

# VETERANS LAW JOURNAL

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## CAVC Heads to DAV in Kentucky for Oral Argument

by John Leon

Along the banks of the Ohio River, the U.S. Court of Appeals for Veterans Claims (the Court) held oral argument at the national headquarters of the Disabled American Veterans (DAV) in Erlanger, Kentucky, on June 17, 2025.

Presided over by Judges Bartley, Laurer, and Jaquith, the arguments were live-streamed on the Court's YouTube channel ([Boehringer v. Collins, No. 23-7995](#)). The case focused on continuous pursuit rules under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) for supplemental claims.



[L to R: Chief Judge Allen, and Judges Laurer, Bartley, and Jaquith, courtesy of DAV]

The panel was joined afterwards by Chief Judge Allen, who moderated a question-and-answer session once the formal proceedings concluded. Also in attendance was the veteran whose appeal was being considered, Mr. David Boehringer.

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[Counsel and those in attendance at oral argument, including appellant Mr. Boehringer, courtesy DAV]

While the Court has traditionally visited law schools during its outreach events, it has increasingly partnered with veterans service organizations. Since the start of 2024, the Court has held arguments at events hosted by the American Legion, the National Association of County Veterans Service Officers, and the National Organization of Veterans' Advocates, in addition to this DAV event.



[L to R: Chief Judge Allen and Judges Laurer, Bartley, and Jaquith, courtesy of DAV]

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



## Message from Chief Judge Allen

Colleagues and friends,

With summer vacations in the rearview mirror, the start of the school year, and the end of the fiscal year upon us, fall is often a busy time of year. The Court is certainly expecting lots of activity this fall!

On Saturday, November 8, and Sunday, November 9, the Court, in conjunction with George Washington University Law School, will host the annual National Veterans Law Moot Court Competition. As many of you know, the moot court competition is a key event on our calendar every year. It is one of the best ways that the Court engages with law students about our area of the law. Our competition is also one of the only moot court competitions where law students have the opportunity to argue in front of real practitioners and judges. This year, 28 teams from across the country have registered. There was so much interest that we opened a waitlist for other interested teams! It is shaping up to be an excellent event, as always.

This is where our community becomes so important: To continue the competition's legacy of practical experience for law students, we need volunteers. Whether you can spare a few hours to grade briefs or show up on Saturday, November 8, to share your wealth of knowledge by serving as a judge for the oral arguments, we would love to have your help! Being a judge is a great opportunity to connect with the veterans law community, meet new

practitioners, and provide law students with invaluable experience. Be on the lookout for additional information from the Bar Association on how to volunteer. And please spread the word to your colleagues!

The Court also continues our outreach efforts with several events planned for the fall. On September 11, 2025, the Court held oral argument at the annual NOVA Conference in Washington, D.C. We also have an upcoming outreach trip planned at Rutgers Law School in Camden, New Jersey, on October 7. On October 23, the Court will hold argument at the American Legion Symposium in Leesburg, Virginia. And, we will end a very busy year of outreach at the University of Missouri School of Law in Columbia, Missouri, on November 13.

These outreach trips and travel oral arguments are so important for connecting with practitioners and law students across the country and spreading the word about veterans law. They also would not be possible without a dedicated team of Court staff, law clerks, judges, and members of the Bar, who willingly give up time away from home. I am grateful to all of you who always support the Court's outreach efforts.

The Court is also continuing towards the implementation of our new case management system, Appellate Case Management System (ACMS). The ACMS team ended its first phase of building our new system in August and is hard at work on phase two. I will continue to update our community on this important project and will provide more information about training and our plans to "go live" as we move forward.

Amid all this activity, the Court also has said goodbye to two long-time employees this year. In July, Cary Sklar, the Court's General Counsel, retired, and, this month, Cynthia Brandon-Arnold, the Chief Staff Attorney, will retire. Cary and Cynthia have over 50 years combined experience at the Court. We will miss them and wish them all the best as they embark on their next chapters.

Turning to another pillar of the Court family, August 6, 2025, marked the 6-year anniversary of our courtroom naming in honor of Judge Frank Q. Nebeker, the first chief judge of our Court. Judge Nebeker's impact on the Court and veterans law generally cannot be overstated. He laid a foundation that we continue to build on as our caseload and staff have grown over the years. So many of the decisions he made starting our Court in 1989 have been key to our continued success. Judge Nebeker passed away last year, and he has been greatly missed but will never be forgotten.

Finally, and to sound a bit like a broken record, I leave you with some more astounding statistics about the number of appeals at the Court. As we approach the end of fiscal year 2025, the Court has received record numbers of appeals. Each month from April 2025 to July 2025 (we have not finalized numbers for August yet), the Court received more than 900 appeals. We remain on track to receive more than 10,000 appeals this year, making it our highest year on record! To provide some context of how far we've come and to return to our first chief judge, at the Court's first Judicial Conference in 1992, Judge Nebeker reported in the Court's first *three* years of operations, we received 5,117 appeals. We are now hitting almost double that number in a single year! I must commend our Court staff, particularly the Public Office and Central Legal Staff, for their continued efforts to process this historic number of appeals in as timely a manner as ever. It is because of their hard work and dedication that the Court has been able to meet the demands of this increased caseload.

I hope you all find some time to take a breath during this busy time of year. Have a great fall!

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## Message from Bar Association President James R. Drysdale

Dear Fellow Bar Association Members,

The CAVC Bar Association is a 501(c)(3) nonprofit organization that relies on volunteers for governance and operations. Serving on the Board of Governors or on a committee is a commitment that demands both time and dedication. The CAVC Bar Association is fortunate to have members who provide thoughtful guidance and identify meaningful opportunities for continuous improvement and smart growth. For their tremendous efforts this year, I would like to express sincere thanks to our current Board members who are completing their terms (John Juergensen, Keith M. Krom, Renee K. Reasoner, Christopher Wysokinski, who are completing three-year terms as Governors-at-large, and James Hekel, who is completing a one-year term as Secretary), as well as our committee member volunteers, including the Editorial Board of the *Veterans Law Journal*.

In addition, I would especially like to thank our Immediate Past President, Ashley Varga, whose excellent leadership over numerous years in various roles leaves the CAVC Bar Association well-positioned for the future. Those who volunteer to serve understand the value of service to the profession. I encourage you to take a moment to thank each member for their contributions over the past year and for their dedication to the bar association's mission.

As you may know, elections are underway for new members of the Board of the CAVC Bar Association, with ballots being accepted through **September 26, 2025**. I encourage all current members to participate in the selection of our governing Board by visiting our website at [www.cavcbarassociation.org](http://www.cavcbarassociation.org) and, after entering your username and password to log in, selecting "2025-2026 Election Ballot" from the drop-down menu next to your name. If you have not yet renewed

your CAVC Bar Association membership for 2024-2025, it is not too late! Please select "Join or Renew" from the homepage to purchase or renew your membership before casting your ballot.

The results will be announced at our annual meeting on **September 30, 2025**, at 3:00 PM (ET) in the library of the U.S. Court of Appeals for Veterans Claims on the Second Floor of 625 Indiana Ave., N.W., in Washington, DC. Following the annual meeting, the CAVC Bar Association will present the program, "AMA: The First Five Years" with Debra Bernal and April Donahower (CLE credit pending, available to members). Both the annual meeting and educational program will be available in-person and via livestream on our website [cavcbarassociation.org](http://cavcbarassociation.org).

This will be my last message to you in these pages, as Meghan Gentile, our current President-elect, will assume leadership of our organization on October 1, 2025. I'm confident the CAVC Bar Association will be in good hands. Among other things, Meghan previously led the effort to update our constitution and bylaws, which were successfully amended by a vote of the membership in 2024. This was unglamorous but vital work, and we're stronger as an organization for it.

It is heartening to review the accomplishments of our organization this year. We broadened our geographic reach by hosting member events or by exhibiting at conferences in Salt Lake City, UT, Boston, MA, Gulfport, FL, Minneapolis, MN, and Washington, DC. We continued to foster opportunities for member engagement, including washing the Korean War Veterans Memorial as part of the Bar Association's Day of Service (which is summarized in an article below), greeting an Honor Flight arrival at Reagan Washington National Airport, and partnering for the first time with the Court for its annual "Bring Your Children\* to Work Day (\*Grandchildren, nieces, and nephews are welcome too!)." We plan to continue seeking opportunities to connect with our geographically diverse membership, so please watch for events near you!



[Keith Krom and Ranger Pierce at the washing of the Korean War Memorial, courtesy of James Drysdale]

Additionally, we expanded opportunities for our members to earn CLE credit (including during our annual meeting on September 30, 2025). We also plan to provide more opportunities for our members to earn credit for the high-quality, engaging content that our Programs Committee regularly produces. In October 2024, the CAVC Bar Association offered a group admission ceremony for the U.S. Supreme Court Bar. In November 2025, we will do so again. We are honored to have Clerk of the U.S. Court of Appeals for Veterans Claims, Tiffany M. Wagner, move for the admission of ten CAVC Bar Association members to practice before the U.S. Supreme Court. Both this year and last, the number of interested members exceeded the spots available, so we hope to secure another chance next year for this unforgettable experience.

Finally, the CAVC Bar Association proudly sponsors the National Veterans Law Moot Court Competition (NVLNCC) each year, along with the U.S. Court of Appeals for Veterans Claims and the George Washington University Law School. This year the competition will be held on November 8-9, 2025, in Washington, DC. Thank you to our members who regularly volunteer to review briefs or judge preliminary rounds of oral argument. If you have not done so before, please consider volunteering this year! The NVLMCC has become renowned for the experience it offers competitors to engage with veterans law practitioners and, potentially, to argue

in a final round before judges of the U.S. Court of Appeals for Veterans Claims. Your direct involvement continues to make the NVLMCC a deeply rewarding experience, so please consider volunteering!

I am also happy to report that the CAVC Bar Association is well positioned financially. We will conclude the year favorable to the annual budget. We have seen a year-over-year increase in overall membership numbers and membership revenue. Our line-item and committee budget projections continue to become more accurate and predictable each year as we build upon the work of Immediate Past President Ashley Varga in updating our accounting software and annual budget processes. In addition, this year, the Board continued to seek ways to implement best practices in nonprofit corporate governance wherever possible. Remaining favorable to the budget while broadening our geographic reach and expanding our services is no small feat, so we genuinely appreciate your ongoing support of the CAVC Bar Association!

Even with a record number of appeals being filed at the Court each month, the CAVC Bar Association is prepared to respond to the needs of its members. As the pace and volume of our work increases, the CAVC Bar Association seeks to continue bringing your practical and insightful information that can save you time and increase your work efficiency. To that end, we are always seeking new ways to respond to the needs of our members and always welcome feedback. Please reach out to [cavcbar@gmail.com](mailto:cavcbar@gmail.com) if you have questions, suggestions, or would like more information about how to become involved.

As always, thank you for your support of the CAVC Bar Association!

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

## PRACTICE SERIES ARTICLE: Veterans' Advocate

### An Evolving Perspective on the AMA

By Zachary Stolz

As appellants' counsel, my job is to find and explain errors in VA adjudications and to point out problems with its very complicated benefits system. But, as the government's fiscal year winds down, I wanted to acknowledge the work our colleagues at VA have done and, despite some personal skepticism at the beginning, to note the significant improvements we are experiencing now that the AMA has been fully implemented.

By mid-August 2025, VA processed 2,524,115 claims. This is 6,600 more than 2024's record-breaking number. The Board's goal is to issue over 118,000 decisions in fiscal year 2025. This production is the result of so much hard work and dedication. For someone who has been representing veterans and their families for over 20 years now, it is incredible to see.

This production is coupled with the successes of the AMA. I will admit to being a little skeptical of the AMA when it began to be discussed in earnest a decade ago. But now, six years after these massive changes became law, we are seeing some tangible benefits.

From our perspective, veterans and their families are benefiting from more predictable resolution in some of the new "lanes," particularly the higher-level review and supplemental claim options. In many cases, there are multi-year reductions in wait times for the resolution of claims. Counsel now have a greater ability to tailor the appeal path and can help VA adjudicators avoid unnecessary delays.

The AMA has also mostly lived up to its promise of including clearer rules to encourage continuous

pursuit of benefits to preserve effective dates. This has allowed for defined evidentiary windows, which makes case preparation more focused and enables advocates to strategically time submissions of key evidence.

We see structural improvements at the Board as well. There are more defined hearing scheduling processes that benefit claimants. And there is some increased efficiency in written decisions in the direct review docket.

At both the agency of original jurisdiction and the Board, there has been clearer communication about appeal status and more consistent (albeit sometimes flawed) notice letters outlining what is needed for a successful claim. This leads to an enhanced ability for counsel to plan multi-step advocacy efforts, including utilizing the different lanes to strengthen the record and cutting down on wait times with more targeted integration of medical and lay evidence.

For example, if a single VA decision addresses multiple claims, counsel is not limited to a single appeal lane. Instead, practitioners can make strategic choices and leverage the variety of AMA appeal options to choose the best course for each claim. Claims that require further development can be appealed in the supplemental claim lane, with an option to add to the record and trigger VA's duty to gather helpful evidence. Conversely, claims that are developed, and for which clients are seeking a fast and final decision, can be appealed to a higher-level review adjudicator or the Board. These AMA options allow counsel to forge an appeals path that is responsive to the needs of the claim and the client, and that is unencumbered by a rigid, one-size-fits-all appeal structure.

Of course, the increased production and new rules mean appeals to the CAVC were bound to increase, and so they have. The Court is on pace to handle over 10,000 appeals this year—a record. The AMA's sweeping changes have also predictably led to more precedential cases like *Calhoun*, *Bolds*, *Jackson*, *Chisholm*, and *Bilharz*, in which the Court is asked

to wrestle with the legal ramifications. Such questions have been challenging and fascinating, and there are so many cases yet to come.

There is little question that the AMA is more complicated than the legacy world. This led to some frustration from both veterans and advocates at first. But as the process matures and we all become more familiar with the ins and outs, it has become easier to explain the process to veterans and to set more realistic expectations.

Advocates and our counterparts at VA will always have disagreements. Resolving them within the context of faster decisions with more experienced adjudicators and improved systems is something I am sure we all welcome together.

*Zach Stolz is a Partner at Chisholm Chisholm & Kilpatrick (CCK Law). His practice focuses on representing disabled veterans before the Court of Appeals for Veterans Claims. In 2024, he was honored to receive the Court's Hart T. Mankin Distinguished Service Award.*

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## Upcoming Events at a Glance

- Sep. 26: Election Deadline for Board Members
- Sep. 30: CAVC Bar Association Annual Meeting
- Oct. 15: VLJ Annual Committee Meeting
- Oct. 22: Joint Program with CAVC Historical Society
- Oct. 29: VLJ Planning Meeting for December Issue
- Nov. 5: Supreme Court Group Admission
- Nov. 8-9: Moot Court Competition at GWU



## CAVC Bar Association Members' Day of Service–Korean War Memorial Wall Washing

by Keith M. Krom

Twenty-eight volunteers (members of the CAVC Bar Association and their family and friends) met at dawn on the morning of June 21, 2025, to join in the Association's second day of service—washing the Korean War Veterans Memorial. (The first was welcoming the May 17, 2025, Honor Flight of 88 World War II, Korean War, and Vietnam War veterans from Michigan, featured in the *Veterans Law Journal*, 2025, Vol. II).

The wall washing volunteer program is managed by the National Mall and Memorial Parks and the Trust for the National Mall. The program, which invites volunteer groups to wash the Vietnam Veterans Memorial and the Korean War Veterans Memorial, runs from May to November each year, with both sites alternating between the Saturday and Sunday slots.

