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Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at the Federal Circuit in 2011

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Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at the Federal Circuit in 2011

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Veterans Law

CHANGING VOICES IN A FAMILIAR CONVERSATION ABOUT RULES VS. STANDARDS: VETERANS LAW AT THE FEDERAL CIRCUIT IN 2011

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INTRODUCTION

When an institution is in flux, there are two obvious ways to examine it. One can attempt to make predictions about its future, or one can explore the current baseline to set up future analysis of the impact of change. As discussed below, both the Federal Circuit and the dynamic that has shaped veterans law in recent decades are in flux. This Article, while continuing the recent trend of reviewing the developments in veterans law at the Federal Circuit over the preceding calendar year,¹ takes the latter approach to the bigger picture. An annual review article is better suited to the second pursuit and there is little solid information that could be used to predict where the events of 2011 will take veterans law. Accordingly, a deeper reflection on the status quo helps set the stage for digesting the coming changes.

Part I of this Article looks at the “changing voices” in veterans law. This past year has seen an unusually high number of departures and arrivals at the Federal Circuit. In addition, constitutional cases filed in the other federal courts indicate that opinions from other circuits may soon change the dynamic of veterans law at the Federal Circuit. Part II of this Article will look at the familiar conversation. That section builds upon an observation made by Paul R. Gugliuzza in last year’s review article,² and suggests that, under the surface of the Federal Circuit’s jurisprudence, there is a familiar rules-versus-standards debate that may reflect different views about what it means for the system to be “veteran friendly.” Part III contains a review of the veterans law cases decided by the Federal Circuit in 2011. The Conclusion provides a few thoughts about what the 2011 veterans law cases suggest about the analysis set forth in Part II. Finally, the Addendum continues and expands the statistical look at veterans law

1. See Miguel F. Eaton et al., *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155 (2010); Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201 (2011). Although no journal produces an annual review of veterans law at the Court of Appeals for Veterans Claims (CAVC) level, its recent case law has been explored by Michael Allen. See Michael P. Allen, *The Law of Veterans’ Benefits 2008–2010: Significant Developments, Trends, and a Glimpse Into the Future*, 3 VETERANS L. REV. 1 (2011).

2. Gugliuzza, *supra* note 1.

at the court, begun by Gugliuzza in last year's review article.³

I. CHANGING VOICES

A. Judges

Perhaps the most notable events at the Federal Circuit in 2011 were not opinions, but rather the exceptional amount of turnover experienced by the court. After years of relative stability, the composition of the Federal Circuit changed significantly. Three judges left the bench completely, two assumed senior status, and three new judges were confirmed, with a fourth nomination announced to fill the final vacancy.⁴

1. Departures

Chief Judge Paul Michel retired on May 30, 2011.⁵ Judge Michel had been on the court since 1988,⁶ the year that Congress passed the Veterans' Judicial Review Act⁷ (VJRA). Judge Michel authored dozens of veterans law cases, including *Hodge v. West*,⁸ which identified the Department of Veterans Affairs' (VA) duty "to fully and sympathetically develop the veteran's claim to its optimum" based upon the legislative history of the VJRA,⁹ and the en banc opinion in *Bailey v. West*,¹⁰ which held that the time period for appealing to the Court of Appeals for Veterans Claims (CAVC) is subject to equitable tolling.¹¹ Together, these two cases have been significant factors in easing the burden on veterans to understand and strictly comply with the governing statutes and regulations.

The court also lost two senior members, both of whom were

3. See Gugliuzza, *supra* note 1, at 1258–63.

4. The Court of Appeals for Veterans Claims is poised for a significant transition as well. There are currently three nominations, which, if confirmed, would increase the number of active judges on that court from six to nine. See *More News on Judicial Vacancies*, VETERANS L.J., Winter 2011–12, at 6, available at http://www.cavcbar.net/Winter_2011-12.pdf (discussing the nomination of Carol Wong Pietsch); *Vacancies on the CAVC Attract National Attention . . . and Some Nominees*, VETERANS L.J., Summer 2011, at 1, available at http://www.cavcbar.net/Summer_2011.pdf (reporting on the nominations of Margaret "Meg" Bartley and Gloria Wilson Shelton).

5. See *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/judges.html> (search "Michel"; then follow "Michel, Paul Redmond" hyperlink) (last visited Mar. 19, 2012).

6. *Id.*

7. See Pub. L. No. 100-687, 102 Stat. 4105 (1988).

8. 155 F.3d 1356 (Fed. Cir. 1998).

9. *Id.* at 1362 (quoting H.R. REP. NO. 100-963, at 13 (1988)).

10. 160 F.3d 1360 (Fed. Cir. 1998) (en banc), *overruled by* *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc).

11. *Id.* at 1368.

veterans and whose tenure on the court pre-dated the creation of the CAVC. Judge Daniel M. Friedman, an original member of the Federal Circuit, passed away on July 6, 2011, after more than twenty years of service in senior status.¹² Judge Friedman authored many notable opinions, including *Donovan v. West*,¹³ which affirmed the concept of delayed subsuming.¹⁴ Judge Glenn Archer passed away later that same month, on July 27, 2011.¹⁵ Judge Archer was appointed in 1985 and had been serving in senior status from 1997 until his passing.¹⁶ Judge Archer's veterans law opinions included *MacPhee v. Nicholson*,¹⁷ which held that a medical record by itself cannot be considered a claim for benefits.¹⁸

2. Transitions

Not only did the court lose these three voices, but two other long-serving judges took on a reduced role. A month after Chief Judge Michel's retirement, Judge Haldane Robert Mayer assumed senior status.¹⁹ Judge Mayer's judicial service began in 1987, prior to the creation of the CAVC.²⁰ Judge Mayer is a graduate of West Point and was awarded the Bronze Star during his service in Vietnam.²¹ Until the appointment of Judge Wallach, his transition left the court without a combat veteran in an active position. Judge Mayer has authored dozens of opinions in the area of veterans law, including *Collaro v. West*,²² which discussed the jurisdictional effect of a vague Notice of Disagreement,²³ and *Barrett v. Principi*,²⁴ which extended equitable tolling to cases of mental or physical incapacity.²⁵

12. See *Daniel M. Friedman, Circuit Judge [1916–2011]*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/daniel-m-friedman-circuit-judge.html> (last visited Apr. 9, 2012).

13. 158 F.3d 1377 (Fed. Cir. 1998).

14. *Id.* at 1381–83.

15. See *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/judges.html> (search “Archer”; then follow “Archer, Glenn Leroy Jr.” hyperlink) (last visited Apr. 9, 2012).

16. *Id.*

17. 459 F.3d 1323 (Fed. Cir. 2006).

18. *Id.* at 1327–28.

19. See *Haldane Robert Mayer, Circuit Judge*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/haldane-robert-mayer-circuit-judge.html> (last visited Apr. 9, 2012).

20. *Id.*

21. See *id.* Among the court's senior judges, Judge S. Jay Plager is a veteran of the Korean War. See *S. Jay Plager, Circuit Judge*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/s-jay-plager-circuit-judge.html> (last visited Apr. 9, 2012).

22. 136 F.3d 1304 (Fed. Cir. 1998).

23. *Id.* at 1309–10.

24. 363 F.3d 1316 (Fed. Cir. 2004).

25. *Id.* at 1321.

Just one month later, Judge Arthur J. Gajarsa also assumed senior status.²⁶ Although his service did not predate the creation of the CAVC, he had served on the court since 1997.²⁷ Judge Gajarsa's veterans law opinions include *Schroeder v. West*,²⁸ which established that a claim for a benefit encompasses all possible theories,²⁹ and *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*,³⁰ which upheld VA's regulations governing the adjudication of post-traumatic stress disorder claims.³¹

3. Arrivals

A trio of new voices filled the void left by these changes.³² First, Judge Kathleen M. O'Malley was sworn in on December 27, 2010, after having served as a district court judge in the Northern District of Ohio for sixteen years.³³ Judge O'Malley immediately became the only former district court judge on the court.³⁴ As a trial judge, she had been an active teacher and scholar of patent law.³⁵ Judge O'Malley authored her first precedential veterans law opinion, *Roberts v. Shinseki*,³⁶ this past June.

On April 7, 2011, Judge Jimmie V. Reyna was sworn in after a career practicing in international trade.³⁷ Prior to his appointment, Judge Reyna had been the president of the Hispanic National Bar Association and active in a wide variety of Hispanic professional organizations.³⁸ His first published opinion in veterans law was in

26. See *Arthur J. Gajarsa, Circuit Judge*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/arthur-j-gajarsa-circuit-judge.html> (last visited Apr. 9, 2012).

