	00
JUL	04										22	22									50	50	50	50	50								00	2	0	00
AUG	04							22	22																								00	2	0	00
SEP	04																															99	00	2	0	00
OCT	04		50	50																													00	2	0	00
NOV	04						22	22														50	50				22					99	00	2	0	00
DEC	04				22	22																											00	2	0	00

Reports with a year to half-a-decade delay, such basic monthly summaries would be a welcome relief because a simple solution might easily be worth a thousand confusing forms. And while, at the end of "Back to the Future," Doc whisks Marty and Jennifer from 1990 to 2015 and unforgettably exclaims, "Roads? Where we're going, we don't need roads!" the reality of 2023 is that VA does still need roads: simple old-fashioned blocks to build a simple path to clarity.[i]

Anna Kapellan is a Counsel to the Board of Veterans' Appeals with the Specialty Case Team, Overpayment and Waiver Group. She would like to thank Morgan MacIsaac-Bykowski of the Veterans Advocacy Clinic at the Veterans Law Institute of Stetson University for her kind encouragement to explore the frequently overlooked, difficult logistics of VA overpayment law.

[i] For additional discussion of deficiencies of and logistical barriers arising from VA Form 21-8951-2 in terms of due process associated with the creation of VA overpayments, *see Back to the Future: Unapparent Shortcomings of VA Form 21-8951-2 Used as an Instrument to Charge a VA Overpayment*, VETERANS L.J. vol. IV, 35 (2022).

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