The group was greeted by National Park Service (NPS) Ranger James Pierce, the Volunteer-In-Parks (VIP) Coordinator. Ranger Pierce served in the U.S. Army National Guard in 2001 and served two tours overseas (Operation Iraqi Freedom–113th Field Artillery and Operation Enduring Freedom–514th Military Police Company). On October 1, 2012, while on foot patrol in the Khost Province of Afghanistan, the 514th Military Police Company was attacked by a

suicide bomber. The attack killed three and injured three additional members of the company. He was one of the three injured members.

While focusing on his rehabilitation at Walter Reed Hospital, he learned about Operation Warfighter (Guardian), a Department of Defense internship program that matches qualified wounded, ill, or injured service members with non-funded federal internships. For two years, he interned as a park ranger at National Mall and Memorial Parks, serving under the VIP program. Following his medical retirement from the Army, he earned a permanent position with the NPS and continues today serving as a park ranger at National Mall and Memorial Parks.

Ranger Pierce began by thanking the volunteers for honoring veterans by participating in the wall washing. He then led the group on an executive tour of the Memorial.

The Memorial commemorates the sacrifices of the 5.8 million Americans who served in the U.S. Armed Forces during the three years of the war and the 36,634 American servicemembers and 7,174 members of the Korean Augmentation to the U.S. Army who died in hostile actions in the Korean War theater. President George H.W. Bush presided over the groundbreaking ceremony on June 14, 1992, and President Bill Clinton and Kim Young Sam, president of the Republic of Korea, dedicated the memorial on July 27, 1995, the 42nd anniversary of the armistice that ended the war.

In October 2016, President Barack Obama signed the Korean War Veterans Memorial Wall of Remembrance Act (Public Law 114-2340), which authorized the addition of the names of the fallen to the memorial. The renovations involving the addition of the Wall of Remembrance, the extension of the circular plaza, and repairs and rehabilitation of existing fabric were completed in July 2022.

Ranger Pierce explained that the Memorial contains certain features that indirectly emphasize the importance of the number 38—corresponding to the

38th parallel or 38 degrees latitude that divides North & South Korea and the 38 months the war lasted. For example, the incline of the pathway leading to the Memorial is set at 38 degrees. Traversing that pathway, visitors first come to the triangular Field of Service. Here, a group of 19 stainless steel statues, symbolizing the U.S. Air Force, Army, Marines, and Navy, depicts a platoon on patrol in Korea. Strips of granite and scrubby juniper bushes suggest the rugged Korean terrain, and windblown ponchos recall the harsh weather. Frank Gaylord was the statues' principal sculptor.

A granite curb on the north side of the statues lists the 22 countries of the United Nations that sent troops or gave medical support in defense of South Korea. On the south side, a black granite wall's polished surface mirrors the 19 stainless steel Field of Service statues and creates the image of a total of 38 statues (again highlighting the number 38). The reflected images intermingle with the faces etched into the granite. Louis Nelson created the mural using actual photographs of unidentified American soldiers, sailors, airmen, and Marines. The faces represent all those who provided support for the ground troops.



Adjacent to the mural is the Wall of Remembrance and Pool of Remembrance. The wall includes the names of 36,634 American servicemen and more than 7,100 members of the Korean Augmentation to the United States Army who gave their lives defending the people of South Korea. Numbers of those killed, wounded, missing in action, and held prisoner of war are etched in stone nearby. Opposite, another granite wall bears a message

inlaid in silver, **Freedom is Not Free**. Ranger Pierce noted that friends of family often leave mementos in honor of the fallen at the base of the Wall of Remembrance. He instructed the volunteers to carefully remove the mementos during the wall washing and return them to their original places.



With that background, volunteers picked up their buckets and brushes, along with a few drops of the special cleaning fluid used by NPS to protect the surfaces, and proceeded to work. By 7:30 a.m., the Memorial was fully clean and ready for the day's visitors coming to pay their respect and gratitude.

*Keith M. Krom is a Senior Staff Attorney at The Veterans Consortium Pro Bono Program.*

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## Supreme Court Holds Combat-Related Special Compensation Payment Statute Contains Its Own Settlement Mechanism

by Rebecca "Beck" Webster

Reporting on *Soto v. United States*, 145 S. Ct. 1677 (2025).

In *Soto*, the U.S. Supreme Court unanimously held that the combat-related special compensation (CRSC) statute established its own settlement procedures, and that therefore, the Barring Act settlement procedures and limitations do not apply to claims for CRSC payments. See 10 U.S.C. § 1413a;

31 U.S.C. § 3702. Justice Thomas delivered the opinion of the Supreme Court.

The appeal before the Supreme Court stemmed from Mr. Soto's June 2016 claim for CRSC payments. In October 2016, the Secretary of the Navy approved Mr. Soto's claim and authorized retroactive payments going back six years, leveraging the Barring Act's six-year statute of limitations. Mr. Soto filed a class action in the U.S. District Court for the Southern District of Texas (District Court), and in December 2021, the District Court entered summary judgment for the class. The District Court concluded that the CRSC statutes constitute a law that provides its own settlement mechanism, thus displacing the Barring Act's settlement procedures and limitations. The Government appealed, and in February 2024, the U.S. Court of Appeals for the Federal Circuit reversed, reasoning that the statute did not explicitly confer settlement authority and instead only established who may be eligible for CRSC payments. Mr. Soto subsequently petitioned for certiorari, which the Supreme Court granted in January 2025.

The question before the Supreme Court was whether the CRSC statute provides settlement mechanisms that displace the Barring Act's settlement procedures, including the statute of limitations.

In relevant part, the Barring Act provides that "[e]xcept as provided in this chapter . . . or another law, all claims of or against the United States Government" shall be settled according to section § 3702, to include a six-year statute of limitations.

Mr. Soto argued that the Barring Act does not apply to CRSC payment claims because the CRSC statute defines eligibility for CRSC payments, explains the amount of benefits, and instructs the Secretary of Defense on application procedures and criteria for awards.

In contrast, the Government argued that the CRSC statute does not contain a settlement mechanism, as it does not have "hallmark formulations" to confer settlement authority including "language that

‘speak[s] of claims being allowed or disallowed,’ ‘refer[s] to a finding being final and conclusive,’ or designates ‘authority to sue or be sued.’” Justice Thomas began the analysis with a definition of “settle” in the context of claims against the Government as “the power both to ‘determine upon the validity of the claim, and to ‘determin[e] . . . the amount due’ on it” (citing *Illinois Surety Co. v. United States ex rel. Peeler*, 240 U. S. 214, 219 (1916)). Applying the plain language of the CRSC statute, Justice Thomas found that the statute clearly contains a settlement mechanism because the statute established a “self-contained, comprehensive compensation scheme for a narrowly defined group of exceptionally deserving claimants.”

In his analysis, Justice Thomas additionally addressed the Federal Circuit’s analysis and the Government’s arguments that the Barring Act applies to CRSC payment claims. He explained that the Federal Circuit’s requirement that Congress use specific language to authorize settlement, such as use of the word “settle,” is inconsistent with established precedent. See *FAA v. Cooper*, 566 U. S. 284, 291 (2012) (noting that the Supreme Court has “never required that Congress use magic words”). Justice Thomas further noted that a settlement mechanism does not need a statute of limitations to fit within the Barring Act’s “another law” exception, as it is not unusual to think that Congress wished to forgo a limitations period for a specific, limited population of claimants.

Regarding the Government’s arguments, Justice Thomas disagreed with the premise that a statute must feature “hallmark formulations,” because while the government agrees that a settlement mechanism need not contain the word “settle,” this still amounts to “the same sort of ‘magic words’ test that [the Court has] so often denounced.”

Ultimately, the Supreme Court held that the CRSC statute contained a settlement mechanism that displaces the Barring Act’s default settlement procedures, including the six-year statute of limitations. Accordingly, the Supreme Court

reversed the judgment of the Federal Circuit and remanded the case for further proceedings.

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

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## Federal Circuit Affirms that VA May Address Whether Certain Evidence is New and Material After it Fails to Do So at the Time Evidence Was Submitted

by Elise Romberger

Reporting on *Deal v. Collins*, 141 F.4th 1260 (Fed. Cir. 2025).

In *Deal v. Collins*, the Federal Circuit affirmed the U.S. Court of Appeals for Veterans Claims (the “Court”) decision upholding the Board of Veterans’ Appeals (“Board”) denial of an earlier effective date for Ms. Deal’s claim for service connection for a psychiatric disorder.

Under 38 C.F.R. § 3.156(b), “[n]ew 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.”

Ms. Deal filed a claim for compensation in October 1991 that included a claim for a psychiatric condition. In a July 1992 rating decision, the regional office denied her claim. Though she did not appeal this decision, within the appeal period, Ms. Deal received treatment for her disorder, and a 1993 medical record was associated with her claims file. In March 1995, she again filed for service

connection for her psychiatric condition and was again denied. In August 2003, she filed a third claim for service connection for her psychiatric condition. This claim led to a March 2016 Board decision granting service connection, and later an assignment by the regional office of an effective date of August 1, 2003; the date of her most recently filed claim.

Ms. Deal appealed, arguing that she was entitled to an effective date of either October 1991 or March 10, 1995, because those claims remained open due to VA's failure to address whether certain evidence received within the appeal period, including the 1993 medical record, counted as new and material evidence. In June 2021, the Board granted an effective date to March 10, 1995, finding that new and material evidence had been received in 1997, but not in 1993.

Before the Federal Circuit, Ms. Deal argued that because the Board did not address whether the 1993 record was new and material evidence until June 2021, her claim was open in the interim, including when the Board granted service connection in March 2016. Thus, she argued, VA should have considered whether she was entitled to an effective date of her original October 1991 claim. The Secretary disagreed, arguing that VA's failure to address whether evidence is new and material does not automatically entitle her to an earlier effective date.

The Federal Circuit noted that on its face, § 3.156(b) does not contain any consequences if VA fails to address whether certain evidence is new and material. The Court briefly discussed prior caselaw, notably *Bond v. Shinseki*, 659 F.3d 362 (Fed. Cir. 2011), and *Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir. 2014), which held that § 3.156(b) requires VA to address whether evidence is new and material and until VA can provide a determination that is directly responsive to that inquiry, a claim remains open. These cases, however, do not stand for the proposition that if VA fails to provide such a determination, and then subsequently grants benefits for a later filed claim, that VA must then consider entitlement to an effective date of an

earlier filed claim. Rather, the Court held, if VA has not met its obligation to provide a responsive determination on whether certain evidence is new and material, it must do so. And for this limited purpose only, a claim remains open.

From there, the Court wrote, VA must decide whether certain evidence is new and material. If it is new and material, it is considered in connection with the earlier claim, and the claimant might be entitled to an earlier effective date. If it is not, it is not treated as having been filed in connection with the prior claim, and the claimant is not entitled to an earlier effective date. Here, the Board had found that Ms. Deal's 1993 record was not new and material. Because the Board made that determination, as it was required to do, the Court affirmed.

Following *Bond* and *Beraud*, it was unclear whether, if VA failed to make a directly responsive adjudication to new and material evidence submitted, the claim remained pending for VA (including the Board) to make such a subsequent determination. Although the Federal Circuit strongly implied that the Board can make this determination in the first instance, in *Deal* it held that the claim remains open.

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

## Rating by Analogy: Federal Circuit Clarifies Standard of Review to Be Applied by Court When Reviewing Board Selection of an Analogous Diagnostic Code

by Elizabeth M. Pesin

Reporting on *Herrington v. Collins*, 138 F.4th 1324 (Fed. Cir. 2025).

In *Herrington*, the Federal Circuit addressed the proper standard of review to be applied by the U.S. Court of Appeals for Veterans Claims (the “Court”) when reviewing the Board of Veterans’ Appeals’ (the “Board’s”) selection of an analogous diagnostic code (DC) to rate a disability under 38 C.F.R. § 4.20. That regulation permits the Department of Veterans Affairs (“VA”) to rate a disorder not listed in 38 C.F.R. Part 4, VA Schedule for Rating Disabilities, “under a closely related disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous.”

The Federal Circuit affirmed the Court’s decision, which affirmed the Board’s denial of a rating in excess of 30 percent for gastroesophageal reflux disease (GERD). The Federal Circuit noted that the Court reviews the Board’s selection of the proper diagnostic code for a listed disorder pursuant to the standard in 38 U.S.C. § 7261(a)(3)(A), under which it may hold unlawful and set aside determinations that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See *Butts v. Brown*, 5 Vet. App. 532 (1993) (en banc). Given that selection of an analogous diagnostic code for rating unlisted disorders similarly concerns questions of fact or the application of law to the facts, the Federal Circuit held that the same deferential standard of review applies in this context.

The case arose from a July 2011 rating decision, which awarded service connection for GERD with a

noncompensable initial evaluation, effective September 2009. In August 2011, Mr. Herrington requested reconsideration. At a January 2012 VA medical examination, he reported pyrosis, regurgitation, reflux, and persistent epigastric distress. The examiner reviewed the existing diagnoses for GERD and Barrett’s esophagus, treated with continuous medication, but found no evidence of upper gastrointestinal bleeding, anemia, dysphagia, weight loss, nutritional deficiency, vomiting, or atypical chest pain since the last VA examination. A June 2012 rating decision increased the rating for GERD to 10 percent.

In August 2012, Mr. Herrington again requested reconsideration. At a January 2013 VA examination, Mr. Herrington reported ongoing substernal burning, epigastric pain, dry cough, radiating chest pain, infrequent episodes of epigastric distress, and reflux treated with medication. In April 2013, he filed a claim for an increased evaluation for GERD and hernia, describing persistent epigastric distress, difficulty swallowing, chest pain, a lump in his throat, painful burning in his throat, radiating chest pain, and sleep disturbance treated with prescriptions for Nexium and Reglan.

In an August 2013 disability benefits questionnaire (DBQ), Mr. Herrington’s private gastroenterologist reported severe relapsing GERD with heartburn and chest pain treated with prescription Nexium. The private DBQ, like the VA examinations, found no anemia, weight loss, vomiting, or hematemesis. At a June 2014 VA examination, Mr. Herrington reported dysphagia, pyrosis, reflux, regurgitation, substernal pain, sleep disturbance, nausea, and vomiting treated with prescription medication. The July 2014 rating decision continued the 10 percent evaluation for GERD, and Mr. Herrington filed a timely Notice of Disagreement. A February 2016 VA examination characterized Mr. Herrington’s GERD as moderate in severity. In January 2019, the Board awarded a 30 percent evaluation for GERD under DC 7346 for hiatal hernia but denied an evaluation in excess of 30 percent.

Mr. Herrington appealed the Board's January 2019 decision to the Court, and, in a September 2020 memorandum decision, the Court set aside the January 2019 Board decision and remanded the matter for the Board to consider other potentially applicable DCs, including under 38 C.F.R. § 4.114, DC 7306, for marginal ulcers.

Thereafter, at his July 2019 VA examination, Mr. Herrington reported sleep disturbance, epigastric distress, pyrosis, reflux, substernal pain, regurgitation, dysphagia, and hoarseness treated with prescription medication, and the examiner noted similar symptoms.

In May 2021, the Board found that GERD had been manifested by recurrent epigastric distress with dysphagia, pyrosis, regurgitation, and substernal pain that resulted in considerable impairment of health, but not weight loss, hematemesis, melena, anemia, or other symptom combinations productive of severe impairment of health. The Board therefore concluded that an evaluation in excess of 30 percent was not warranted under DC 7346. The Board considered other DCs but found that Mr. Herrington's esophageal conditions were most closely analogous to DC 7346 in terms of symptomatology and resulting disability picture. Mr. Herrington filed a timely Notice of Appeal, and thereafter the Court affirmed the Board's decision, concluding that its selection of DC 7346 was "not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

On appeal to the Federal Circuit, the main point of contention involved what standard the Court should have applied when reviewing the Board's selection of an analogous diagnostic code to rate a disability under 38 C.F.R. § 4.20. Mr. Herrington argued that the correct standard was *de novo* review, and the Court therefore erred by applying the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard set forth in 38 U.S.C. § 7261(a)(3)(A).