27. *Id.*

28. 212 F.3d 1265 (Fed. Cir. 2000).

29. *Id.* at 1271.

30. 330 F.3d 1345 (Fed. Cir. 2003).

31. *Id.* at 1350–52.

32. On November 10, 2011, Richard G. Taranto was nominated to fill the final vacancy on the court. See *President Obama Nominates Richard Gary Taranto to Serve on the US Court of Appeals*, OFFICE OF THE PRESS SEC'Y, WHITE HOUSE (Nov. 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/10/president-obama-nominates-richard-gary-taranto-serve-us-court-appeals>. He is an intellectual property specialist and an experienced Supreme Court advocate. *Id.*

33. See *Kathleen M. O'Malley, Circuit Judge*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/kathleen-m-omalley-circuit-judge.html> (last visited Mar. 19, 2012).

34. *Id.*

35. *Id.*

36. 647 F.3d 1334 (Fed. Cir. 2011), *reh'g and reh'g en banc denied*, 647 F.3d 1334 (Fed. Cir. 2011), *cert. denied*, No. 11-603, 2012 WL 895974 (U.S. Mar. 19, 2012). This case is discussed below in Part III.E.4.

37. See *Jimmie V. Reyna, Circuit Judge*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/jimmie-v-reyna-circuit-judge.html> (last visited Apr. 9, 2012).

38. *Id.*

January 2012 in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*,³⁹ a review of a direct rule-making challenge.

Finally, on November 18, 2011, Evan J. Wallach was sworn in as the newest member of the court.⁴⁰ Like Judge Reyna, Judge Wallach also brought an international trade background to the court, having served on the Court of International Trade for sixteen years.⁴¹ Judge Wallach filled the combat-veteran void left by Judge Mayer, having also been awarded a Bronze Star during his Army service in Vietnam.⁴²

Although none of the judges brought any veterans law experience to the Federal Circuit,⁴³ they all added new perspectives to the court by way of their backgrounds, which differ from all previous judges on the court. Of course, it is too soon to determine where these changes will take the Federal Circuit in the area of veterans law (or in any other area), but the fact that the composition of the court has not only changed, but has incorporated backgrounds previously unknown to the bench, counsels special attention in the near future to the details of opinions involving the court's newest members.

B. Other Circuits

In retrospect, it may turn out that the most important veterans law decision of 2011 was not made by either the Federal Circuit or the CAVC, but rather by the U.S. Court of Appeals for the Ninth Circuit. In *Veterans for Common Sense v. Shinseki*,⁴⁴ a divided panel of the Ninth Circuit held that significant portions of both VA's health care and benefits systems violated veterans' due process rights, and indicated that the district court may need to appoint a special master to assist in reforming VA.⁴⁵ The sprawling opinions in that case span sixty-one pages in the Federal Reporter; many of the details of the holdings are

39. Nos. 2010-7136, 2010-7139, 2010-7142, 2011-7041, 2012 WL 164436 (Fed. Cir. Jan. 20, 2012).

40. See *Evan J. Wallach, Circuit Judge*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/judges/evan-j-wallach-circuit-judge.html> (last visited Apr. 9, 2012).

41. *Id.*

42. *Id.*

43. Chief Judge Michel noted in his 2010 State of the Court address that the court had never had a veterans law practitioner. Chief Judge Paul R. Michel, *Judicial Conference for the United States Court of Appeals for the Federal Circuit, State of the Court* (May 20, 2010), <http://www.cafc.uscourts.gov/images/stories/announcements/2010/stateofthecourt10.pdf>.

44. 644 F.3d 845 (9th Cir. 2011), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011).

45. *Id.* at 868, 878, 887.

beyond the scope of this Article.⁴⁶ In addition, the Ninth Circuit granted a rehearing en banc; thus the ultimate fate of the case is unknown.⁴⁷ Nonetheless, the panel decision in *Veterans for Common Sense* has two key holdings that are worth reviewing, as they may prove very significant if upheld in substance.

1. Jurisdiction

First, the *Veterans for Common Sense* panel held that the district court had jurisdiction to hear the appellant's claims that delays within the VA system were so egregious as to violate due process.⁴⁸ Prior to the passage of the VJRA, federal courts entertained constitutional claims against VA on many occasions.⁴⁹ However, after the passage of the VJRA, many courts concluded that remedies for delay in veterans benefits claims had to be pursued through the CAVC.⁵⁰ The panel in *Veterans for Common Sense* disagreed. In essence, the majority concluded that granting systemic relief addressing how VA processed claims did not infringe on the CAVC's exclusive jurisdiction to review the outcome of individual decisions.⁵¹

If this view of the jurisdiction of the geographic circuits takes root,⁵² situations may arise in which the Federal Circuit's rulings on veterans law are disputed by other courts of appeals. This possibility

46. Such details are discussed extensively, however, in James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57 (2012).

47. See *Veterans for Common Sense v. Shinseki*, 663 F.3d 1033 (9th Cir. 2011), granting reh'g en banc to 644 F.3d 845 (9th Cir. 2011).

48. *Veterans for Common Sense*, 644 F.3d at 879.

49. See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 213–16 (2011) (providing examples of due process and fundamental fairness challenges to the limitation on attorney's fees); see also Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99 (1990) (discussing constitutional challenges brought under the right to free exercise of religion, equal protection, and due process).

50. See *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 660 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 195 (2010) (holding that the CAVC's jurisdiction could not be "circumvent[ed] . . . by creative pleading"); *In re Russell*, 155 F.3d 1012, 1013 (8th Cir. 1998) (per curiam) (concluding that the CAVC has exclusive jurisdiction over challenges to VA's processing of claims); *Beamon v. Brown*, 125 F.3d 965, 967–70 (6th Cir. 1997) (holding that, in passing the VJRA, Congress intended to preclude federal courts of general jurisdiction from considering constitutional claims pertaining to claims for veterans benefits).

51. *Veterans for Common Sense*, 644 F.3d at 870–72, 879–84 (addressing the issue as to VA's health and benefits appeals systems).

52. It is noteworthy that the bulk of the en banc oral argument in *Veterans for Common Sense* was devoted to the jurisdictional issue and whether claims alleging racial or gender discrimination in benefits decisions could be properly brought through the CAVC. See Video Recording of Oral Argument, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. Dec. 13, 2011), http://www.ca9.uscourts.gov/media/view_video_subpage.php?pk_vid=0000006173 (especially at 35:30).

is more than just theoretical. For example, gay and lesbian service members have already filed a constitutional challenge to the federal statute defining marriage⁵³ for purposes of receiving veterans benefits in the U.S. District Court for the District of Massachusetts.⁵⁴ An appeal of an individual benefits claim raising the same issue is also pending at the CAVC.⁵⁵ Therefore, there is already at least one issue in the pipeline in which the Federal Circuit's ruling on the substance of veterans law could eventually conflict with that of a regional circuit.

An obvious result of such situations is that circuit splits could emerge on constitutional issues related to the veterans benefits system, increasing the likelihood that the Supreme Court would consider such issues. Another potential effect is that the Secretary could be faced with choosing how to administer the system in the face of conflicting opinions and may be prompted to engage in a type of non-acquiescence behavior that has plagued other administrative systems.⁵⁶ Accordingly, the jurisdictional decision in *Veterans for Common Sense* warrants close observation in the near future.

2. *Delay as a violation of due process*

The second major ruling by the *Veterans for Common Sense* panel was that the appellant had proven the constitutional violations alleged. Specifically, the panel held, in part, that the delays involved in the processing of appeals at the Board of Veterans' Appeals' (BVA) level violated due process.⁵⁷ Although a full discussion of the remedial

53. 38 U.S.C. § 101(31) (2006) (defining a spouse as "a person of the opposite sex who is a wife or husband"); see also 38 C.F.R. § 3.50(a) (2011) (same).

54. Complaint for Declaratory, Injunctive and Other Relief, *McLaughlin v. Panetta*, No. 11CV11905, 2011 WL 5121135 (D. Mass. Oct. 27, 2011).

55. See James Dao, *Denied Veterans Benefits Over Same-Sex Marriage, Ex-Sailor Challenges Law*, N.Y. TIMES, Oct. 12, 2011, <http://www.nytimes.com/2011/10/13/us/denied-veterans-benefits-over-same-sex-marriage-carmen-cardona-sues.html?pagewanted=all> (challenging the denial of an increase in disability compensation upon marriage).

56. See Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989) (defining nonacquiescence as "the deliberate refusal of an administrative agency, exercising adjudicatory authority, to follow relevant judicial precedent in deciding another matter presenting the same question of law," and discussing its practice by the Social Security Administration); see also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (analyzing the practice of nonacquiescence by the Social Security Administration and the National Labor Relations Board, among others).

57. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 884–87 (9th Cir. 2011), *reh'g en banc granted*, 663 F.3d 1033 (9th Cir. 2011). See generally Michael Serota & Michelle Singer, Note, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388 (2011) (arguing in favor of the conclusion reached by the majority in *Veterans for Common Sense*).

issues is beyond the scope of this Article,⁵⁸ the panel remanded the case with the suggestion that a special master be appointed to aid in developing a remedial plan.⁵⁹

If the case were ultimately remanded for the trial court to use its equitable powers to reengineer VA's claims process, then a multitude of issues for the Federal Circuit may arise. Veterans enjoy a great many procedural rights, and veterans law is a procedurally intensive area. If VA were forced to modify its processes at the direction of the district judge handling *Veterans for Common Sense*—especially if the district judge issued orders seeking to “streamline the process”—then the Federal Circuit could soon face disappointed claimants who assert that the new procedures imposed by the remedial process in *Veterans for Common Sense* denied them procedural rights guaranteed by statute and regulation. It is too soon to speculate about the specific conflicts that might arise; however, the prospect of significant procedural changes being imposed upon VA justifies close attention by anyone interested in veterans law to the ongoing proceedings in *Veterans for Common Sense*.

II. A FAMILIAR CONVERSATION

A. Rules Versus Standards

Regardless of where veterans law is being addressed or which judges are considering the issues presented, it is likely that familiar themes will emerge. In last year's summary article, Gugliuzza asserted that the rulings of the Federal Circuit “reflect a preference for a flexible, standards-based approach to deciding veterans claims” over categorical rules,⁶⁰ but did not explore this observation further. Despite this casual introduction, it is an assertion that merits further consideration.

The rules-versus-standards debate is a classic one of scholarly analysis⁶¹ and has been applied to countless areas of jurisprudence,⁶²

58. For a lengthy discussion of the issues, see Ridgway, *supra* note 46.

59. *Veterans for Common Sense*, 644 F.3d at 878, 887.

60. Gugliuzza, *supra* note 1, at 1221.

61. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (considering both cost of creation by rulemaking/standard-setting bodies and expense to individuals in determining application to their contemplated acts); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (addressing the rules-versus-standards debate in the context of individualism versus altruism); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (revisiting the debate from the law and behavioral sciences perspective); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287 (2006) (arguing for the employment of rules over standards to provide citizens with the maximum

although the debates are far from academic. As Pierre Schlag has observed, “disputes that pit a rule against a standard are extremely common in legal discourse.”⁶³ “Indeed, the battles of legal adversaries (whether they be judges, lawyers, or legal academics) are often joined so that one side is arguing for a rule while the other is promoting a standard.”⁶⁴ Accordingly, it is not surprising that veterans law would feature such debates.

The essential features of the debate are well defined. Rules draw sharp lines, whereas standards allow for individualized judgments.⁶⁵ Rules facilitate delegation within agencies by giving subordinates clear instructions, whereas standards increase the likelihood of erroneous and inconsistent decisions by front-line administrators.⁶⁶ Rules cost more up front to formulate and promulgate, whereas standards cost more to apply and enforce.⁶⁷ These features are not in debate. What is debated is which type of norm should be applied to any given problem. Gugliuzza’s observation about the Federal Circuit’s possible preference for standards begs the question of what can be learned about veterans law and the court’s jurisprudence by reframing the core veterans law debates in terms of the classic dilemma.

B. Chevron Versus Gardner

As recently discussed by Linda Jellum, a more explicit debate in veterans law is one between the deference owed to VA under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁶⁸ and the *Brown v.*

practicable definiteness in laws regulating their non-litigation conduct); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (arguing that even if the rules-versus-standards debates were stereotyped there may be substance to such arguments about form); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (exploring the way in which the rules/standards debate divided the Court on constitutional issues); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 956–57 (1995) (contrasting guidelines, principles, and analogies to rules and standards).

62. See, e.g., Daniel Bodansky, *Rules vs. Standards in International Environmental Law*, 98 AM. SOC’Y INT’L L. PROC. 275 (2004) (environmental law); Tun-Jen Chiang, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353 (patent law); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007) (antitrust law); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309 (2007) (jurisdiction of federal courts); Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275 (2002) (cyberlaw); Spencer Overton, *Rules, Standards, and Bush v. Gore: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65 (2002) (election law).

63. Schlag, *supra* note 61, at 380.

64. *Id.*

65. *Id.* at 384–85.

66. *Id.* at 386–87.

67. Kaplow, *supra* note 61, at 562–63.

68. 467 U.S. 837 (1984).

*Gardner*⁶⁹ canon of “veteran friendly” interpretation.⁷⁰ Jellum has proposed a spectrum of possibilities for resolving the conflict.⁷¹ However, she has not explored why the conflict developed in the first place.

It is not difficult to reconceive the *Chevron-versus-Gardner* debate as a rules-versus-standards conflict. The well-accepted administrative benefits of bright-line rules naturally pull the Secretary in that direction. VA has long struggled to keep up with its chronically increasing load of benefits claims.⁷² The lay adjudicators on the front lines may or may not have college degrees,⁷³ and have pushed back against the burdens of implementing complex regulatory schemes. For example, the labor union representing VA adjudicators opposed a proposed regulation on rating traumatic brain injuries as too complex, arguing that “RO employees who are ‘expected to decide and evaluate [complex claims], in less than two hours, are generally not brain surgeons with law degrees.’”⁷⁴ In addition, the VA system has also suffered from substantial disparities in outcomes among its regional offices,⁷⁵ which it has struggled to rectify.⁷⁶ Accordingly, it is natural for VA to address these problems by relying heavily on bright-

69. 513 U.S. 115, 118 (1994).

70. See Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner’s Presumption That Interpretive Doubt Be Resolved in Veterans’ Favor with Chevron*, 61 AM. U. L. REV. 59 (2011) (arguing that courts should construe veterans’ statutes liberally in order to further remedial purposes rather than simply construing them in the veteran’s favor).

71. *Id.* at 102–21.

72. See James D. Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later: Confronting the New Complexities of Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 289–95 (2010) (discussing VA’s strategies over the last two decades for improving and speeding the processing of claims).

73. See *id.* at 283–84 n.208 (noting that VA phased out lawyers to avoid raising adjudicator salaries).

74. See *id.* at 284 (quoting American Federation of Government Employees, *Comment on Proposed Rule AM75: Schedule for Rating Disabilities; Evaluation of Residuals of Traumatic Brain Injury* 3–4 (2008), available at <http://www.regulations.gov/#!documentDetail;D=VA-2008-VBA-0002-0008>).

75. See VA OFFICE OF INSPECTOR GEN. REP. NO. 05-00765-137, REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS 63 (2005) (comparing average compensation among twelve states).

76. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-213, FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING (2010) (recommending that VA assess whether Expedited Claims Adjudication should be widely implemented and whether its pilot reorganization of claims processors should be expedited); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-512T, LONG-STANDING CLAIMS PROCESSING CHALLENGES PERSIST (2007) (emphasizing concerns regarding pendency of claims adjudication and appeal and accuracy and consistency of decisions); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-749T, CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT (2005) (testimony of Cynthia A. Bascetta, Director, Health Care-Veterans’ Health and Benefits Issues, before the U.S. Senate Committee on Veterans’ Affairs).

line rules that promote speedy and consistent decision making on the front lines. Given that administrative concerns pull the Secretary strongly in the direction of bright-line rules, it is natural that his arguments for *Chevron* deference would routinely consist of ones in favor of such rules.

The Secretary's natural tendency to favor rules also makes it natural for veterans' representatives to assert fuzzier standards as an alternative. If a claim were denied by the application of a bright-line rule, it would often be easier to offer a standard as an alternative than to show that the Secretary erred in failing to adopt an alternative bright-line rule. Furthermore, "the rule that interpretive doubt is to be resolved in the veteran's favor" articulated in *Brown v. Gardner* stems from the general belief that veterans benefits are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."⁷⁷ As the hundreds of thousands of disability benefits claims presented each year reveal an endless array of factual and procedural circumstances, the flexibility embodied by standards will often allow for favorable outcomes in a wider spectrum of cases than could be achieved through a simple rule.