At the outset, the Federal Circuit discussed the relevant regulation, 38 C.F.R. § 4.20, noting that it

allows a veteran's disability to be rated by analogy when the disability "does not clearly fall under one of the delineated diagnostic codes" in the Rating Schedule, citing *Webb v. McDonough*, 71 F.4th 1377 (Fed. Cir. 2023). And the Federal Circuit further clarified that selection of the diagnostic code concerns questions of fact under *Delisle v. McDonald*, 789 F.3d 1372, 1374 (Fed. Cir. 2015). Along the same lines, the Federal Circuit found that the plain language of 38 C.F.R. § 4.20 demonstrates that selection of a "closely related disease or injury" is a fact-intensive inquiry.

The Federal Circuit concluded that the Board applied the law to the facts of Mr. Herrington's case, including lay and medical evidence, to find that his GERD more nearly approximates the criteria for a rating of 30 percent for GERD, under DC 7346, accounting for prior medical examinations, symptoms, and medications, and applying the rating criteria of DC 7346 and the criteria of multiple other diagnostic codes. The Federal Circuit also held that the Court applied the correct standard of review—the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard.

Effective May 19, 2024, VA updated the rating criteria for the digestive system under 38 C.F.R. § 4.114, including adding a new DC (7206) that expressly pertains to GERD. However, for other disorders that continue to be rated by analogy, *Herrington* suggests that all identified symptoms, as well as treatment for same, are to be considered in the context of the appellant's contentions and the applicable law.

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## Federal Circuit Affirms Permanent Loss of Dependent's Compensation When DEA Benefits Are Elected

by Shahin Mirzaei

Reporting on *Wright v. Collins*, 145 F.4th 1336 (Fed. Cir. 2025).

In August 2025, the U.S. Court of Appeals for the Federal Circuit issued *Wright v. Collins*, affirming the decision of the U.S. Court of Appeals for Veterans Claims (the “Court”) and upholding the Board of Veterans’ Appeals’ (“Board’s”) denial of additional compensation to Mr. Rodney Wright for his adult daughter once she elected to receive survivors’ and dependents’ educational assistance (DEA) benefits. The Federal Circuit held, in agreement with the Court and the Board, that Mr. Wright was permanently barred from receiving additional dependent compensation after his daughter elected DEA benefits.

The Federal Circuit analysis revolved around the legislative history of the statutes 38 U.S.C. §§ 1115 and 3562. The Federal Circuit analyzes the statutory interpretation of these statutes and ultimately, establishes the correct interpretation by considering the statute’s text, structure and legislative history.

Mr. Rodney Wright, a totally disabled veteran, was receiving additional compensation for his daughter under 38 U.S.C. § 1115 until she chose to receive DEA benefits. At that point, the VA ceased the compensation, citing 38 U.S.C. § 3562. Mr. Wright appealed to the Board, which affirmed the denial, citing the text of section 3562 and stating, “Once a child has opted for DEA benefits, that choice is final, and the VA cannot add them back to the award as a dependent.” Wright then appealed to the Court, which also upheld the Board’s ruling and concluded that the statute imposes a permanent bar regardless of when or whether the dependent stops receiving DEA.

Mr. Wright then appealed to the Federal Circuit, citing section 1115, which authorizes additional disability compensation for veterans with dependents. He argued that once his daughter finished receiving DEA benefits, he should again be allowed to receive the additional dependent’s compensation for her. Mr. Wright also stated that section 3562 should apply only during periods when a dependent and veteran receive both benefits at the same time and not permanently. The Federal Circuit rejected that argument, finding that the bar was triggered immediately and was intended to last forever, regardless of whether DEA payments are ongoing or have ended.

The first question that the Federal Circuit discussed is whether section 3562 bars a disabled veteran from receiving additional compensation under section 1115(1)(F) once the veteran’s child begins receiving DEA benefits. In doing so, the Federal Circuit first focused on the language of section 3562, which prevents payment of “increased rates or additional amounts” of compensation for a dependent who elects DEA benefits. The Federal Circuit looked at the relationship between section 1115(1)(F), which permits additional compensation for a dependent pursuing education, and section 3562, which establishes the nonduplication rule. The court reasoned that the language of section 3562 is clear: Once a child elects DEA benefits, the veteran is barred from receiving any further additional compensation for that dependent under section 1115(1)(F). The Federal Circuit rejected Mr. Wright’s argument that the bar only blocks simultaneous benefits, holding that the structure and text establish a permanent, not a temporary, bar.

The second question was whether, assuming section 3562 does operate in this way, the bar may be lifted when the disabled veteran’s child exhausts his or her DEA benefits. In response to this question, the Federal Circuit focused on whether there is any statutory or contextual basis for interpreting the bar as temporary. The Federal Circuit affirmed that the statutory language contains no suggestion that the bar can be lifted. Instead, the Federal Circuit emphasized that the decision to receive DEA

benefits is final and that no provision allows the resumption of additional compensation under section 1115(1)(F) after DEA is exhausted. Congress, as the court noted, could have included a provision to end the bar when DEA ends but did not do so. As a result, the Federal Circuit held that the bar is permanent and does not terminate even after the dependent's eligibility for DEA benefits lapses.

Furthermore, the Federal Circuit emphasized that interpreting the statute to allow reinstatement of additional compensation after DEA benefits terminate would contradict the express nonduplication mandate found in section 3562. The purpose of the nonduplication rule is to prevent veterans and their dependents from receiving duplicative benefits for the same period or qualifying event. The Federal Circuit explained that if courts were to read section 3562 as only suspending compensation during periods of active DEA receipt and then permitting it to resume later, that would defeat the statute's "nonduplication" purpose, as it would allow duplicate payments to go to the same dependent, just in different ways. In conclusion, the Federal Circuit agreed that such a reading would render the nonduplication policy meaningless and create administrative confusion within the VA system. Therefore, Mr. Wright's claim that the court should apply the pro-veteran canon of construction in case of ambiguity failed, as it contradicted the clear text of the statute.

The Federal Circuit's decision is unanimous. This decision affirms the primacy of statutory text over policy considerations, advising veterans and their representatives to carefully consider the permanent consequences of a dependent's election of DEA benefits, as policy argument cannot overcome the statute's express language.

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## Court Takes Aim at VA's Interpretation of Obesity for Purposes of Secondary Service Connection

by Tara Burden

Reporting on *Adams v. Collins*, No. 23-5064 (Vet. App. July 8, 2025).

In *Adams*, the U.S. Court of Appeals for Veterans Claims (the "Court") vacated a May 2023 Board of Veterans' Appeals ("Board") decision that denied entitlement to service connection for obesity secondary to posttraumatic stress disorder ("PTSD") because the Department of Veterans Affairs ("VA") does not consider obesity to be a per se disease or disability subject to service connection. Ultimately, the Court deferred to VA's interpretation of 38 U.S.C. § 1110 when excluding obesity as a condition that may be considered a "disease" for service connection on a *direct basis* but found the 2017 VA Office of General Counsel precedential opinion ("G.C. Prec. 1-2017") that obesity can neither be a "disability" nor a "disease" for service connection on a *secondary basis* an impermissible interpretation of section 1110 and 38 C.F.R. § 3.310.

In the March 2016 VA Form 21-526EZ, Mr. Adams identified his "disability" as "Obesity Secondary to PTSD." In support of his claim, he provided a medical article that discussed a possible relationship between PTSD and obesity. In the Notice of Disagreement, his assertions focused on a "weight problem." In his December 2019 supplemental claim and August 2020 appeal to the Board, he again identified "Obesity" and that it was secondary to his PTSD. During the January 2023 video hearing, he testified, in part, that he initially noticed an increase in weight during service. He described using food as a coping mechanism and testified that he ate at any hour. However, he never specifically explained how obesity affected his functioning, such as identifying

limitations regarding his ability to engage in exertional and postural activities.

In the May 2023 Board decision, following G.C. Prec. 1-2017 by which it was bound, the Board found that obesity was not a per se disease or injury for purposes of service connection under sections 1110 and 1131 and, thus, the Board could not grant service connection on a direct or secondary basis. The Board also found that the veteran had “not described any functional impairment caused by his obesity, and he has not shown that it causes functional impairment of earning capacity.”

Mr. Adams submitted a timely notice of appeal and argued before the Court that a general prohibition on service connection for obesity found in G.C. Prec. 1-2017 should be held invalid in light of *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018), as there is no gap for VA to fill with respect to the terms “disease” and “injury” because they are unambiguous.

Mr. Adams further argued that G.C. Prec. 1-2017 improperly relied on the fact that obesity was absent from 38 C.F.R. Part 4, VA Schedule for Rating Disabilities (the “Rating Schedule”), because any “condition” that results in functional impairment can be service connected. The issue is not whether the claimed condition is a “disease” (or illness) listed in the Rating Schedule but rather whether the claimed condition is a disability that results in functional impairment. Additionally, Mr. Adams argued that the basis for G.C. Prec. 1-2017’s finding that obesity is not a disease is misplaced. The fact that obesity does not cause “morbidity and/or mortality” for everyone is not relevant because the inquiry is whether the disability causes functional impairment.

The Secretary initially asserted that the Court did not have jurisdiction over the matter. Under 38 U.S.C. §§ 501(a) and 1155, VA was authorized to create the Rating Schedule and prescribe all rules and regulations necessary and appropriate to carry out the laws. Thus, its determination as to which disabilities are specifically included in the Rating Schedule is precluded from judicial review. The Secretary argued that VA properly exercised its gap-

filling authority when issuing G.C. Prec. 1-2017. The Secretary also argued that *Saunders* is distinguishable from the current matter because *Saunders* did not discuss obesity. Here, Mr. Adams had not shown that his obesity caused pain that had resulted in functional impairment and that the Board was not obligated to address Mr. Adams’s “lay hypothesizing” as to his symptoms being hallmarks of a disability. Furthermore, the Secretary argued that G.C. Prec. 1-2017 relied on scientific research when concluding that obesity does not produce an impairment that would reduce one’s earning capacity.

The Court found it had jurisdiction over the matter. Relying on *Larson v. McDonough*, 10 F.4th 1325, 1329 (Fed. Cir. 2021), the Court pointed out that Mr. Adams was not asking the Court to review the content of the Rating Schedule but rather whether obesity could be a disability under section 1110 (and section 1131).

The Court held, with respect to whether obesity could be a disability in general, that G.C. Prec. 1-2017 was not a persuasive interpretation of section 1110 when it excluded obesity as a “disability.” The Court took issue with the following sentence in the opinion: “While there is evidence that severe obesity, *i.e.*, [body mass index] BMI of greater than 40, impairs physical and social function, ‘. . . many obese persons suffer no impairment as a consequence of their obesity.’” The Court stated that G.C. Prec. 1-2017 failed to reconcile the finding that obesity could impair some people with the conclusion that it can never be a disability (for VA purposes). Similar to the issue of pain addressed in *Saunders*, whether obesity causes functional impairment must be evaluated on a case-by-case basis.

The Court rejected Mr. Adams’s argument that VA improperly exercised its gap-filling authority when G.C. Prec. 1-2017 concluded that obesity was not a “disease” for the purposes of section 1110 for service connection on a direct basis. The Court accepted that G.C. Prec. 1-2017 acknowledges that section 1110 does not define the word “disease” and that VA used

authority Congress delegated to it to fill the gap. In *Saunders*, the Federal Circuit held that the term “disability” in section 1110 was unambiguous. The holding, however, did not cause all of section 1110 to be unambiguous, to include the term disease (and injury). The Court also noted that Congress made a clear distinction between the requirement for a “disability” and the requirement for a “disease or injury;” to “read out” the “disease or injury” requirement “eviscerates the nexus requirement” and is therefore “illogical.” *Saunders*, 886 F.3d at 1366.

Whether obesity can be a disease for service connection on a direct basis, the Court rejected Mr. Adams’s argument that the question of whether obesity is a disease does not matter if there is evidence that the veteran’s obesity functionally impacts earning capacity. In *Terry v. Principi*, the Federal Circuit held that section 1110 “make[s] it clear that if a disability cannot be attributed to an ‘injury’ or a ‘disease’ incurred or aggravated in the line of duty, *the disability is not compensable.*” *Terry*, 340 F.3d 1378, 1382 (Fed. Cir. 2003) (emphasis added). The Court made the point that Mr. Adams had failed to provide it with a valid argument challenging VA’s interpretation of “disease” when considering service connection on a direct basis under section 1110.

Regarding whether obesity can be a disease for service connection on a *secondary basis*, the Court held that G.C. Prec. 1-2017 was not a persuasive interpretation because it was inconsistent with section 1110 and 38 C.F.R. § 3.310, and thus not entitled to deference. In *Allen v. Brown*, 7 Vet. App. 439, 448 (1995)(en banc), the Court held that “the term ‘disability’ as used in [section] 1110 refers to impairment of earning capacity, and . . . such definition mandates that any additional impairment of earning capacity resulting from an already service-connected condition, *regardless of whether or not the additional impairment is itself a separate disease or injury caused by the service-connected condition*, shall be compensated.” (emphasis added). In *Spicer v. McDonough*, 61 F.4th 1360, 1364 (Fed. Cir. 2023), the Federal Circuit held that

“[section] 1110 plainly requires compensation when a service-connected disease or injury is a but-for cause of a present-day disability,’ including additional disability that results from ‘the natural progression of a condition not caused by a service-connected injury or disease, but that nonetheless would have been less severe were it not for the service connected disability.’”

The holdings in *Allen* and *Spicer* make clear that the “condition” a veteran is seeking service connection for on a secondary basis need not be a disease or illness. The award of service connection for the “primary” service-connected disability fulfills the “disease or illness” requirement of section 1110. A veteran need only show that the claimed condition has resulted in a disability causing a functional impairment of earning capacity, and that there is a relationship (causation or aggravation) between the claimed condition/disability and the service-connected disease or illness.

The Court held that VA’s interpretation that obesity was not a “disease” for purposes of § 3.310(b) is also inconsistent with section 1110 because the Federal Circuit had already found § 3.310(b) “unlawful as inconsistent with 38 U.S.C. § 1110.” *Spicer*, 61 F.4th at 1366.

The Court vacated the Board’s decision and remanded the matter for the Board to provide an adequate statement of reasons or bases about whether Mr. Adams’s obesity resulted in functional impairment of earning capacity and, if so, make factual determinations as to whether Mr. Adams’s service-connected PTSD is a but-for cause of the obesity.

Judge Jaquith concurred in part and dissented in part. Judge Jaquith agreed with the majority insofar as it (1) held that G.C. Prec. 1-2017 did not provide a persuasive interpretation of section 1110 when finding obesity not a “disability;” (2) rejected the opinion’s finding that obesity is not a “disease” for service connection on a secondary basis by aggravation; and (3) further held that the Board failed to provide an adequate reasons or bases when

it found that Mr. Adams's obesity did not result in a functional impairment of earnings capacity (which requires remanding the matter back to the Board).

Conversely, Judge Jaquith disagreed with the majority's deference to G.C. Prec. 1-2017 that (1) obesity is not a "disease" for purposes of section 1110 and that (2) service connection for obesity is prohibited on a direct basis. Judge Jaquith determined that the Board had essentially conflated the requirements for direct and secondary service connection without addressing, or even mentioning, whether the "watershed precedential cases"—including *Larson* and *Saunders*—undermined the "continuing validity of G.C. Prec. 1-2017's categorical exclusion of obesity as a disease and disability permitting compensation." And he emphasized that vacatur and remand were warranted for the Board to perform this required analysis in the first instance.