Of course, many cases will not fit this mold. Sometimes, both or neither party will be advocating for a bright-line rule. In other cases, veterans advocates will advocate for a rule after a current discretionary standard has been applied in an unfavorable way. Moreover, a tendency by the Federal Circuit does not guarantee the outcome of any given case. However, the rules-versus-standard prism may be an effective tool in understanding the Secretary when he argues for deference to a rule against a standard being asserted by the claimant.

C. *The Multi-Faceted Meaning of "Veteran Friendly"*

Although the *Chevron*-versus-*Gardner* presentation has some merit, in many ways it does not accurately explain the core conflict. That framework sets VA and veterans as antagonists, but they need not be portrayed that way. Another way to see the rules-versus-standards debate in veterans law is to view it as a debate over what it means for the system to be "veteran friendly." The reality is that the Secretary has a different perspective on the system than individual claimants for benefits.⁷⁸ The perspective of veterans' advocates is relatively easy

77. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

78. Of course, it is entirely natural for policymakers to have a different

to see. Veterans before the Federal Circuit routinely argue that a ruling in their favor is the “veteran friendly” outcome, and those assertions have an intuitive appeal.⁷⁹ Understanding the Secretary’s perspective on what it means to administer the system in a “veteran-friendly” manner, however, requires more exploration.

First, as discussed above, the Secretary must be concerned with the overall speed of the system. As recognized in the context of Social Security Disability Insurance benefits, “disability insurance program[s] are] designed to alleviate the immediate and often severe hardships that result from a wage-earner’s disability. In that context, delays . . . detract seriously from the effectiveness of the program[s].”⁸⁰ Long delays in processing claims “reduce a disabled veteran’s ability to buy food and clothing and to make mortgage payments, causing significant psychological stress that can lead to marital and family difficulties, domestic violence, divorce, and even suicide.”⁸¹ Therefore, the Secretary must carefully consider how much complexity can be added to the decisions that the system has to make without defeating its fundamental purpose.⁸² In this regard, rules that enable timely decisions so that benefits may be disbursed before veterans’ lives slip into crisis are deemed “veteran friendly.”

Second, the Secretary must also be concerned with the consistency of the program. Widespread perception that benefits decisions are not accurate and fair undermines public support for benefits systems.⁸³ In the past, public perception that the veterans disability system was being exploited by veterans who were obtaining benefits

perspective than the judicial system. The implications of these different perspectives have recently been explored by David A. Super, who argued that the legal culture overestimates the value of additional information and delayed decision making, while undervaluing prompt and predictable decision making. David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1413 (2011).

79. It would be a mistake, however, to accept blindly that ruling for the veteran in any given case has an overall effect that is favorable to veterans. Many veterans’ appeals present situations in which ruling in favor of the veteran in one procedural posture may adversely impact veterans in a different procedural posture. See, e.g., *Clemons v. Shinseki*, 23 Vet. App. 1, 7–8 (2009) (per curiam) (discussing the veteran-unfriendly implications of applying the plain language of the holding in *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008), to situations outside the fact pattern in that case).

80. *White v. Mathews*, 559 F.2d 852, 858 (2d Cir. 1977).

81. Serota & Singer, *supra* note 57, at 414 (citations omitted).

82. For just one example of a discussion of the competing concerns that go into the design of VA’s adjudicative system, see Marcy W. Kreindler & Sarah B. Richmond, *Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants*, 2 VETERANS L. REV. 55 (2010).

83. See, e.g., Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, 34 REGULATION 41 (2011) (arguing that much of the Social Security disability insurance decision-making process should be abolished because it produces inaccurate results that dramatically favor the granting of non-meritorious claims).

that were not merited led to legislative backlash in both the nineteenth⁸⁴ and twentieth centuries.⁸⁵ Thus, bright-line rules that are less likely to lead to exploitation help the Secretary guard the political capital that sustains public legitimacy of the veterans benefits program, and help the system remain friendly for future generations of veterans.

Finally, the Secretary has to decide how best to distribute the finite funds that Congress makes available for veterans benefits. The cost of running the adjudication system competes with other worthy programs in VA's budget. The bulk of VA's discretionary budget is spent on increasing access to health care,⁸⁶ but VA runs many other programs to help veterans as well, such as the current Secretary's campaign to end homelessness among veterans.⁸⁷ Particularly in this era of tight budget constraints,⁸⁸ each dollar that is spent on the overhead of administering veterans benefits claims⁸⁹ is a dollar that cannot be spent on providing access to health care, assisting homeless veterans, or providing other important services to veterans. Given the myriad of health care, readjustment, and disability needs among the nation's sixty million veterans and dependents,⁹⁰

84. See Ridgway, *supra* note 49, at 148 (noting that widespread fraudulent claims led "Congress to abolish the current rolls and force all veterans to reapply for benefits").

85. *Id.* at 168–72.

86. In 2011, VA requested \$62 billion in discretionary funds for fiscal year 2012. *U.S. Dep't of Veterans Affairs Budget Request for Fiscal Year 2012: Hearing Before the H. Comm. on Veterans' Affairs*, 112th Cong. 55 (2011) (statement of Eric K. Shinseki, Sec'y, U.S. Dep't of Veterans Affairs), available at <http://veterans.house.gov/hearing-transcript/final-transcript-hearing-us-department-veterans-affairs-budget-request-fiscal>. Nearly 90% of these discretionary funds are used to provide health care to veterans. VETERANS FOR VETERANS ET AL., *THE INDEPENDENT BUDGET: CRITICAL ISSUES REPORT FISCAL YEAR 2013*, at 5 (2011), available at http://www.independentbudget.org/2013/CI_2013.pdf.

87. See, e.g., *Homeless Veterans*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/homeless> (last visited Mar. 19, 2012) (detailing current programs to combat homelessness among veterans).

88. VA has not been immune from the current budget difficulties. For example, the national commander of the Veterans of Foreign Wars recently testified before Congress that at current spending levels "it will take VA more than 25 years to complete its current 10-year capital investment plan." See *VA's Budget Request for Fiscal Year 2013, Hearing Before the S. Comm. on Veterans' Affairs*, 112th Cong. (2012) (statement of Raymond Kelley, Director, Nat'l Legislative Serv., Veterans of Foreign Wars of the U.S.), available at <http://www.vfw.org/VFW-in-DC/Congressional-Testimony/VA%E2%80%99S-BUDGET-REQUEST-FOR-FISCAL-YEAR-2013/>.

89. For some perspective on the problem, it is worth noting that, if replacing a generally applicable, bright-line rule with a fuzzier standard were to add only five minutes to the time it takes to process a claim, that could amount to an annual burden of up to 100,000 hours (or fifty full-time employees) in a system that handles 1.2 million claims in a year.

90. *Strategic Goals*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.bamc.amedd.army.mil/wtb/docs/va-pamphlet.pdf> (last visited Apr. 9, 2012).

determining an allocation of VA's budget that would be most friendly to veterans is a difficult, if not impossible, task.⁹¹ In this context, using rules to hold down administrative costs is friendly to all the veterans who otherwise would not be assisted through VA's other programs.

Accordingly, the Secretary's system-wide perspective need not be considered antagonistic to veterans, even though it may conflict with some arguments at the Federal Circuit. Indeed, the eminent administrative-law scholar Jerry Mashaw has argued that due process values are served by an emphasis on good management of front-line adjudicators, because the nature of disability benefits programs "severely limit[s] the value of procedural safeguards and appellate checks in assuring accurate and timely adjudication" of claims.⁹²

Ultimately, as with the *Chevron-versus-Gardner* framing, this view of the rules-versus-standards debate is not a panacea. However, it can be useful in understanding how VA can take positions in individual cases that may be contrary to arguments that appear "veteran friendly" in isolation. Whether this framing is useful in understanding the Federal Circuit's veterans law jurisprudence is a question for further consideration.