Judge Jaquith also opined that, in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 388 (2024) the Court should not have simply deferred to VA's interpretation but rather should have exercised its independent judgment when reviewing VA's categorical exclusion of obesity from disability compensation in G.C. Prec. 1-2017. And after pointing out how, as G.C. Prec. 1-2017 itself acknowledged, Congress had "left a gap in title 38 by not defining 'disease,'" which VA had "not filled" by regulation, Judge Jaquith further determined that the opinion was not entitled to any deference as to "whether obesity is a disease—for purposes of disability compensation or otherwise . . . even under the pre-*Loper* regime." Then, after referencing numerous federal authorities that "included obesity as a chronic disease," Judge Jaquith concluded that G.C. Prec. 1-2017's "categorical exclusion of obesity from its unstated definition of disease" and the Board's reliance on that opinion was not "persuasive."

The full impact of *Adams* going forward remains unclear. Though the majority deferred to VA's interpretation that obesity is not a "disease" for service connection on a direct basis, the Court appears open, especially in light of Judge Jaquith's

dissent, to departing from this portion of the opinion if an appellant raises such an argument in the future.

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

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## No AMA Requirement for the Same Board Member Who Conducted the Hearing to Render the Decision, *Bryant* Duties Apply to Board Hearings

by Margaret "Peggy" A. Costello

Reporting on *In re Bilharz*, No. 22-6158, No. 23-7931 (Vet. App. Aug. 14, 2025).

The U.S. Court of Appeals for Veterans Claims (the "Court") consolidated the appeals of Mr. Bilharz and Mr. Pinto because both raised the question of whether, for appeals processed under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), a claimant's right to fair process in VA's administrative appeals system (or the right to due process) requires the same Board member who conducts a Board hearing to also render the Board's decision in that case.

In a lengthy panel opinion authored by Chief Judge Allen (with a dissent by Judge Jaquith), the Court focused on the application of fair process/due process and determined that neither doctrine categorically prohibits the practice of having a different Board member from the one who conducts the hearing render the opinion. The practice is not statutorily required by the AMA, as it was under the legacy system's rules. The Court also held that Board members presiding over hearings under the AMA continue to be subject to the duties recognized

by the Court in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), although those duties now have a different regulatory basis from that recognized in *Bryant* for legacy appeals.

The Court concluded that, under an analysis of due process/fair process, neither appellant was entitled to a hearing conducted by the same Board member who rendered the decision. However, the Court remanded both claims: Mr. Pinto's claim was remanded on the *Bryant* issue, and Mr. Bilharz's claim was remanded because the Board did not provide adequate reasons and bases for its decision.

Mr. Bilharz appealed a June 2015 rating decision that denied entitlement to service connection for several claims. Following a 2018 Board hearing, his claims at issue were remanded, and a Supplemental Statement of the Case was issued denying the claims. Mr. Bilharz then opted into the AMA, chose direct review by the Board, and in July 2022, the Board continued to deny the claims, which is the subject of this appeal. The Board noted that the Board member who authored the decision was not the same Board member who had conducted the 2018 hearing.

The Board relied on *Frantzis v. McDonough*, 35 Vet. App. 354 (2022), *aff'd*, 104 F.4th 262 (Fed. Cir. 2024), for not requiring that the same Board member who conducted the hearing render the decision. The basis for the *Frantzis* decision was that the AMA does not statutorily require the same Board member who conducted the hearing to decide the case, but that case did not decide the fair process or due process issue. Mr. Bilharz's principal argument on appeal focused on the fair process/due process issue.

Mr. Pinto's appeal stemmed from a 2022 rating decision that denied an initial rating higher than 30% for PTSD and entitlement to TDIU. His claim was always processed under the AMA. Mr. Pinto appealed to the Board and participated in a hearing in July 2023. The Board member conducting the hearing stated that it was "very helpful. . . to hear directly from you about how your condition impacts you." In December 2023, the Board denied Mr.

Pinto's claim for an increased rating for PTSD, as well as his claim for TDIU. As in Mr. Bilharz's case, the Board member who authored the decision was not the same Board member who presided at the hearing. In addition to his fair process/due process argument regarding a Board member rendering the decision who was different from the Board member who presided at the hearing, Mr. Pinto also contended that the Board member failed to fulfill his duty to fully explain the issues and suggest the submission of potentially overlooked advantageous evidence during the Board hearing.

The Secretary argued that the Board's process fully complied with the statutory and regulatory requirements under the AMA. Relying on *Frantzis*, the Secretary also argued that the claimants received adequate procedural safeguards, including the right to submit additional evidence, request another hearing, or appeal the Board's decision. The Secretary also claimed that VA's system is designed for efficiency, and that requiring the same Board member to decide an appeal after conducting a hearing would unnecessarily burden the process, leading to delays and inconsistencies in case resolution. Finally, the Secretary argued that *Bryant* no longer applies to Board hearings following the changes to 38 C.F.R. § 3.103, which arguably limits the *Bryant* obligations of hearing officers to hearings before the agency of original jurisdiction.

The Court discussed what is referred to as the "fair process doctrine" and concluded that fair process is "nothing more than a requirement that VA provide claimants with due process." The Court acknowledged that it was not ruling out an "as applied" violation in a specific case, rather than a categorical violation, but it found no such "as applied" violation with respect to either appellant in this case.

In its analysis, the Court acknowledged its requirement that, in the administrative process, VA comply with the "fair process doctrine," which stems from *Thurber v. Brown*, 5 Vet. App. 119 (1993) (discussing principles of "procedural regularity and basic fair play"). The Court noted that its decisions

have relied on a variety of sources on which to base the fair process doctrine, including the general structure of VA claims adjudication, the Administrative Procedure Act, and the Federal Rules of Evidence, with the most prominent source relied on in the *Thurber* decision being the U.S. Constitution. The Court recognized that its decision in *Brack v. McDonough* (37 Vet. App. 172, 176 (2024)) described a claimant's right to fair process as one that is "primarily based on the underlying concepts of the VA adjudicatory scheme, not the U.S. Constitution." The Court expressed its concern that there are serious constitutional issues implicated by a suggestion that the fair process doctrine could require VA to employ procedures that are not mandated by statutes or regulations and that are not required as a matter of constitutional due process.

The Court stated: "Reliance on the general pro-claimant VA system seems a slender reed on which to base such judicial authority. In short, we are troubled by a fair process doctrine not tethered to constitutional due process." However, the Court concluded that caselaw from the Federal Circuit has made it clear that fair process is effectively due process, and precedent of the Federal Circuit prevails. The Court then applied the analytical framework set out in *Matthews v. Eldridge*, 424 U.S. 319 (1976), and concluded that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

The Court rejected the argument that fair process/due process principles categorically prohibit a Board member from rendering a decision under the AMA if a different Board member presided over a hearing in that appeal. The intentional changes Congress made in implementing the AMA explicitly removed the statutory requirement for the same Board member; that was a choice Congress was allowed to make, and it did not violate the Due Process Clause of the Constitution. The Court also specifically found no "as applied" violation of due process/fair process principles with respect to either Mr. Bilharz or Mr. Pinto.

Regarding *Bryant* duties, the Court held that, although *Bryant* was decided under the legacy appeals system, incorporating § 3.103(c)(2) as the "Bryant duties," those duties still apply pursuant to 38 C.F.R. § 20.705. The Court noted that the specific requirement of *Bryant* found in § 3.103—that the Board hearing officer must "explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position," among other things—has now been amended and essentially replaced with § 20.705, which does not contain that specific language. The Court found that the language of § 20.705 does not limit the duties to those enumerated in the section. Moreover, in commentary in the Federal Register, the Secretary expressly stated that the regulatory changes to § 3.103 and the adoption of § 20.705 were not intended to abrogate the *Bryant* duties. Thus, the Court held that the *Bryant* duties continue to apply, but their regulatory underpinning is now § 20.705 under the AMA, rather than § 3.103 under the legacy system.

In holding that Board members must continue to comply with the *Bryant* duties, the Court found that those duties were violated at Mr. Pinto's hearing, warranting remand. Specifically, the Court found that despite the repeated references in its decision about Mr. Pinto's failure to provide evidence to support his claims during his hearing, the Board member did nothing to suggest to him that such evidence could be advantageous to his claim; rather, the Board member largely sat silent. The Board member did not mention the requirements to satisfy a PTSD evaluation higher than 30%, nor did the Board member suggest the submission of evidence that Mr. Pinto may have overlooked that could have been advantageous to his claims for an increased PTSD rating and TDIU.

Although the Court did not find any violation of fair process/due process during Mr. Bilharz's Board hearing, the Court agreed that his alternative argument—that the Board did not support its decision with an adequate statement of reasons or bases—warranted remand. Specifically, the Court found that the Board did not provide adequate

reasons and bases for its credibility determinations of Mr. Bilharz.

Judge Jaquith agreed with the panel's decision regarding the *Bryant* duties as applied and the remand of Mr. Bilharz's case due to an inadequate statement of reasons or bases. However, he wrote a strong and detailed dissent regarding the analysis of the Board's duties under due process/fair process. Specifically, he took issue with "the majority's failure to require either due process or fair process here, and from the majority imperiling the fairness foundation of the pro-veteran adjudicative system that Congress created."

Judge Jaquith distinguished between due process and fair process, and relied, as a basis, on the U.S. Supreme Court's holding in *Gonzales v. United States*, 348 U.S. 407 (1955), which was distinguished in the Court's opinion by Chief Judge Allen. Judge Jaquith concluded that both Mr. Bilharz and Mr. Pinto were denied both fair process and due process by the Board's mishandling of their claims, primarily from the process of adjudicators who had not heard their testimony or presided at their hearings deciding their claims. He ended by citing Judge Hagel's concurring opinion in *Roberts v. Shinseki*, 23 Vet. App. 416, 432 (2010), *aff'd in part*, 647 F. 3d 1334 (Fed. Cir. 2011). ("The Court should not co-pilot the bureaucracy's bulldoze over 'the bedrock of veteran's entitlement to benefits,' which is 'fair process in the adjudication of their claims.'").

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## Ripeness, Mootness, and How Downstream Consequences Can Resurrect Otherwise Resolved Claims

by David R. Seaton

Reporting on *Concepcion-Maldonado v. Collins*, No. 22-7476 (Vet. App. June 23, 2025).

In *Concepcion-Maldonado v. Collins*, the U.S. Court of Appeals for Veterans Claims (the "Court") found that under certain circumstances, a grant of service connection for a disability under the modernized appellate framework did not necessarily require the dismissal of a claim for service connection for that same disability due to mootness if dismissal of such a claim would prejudice a downstream issue—in this case, the effective date of the grant of service connection.

Ivan Concepcion-Maldonado, who previously served in the United States Army, filed a claim for service connection for a neck disability on July 12, 2016, under the legacy appeals system. A Department of Veterans Affairs ("VA") regional office (RO) denied Mr. Maldonado's claim. He appealed the denial to the Board of Veterans' Appeals ("Board"). After the Board affirmed the RO's denial of the claim, Mr. Concepcion-Maldonado appealed to the Court. During the pendency of the appeal, Congress passed the Veterans Appeals and Improvement Modernization Act of 2017 (AMA) establishing the modernized appellate framework, and Mr. Concepcion-Maldonado filed a supplemental claim under the AMA. The RO subsequently granted the Veteran's claim for service connection for a neck disability effective January 25, 2023, but by this point in time, the Veteran's claim for service connection under the legacy appellate framework had already been received by the Court.

The Secretary initially requested dismissal of the appeal based on mootness, arguing that the issue on appeal was entitlement to service connection and

that service connection had already been granted. Mr. Concepcion-Maldonado objected, arguing that the resolution of the legacy appeal would have a dispositive effect on the effective date of the claim for service connection, thus establishing a pecuniary interest and maintaining a live case or controversy. The Court, finding that the case presented a fact pattern that required binding legal precedent from the Court guiding further proceedings, assembled a panel to dispose of the matter. During the proceedings before the Court, the Secretary conceded Mr. Concepcion-Maldonado's argument that the legacy appeal was not moot. The Court—noting that a concession of one party to another does not establish binding precedent—proceeded with the panel decision anyway.

Veterans seeking compensation for disabilities incurred during a period of service must file a claim for service connection for that disability. 38 C.F.R. § 3.303. If and only if a veteran's claim is granted, then the veteran will be assigned an appropriate amount of compensation for that disability and an effective date when that compensation begins. *Monk v. Wilkie*, 32 Vet. App. 87 (2019) (en banc order), *aff'd in part, dismissed in part sub nom. Monk v. Tran*, 843 F. App'x 275 (Fed. Cir. 2021). Under the fact pattern of the case at bar, a favorable disposition of the legacy appeal could potentially result in an effective date of July 12, 2016, thus resulting in more than six years of back pay for the Mr. Concepcion-Maldonado, while a dismissal of the claim for mootness would effectively deny him this money.

The Court reasoned that this case invoked two competing principles, the first of which is that effective dates are downstream from claims of service connection that arise if and only if a claim for service connection is granted. The second principle is that the RO cannot deprive the Board of jurisdiction over an issue. Ultimately, the Court found that the fact pattern of the case at bar clearly illustrated a pecuniary interest at stake that, as a result, forced the Court to favor adjudicating the case rather than dismissing it.

In elaborating on this conclusion, the Court looked to the jurisprudence of several key cases to justify this particular exegesis. The Court, looking to *Bailey v. Wilkie*, 33 Vet. App. 188 (2021), for example, noted that a previous grant of service connection was insufficient to invalidate jurisdiction when an effective date claim was at issue under the legacy system. The Court, referencing *Johnson v. Collins*, 38 Vet. App. 151 (2025), noted that a grant of service connection based on a liberalizing law did not moot a previous claim for service connection under the legacy system. The Court noted that “[a]lthough . . . *Bailey* and *Johnson* . . . didn't explicitly focus on the interplay between the legacy and modernized systems, both highlighted situations in which [the veteran] couldn't obtain full relief by pursuing an effective date only as a downstream issue in their modernized claim.” Therefore, the Court ultimately “conclude[d] . . . that a VA grant in a modernized claim can't moot a legacy claim for the same benefit when, as here, resolving the legacy appeal makes an earlier effective date possible.”

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

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## Court Approves Settlement to Resolve Alleged Unreasonable Delay in Docketing AMA Appeals of VHA Denials

by Gina D'Amico

Reporting on *Gladney-Chase v. Collins*, No. 24-4472 (Vet. App. July 10, 2025) (per curiam order).

The U.S. Court of Appeals for Veterans Claims (the “Court”) in *Gladney-Chase* approved a settlement agreement between a certified class of veterans and

dependents who filed Notices of Disagreement (NODs) at the Board of Veterans' Appeals ("Board") within the modernized appeal system (AMA) of the Department of Veterans Affairs ("VA") more than 180 days prior to March 18, 2025. The NODs were filed in response to Veterans Health Administration (VHA) decisions and remained on the Board's pre-docket queue as of March 18, 2025. Notably, the Court found the settlement fair, adequate, and reasonable.

The terms of the approved settlement agreement include directives to the Secretary to (1) ensure VHA transfers all documents necessary for the Board to docket class members' appeals to the Board no later than January 6, 2026; (2) ensure the Board makes all reasonable efforts to either docket the appeal or provide notice to the claimant of their decision not to docket the appeal within 45 days of receipt of the complete claims/evidentiary file from VHA; (3) ensure that the Board requests supplementary information, documents, and/or evidence from VHA within 45 days of receipt of a file that is incomplete; (4) create a uniform process for VHA to follow to transfer documents to the Board; (5) create a notice with class counsel informing class members what steps VA is taking no later than September 8, 2025; and (6) report every 60 days to class counsel on the status of class members' appeals.

In addition, specific only to the class members, the Board will inform both VHA and VA's Office of General Counsel (OGC) if any files received from VHA are insufficient to determine whether the particular class member's appeal is properly before the Board. If VHA is unable to resolve the issue within 14 calendar days, OGC will notify class counsel so he or she may assist the Board and VHA in ensuring prompt appropriate action by the Board. Once any issues regarding the sufficiency of the file(s) are resolved, the Board will have 45 calendar days to either docket the appeal or decline to docket the appeal (with notice to the claimant). There are additional provisions of the settlement that any class member is encouraged to review.