91. It is, however, worth examining the current allocation of funds. Michael Asimow and Jeffrey S. Lubbers recently argued that aspects of the Australian model of administrative appeals may be useful as models for reforming administrative appeals in the United States. Michael Asimow & Jeffrey S. Lubbers, *The Merits of "Merits" Review: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 WINDSOR Y.B. ACCESS JUST. 261, 281–82 (2010). Although they do not consider resource allocation in their argument, the facts they cite make for interesting comparisons. Asimow and Lubbers note that the Australian system spends over \$30,000 USD per appeal (assuming the recent average conversion rate of nearly one U.S. dollar to one Australian dollar) and administrative law judges who handle disability claims decide approximately 100 to 150 cases a year per full-time equivalent (depending upon the rate of production of part-time judges). *Id.* at 266–67. This is a dramatically higher investment of resources in administrative appeals than in the American VA system. In fiscal year 2010, the BVA decided an average of 682 appeals per member, with a budget of \$1490 per decision. See 1 DEP'T OF VETERANS AFFAIRS, ANNUAL BUDGET SUBMISSION (FY 2012) 2C-5 (2011), available at <http://www.va.gov/budget/products.asp> (stating that the BVA's actual budget for fiscal year 2010 was \$73.3 million); BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN FISCAL YEAR 2010, at 3, 19 (2011), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf (stating that the BVA issued 49,127 decisions with sixty members and the equivalent of twelve acting members). Accordingly, it appears that Australian administrative appeals are supported by twenty times more resources, which, inter alia, allow their administrative law judges handling disability claims to decide one-fifth the number of cases as their counterparts at the BVA. Even assuming some inaccuracy due to estimations and conversions, the spending gap is massive and raises questions about why the two systems have such dramatically different allocations of resources.

92. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775 (1974).

D. General Conclusions

A thorough examination of the role of rules and standards in the veterans system is beyond the scope of this Article, as is a normative analysis of how best to interpret the concept of veteran friendliness. Either topic would involve a wide variety of considerations. For purposes of this Article, the most that can be done is to ask whether Gugliuzza's observation is supported by empirical evidence. If the Federal Circuit were to favor standards, it would not necessarily mean that the court would favor either side in any given case.⁹³ In the few cases Gugliuzza discussed, he observed that rulings in favor of standards did not uniformly result in rulings in favor of one side.⁹⁴ If it were true, however, that there are institutional reasons why the parties systematically tend to gravitate toward arguments of one type over the other, then exploring the Federal Circuit's jurisprudence in the area would be a worthy endeavor.⁹⁵

III. THE 2011 VETERANS BENEFITS DECISIONS OF THE FEDERAL CIRCUIT

This Part considers the veterans law cases decided by the Federal Circuit in 2011. The court issued eleven precedential decisions on veterans law⁹⁶: three fewer than in 2010, and still down significantly from its earlier production rate.⁹⁷ As with last year's Article, these cases will be considered in the order in which the issues would normally be encountered in processing a benefits claim.

A. Duty to Assist

The Federal Circuit decided two cases in 2011 clarifying the scope

93. Given the substantial changes in the make-up of the court, there is also no certainty that any past tendency would continue into the future.

94. Gugliuzza, *supra* note 1, at 1221.

95. A secondary issue of great significance is how VA responds, consciously or unconsciously, to any such tendency. In the realm of patent law, Jonathan Masur argued that fear of reversals by the Federal Circuit has created inflationary pressure within the Patent and Trademark Office, which has substantially increased the rate at which it grants patents. Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 473–74 (2011). Arti K. Rai has challenged that argument as over-estimating the influence of the court on the operation of the agency. Arti K. Rai, *Who's Afraid of the Federal Circuit?*, 121 YALE L.J. ONLINE 335, 337 (2011).

96. The Federal Circuit also issued published opinions on four CAVC decisions on attorney fee petitions under the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (codified in part at 28 U.S.C. § 2412 (2006)). See *Patrick v. Shinseki*, 668 F.3d 1325, 1325 (Fed. Cir. 2011); *Padgett v. Shinseki*, 643 F.3d 950, 950–51 (Fed. Cir. 2011); *Wagner v. Shinseki*, 640 F.3d 1255, 1257 (Fed. Cir. 2011); *Avgoustis v. Shinseki*, 639 F.3d 1340, 1341 (Fed. Cir. 2011). However, these cases are not discussed here, as they do not pertain to the law governing veterans' benefits.

97. Gugliuzza, *supra* note 1, at 1220–21.

of VA's duty to assist veterans. Both cases dealt with VA's duty to develop evidence in support of a claim. The Secretary's duty is codified at 38 U.S.C. § 5103A, which requires the VA to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim."⁹⁸

1. *Adequacy of a VA medical examination*

Whenever a veteran submits evidence that indicates that a disability may be related to service, but which is insufficient to decide the claim, the Secretary must obtain a medical opinion to resolve the issue.⁹⁹ In *Sickels v. Shinseki*,¹⁰⁰ the Federal Circuit had to address both the adequacy of a medical opinion and the Board's analysis of that issue.¹⁰¹ The veteran's claim for service connection for a knee condition was remanded by the Board for a medical opinion and any examination or testing deemed necessary.¹⁰² On remand, the cover of the request for a medical opinion had "NO EXAM AT THIS TIME" repeatedly printed on it, and the physician rendered an opinion without examining the veteran.¹⁰³ However, the detailed instructions indicated that "[i]f the medical specialist deems it to be necessary, the veteran should undergo a VA examination and/or diagnostic testing."¹⁰⁴ The physician provided an opinion without examining the veteran or ordering any testing. The Board accepted the new opinion as satisfying its instructions and denied the claim on the basis of the new opinion.¹⁰⁵ In a single-judge decision, the CAVC rejected the appellant's argument that the instructions to the examiner were confusing, as the appellant failed to make that argument to the Board and because the examiner must be presumed competent.¹⁰⁶

The Federal Circuit affirmed the decision of the CAVC in an opinion by Judge Clevenger. As is frequently the case, the initial issue was jurisdiction. The government argued that the appellant was merely challenging the adequacy of the examination in his case, but the Federal Circuit accepted the appellant's contention that the issue was whether the BVA was obligated to provide a detailed statement in

98. 38 U.S.C. § 5103A(a) (2006).

99. See *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006) (discussing 38 U.S.C. § 5103A(d)(2)).

100. 643 F.3d 1362 (Fed. Cir. 2011).

101. *Id.* at 1363–64.

102. *Id.*

103. *Id.* at 1364.

104. *Id.*

105. *Id.*

106. *Id.* at 1365.

every case as to why it found that the medical opinion was adequate.¹⁰⁷

Nevertheless, the Federal Circuit rejected that argument, finding it indistinguishable from the argument rejected in *Rizzo v. Shinseki*.¹⁰⁸ In *Rizzo*, the court concluded that the Board was not required to address the competency of a VA medical examiner if it were not challenged.¹⁰⁹ The *Sickles* court similarly concluded that the Board could not be “fault[ed] for failing to explain its reasoning on unraised issues” as to the adequacy of the medical examination.¹¹⁰

This discussion in *Sickles* was an interesting follow-up to the court’s prior decision in *Robinson v. Shinseki*,¹¹¹ which dealt with the Board’s duty to support its decision with an adequate statement of reasons or bases.¹¹² In *Robinson*, the Federal Circuit held that “claims which have no support in the record need not be considered by the Board,” and that “the Board is not obligated to consider all possible substantive theories of recovery.”¹¹³ In essence, *Sickles* appeared to apply a similar standard to issues regarding the adequacy of the medical opinion. However, *Robinson* was not cited and the phrasing of the opinions was different. Thus, there remains room for future elaboration as to the Board’s duty to discuss issues in claims on review.

2. *Necessity of an industrial survey*

The second issue addressed by the Federal Circuit concerning the duty to assist relates to a veteran’s entitlement to a rating of total disability based upon individual unemployability (TDIU). The rating is awarded when a veteran meets certain threshold criteria based upon his or her schedular disability rating and is “unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.”¹¹⁴ In contrast to schedular disability ratings, which are objective, a rating of TDIU is based upon a veteran’s subjective ability to work, including consideration of his or her education, experience, and training.¹¹⁵

The question presented in *Smith v. Shinseki*¹¹⁶ was whether VA was required to obtain an industrial survey from a vocational expert

107. *Id.*

108. 580 F.3d 1288 (Fed. Cir. 2009).

109. *Id.* at 1292.

110. *Sickles*, 643 F.3d at 1366.

111. 557 F.3d 1355 (Fed. Cir. 2009).

112. *Id.* at 1361.

113. *Id.* (internal quotation marks omitted).

114. 38 C.F.R. § 4.16(a) (2011).

115. *See id.* § 4.16(b).