Prior to the hearing, the Court requested that class counsel address Mr. Gladney-Chase's position as class representative in light of the satisfaction of his individual petition. Class counsel argued that Mr. Gladney-Chase's continued position as class representative is permitted based on the exception to mootness in *Freund v. McDonough*, 114 F.4th 1371 (2024), in which the Federal Circuit discussed the inherently transitory exception to mootness. There, the Federal Circuit found that when "each claim [is] addressed and immediately restored by the Secretary once it becomes known," the claim is inherently transitory. *Id.* at 1380. Counsel asserted that the Secretary's correction of the issue for Mr. Gladney-Chase was addressed within 40 days after the Court ordered the Secretary to respond to his petition. The swiftness of the Secretary's correction of the issue for Mr. Gladney-Chase prevented the Court from reviewing the question of class certification, making his petition inherently transitory and subject to the mootness exception. The Court's order approving the settlement did not remove Mr. Gladney-Chase as representative, so presumably it agreed with class counsel.

Certainly, class members should review the settlement and ensure their cases are handled consistent with the terms of that settlement. However, all veterans, dependents, and their representatives should monitor their claims to ensure that the agreements made by the Secretary are being followed and notice is properly provided.

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

## Court Determines That 38 U.S.C. § 3680A Modifies 38 U.S.C. § 3672 and Thus Imposes Additional Requirements on the Approval of Flight Training Courses

by Lilah Avery

Reporting on *Loomis v. Collins*, No. 23-4348 (Vet. App. July 15, 2025).

In *Loomis v. Collins*, the U.S. Court of Appeals for Veterans Claims (the “Court”) considered whether the requirement that a course be offered by an institution of higher learning (“IHL”) applies to the provision constructively approving certain flight training courses for Department of Veterans Affairs (“VA”) education benefits. The Court held that 38 U.S.C. § 3680A modifies 38 U.S.C. § 3672 and thus imposes additional requirements on the approval of flight training courses. Additionally, the Court reviewed whether 38 C.F.R. § 21.4252(c), which prohibits VA from approving any private pilot training course, conflicts with section 3672(b)(2)(A). The Court held that in light of its holding regarding statutory interpretation, it need not reach the question of the regulation’s validity because Mr. Loomis did not meet the IHL requirement.

Mr. Loomis served in the U.S. Air Force from March 1995 to February 2015 and completed his military career as a joint terminal attack controller (JTAC). After service, he joined General Atomics as a field representative and hoped to become a sensor operator, which involves work comparable to a JTAC. However, as a prerequisite for that position, General Atomics required Mr. Loomis to obtain a private pilot certification. Therefore, to fund the certification, he requested education assistance benefits, via his unused Post-9/11 GI Bill education benefits, so he could complete flight training at MidCoast Aviation Services, LLC (“MidCoast”).

However, VA was unpersuaded by his application and denied Mr. Loomis education assistance benefits. In denying his claim, the regional office relied on the fact that MidCoast’s private pilot training course was not an approved program for VA education assistance benefits purposes. Mr. Loomis appealed the rating decision and argued that the state of Georgia deferred flight course approval to VA and that a VA regulation, which prohibited VA from awarding benefits for the private pilot training course, conflicted with title 38. Later, in a March 2023 Board hearing, Mr. Loomis refined his argument and averred that § 21.4252(c)(1) nullified two provisions under section 3680A and, contrary to legislative intent, imposed an IHL requirement on flight training courses.

In July 2023, the Board of Veterans’ Appeals (“Board”) denied Mr. Loomis educational assistance benefits for a private pilot certification. Specifically, the Board found that his basic entitlement to educational assistance benefits was undisputed, but that MidCoast’s private pilot training course had not been approved by a state or VA. The Board reasoned that MidCoast was not recognized as an IHL and that Mr. Loomis was not taking the private pilot training course for credit toward a standard college degree. The Board then acknowledged his arguments but responded that § 21.4252(c) merely supplemented the statutes and, regardless, the Board noted that it lacked jurisdiction to determine the regulation’s legality.

Mr. Loomis, through counsel, appealed the July 2023 Board decision, arguing that his private pilot training course is “deemed approved” for Post-9/11 GI Bill purposes if approved by the Federal Aviation Administration (FAA) and offered by an FAA certified pilot school, thus the Board erred in denying education benefits for extra-legal reasons. Specifically, Mr. Loomis contended that an FAA-approved pilot training course offered by an FAA-certified pilot school is approved for Post-9/11 GI Bill benefits purposes as a matter of law and VA regulations requiring the denial of Post-9/11 GI Bill benefits for private pilot training courses are inconsistent with section 3672(b)(2). Additionally,

he argued that the Court should set aside § 21.4252(c)(1) as contrary to law, vacate the Board's decision, and remand the matter for the Secretary to determine whether MidCoast's private pilot training course is an FAA-approved course.

The Secretary argued that Mr. Loomis failed to demonstrate error with the July 2023 Board decision and, thus, the Court should affirm. Specifically, the Secretary asserted that Mr. Loomis failed to show how section 3680A(b), as relied on in the July 2023 Board decision, was problematic or how it constituted error, other than expressing disagreement with the proper interpretation of the statutes.

In his reply brief, Mr. Loomis advanced three additional arguments. First, he asserted that the term "pilot school" under section 3672(b)(A) differs from an IHL under section 3680A(b). Therefore, section 3680A(b)'s approval criteria cannot apply to pilot schools. Second, he contended that if section 3680A(b) modifies section 3672(b)(2)(A) but pilot schools and IHLs are distinct, then no course offered by a FAA-certified pilot school can ever be approved. Third, Mr. Loomis cautioned that the Court not read too much into the phrase "subject to" in section 3672(b)(2)(A) when section 3680A(b) permits exceptions under any other provision of title 38.

After the parties filed briefs, the case was submitted to the panel of Judge Toth, Judge Falvey, and Judge Laurer for oral argument and decision. In the panel decision, the Court found that to qualify for education assistance benefits for his private pilot training course, under section 3672(b)(2)(A), Mr. Loomis needed to show that his training was offered by an IHL as required by section 3680A(b). Since Mr. Loomis did not show that his training was offered by an IHL, he failed the first step of the inquiry. The Court also found that the July 2023 Board decision did not need to address whether VA found that the course was constructively approved.

Of the three judges who considered this case, Judge Falvey filed the opinion of the Court, with Judge Toth joining in the opinion and Judge Laurer

dissenting. In his dissent, Judge Laurer began by stating that the majority missed an opportunity to give effect to the meaning of the words Congress enacted to implement its policy to help qualifying veterans cover expenses while training for a job. He went on to conduct his own statutory interpretation that, in his opinion and contrary to the majority's interpretation, gave meaning to *both* sections 3672(b)(2)(A) and 3680A. Judge Laurer stated that he would hold that Post-9/11 GI benefits may extend to flight training courses offered by a private pilot school if it is approved by a state approving agency or VA and satisfies the requirements of section 3672(b)(2)(A)(ii). Judge Laurer also asserted that he would set aside § 21.4252(c)(1) as inconsistent with section 3672(b)(2)(A)(ii).

Veterans and their advocates, seeking to cover expenses for certain flight training courses, should review the qualifications of said courses, as the holding in this decision now imposes additional requirements.

*Lilah Avery is a staff attorney at the Veterans Consortium Pro Bono Program.*

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## **Applying the Supreme Court's Reasoning in *Rudisill*, the Court Concludes a Veteran with Six Years of Active Duty Service is Entitled to Both Educational Benefits**

By Anna Kapellan

Reporting on *Perkins v. Collins*, No. 24-6515 (Vet. App. May 16, 2025).

In *Perkins*, the U.S. Court of Appeals for Veterans Claims (the "Court") addressed entitlement to educational benefits. Appellant Cassidy A. Perkins is an Air Force veteran who served from August 2014 to August 2020. Ms. Perkins applied for Post-9/11 benefits and was granted 36 months of eligibility. But VA decided that Ms. Perkins' Montgomery

benefits were barred by her already-exercised ability to secure her Post-9/11 eligibility. Ms. Perkins appealed, arguing that her six years of service had rendered her qualified for both, independently of each other.

Chief Judge Allen, writing for a unanimous panel that included Judges Toth and Laurer, noted that “*Rudisill* essentially decided” *Perkins* for the Court. In *Rudisill*, the U.S. Supreme Court concluded that veterans with separate entitlement to Montgomery and Post-9/11 benefits can receive up to 48 months of educational aid, even if such veterans begin using their Post-9/11 benefits before they exhausted their Montgomery eligibility. The Montgomery Bill provides benefits to veterans who serve at least three years between July 1, 1985, and September 30, 2030. The Post-9/11 Bill, enacted in 2008, offers similar benefits to those who serve after September 11, 2001, thus yielding an overlap in eligibilities and suggesting that veterans had to elect the benefit they wished to receive. The immutability of that election and the loss of the alternative election were never in the picture since another provision permitted switching from Montgomery to Post-9/11 benefits if some, but not all Montgomery benefits were used, and the only caution in that provision was the uniform cap on the combined number of months of benefits.

By the time James Rudisill, an Army veteran who had served three separate active-duty tours, had used 25 months of his Montgomery benefits during college, he had already attained his Post-9/11 eligibility via subsequent service. He sought to use his remaining 23 months of that combined entitlement toward a graduate school. However, VA found that Mr. Rudisill’s Post-9/11 eligibility was capped by 38 U.S.C. § 3327(d)(2) even though he was not switching benefits: He was exercising a distinct and different entitlement that he separately accrued.

The Supreme Court majority opinion in *Rudisill* concluded that if “the statute were ambiguous, the... canon would [have] favor[ed] Rudisill, but the statute is clear, so we resolve this case [in favor of Rudisill] based on [the] statutory text alone,”

prompting a concurrence and a dissent observation that such an invitation bore many dangers since the canon “developed almost by accident,” with “no explanation ... for its foundation,” and might be proven to play no role in the task of statutory interpretation.

Returning to *Perkins*, the Board had denied Ms. Perkins’s claim, concluding that 38 U.S.C. § 3322(h) barred “duplication of eligibility” for service that started on or after August 1, 2011. Mindful of *Rudisill*, the Board concluded that the logic had to be distinguishable—and inapplicable—to Ms. Perkins’s circumstances since *Rudisill* involved multiple service periods separated by breaks in service. The Board’s conclusion necessarily begged two questions: First, how long did that break in service have to be? (e.g., Is just one day enough? If yes, would one hour do it? If no, should it then be at least a week? Or a month?) Second, would Ms. Perkins have been entitled to additional educational benefits had she switched, with just a one-minute break, from the Air Force to, say, the Marine Corps, and served her second three years *not* in the Air Force? With that, Ms. Perkins appealed to the Court.

The Court took a step back, assessed the broader picture, and pointed out that the statute only prohibited applying the *same* service time to both benefits rather than deriving *different* benefits from *different* segments that, jointly, create a single continuous timeline that, divvied into pieces, could produce enough credits without the need to label the credits as, for instance, “letter-X” credits and “letter-Y” credits: since the only bar in existence was that on the combined amount of “letter” credits.

Therefore, drawing from the *Rudisill* wisdom, the Court stressed that any educational entitlement stems from the complete length of service. With that, the Court emphasized that both Montgomery and Post-9/11 bills provided 36 months of benefits each and were limited by—and only by—the overall 48-month cap on such benefits. Since Ms. Perkins’s six-year service met the eligibility criteria for both, and her educational benefits could easily be divided

accordingly, e.g., two years toward Montgomery and three years toward Post-9/11, without any double-dipping overlap, the lack of any overlap demonstrated that—short of the overall 48-month cap—no limitations were in play.

And, in that sense, the value of *Perkins* is greater than a mere guidance about how to calculate credits when applying the Post-9/11 and Montgomery mandates. Indeed, the lesson of *Perkins* is also prudential: while subtle details are indisputably important in the adjudicatory process and might have a critical impact, no details can be prioritized to such an extent that the outcome could be at risk of defying common sense.

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## **38 U.S.C. § 7112(b) Does Not Compel Expedited Adjudication of MST Claims Despite Undesirable Three Year Delay**

By Charity Rohlfs

Reporting on *Wiggins v. Collins*, No. 24-4591 (Vet. App. Aug. 1, 2025) (per curiam order).

In *Wiggins*, the U.S. Court of Appeals for Veterans Claims (the “Court”) denied Ms. Wiggins’s petition for a writ of mandamus. The Court determined that Ms. Wiggins was unable to show that she sought the same relief on the same grounds that she seeks through mandamus from the Department of Veterans Affairs (“VA”), that she did not lack an adequate alternative means of relief, and that she did not have a clear and indisputable right to the

writ. The Court utilized the *TRAC* factors in evaluating the delay. *Telecomm. Rsch. & Action Ctr. v. F.C.C. (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984). The Court distinguished Ms. Wiggins’s case from *Heller v. McDonough*, 38 Vet.App. 75 (2024) (per curiam order).

Appellant, Ms. Wiggins, served on active duty from September 2013 to July 2016. In March 2021, Ms. Wiggins applied for disability compensation for post-traumatic stress disorder (PTSD) caused by military sexual trauma (MST) and intimate partner violence. In April 2021, VA granted service connection and assigned a 30 percent rating for major depressive disorder (MDD) but denied service connection for PTSD. Ms. Wiggins requested higher level review for the MDD rating and the denial of service connection for PTSD.

In November 2021, VA increased her disability rating to 50 percent but again denied the service connection for PTSD. Ms. Wiggins filed a Notice of Disagreement (NOD) in November 2021, challenging the denial of service connection for PTSD and the rating assigned for MDD. She requested a hearing with a veterans law judge. In cases requesting a hearing, a median wait of three years was widely known and the subject of congressional scrutiny. In March 2022, Ms. Wiggins filed a motion to advance her appeal based on financial insecurity that caused suicidal ideations. The Board denied the motion in May 2022 but informed her that with additional evidence of severe financial hardship, it would consider another motion to advance.

In April 2024, Ms. Wiggins sought to withdraw her hearing request and transfer to the direct review docket, but her appeal remained on the hearing docket because the request to change was untimely. In July 2024, Ms. Wiggins filed the petition for a writ of mandamus, noting that she was an MST victim and that 38 U.S.C. § 7112 requires expedited treatment of MST claims. In August 2024, the Board found that Ms. Wiggins’s case was a covered MST case but would be adjudicated in the order it was placed on the docket, in accordance with 38 U.S.C. §

7107(a)(4). The Board found that section 7107(b) “cause shown” for docket advancement was not met.

In her petition, Ms. Wiggins asserted that section 7112 is ambiguous, but the legislative purpose is clear: expedite MST claims. She also argued that a *TRAC* factor analysis supports expediting MST claims. The Secretary contends that section 7107(a)(4) dictates that the Board decide appeals in the order they are placed on the docket. Additionally, the Secretary asserted that Ms. Wiggins did not show sufficient cause consistent with section 7107(b) to advance her case on the docket.

The Court explained that for a writ to be issued, three factors must be met. First, the petitioner must show that there is not another alternative means to obtain the relief so that the writ does not replace the appeal. Second, the petitioner must show a clear and indisputable right to the writ. Third, the Court must be convinced that the circumstances warrant issuing the writ. In *Heller*, the Court considered the relationship between advance on the docket denials and unreasonable delay. The Court evaluated the reasonableness of VA's delays in *Heller's* case by utilizing the six *TRAC* factors.

The six *TRAC* factors used to assess the reasonableness of delays are: “(1) whether a ‘rule of reason’ accounts for the length of time elapsed during agency consideration; (2) whether Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed; (3) the character of interests at stake; (4) the effect of expediting on competing agency resources; (5) the nature and extent of the interests prejudiced by the delays; and (6) the presence of bad faith or impropriety is not necessary to find unreasonable delay.” *Martin v. O'Rourke*, 891 F.3d 1338, 1344-45 (Fed. Cir. 2018) (finding that *TRAC* provides the framework for analyzing claims of unreasonable delay).

The Court began the *TRAC* analysis under the second factor by considering if section 7112(b) required immediate and automatic advancement on

the docket for covered MST cases by evaluating the statutory language. The Court found that section 7112(b) was ambiguous and that the section heading “Expedited treatment of certain claims” did not mean MST cases received expedited treatment. Rather, section 7112(b) requires that the Board promptly determines whether an NOD involves a covered MST case.

The Court explained that if “Congress intended MST covered cases to receive treatment in the form of automatic advancement on the docket, [Congress would] either amend section 7107(b) to include MST claims or cross-reference section 7112 to signal the inclusion of such claims in the Board's analysis of whether to advance a claim on the docket.” The Court emphasized that section 7107(b) does not reference any other statutory provisions as providing additional exceptions to the docketing requirement. Due to this, the Court was unable to discern a specific timetable for adjudicating MST claims, though it noted that MST claims are to receive high priority within VA. This factor weighed against issuing the writ.

The Court next considered *TRAC* factor 1, *Rule of Reason*. The Court evaluates the reasonableness of the delay dependent on the factual record. The Court found that VA's delays affect all claimants equally awaiting a hearing and the delays are well published to allow for claimants to choose a non-hearing docket for faster adjudication. The Court noted that VA had acted on Ms. Wiggins's claim by considering and denying the motion to advance as well as notifying Ms. Wiggins that it would consider a subsequent motion to advance if new evidence showed a deterioration in her health or financial situation. This factor weighed against granting the writ.

The Court next reviewed *TRAC* factors 3 and 5, *Character of Interests at Stake* and *Nature of Interests Prejudiced by Delays*. Factor 3 favors veterans disability claims, as these claims always involve health and welfare; therefore, the Court weighed this factor in Ms. Wiggins's favor because her claims involve MDD and PTSD, impacting her

health and welfare. Factor 5 overlaps with factor 3, as the court must conduct an analysis of the delay on a particular veteran.

Here the Court found that the evidence of financial insecurity which aggravated her PTSD including having suicidal ideation pertained to a pre-2022 time period. The Court notes, unlike in *Heller*, that Ms. Wiggins's financial situation and employment prospects had improved since her 2022 evidence and that her financial situation and health did not deteriorate after the denial of her motion to advance. This factor weighed against issuing the writ.

The Court next evaluated *TRAC* factor 4, *The Effect of Expediting on Competing Agency Resources*. The Court found that if the writ were issued, it would allow Ms. Wiggins to jump ahead in the appeal line, which negatively impacts other veterans by delaying those cases. The Court found this factor weighed against issuing the writ.

Finally, the Court examined *TRAC* factor 6, *Bad Faith or Impropriety*. The Court noted that Ms. Wiggins did not claim that the denial of her motion to advance was done in bad faith. The record showed that the Board considered Ms. Wiggins's finances and found that her finances did not constitute sufficient cause to advance her case on the docket. This factor weighed against issuing the writ.

After examining the *TRAC* factors, the Court held that the adjudication delay was not unreasonable. The Court did note that the three-plus-year wait for a hearing is "undesirable" but widely published and the focus of much deliberation by Congress, VA, and veterans advocacy groups.

The Court next focused on deciding if an adequate alternative means of relief existed for Ms. Wiggins despite her inability to demonstrate her right to the writ. The record reflected that the evidence Ms. Wiggins submitted to the Board did not demonstrate sufficient cause to advance because it did not demonstrate severe financial hardship, e.g.

bankruptcy, foreclosure, or homelessness. Regardless of the inadequacy of the evidence, the Board specifically stated it would willingly consider a new motion to advance if additional evidence demonstrating cause was submitted. Importantly, Ms. Wiggins's March 2022 motion to advance did not assert the MST-induced trauma. As the MST-induced trauma was not before the Board, the Court further found it was unable to issue the writ because Ms. Wiggins had not sought "the same relief on the same grounds" from VA.

The Court concluded that section 7112(b) does not compel expedited adjudication of MST cases. However, the Court explained that the Board may find MST relevant in assessing whether to advance an appeal on the docket under section 7107(b). Likewise, the Court considers MST claims when evaluating Agency delay under the *TRAC* factors. Furthermore, the Court found that Ms. Wiggins did not show a clear and indisputable right to mandamus or that she lacked an adequate alternative means of relief. For those reasons, the Court denied the petition for a writ of mandamus.

Judge Jaquith dissented, asserting "that the judicial inquiry into the construction of section 7112 should end with [the Court] recogni[zing] that Congress said what it meant and meant what it said when it wrote that MST claims get expedited treatment." The dissent averred that the Court should hold that "expedited treatment is required and has not been provided." Furthermore, the dissent contended that the Board's failure to fulfill the statutory obligation to determine this was a covered MST case necessitates issuing the writ of mandamus. The dissent outlined the VA timeline, describing the time as the "opposite of expedited treatment and promptness." The timeline detailed the failure by the Board to note the MST in a form letter and the Board ignoring Congress, the VA, and the Court.

The dissent also noted that the VA Office of Inspector General found that VA has not properly implemented changes to assist veterans with MST in obtaining the care and benefits which they are entitled. Furthermore, the dissent noted that "a

2023 VA study found that women veterans who screened positive for MST had 3.20 times the prevalence of post-military suicidal ideation, 3.02 times the prevalence of a post-military suicide attempt, and 4.05 times the prevalence of past-month suicidal ideation, compared to those who screened negative, and those numbers rose to 3.81, 3.84, and 4.86 for women veterans who reported experiencing military sexual assault,” which could constitute serious illness and sufficient cause for advancement on the docket. The dissent also disagreed with the *TRAC* analysis conducted.

*Wiggins* provides guidance for cases dealing with MST, delays in adjudication, and motions to advance on the docket. Prior to filing a petition for a writ of mandamus, if the Board informs that it will consider a subsequent motion to advance if additional evidence is submitted, submit the additional evidence demonstrating the ongoing financial insecurity and/or worsening mental state. This assists in proving that no adequate means of obtaining relief exist. Additionally, utilize the *TRAC* factors to evaluate the reasonableness of VA delays in denying a motion to advance on the docket. Furthermore, clearly assert claims of MST to the Board first, as the Court normally is limited in reviewing final Board decisions.

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

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## Board Remand is an Appealable Final Decision Following a Denial of Benefits

by Koria Stanton

Reporting on *Willen v. Collins*, 38 Vet. App. 259 (2025).

In *Willen v. Collins*, the U.S. Court of Appeals for Veterans Claims (the “Court”) reversed a November

2023 Board of Veterans’ Appeals (“Board”) decision concluding that a January 2014 initial rating claim became final and the rating period on appeal began on April 11, 2016.

Mr. Willen’s original claim for service connection for depression was received in January 2014. In a September 2014 rating decision, a Department of Veterans Affairs (“VA”) agency of original jurisdiction (AOJ) awarded service connection for major depressive disorder (MDD) with an initial 30 percent rating, effective January 16, 2014, the date VA received his original claim. Within one year of the issuance of such rating decision, several records were associated with the claims file, to include Social Security Administration (SSA) records and VA treatment records submitted by the veteran dated from January 2014 through May 2015, which reflected evidence of symptoms and functional impairment relevant to his MDD rating.

No further communication was received from Mr. Willen regarding his MDD until April 2017, when he filed an increased rating claim for such disability. In pertinent part, in November 2021, VA obtained a medical opinion following a Board remand, and as a result, in a January 2022 rating decision, the AOJ awarded an increased 70 percent rating for the veteran’s MDD, effective the date of the November 2021 VA examination showing an increase in the severity of such disability commensurate with such rating. A few months later, VA also awarded a total disability rating based on individual unemployability (TDIU), effective January 2022. Mr. Willen then appealed to the Board, which granted an earlier effective date of November 2021 for the award of a TDIU but denied a rating in excess of 70 percent for his MDD. He appealed to the Court, which granted a joint motion for partial remand that vacated the Board decision and remanded his increased rating claim and the intertwined TDIU application prior to November 2021 to the Board.

Upon the case’s return to the Board, Mr. Willen argued that his January 2014 original claim remained pending under 38 C.F.R. § 3.156(b), as VA received new and material evidence within one year of the

September 2014 rating decision, to specifically include evidence of suicidal ideation.

In the November 2023 decision on appeal, the Board, as relevant, remanded the veteran's increased rating claim for MDD, as well as the intertwined TDIU application prior to November 2021, for additional development. Prior to reaching the merits of such claims, in a section entitled "Preliminary Matters," the Board determined that the September 2014 rating decision was final, as "no additional evidence pertinent to the issue was physically or constructively associated with the claims folder within one year of that decision." In this regard, the Board rejected Mr. Willen's argument seeking an effective date from 2014, noting that it could not find the evidence he mentioned. Rather, the Board determined that the rating period on appeal stemmed from April 11, 2016, one year prior to the receipt of his increased rating claim for MDD. After limiting the period on appeal, the Board remanded the defined review period on appeal, i.e., from April 11, 2016, to the present, for additional development, to include obtaining a retrospective opinion regarding the severity of the veteran's MDD. Mr. Willen then appealed to the Court.

The Secretary filed a motion to dismiss Mr. Willen's appeal for lack of jurisdiction, as he was trying to appeal a Board remand. The Court denied the motion but allowed the Secretary to renew the arguments in a merits briefing. At the merits stage, the Secretary reiterated that there was nothing for the Court to review, as the November 2023 Board remand was not a final decision that denied entitlement to benefits. Mr. Willen, on the other hand, argued that he made his finality argument to preserve the possibility of an effective date prior to April 11, 2016, and the only reason for the Board to address this argument in a remand order was to finally narrow the issues before VA. Here, he noted that the Board did not say its discussion was not final or subject to change depending on future events.

Besides asking the Court to reject the Secretary's aforementioned jurisdiction argument, Mr. Willen

also asked the Court to reverse the Board's conclusion about new and material evidence, arguing that there was no way to review the evidence VA received within a year of the September 2014 rating decision and not find that at least some of it was new and material. Of note, the Secretary conceded that new and material evidence was there, but he requested that if the Court rejected his jurisdiction argument, it would remand rather than reverse the Board's conclusion in order to allow the Board to review the evidence in the first instance and determine whether such was new and material.

The Court sided with Mr. Willen, rejecting the arguments put forth by the Secretary, as well as the Board. First, the Court made it clear that, in the end, the veteran desired an effective date prior to November 2021 for the awards of the 70 percent rating for his MDD and a TDIU, presumably dating back to January 2014, as he invoked 38 C.F.R. § 3.156 in support of his appeal. Thus, the Court began its analysis with a review of 38 C.F.R. § 3.156(b), emphasizing that if VA receives new and material evidence within a year of a decision, it must treat that evidence as part of the initial claim, and the failure to complete a new-and-material analysis may keep a claim from becoming final. *See Lang v. Wilkie*, 971 F.3d 1348, 1355 (Fed. Cir. 2020). Here, it was noted that the Board rejected the veteran's theory that his January 2014 original claim never became final, as the Board did not find any new evidence within a year of the September 2014 rating decision.

Next, in addressing its exclusive jurisdiction to review final Board decisions under 38 U.S.C. § 7252(a), the Court discussed numerous decisions that held a Board remand was not a final appealable decision. Specifically, in *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005), the U.S. Court of Appeals for the Federal Circuit found that a Board remand, although arguably erroneous, was not a final decision granting or denying benefits that was subject to appellate review.

However, the Court also noted that the Board could produce a final, appealable decision, even when it

did not explicitly state it was denying a particular benefit, when it cut off the path to benefits. In this regard, the Court cited its recent decision of *Cardoza v. McDonough*, 37 Vet. App. 407 (2024) (holding that the Board's refusal to docket an appeal, even when not phrased as a denial of benefits, was a final Board decision that fell within the Court's jurisdiction), as well as the Federal Circuit's recent decision in *Bean v. McDonough*, 66 F.4th 979 (Fed. Cir. 2023) (“[W]hen a claim is adequately presented to the Board and not addressed, the Board's disposition of the appeal constitutes a decision of the Board on that claim that may be appealed to the Veterans Court”).

In the same vein, the Court pointed out it was also possible that, even when the Board gave a conclusion that looked decisive with findings that looked final, it did not produce a final appealable decision. Here, the Court cited its decisions in *Acosta v. Principi*, 18 Vet. App. 53 (2004) and *Dallman v. Wilkie*, 33 Vet. App. 101 (2020), which both dealt with the Board's conclusion that an earlier VA decision became final in the context of reopening previously denied service connection claims under 38 C.F.R. § 3.156. The Court explained that in these cases, it held the Board's finality determination was not a final decision, as the Board had remanded the underlying service connection claims and did not make any binding conclusions relevant to an effective date.

Based on the foregoing, the Court found that the Board issued a final denial of benefits in its November 2023 decision when it limited its consideration of Mr. Willen's MDD rating from April 11, 2016, to the present, and remanded his increased rating claim with instructions limiting additional development to such period on appeal. Here, the Court correlated the Board's conclusion that the rating period on appeal began in April 2016, which effectively foreclosed the possibility of increased benefits prior to such time period, to its actions in *Cardoza*, where its refusal to docket an earlier effective date appeal extinguished the chance for additional compensation.

Next, the Court found that the Board's refusal to exercise jurisdiction over Mr. Willen's increased rating claim for MDD prior to April 2016 was a final decision. In this regard, the Court distinguished the case from *Acosta* and *Dallman*, explaining that, while those cases dealt with service connection and the effective date was a downstream issue, in the instant case, the Board narrowed the scope of the veteran's appeal (after evaluating evidence and argument, and considering the law) and “cut off” more than two years from his potential benefits. Here, the Court noted that the Board's remand did not include consideration of Mr. Willen's benefits from January 2014 to April 2016; thus, the Board denied his benefits prior to April 2016. The Court also explained that the Board essentially refused to exercise jurisdiction over the veteran's MDD rating prior to April 2016, citing *Mintz v. Brown*, 6 Vet. App. 277 (1994). In this regard, the Court noted that both it and the Federal Circuit had held in *Cardoza* and *Bean*, respectively, that the Board issues a final decision when it declines jurisdiction, even if it does not expressly state that it is denying a benefit.

Following its determination that the Board's denial of consideration of an increased rating for Mr. Willen's MDD prior to April 2016 was a final and appealable decision, the Court then found that the Board erred when it concluded he had not submitted new and material evidence within a year of the September 2014 rating decision. As an initial matter, the Court agreed with the veteran with respect to it reviewing his submitted evidence, noting that while it can neither find facts nor weigh evidence in the first instance, it can review findings of fact, i.e., the Board's new-and-material determinations, for clear error. Applying this principle, the Court concluded that, within a year of the September 2014 rating decision, Mr. Willen submitted VA treatment records reflecting that he suffered from suicidal ideation around the time he filed his original claim for service connection for MDD, which is a symptom expressly contemplated by the 70 percent rating criteria under 38 C.F.R. § 4.130. Accordingly, the Court found that such evidence was new and material, as VA had not yet reviewed it and it tended to prove the veteran

qualified for a higher rating than the 30 percent that was assigned at such time.

The Court also found that as VA failed to act on such new and material evidence, the September 2014 rating decision never became final, which in turn meant Mr. Willen's current appeal was a continuation of his disagreement with the initially assigned rating for his MDD rather than his April 2017 increased rating claim for such disability. In finding that the Board's conclusion—that the rating period on appeal was limited based on Mr. Willen's April 2017 increased rating claim—was clearly erroneous, the Court ultimately reversed the Board's November 2023 decision and remanded the matter to the Board so it could readjudicate the issue of Mr. Willen's MDD rating and his intertwined TDIU application going back to January 2014.