116. 647 F.3d 1380 (Fed. Cir. 2011).

before deciding the veteran's entitlement to TDIU.¹¹⁷ The foundation of the appellant's argument was that such surveys are used in the Social Security Disability Insurance (SSDI) system to determine whether disability benefits should be awarded.¹¹⁸ The appellant argued that an industrial survey was necessary to substantiate entitlement to TDIU, and that VA therefore was obligated to provide him with one before deciding his claim.¹¹⁹

In an opinion authored by Judge Dyk, the Federal Circuit affirmed the single-judge decision of the CAVC, rejecting the appellant's argument.¹²⁰ The court held that a TDIU rating in the veterans benefits system is substantively different from a disability determination in the SSDI system.¹²¹ The court observed that, in the SSDI system, the disability determination considers the availability of appropriate employment in the applicant's locality, and the burden is on the government to prove that such work exists.¹²² The opinion in *Smith* noted that, in contrast, "[t]he VA regulation governing TDIU claims includes no requirement that the agency consider the availability of work."¹²³ The opinion then considered the VA's Adjudication Procedures Manual M21-1MR and observed that it explicitly states that "the 'availability of work' is an 'extraneous factor' that is irrelevant to the TDIU determination."¹²⁴ Based upon this language, the court deferred to VA's interpretation of its own regulation because it was not plainly erroneous or inconsistent with the regulation.¹²⁵ In its conclusion, the opinion took care to note that VA had the discretion to obtain such a survey in a given case if it decided that the survey were necessary, but that such an opinion is not invariably required.¹²⁶ The opinion ended with the comment that, assuming the court had jurisdiction to consider the facts of this case, it could not conclude on these facts that the VA abused its discretion in declining to provide a vocational expert.¹²⁷

Smith is consistent with early CAVC case law recognizing that the SSDI system is meaningfully different from the veterans benefits

117. *Id.* at 1382.

118. *Id.* at 1385.

119. *Id.* at 1383.

120. *Id.* at 1382.

121. *Id.* at 1385.

122. *Id.* (citing 20 C.F.R. § 404.1560(c) (2011)).

123. *Id.* at 1384.

124. *Id.* (quoting DEP'T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL REWRITE M21-1MR, pt. IV-ii, ch. 2, § F, at 12, available at http://www.benefits.va.gov/WARMS/Site_Map.asp).

125. *Id.* at 1385.

126. *Id.* at 1386.

127. *Id.*

scheme and that its determinations, therefore, should be considered persuasive at most rather than binding.¹²⁸ Although modern social programs may trace their roots to the veterans benefits system,¹²⁹ veterans fought against having their benefits folded into larger, New Deal social programs such as Social Security.¹³⁰ Accordingly, the two programs share only a modest similarity to each other. Thus, the result of *Smith* is unsurprising.

B. Service Connection

In 2011, the Federal Circuit decided only a single case discussing the substance of the central issue of when disability benefits should be granted. That case dealt with an evidentiary issue in the relatively narrow category of cases in which benefits are sought for post-traumatic stress disorder (PTSD) stemming from an in-service personal assault.¹³¹ One unique aspect of a claim for compensation for PTSD is that there is an explicit requirement that there must be evidence to corroborate the occurrence of the stressful event (stressor) upon which the claim is based.¹³² It is generally insufficient that a medical professional believes that the veteran has PTSD and that the veteran's account of the stressor is accurate; rather, independent evidence of the stressor is required.¹³³ A special rule applies to combat stressors. If the stressor were related to combat, then it would be sufficient to corroborate generally that the veteran was involved in combat.¹³⁴ However, if the stressor were not combat-related, then more specific corroboration would be required.¹³⁵

128. See *Collier v. Derwinski*, 1 Vet. App. 413, 417 (1991) (comparing and contrasting the Social Security and VA systems).

129. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 7–11 (1992) (asserting that pensions for Civil War veterans and for widowed mothers in the early twentieth century were precursors to the New Deal era reforms); GILBERT Y. STEINER, *THE STATE OF WELFARE* 237–40 (1971) (discussing old age, disability, and survivors' pensions for veterans within the context of the greater welfare system).

130. See *Ridgway*, *supra* note 49, at 181–82 (discussing veterans' efforts to support New Deal social programs yet maintain the separate nature of their own benefits programs).

131. *Menegassi v. Shinseki*, 638 F.3d 1379 (Fed. Cir. 2011).

132. See *West v. Brown*, 7 Vet. App. 70, 76 (1994) (outlining the evidentiary corroboration requirements for PTSD claims).

133. See *Cohen v. Brown*, 10 Vet. App. 128, 145 (1997) (finding that a Vietnam veteran's stressor was sufficiently corroborated by his fellow service member's statement of frequent exposure to mortar attacks).

134. See *Suozzi v. Brown*, 10 Vet. App. 307, 310 (1997) (noting that the veteran's radio logs sufficiently corroborated his stressor when he did not engage in combat); *West*, 7 Vet. App. at 76 (holding that the veteran's personal participation in the stressful event does not need to be shown by the corroborating evidence when the veteran engaged in combat).

135. *West*, 7 Vet. App. at 76.

In *Menegassi v. Shinseki*,¹³⁶ the Federal Circuit had to consider whether in-service personal assaults are subject to their own special rules regarding corroboration.¹³⁷ The regulation governing in-service personal assaults provides that evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident.¹³⁸ The regulation proceeds to provide examples, such as records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians.¹³⁹ However, the regulation does not indicate whether records from health counseling centers, hospitals, or physicians must be contemporaneous with the alleged stressor or can be separate from a subsequent diagnosis.

In *Menegassi*, the veteran filed a claim in 2001 alleging that she was sexually assaulted in service in 1984.¹⁴⁰ The BVA determined that "there was no evidence of a reported sexual assault or behavioral changes from the in-service medical records, in-service personnel records, or any other records contemporaneous to the veteran's service."¹⁴¹ On appeal, a single judge of the CAVC affirmed the BVA in a memorandum decision, and quoted *Cohen v. Brown*¹⁴² for the proposition that "[a]n opinion by a mental health professional based on a post-service examination of the veteran cannot be used to establish the occurrence of the stressor."¹⁴³

In an opinion by Judge Prost, the Federal Circuit held that section 3.304(f)(5) created an exception to the rule expressed in *Cohen*.¹⁴⁴ Reaching this conclusion was relatively simple because VA had noted in promulgating the regulation that "a doctor's diagnosis of PTSD due to personal assault—if competent and credible—in the absence of contrary evidence, would likely constitute competent medical evidence sufficient to corroborate the occurrence of the stressor."¹⁴⁵ Accordingly, the parties agreed that the CAVC had erred.¹⁴⁶

What divided the court was the issue of whether the CAVC's error in relying on *Cohen* in the context of a personal assault case was harmless. Although Judge Prost, joined by Chief Judge Rader, held

136. 638 F.3d 1379 (Fed. Cir. 2011).

137. *Id.* at 1380–81.

138. 38 C.F.R. § 3.304(f)(5) (2011).

139. *Id.*

140. *Menegassi*, 638 F.3d at 1380.

141. *Id.*

142. 10 Vet. App. 128 (1997).

143. *Menegassi*, 638 F.3d at 1381 (quoting *Cohen*, 10 Vet. App. at 145).

144. *Id.* at 1382.

145. *Id.* at 1381–82 (discussing 67 Fed. Reg. 10,330–31 (Mar. 7, 2002)).

146. *Id.*

that the error was not prejudicial, Judge Dyk disagreed on the facts.¹⁴⁷ There was no dispute among the judges that the Federal Circuit could decide the issue of whether the error was harmless in this case because the facts were undisputed.¹⁴⁸ However, the majority felt that the BVA had exhaustively detailed the evidence and applied the law correctly, regardless of the misstatement in the CAVC decision.¹⁴⁹ In contrast, Judge Dyk interpreted the BVA decision as applying the same bright-line rule that the CAVC had erroneously stated.¹⁵⁰ Accordingly, he would have remanded the matter for a new decision by the BVA because the Federal Circuit could not properly make a determination as to what the BVA would have found if it had applied the correct standard.¹⁵¹

Menegassi highlights the fact that the Federal Circuit's review of decisions rendered by the CAVC does not always focus on those decisions. Prejudicial error, in particular, is an aspect where the court may spend a great deal of time examining the BVA's decision rather than the CAVC's. It is unclear whether the court's analysis of decisions an extra-step removed could increase the likelihood of split decisions. If enough data were collected, however, it would be interesting to determine whether the judges have distinctly different approaches to interpreting BVA decisions.

C. *Effective Date*

In 2011, the Federal Circuit also decided a single case addressing the proper effective date for benefits. The effective date for an award of benefits "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor."¹⁵² In practice, most effective date determinations turn on the determination of when the claim was filed because veterans rarely file a claim before actually being eligible. Frequently, claims are granted only after being reopened years after a prior denial, and in that situation the effective date is the date of the claim to reopen.¹⁵³

147. *Id.* at 1384 (Dyk, J., concurring in part and dissenting in part).

148. *Id.* at 1383 (majority opinion) (citing *Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008)).

149. *Id.*

150. *Id.* at 1384 (Dyk, J., concurring in part and dissenting in part).

151. *Id.* at 1384–85.

152. 38 U.S.C. § 5110(a) (2006); *see also* 38 C.F.R. § 3.400 (2011) (stating that the effective date will be fixed as the date of receipt of the claim or the date the entitlement arose, whichever is earlier).

153. *Flash v. Brown*, 8 Vet. App. 332, 340 (1995); *see also* 38 C.F.R. § 3.400(r) (applying the effective date rule to reopened claims).

In *Bond v. Shinseki*,¹⁵⁴ the Federal Circuit addressed a key exception to the effective date limitation for new claims.¹⁵⁵ Pursuant to 38 C.F.R. section 3.156(b), “[n]ew and material evidence received prior to the expiration of the appeal period . . . will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.”¹⁵⁶ The CAVC previously held that the submission of new and material evidence under this regulation would prevent a rating decision from becoming final if VA were to fail to properly address it.¹⁵⁷

The question presented in *Bond* was whether VA could treat new evidence submitted within the period for appealing a grant of service connection as a claim for an increased disability rating without considering the application of section 3.156(b).¹⁵⁸ In *Bond*, the veteran submitted evidence that was potentially new and material, but provided it with a letter “respectfully request[ing] an increase in percentage rating” for his PTSD.¹⁵⁹ He was eventually awarded an increased disability rating, and VA based his effective date on the letter, treating it as a claim for an increased rating without any consideration of the possible application of the regulation on new and material evidence submitted during the appellate period.¹⁶⁰

Although the appellant was appealing an unfavorable single-judge decision by the CAVC, Judge O’Malley’s opinion for the Federal Circuit largely focused on the government’s arguments defending the outcome of the effective date determination. The government argued that the veteran’s characterization of his submission as seeking an increased rating was dispositive and that VA therefore did not need to consider the possible application of the regulation.¹⁶¹ The court rejected this argument, noting that section 3.156(b) is phrased in mandatory terms and that “neither law—nor logic—dictates that evidence supporting a new claim cannot also constitute

154. 659 F.3d 1362 (Fed. Cir. 2011).

155. *Id.* at 1364 n.1.

156. 38 C.F.R. § 3.156(b).

157. *Bond*, 659 F.3d at 1365 (citing *Muehl v. West*, 13 Vet. App. 159, 161–62 (1999)). Although not relevant to the analysis in *Bond*, it has been argued that the regulation is better understood as one that causes the new claim to relate back to the filing of the original claim, rather than one that prevents the original claim from becoming final. See *Young v. Shinseki*, 22 Vet. App. 461, 472–75 (2009) (Lance, J., concurring) (suggesting a framework by which the regulation achieves its objectives without vitiating the finality of earlier decisions).

158. *Bond*, 659 F.3d at 1366–67.

159. *Id.* at 1363.

160. *Id.* at 1364.

161. *Id.* at 1367.

new and material evidence relating to a pending claim.”¹⁶² Accordingly, VA’s duty to apply the regulation was not obviated by either the appellant’s characterization of his submission or the fact that the submission met the requirements for a valid increased rating claim.¹⁶³

The Secretary also argued that VA should be presumed to have considered the possible application of section 3.156(b), and that the rating decision should be regarded as implicitly determining that the regulation was not satisfied.¹⁶⁴ The Federal Circuit rejected such a presumption because it would “effectively insulate the VA’s errors from review whenever it fails to fulfill an obligation, but leaves no firm trace of its dereliction in the record.”¹⁶⁵ Accordingly, the court remanded the matter for an explicit determination by VA as to whether section 3.156(b) would be applicable in the case.¹⁶⁶

Although the court’s opinion in *Bond* did not invoke the sympathetic reading doctrine, its analysis and conclusion are clearly consistent with the idea that “it is the Secretary who knows the provisions of title 38 and can evaluate whether there is potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission.”¹⁶⁷

The more interesting aspect of *Bond* is squaring it with the Federal Circuit’s decision in *Sickels* discussed above, which held that the Board could not be faulted for failing to discuss an issue that was not raised to it.¹⁶⁸ The CAVC has held that “[t]he question of the precise location of the line between the issues fairly raised by the appellant’s pleadings and the record and those that are not must be based on the record in the case at hand; therefore, it is an essentially factual question.”¹⁶⁹ Once again, although the Federal Circuit does not review factual determinations, its decisions are necessarily shaped by the facts of the cases before it and factual differences will therefore necessarily matter even when they are not the explicit subject of the differing opinions. However, it will take more than the two data points available in the Federal Circuit’s 2011 cases to develop a full

162. *Id.* at 1367–68.

163. *Id.* at 1369.

164. *Id.* at 1368.

165. *Id.*

166. *Id.*

167. *See* *Ingram v. Nicholson*, 21 Vet. App. 232, 256–57 (2007) (per curiam) (explaining why a “four corners” review of a veteran’s application is overly strict).

168. *See supra* Part III.A.1 (outlining when VA is required to provide a medical examination).

169. *Robinson v. Peake*, 21 Vet. App. 545, 553 (2008), *aff’d sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

picture of its views on when the BVA is obligated to address issues not explicitly raised by the claimant.

D. Disability Rating

The Federal Circuit issued three opinions in 2011 dealing with disability ratings. The relative attention granted to this area is not surprising, given the complexity of the regulations in determining how much compensation should be paid to a veteran each month based upon the severity of his or her disabilities. Part 4 of Title 38 of the Code of Federal Regulations has hundreds of “diagnostic codes” detailing how to rate disabilities of every body part and physical system on a scale from 0% to 100% disabling.¹⁷⁰ When these codes are insufficient, there are also provisions for extra-schedular ratings and special monthly compensation to further tailor the monthly payments.¹⁷¹ Thus, there is ample fodder for legal questions to arise.

1. Staged ratings

The first disability rating case of this past year returned to an area that the court addressed in 2009 in *Reizenstein v. Shinseki*.¹⁷² Given the long periods of time that are often at issue in veterans benefits cases, VA often must determine the proper disability rating for a condition, the severity of which has changed over the course of the proceedings. In such a circumstance, VA may assign a “staged” rating, which is one that breaks up the life of the claim into smaller periods with different ratings consistent with the evidence for each time period.¹⁷³ In *Reizenstein*, the Federal Circuit held that 38 C.F.R. section 3.343(a), which protects certain ratings from reduction without a current medical examination, does not apply to the initial award of a staged rating that decreases from a protected level.¹⁷⁴

This past year, the Federal Circuit addressed this issue again in *Singleton v. Shinseki*,¹⁷⁵ in which the appellant (represented by the same attorney as in *Reizenstein*) repackaged his procedural argument as a due process claim.¹⁷⁶ After obtaining a favorable decision from the CAVC on an effective date appeal, the appellant in *Singleton*

170. 38 C.F.R. § 4.27 (2011).

171. *Id.* § 4.16(b).

172. 583 F.3d 1331 (Fed. Cir. 2009); *see also* Eaton, *supra* note 1, at 1196–97 (analyzing the decision).

173. *See* Fenderson v. West, 12 Vet. App. 119, 126 (1999) (noting that the Secretary and the appellant agreed that at the time of an initial rating, separate ratings may be assigned based on the facts that arise).

174. 583 F.3d at 1336–37.

175. 659 F.3d 1332 (Fed. Cir. 2011).