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

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## Court Addresses Ameliorative Effects of Medication on Musculoskeletal Ratings in Non-Precedential Decision

by Mary K. Benton

Reporting on the nonprecedential decision *Kirschbaum v. Collins*, No. 23-2451 (Vet. App. July 15, 2025).

In a July 15, 2025, nonprecedential panel opinion, the U.S. Court of Appeals for Veterans Claims (the "Court") withdrew a March 2025 memorandum decision affirming a February 2023 Board of Veterans' Appeals ("Board") denial of Howard R. Kirschbaum's claim for an increased rating for his neck disability. Mr. Kirschbaum unfortunately passed away during the pendency of the appeal. His

surviving spouse, Mrs. Carol Kirschbaum, was substituted in his place.

Mr. Kirschbaum served in the United States Air Force from August 1966 to August 1970. The Court granted Mrs. Kirschbaum's motion for a panel decision and issued a non-precedential panel decision in place of the affirmance, remanding the instant matter.

The Court held that the Board did not take into consideration the ameliorative effects of Mr. Kirschbaum's use of medication before rating him under the applicable diagnostic code ("DC"). The Court determined that such an error was not harmless under *Tadlock v. McDonough*, 5 F.4th 1327 (Fed. Cir. 2021).

Mrs. Kirschbaum had asked for reconsideration of the Court's March 2025 memorandum decision and argued, through counsel, that the Court misinterpreted *Tadlock* and that the evidence was "[not] clear and...open to debate." She also argued, under *Tadlock*, that the Board, not the Court, should be required to consider the ameliorative effects of Mr. Kirschbaum's use of medication for his disability or in the alternative a panel should make a determination. Specifically, she argued that the Board did not take into account Mr. Kirschbaum's use of medication and its ameliorative effects on his disability which was noted in a June 2018 Department of Veterans Affairs ("VA") examination and an October 2022 Board hearing when rating his condition under 38 C.F.R. § 4.71a, DC 5237.

The Secretary of Veterans Affairs ("Secretary") argued that, under *Jones v. Shinseki*, 26 Vet. App. 56 (2012), and *McCarroll v. McDonald*, 28 Vet. App. 267 (2016), the Board is not required to take into consideration Mr. Kirschbaum's use of medication and its ameliorative effects when rating under the applicable DC.

The Court concluded that the Board did err under *Jones*, *McCarroll*, and *Ingram v. Collins*, 38 Vet. App. 130 (2025), as each of those precedential opinions required the Board to discount Mr. Kirschbaum's

use of medication and its ameliorative effects on his neck disability that was rated under the schedular criteria for musculoskeletal conditions, which did not contemplate such treatment. The Court also held, per *Tadlock*, that because Mr. Kirschbaum took pain medication and his statements surrounding that fact were subject to interpretation, the Board's error was prejudicial. As a result, remand was warranted for the Board to provide adequate reasons and bases.

The case was before Chief Judge Allen, who wrote the nonprecedential opinion, Judge Meredith, and Judge Toth. Judge Toth, who had rendered the March 2025 memorandum decision, dissented by disagreeing with the majority's reading of *Tadlock*, based partly on *Shinseki v. Sanders*, 556 U.S. 396 (2009). Specifically, in his dissent, Judge Toth determined that the instant holding failed to contemplate if Mr. Kirschbaum could have factually obtained an increased rating under DC 5237 if the Board took into consideration his use of medication and its ameliorative effects. He averred that the evidence of record clearly showed how Mr. Kirschbaum's use of pain medication did not help with his neck condition and therefore maintained that affirmance was warranted.

The Secretary filed a motion to stay proceedings pending the outcome of *Ingram* at the Federal Circuit. Chief Judge Allen, Judge Meredith, and Judge Toth denied the Secretary's request, as *Ingram* was not the sole basis for remand.

Practitioners should take note of the potential outcome of the *Ingram* appeal to the Federal Circuit and its possible influence on any future precedential decisions with similar fact patterns as this case.

*Mary K. Benton is a staff member with The Veterans Consortium Pro Bono Program.*

## Secretary's Equitable Relief Decisions Under 38 U.S.C. § 503 Are Beyond the Board's Judicial Review

by Christina Zahara Noh

Reporting on the nonprecedential decision *Williamson v. Collins*, No. 2024-1770 (Fed. Cir. July 16, 2025) (per curiam).

In this nonprecedential decision, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") affirmed the U.S. Court of Appeals for Veterans Claims' (the "Court's") dismissal of an equitable relief claim under 38 U.S.C. § 503 for lack of jurisdiction.

After separating from active service in 1966, Mr. Williamson submitted a 1972 VA disability claim. A VA regional office (RO) denied the claim but mailed the rating decision and subsequent confirmation of denial to an incorrect address. In 2007, Mr. Williamson petitioned to reopen the 1972 claim. In May 2021, the Board granted him a 100 percent disability rating effective March 30, 1972, and he received retroactive payment of his benefits.

Mr. Williamson then filed a claim for equitable relief under 35 U.S.C. § 503. Section 503 grants the Secretary authority to provide equitable relief where a veteran has (a) been deprived of his or her rightful benefits due to administrative error; or (b) suffered a loss due to reliance on an erroneous VA decision. The authority to grant equitable relief under section 503 is reserved to the Secretary, but 38 C.F.R. § 2.7(c) allows certain others, including the Chairman of the Board of Veterans' Appeals ("Board"), to recommend equitable relief to the Secretary.

Mr. Williamson sought approximately \$1.7 million in compensation for the nearly 50 years in real estate losses and dependent health care costs incurred while he was not in receipt of the benefits to which

he was ultimately deemed entitled. He argued that he relied to his detriment on the RO's 1972 denial, which he alleged was erroneous due to the RO's clear and unmistakable error (CUE).

In September 2021, the Executive Director of VA's Compensation Service, acting on behalf of the Secretary, denied the request for equitable relief under both section 503(a) and (b), stating that recompense for disadvantageous financial decisions is not a benefit to which Mr. Williamson is entitled, and although the May 2021 Board came to a different decision than the 1972 RO, there was no CUE in the RO's earlier decisions. In so deciding, the Secretary noted that his section 503 equitable relief decisions are not appealable.

Nevertheless, Mr. Williamson filed a Notice of Disagreement with the Board. The Board notified Mr. Williamson pursuant to 38 C.F.R. § 20.104(c) that although it did not have jurisdiction to review the Secretary's decision, it would afford him time to submit additional written or oral evidence or argument regarding the jurisdiction question. Mr. Williamson declined a hearing but submitted additional written argument in which he stated that he assumed that the Board does not have authority to review the Secretary's decisions under section 503. The Board dismissed the claim, finding that the argument lacked merit and that the Court's precedent held that it does not have jurisdiction to review the Secretary's equitable relief decisions under section 503.

Mr. Williamson then appealed to the Court, challenging the factual and legal bases for the Secretary's equitable relief denial but not disputing the Board's lack of review authority. The Court dismissed the appeal, finding that Mr. Williamson's arguments ignored controlling case law and thereby failed to establish jurisdiction. The Court denied reconsideration but granted a panel decision through which it upheld the dismissal.

Proceeding pro se, Mr. Williamson advanced two principal arguments on appeal to the Federal Circuit. First, he argued that denial of judicial

review of the Secretary's section 503 equitable relief decision deprives him of due process and violates the Administrative Procedure Act (APA). He cited the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), to support this argument. Second, he argued that the RO and Board committed CUE in denying his 1972 claim.

In rejecting Mr. Williamson's argument regarding deprivation of due process, the Federal Circuit reasoned that the Secretary's decision to grant or deny equitable relief under section 503 is undeniably discretionary and therefore, there is no legitimate claim by right for entitlement to that benefit. Second, regarding procedural due process, the Federal Circuit found no due process violation because the Board provided Mr. Williamson notice and a fair opportunity to be heard when it informed him of the jurisdictional defect and gave him the opportunity to present additional written or oral evidence or argument.

As for the contention that denial of judicial review of the Secretary's adverse section 503 decision violates the APA, the Federal Circuit found that 5 U.S.C. § 702 of the APA clearly bars review of the Secretary's equitable relief decisions under section 503. Although the APA allows judicial review where a person suffers legal wrong due to agency action, it leaves other limitations on judicial review undisturbed. 5 U.S.C. § 702. Because judicial review of the Secretary's section 503 decisions is clearly barred under 38 U.S.C. § 511, the Federal Circuit found that the APA does not apply to Mr. Williamson's case.

The Federal Circuit noted that Mr. Williamson's reliance on *Loper Bright* is misplaced, as the body of law he attacked did not arise from judicial deference to agency interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); rather, it arose from the courts' use of traditional statutory canons of construction unrelated to *Chevron*.

Finally, the Federal Circuit found that CUE motions apply to Board decisions, and Mr. Williamson failed to show the presence of CUE in any of the Board's earlier denials of benefits based on the 1972 claim.

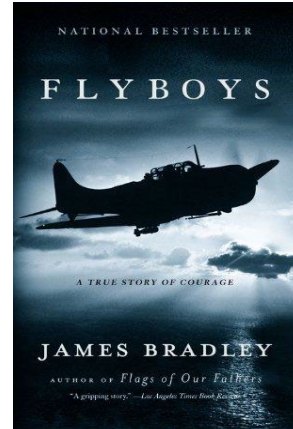
Accordingly, the Federal Circuit affirmed the Court's dismissal of the claim to equitable relief under section 503 for lack of jurisdiction.

The Federal Circuit's ruling, although nonprecedential, reinforces the body of law that holds that through its enactment of section § 511, Congress unambiguously specified that the Secretary's equitable relief decisions under section 503 are not judicially reviewable by the Board and consequently, the Court and the Federal Circuit do not have authority to provide such relief to a claimant.

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

## Book Review of *Flyboys: A True Story of Courage*, by James Bradley

Review by Caleb A. Hayter



Little, Brown and Company, New York, 2003. \$14.95 (Paperback). 404 pages.

In early 1945, during World War II in the Pacific, nine American airmen were shot down by the Japanese. Eight of them were captured and suffered horrific fates. The ninth, floating in the Pacific, narrowly escaped and was rescued by an American submarine. *Flyboys*, by James Bradley, tells their story—and much more.

*Flyboys* is a brutal meditation on empire, war, and the capacity for human barbarism. It is a reminder of what General William Sherman meant when he said “war is hell;” that it is all too easy for “civilized” people to do unspeakable things to each other.

Before this book, James Bradley wrote *Flags of Our Fathers*, describing the Battle of Iwo Jima in February 1945. Bradley's own father was among the 25,000 U.S. marines and sailors who invaded that island to capture its airfields and neutralize threats to American bombers. It was one of the bloodiest battles of the war; over 6,000 Americans died and 19,000 were wounded. Of the 20,000 Japanese

defenders, fewer than 1,100 were captured; the rest perished.

Nearby was another island also held by the Japanese, even more heavily defended: Chichi Jima. While Iwo Jima had airfields, Chichi Jima had radio stations, and our titular flyboys were sent to bomb them to disrupt Japanese communications. Japanese antiaircraft guns shot them down.

While Bradley explores the lives of these men—their childhoods, paths to war, and the horrors they endured—he also takes a broader look at what drives people to act so terribly towards each other, in ways that are shocking even during wartime. While Bradley does not dig far into the hearts and minds of men, he does show that barbarity is not limited by nationality or allegiance.

The roots of the conflict in the Pacific stretch back to the 1840s and the American belief in “Manifest Destiny.” In fact, one of the first permanent settlements ever established on Chichi Jima in 1830 was led by an American named Nathaniel Savory. In June 1853, U.S. Navy Commodore Matthew Perry claimed the island for the United States on his way to visit Tokyo and open Japan—then a nation almost entirely closed off from the world—to the West. Bradley describes the Japanese as learning a lesson from Perry’s visit, and learning it well: the idea that “might makes right.”

The inculcation of that idea within Japanese society led to—in less than 60 years—the growth of Japan from an isolated island nation into an empire, and into conflict with the nation that had taught Japan the empire game: the United States. Japan’s attack on Pearl Harbor in 1941 drew the United States into World War II and called the nine young American men profiled here to serve, killing eight of them, along with millions of others.

Were their deaths preventable? Might they have been spared their awful fate had their Japanese captors been kinder, gentler, more just? Perhaps. But lest you think that the brutality was one-sided, Bradley is honest and unflinching; his depictions of

the U.S. bombing of Japan, by those same bombers the men of Iwo and Chichi Jima fought to protect or destroy, show it was horrifying.

*Flyboys* is not an easy story to read. It is hard for us to understand and accept our own failures and shortcomings, let alone our collective failures as a species. But it is a necessary story, for the final lesson of *Flyboys* is one that is the hardest of all to realize.

The deaths of those eight men, with their friends and family never learning their fates, are even more heartbreaking compared to the story of the ninth man; the one who got away, the one who was rescued by an American submarine. His name? George Herbert Walker Bush. The 41st President of the United States.

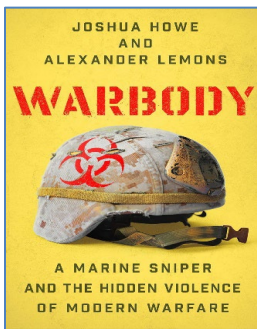
The lesson of the deaths of those men is not just that the course of history would have changed had one more—the ninth man—joined them. The lesson is more sorrowful than that. It is this: what would those men have accomplished in life had they survived?

Sadly, we will never know. And we can thank war, and the idea that “might makes right,” for that.

*Caleb A. Hayter is a 2025 graduate of the James E. Rogers College of Law at the University of Arizona. He is also a proud veteran of the United States Marine Corps and the War in Afghanistan.*

**Book Review of**  
***Warbody: A Marine Sniper and the***  
***Hidden Violence of Modern Warfare,***  
**by Joshua Howe and Alexander**  
**Lemons**

Review by Briana Tellado



W.W. Norton & Company, Inc., New York, 2025.  
 \$29.99 (hardcover). 285 pages.

Part memoir, part environmental history, *Warbody* tells one marine's story of environmental exposures over the course of four deployments. It examines the toxins that a servicemember could be exposed to in the daily course of service, which could include pesticides used to treat uniforms, asbestos used to build ships, medicine used to prevent sickness while deployed, and dust and dirt in the Middle East.

In alternating chapters, Lemons and Howe, a professor of history and environmental studies, take turns describing the events that exposed Lemons to environmental hazards and the science behind how those hazards can physically harm a person. Lemons, a Marine Corps sniper, returns from his fourth deployment (three to Iraq and one to Kuwait) with a constellation of injuries and symptoms. His PTSD, anorexia, plantar fasciitis, and shoulder injury are somewhat quickly diagnosed. Some of his other symptoms, however—fatigue, skin rashes, brain fog,

allergies, and migraines—are first attributed to a case of long mononucleosis. Eventually, Lemons turns away from his VA doctors to seek help from integrative medicine doctors who test him for heavy metal poisoning. When his "challenge tests" are positive for mercury and lead, Lemons begins chelation therapy, ingesting pills several times per day that are supposed to bind to heavy metals so they can be eliminated through the urinary tract. He also tries a fecal matter transplant, nicotine patches, saunas, supplements, activated charcoal, and lymphatic massage.

In Howe's chapters, he explains how the test that Lemons's doctors used to identify heavy metals poisoning is less than reliable, as is the treatment prescribed to alleviate it. But given Lemons's confidence in his diagnosis, he goes so far as to have his mercury fillings replaced with mercury-free amalgams.

Although Howe is dubious about the reliability of Lemons's "challenge tests," he uses what he calls "historical anatomy" to explain how substances such as lead dust from bullets, which is typically not harmful to a person's skin, can end up in someone's bloodstream and bones. When a sniper like Lemons touches rounds and bullets all day and then without washing his hands touches his eyes, nose, or mouth, or touches a cigarette or bottle that then goes into his mouth, the poisonous dust has an entry point into his body. And that doesn't account for the aerosolized lead particles emitted into the air when a weapon is fired or trash is burned in a burn pit.

Howe theorizes that burn pits were also a source of toxic mercury exposure for Lemons. Another source of mercury poisoning could be the fish from the Tigris River that Lemons ate with locals in Iraq while trying to gain their trust on missions.

In one chapter, Lemons explains that after three weeks without a shower, his command trucked in water from the Tigris and treated it with reverse osmosis. "The same older-than-the-Old-Testament river we had floated across a week before, filled with trash, poop, and brown-purple blobs of oil."

In the same forward-deployed environment, Lemons remembers his gratitude when the Seabees came and constructed outhouses for him and his marines to use. The barrels that held the waste "came with a catch: We would have to burn the waste inside with jet fuel and stir the contents down with a wooden or metal paddle."

*Warbody* is recommended reading for any veterans law practitioner looking for an inside, behind-the-scenes look at what toxic substances a servicemember might be exposed to in service without the servicemember even realizing it.

*Briana Tellado is a U.S. Army veteran and a legal editor at the U.S. Court of Appeals for Veterans Claims.*

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## Commentary: Why *Soto v. United States* is the Most Important Supreme Court Veterans Law Case in Years

by James D. Ridgway

If you read *Soto v. United States* or the case summary above, you could be forgiven for thinking that it is an entirely forgettable case relevant only to a modest number of veterans in receipt of specific benefits. However, Supreme Court history is littered with cases whose importance was not widely recognized until later. *Soto* is well positioned to be one of those cases because it emphatically answers a big question that has been looming over veterans law for years: Does the pro-veteran canon of interpretation really exist? *Soto* unanimously says yes it does.

You will be forgiven for not immediately noticing what happened, but let us start at the beginning. Long before the recent turbulence in interpretive doctrine, the role of the canon of veteran-friendly interpretation was unsettled. In *Brown v. Gardner*—the first U.S. Court of Appeals for Veterans Claims

(Court) case to reach the Supreme Court—the opinion noted “the rule that interpretive doubt is to be resolved in the veteran’s favor.” 513 U.S. 115, 118 (1994). While highly quotable, this sentence in *Gardner* suffers from two main problems. First, the pro-veteran canon was not actually the basis of the decision, so it provides no concrete guidance on how the canon should be used. Second, *Gardner* does not mention *Chevron*, which was decided a decade earlier, leaving the line between the pro-veteran canon and agency deference completely opaque.

How the pro-veteran canon interacted with the *Chevron* requirement of deference to agency interpretations was never finally resolved. As *Loper Bright* has displaced *Chevron*, the uncertainty of the role of the pro-veteran canon has only grown. On the one hand, Justice Gorsuch, concurring in *Loper Bright*, implied that the demise of *Chevron* would strengthen the power of the canon in arguing that it would help “ordinary people” like veterans. 603 U.S. 369, 438-439 (2024). On the other hand, Justice Kavanaugh, concurring in *Rudisill v. McDonough*, argued that a proper focus on text leaves no room for substantive canons. 601 U.S. 294, 316-317 (2024). Amid this tension arrives *Soto*.

*Soto* is not an explicit veterans law opinion, but its implications are unmistakable. As described in more detail in Beck Webster’s case summary above, the opinion in *Soto* addresses the scope of the offset between VA disability benefits and DoD retirement benefits. The question presented in *Soto* was whether the six-year limitation under the Barring Act applies to claims under the Bob Stump Act, and the Court ruled in favor of the veteran. What makes this a very important case is that it is a (1) unanimous (2) Justice Thomas opinion that (3) manages to recreate the logic that statutory interpretation includes an assumption that Congress means to favor veterans as a particularly worthy class. In other words, the Supreme Court—in a unanimous opinion by one of its most vocal textualists—reaffirmed the *Gardner* canon in everything but name.

That is a big claim, but it does not require any stretching to recognize that is what happened. Justice Thomas’s opinion begins by stating: “We have explained that, in the context of waiving sovereign immunity, Congress need not ‘state its intent in any particular way,’ or ‘use magic words’ to effectuate a waiver.” 145 S. Ct. at 1685. After describing the statutes and the issue, Thomas writes:

At bottom, § 1413a establishes a self-contained, comprehensive compensation scheme for a *narrowly defined group of exceptionally deserving claimants*. Taken as a whole, *see Winkelman*, 550 U. S., at 523, the statute’s *unique combination of characteristics* authorizes the Secretary concerned to determine both the validity of CRSC claims and the amount due on them.

145 S. Ct. at 1686 (emphasis added). After stating it as a general principle, the opinion reaffirms it in application to reverse the Federal Circuit: “But where, as here, the statutory scheme involves a *small group of particularly deserving claimants*, it is not extraordinary to think that *Congress wished to forgo a limitations period*.” 145 S. Ct. at 1687 (emphasis added). Finally, at the end of the opinion, it rejects the argument that the Court should factor in its own assessment of the wisdom of the pro-veteran interpretation: “Even if we thought sound policy called for a narrower carveout to the Barring Act’s procedures than the ‘another law’ exception that Congress enacted, 31 U. S. C. § 3702(a), that policy choice is a ‘matte[r] for Congress, not this Court, to resolve,’ *Henson*, 582 U.S., at 90.” 145 S. Ct. at 1689.

This is a post-*Loper Bright* example of statutory interpretation in action. There is no mention of *Loper Bright* here, but *Loper Bright* says that statutory interpretation is about picking the best reading of the plain language of a statute, which is the same even when there is no agency interpretation in the mix asking for deference under *Skidmore*. Thus, *Soto* straightforwardly stands for the proposition that the Supreme Court unanimously agrees that even after *Loper Bright*, the best reading of a statute can be the product of an

assumption that Congress intended to be generous to veterans as a narrowly defined group of exceptionally deserving claimants and that assumption should not be usurped by judges applying their own policy judgment.

Notably, Mr. Soto was not in combat. His 100% PTSD came from his military occupational specialty (MOS) in Mortuary Affairs where he “was assigned to ‘search for, recover, and process the remains’ of war casualties.” 145 S. Ct. at 1683. Accordingly, you do not have to be on the deadly end of a bullet to be “exceptionally deserving” for purposes of statutory interpretation. The opinion in *Soto* does not explicitly refer to all veterans, but it does not draw the circle extremely narrow either.

If anything, *Soto* is a far more powerful precedent than *Gardner* beyond noting the author and the unanimous nature of the opinion. First and foremost, the relevant sections are not dicta. *Soto* relies very squarely on the pro-veteran canon analysis even without naming it. The core question is whether statutory language could refer to “settlement” even when Congress did not use that word to describe what it was doing. The opinion openly admits that textualism is not literalism. It is not as simple as asking what words were used and closing your eyes to all other factors. Justice Thomas does not hesitate to affirm that textualism is not about “magic words.” Therefore, even in a post-*Loper Bright* world, the government cannot rely solely on the lack of magic words to reject a pro-veteran reading of a statute.

That said, I am in no way arguing that textualism is wrong or that words do not matter. No one disputes that “we are all textualists now.” Rather, disposing of *Chevron* leaves us with the core problem that brought that case into existence: ambiguity. Sometimes words alone—or words, grammar, and structure by themselves—will leave reasonable readers unclear as to what the author meant. Killing *Chevron* as a solution does not eliminate the problem. If hyper-textualism that embraces magic words is not the answer, then what is the form of textualism that includes contextual considerations

including Congress’s desire to favor “a small group of particularly deserving claimants”?

Contrasting *Soto* with *Rudisill* illustrates why the pro-veteran canon is still needed in the modern world of ardent textualism. *Rudisill* involved a tangled thicket of educational benefits laws that was reviewed by a panel of the CAVC, the en banc Federal Circuit, and the Supreme Court. Collectively, 24 jurists looked at that language. Of those 24 humans in black robes, 13 thought that the “best” reading of the statute was for the government, and nine thought the “best” reading of the statute favors the veteran. However, the veteran won because seven of the nine on his side were at the Supreme Court.

This is silly. It is hard to imagine average citizens looking at this and thinking that declaring what reading is “best” is based on neutral principles rather than raw power. This kind of division should be a screaming signal that there is no “best” reading of the statute. Anyone who says there is, is projecting their own biases onto the language. Textualists need to be able to admit that sometimes the text alone just is not enough.

Of course, it is perfectly rational to focus heavily on language, grammar, and structure when an issue is controlled by a single text that was drafted to address a particular problem. In such instances, close textual analysis can plausibly reveal the intent of the drafter(s) and, thereby, honor the separation of powers in the vast majority of cases. However, this method is particularly likely to founder when dealing with issues that arise from texts that were drafted at different times by different authors who never considered the intersection between or among their works, as was the case in *Rudisill*.

Public confidence in the judiciary is enhanced when outcomes of novel issues are predictable because of the existence of ex ante principles for resolving uncertainty. Textualism serves this purpose, but only to a point. When textualism runs out in the face of true ambiguity, other tools are needed. Substantive canons, like the *Gardner/Soto*

presumption, can create predictability even if considered secondary to textualism in the analytical framework. Indeed, embracing the appropriate use of substantive canons is in the best interest of textualists, as nothing destroys public confidence in textualism more than when textualists stubbornly insist that words, grammar, and structure alone can produce a “best” answer every question, especially those raised by the collision of disparate texts that the authors never noticed might interact. Rather than the spectacle of feuding textualists denying the existence of ambiguity and reaching opposite conclusions applying the same method to the same text (as was on spectacular display at both the Supreme Court and the Federal Circuit in *Rudisill*), admitting that sometimes another approach is needed preserves the credibility of textualism for those frequent times when it does point to a clear answer.

The best way to see this is to return to *Rudisill*. If you were quick, you may have noticed that there were only 22 votes as to the “best” reading of the statutory mess even though there were 24 judges among the three courts. What did those other two say? The majority of the CAVC rightly pronounced: “[I]f *Brown v. Gardner*, 513 U.S. 115, 115 S. Ct. 552, 130 L. Ed. 2d 462, would ever have a real effect on an outcome, it would be here.” *BO v. Wilkie*, 31 Vet. App. 321, 345 (2019). By admitting that ambiguity is real—even in a world of serious textualism—and turning to the toolbox for true ambiguity once textualism fails, the CAVC managed to produce the opinion that would be understood by the average citizen upon whom the courts all rely for true democratic legitimacy.

*James D. Ridgway is a partner at Bergmann & Moore, LLC and the author of Toward a Less Adversarial Relationship Between Chevron and Gardner, 9 U. MASS. L. REV. 388 (2014). All opinions in this article are the author’s own and do not represent those of the Veterans Law Journal or the CAVC Bar Association.*

## Editorial: A Look at Benefits and Concerns of the Proposed Veterans Appeals Efficiency Act of 2025

by Bradley Hennings

H.R. 3835, the *Veterans Appeals Efficiency Act of 2025*, addresses the Department of Veterans Affairs (VA) adjudication and appeals system for veterans' benefits. The bill was introduced and the House Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs held a hearing on it in June 2025. The bill proposes sweeping changes that promise increased transparency, technological modernization, and faster adjudication timelines. But beneath the surface, several provisions raise serious concerns about fairness, due process, and the practical burden on both veterans and the institutions that serve them.

I strongly support reforms that improve the efficiency and equity of VA decision-making. Yet I feel we must also speak out when those reforms risk unintended harm.

Based on a close reading of the bill and the public record, I have identified two provisions where the legislation falls short: claim aggregation and expanded judicial jurisdiction.

### Key Provisions of the Act:

At its core, H.R. 3835 proposes the following reforms:

1. **Annual Reporting Enhancements:** Requires VA to report to Congress annually the average length of time that claims remain pending after Board remands, the number of motions to advance cases on the docket (with reasons for grant/denial), and the number of appeals dismissed due to death, including suicides.

2. **Guidance for Case Advancement:** Mandates that VA publish evidentiary guidelines for motions to expedite cases at the Board under 38 U.S.C. § 7107(b).
3. **Claims Tracking and Transparency:** Directs VA to use technology to track claims in continuous pursuit, remanded cases, hearing backlogs, and instances of agency noncompliance with Board remands, with mandatory annual reports.
4. **Claim Aggregation Authority:** Allows the Board to aggregate appeals involving "common questions of law or fact," a new statutory authority not previously granted.
5. **Expanded Jurisdiction for CAVC:** Grants the Court authority to review certain class actions before final agency action and to issue "limited remands" to the Board for specific legal/factual errors while retaining jurisdiction.
6. **Precedential Decision Feasibility Study:** Requires VA to contract with a Federally Funded Research and Development Center (FFRDC) to study whether the Board should be permitted to issue binding precedential decisions.

### Concern 1: Aggregation of Claims Without Adequate Safeguards

#### What the Bill Allows:

The bill permits the Board Chairman to aggregate appeals that share common legal or factual issues (e.g., joinder, class action, or multiparty procedures) and issue a single decision on the common question. The Board would then still be required to individually adjudicate each case.

#### Why It Is a Problem:

Most critically, the bill lacks any guaranteed mechanism for veterans or their representatives to opt out of aggregation. This omission violates the principle that veterans should maintain control over their own appeals.

#### My Position:

I support procedural innovations that streamline appeals but not at the expense of fairness. Aggregation may have merit for class-wide exposure

issues (e.g., toxic exposure), but it must include opt-out protections, clear evidentiary procedures, and transparency in how aggregated classes are formed and decided.

### **Concern 2: Expanded CAVC Jurisdiction and Limited Remands**

#### ***What the Bill Allows:***

Section 2(e) of the bill expands CAVC jurisdiction to include supplemental claims and class certification requests before VA has issued a final decision. It also formalizes the Court's authority to issue limited remands directing the Board to address specific questions of law or fact, while retaining jurisdiction.

#### ***Why It Is a Problem:***

CAVC is already handling record volumes of appeals. Granting it jurisdiction over non-final claims would balloon its caseload, delay unrelated appeals, and may require new infrastructure without congressional appropriation.

#### ***My Position:***

These provisions are unworkable in their current form. Veterans must not be drawn into class actions without informed consent or procedural clarity. And while CAVC already has the authority to issue limited remands, codifying and regulating the process could undermine the Court's core strength: flexibility and case-by-case justice.

In addition, no formal cost estimate is available, but VA warns that compliance with technical and staffing requirements—especially around tracking, docketing, and class actions—could roll back years of progress reducing the appeal backlog.

### **Final Thoughts**

There is no doubt that H.R. 3835 aims to bring much-needed modernization to veterans benefits adjudication. Provisions such as expanded data reporting, technological tracking, and timeliness metrics are steps in the right direction.

But reform cannot come at the cost of the veterans it is meant to serve.

I know how vital it is for veterans to have agency, clarity, and procedural fairness at every stage of their claims journey. But aggregation without opt-out rights and jurisdictional expansion without guardrails do not meet those standards.

I urge Congress to amend the bill to preserve due process, limit unintended consequences, and ensure that justice is not sacrificed for the sake of speed.

*Bradley W. Hennings is a former Veterans Law Judge and is currently a partner at Chisholm Chisholm & Kilpatrick (CCK Law), where his practice is dedicated to representing veterans before the U.S. Department of Veterans Affairs (VA) and the U.S. Court of Appeals for Veterans Claims (CAVC). All opinions in this article are the author's own and do not represent those of the Veterans Law Journal or the CAVC Bar Association. A version of this article was originally published on cck-law.com and is being reprinted with permission. You can find the latest updates on the status of H.R. 3835 at:*

<https://www.congress.gov/bill/119th-congress/house-bill/3835>.

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

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