176. *Id.* at 1334.

received a staged rating covering more than twenty years.¹⁷⁷ The rating was divided into four periods, which included a reduction from 100% for the period from 1980 to 1991 to 70% for the period from 1991 to 2000.¹⁷⁸ In an opinion by Judge Prost, the court affirmed the panel opinion of the CAVC.¹⁷⁹

The first issue that the court addressed was the reframing of the argument. When his case was before the CAVC, the appellant made essentially the same regulatory argument that was rejected in *Reizenstein*.¹⁸⁰ To avoid the effect of that decision, “Mr. Singleton applied a fresh coat of paint in the hope of attracting more favorable judicial treatment.”¹⁸¹ Specifically, he argued that the rating reduction for the period after 1991 denied him property without due process of law because he did not have an adequate opportunity to submit new evidence and argument before his benefits were reduced.¹⁸² The government objected to this reframing, but the Federal Circuit explained in a footnote that, “[t]hough the new constitutional gloss Mr. Singleton has applied to his case before this court was not present below, his argument is essentially consistent with his previous positions and in this unique circumstance” it was cognizable by the court.¹⁸³

On the merits, the court applied the traditional three-part balancing test of *Mathews v. Eldridge*.¹⁸⁴ Although the panel agreed that the appellant had a protected property interest, it concluded that the normal procedures attendant in the BVA and CAVC proceedings “were sufficient . . . to expose any error.”¹⁸⁵ It further concluded that “the government has a straightforward interest in the speedy resolution of Mr. Singleton’s claim” and that “[a]dding further rounds of review (and, potentially, further rounds of appeal) would require yet more hours of labor and additional adjudication costs for the government.”¹⁸⁶ Thus, the court concluded that there was no due process violation.¹⁸⁷

After *Reizenstein*, the outcome of *Singleton* is not surprising. What is more interesting is the court’s discussion allowing the constitutional

177. *Id.* at 1333–34.

178. *Id.* at 1334.

179. *Id.* at 1336, *aff’g* 23 Vet. App. 376 (2010).

180. 583 F.3d 1331, 1338 (Fed. Cir. 2009).

181. *Singleton*, 659 F.3d at 1334.

182. *Id.*

183. *Id.* at 1334–35 n.2.

184. 424 U.S. 319, 335 (1976).

185. *Singleton*, 659 F.3d at 1336.

186. *Id.*

187. *Id.*

argument to be raised in the first place. In 2009, the Federal Circuit opened the door to due process arguments in veterans benefits cases by holding in *Cushman v. Shinseki*¹⁸⁸ that applicants for benefits have a property interest protected by due process.¹⁸⁹ There can be little doubt that many veterans advocates are anxious to raise such arguments. However, the long process of appealing from the BVA to the CAVC before reaching the Federal Circuit means that it may be some time before such arguments arrive at the Federal Circuit after full development, including agency consideration. *Singleton* suggests that the court will allow some constitutional arguments to be heard without a full presentation below, but is not anxious to short-cut the proper development of such issues.¹⁹⁰

2. *Special monthly compensation*

Veterans who are exceptionally disabled may qualify for special monthly compensation (SMC) beyond the normal 100% disability rate. There are a number of such provisions detailed in 38 U.S.C. § 1114(k)–(s), and one of those provisions led to a divided opinion of the court in *Guerra v. Shinseki*.¹⁹¹ The SMC provision at issue in *Guerra* was § 1114(s), which provides an additional monthly payment if the veteran were to have had a “service-connected disability rated as total,” and either: (1) had another independent disability or combination of disabilities rated at 60%; or (2) was permanently house-bound by reason of service-connected disability.¹⁹²

The veteran in *Guerra* had multiple disabilities stemming from a single combat incident: “a 70% rating for an upper-extremity gunshot wound, a 70% rating for post-traumatic stress disorder, a 40% rating for injuries to his left leg and thigh, a 40% rating for injuries to his right leg and thigh, and a 30% rating for neuropathy.”¹⁹³ Under the table for combining multiple disability ratings,¹⁹⁴ the veteran’s overall schedular rating was 100%.¹⁹⁵ In a single-judge decision, the CAVC held that the veteran was not eligible

188. 576 F.3d 1290 (Fed. Cir. 2009).

189. *Id.* at 1298.

190. Of course, the appellant in *Singleton* could have raised his due process argument prior to *Cushman*, because there is no question that due process applies to the reduction or termination of benefits already awarded. See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985) (holding that the Court need not resolve the question of whether applicants for veterans benefits have a protected interest because some of the class members were already receiving benefits).

191. 642 F.3d 1046 (Fed. Cir. 2011).

192. 38 U.S.C. § 1114(s) (2006).

193. *Guerra*, 642 F.3d at 1048.

194. 38 C.F.R. § 4.25 (2011).

195. *Guerra*, 642 F.3d at 1048.

for SMC under subsection (s) because none of his individual injuries was rated as 100% disabling by itself.¹⁹⁶ In reaching this conclusion, the decision explicitly followed the CAVC's panel opinion in *Bradley v. Peake*.¹⁹⁷

In an opinion by Judge Bryson and joined by Judge Moore, the Federal Circuit rejected the appellant's argument that he could be eligible for SMC based on his combined rating without regard to the fact that none of his individual conditions was rated as totally disabling. The opinion began with the plain language of the statute, which refers to "a service-connected disability rated as total,"¹⁹⁸ but noted that "the use of the singular is not by itself dispositive."¹⁹⁹ The opinion looked to the other parts of the SMC statute and noted that, "[a]mong the seven special monthly compensation provisions in section 1114, the use of the singular indefinite article in referring to a disability . . . is unique to subsection (s)."²⁰⁰ The opinion further noted that, "[e]ven within subsection (s), the statute distinguishes between a single 'disability' [in the first prong] and multiple 'disabilities' [in the second prong]."²⁰¹ The court thus concluded that Congress's intent was evidenced by the language of the statute.²⁰² However, rather than declaring the language dispositive, the opinion proceeded to allow that it "is not entirely free from ambiguity" and applied *Chevron* deference to the Secretary's interpretation as expressed in the implementing regulation, which has been in effect since 1962.²⁰³

The Federal Circuit expressly rejected an argument from the appellant that a cross-reference that once existed in VA's Adjudication Procedure Manual M21-1 was relevant to the outcome.²⁰⁴ That reference referred to the definition of "single disability" for TDIU purposes, which defines "one disability" to include multiple disabilities resulting from a single incident.²⁰⁵ The opinion rejected the argument both because the cross-reference had been removed in 1995 before the claim was filed,²⁰⁶ and because the inference from the cross-reference in the procedure manual was

196. *Id.*

197. 22 Vet. App. 280 (2008).

198. 38 U.S.C. § 1114(s) (2006).

199. *Guerra*, 642 F.3d at 1049.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1049–50.

204. *Id.* at 1050.

205. *Id.* (discussing 38 C.F.R. § 4.16(a) (2011)).

206. *Id.*

contradicted by a formal opinion from VA's Office of General Counsel (OGC) in 1991 that interpreted the statute contrary to the inference.²⁰⁷

The court also rejected the appellant's argument that either the removal of the cross-reference or the issuance of the OGC opinion required compliance with the notice and comment provisions of the Administrative Procedure Act²⁰⁸ to be valid. It did so on the basis that neither was a substantive rule.²⁰⁹ The majority opinion explained that "[a] substantive rule represents an agency's exercise of the power delegated to it by Congress to 'effect a change in existing law or policy or . . . affect individual rights and obligations,'" whereas "[a]n interpretive rule thus 'represents the agency's reading of statutes and rules rather than an attempt to make new law or modify existing law.'"²¹⁰ In the majority's view, both the 1991 OGC opinion and the 1995 modification of the M21-1 manual were clearly interpretive actions.²¹¹

Judge Gajarsa dissented, arguing that "[t]he majority makes two errors in its analysis."²¹² In his view, the majority erred in selectively reading the statute and in perceiving ambiguity in wording that should have been interpreted in favor of the veteran under *Gardner*.²¹³ In Judge Gajarsa's view, it was necessary to look beyond the SMC provision in § 1114 to note that the schedular rating provisions in subparts (a)–(j) use the singular (the disability), even though those provisions clearly apply to combined ratings.²¹⁴ He then went beyond the language of the statute to note that "the legislative history of section 1114(s) demonstrates that the very purpose of the section was to provide additional benefits to those veterans who were totally disabled under section 1114(j) but had additional, severe disabilities."²¹⁵ He quoted several passages in support of his view that the intent of § 1114(s) was to provide "an intermediate benefit for those veterans who were more seriously injured than those having only a total disability but not requiring constant care."²¹⁶ Judge Gajarsa then parsed the language of the provision further, before declaring that "the language of § 1114(s) is

207. *Id.* at 1050–51.

208. 5 U.S.C. § 553 (2006).

209. *Guerra*, 642 F.3d at 1051.

210. *Id.* (quoting *Haas v. Peake*, 525 F.3d 1168, 1195–96 (Fed. Cir. 2008)).

211. *Id.*

212. *Id.* at 1052 (Gajarsa, J., dissenting).

213. *Id.*

214. *Id.*

215. *Id.* at 1053.

216. *Id.* (internal quotation marks omitted).

clear” in favor of the veteran.²¹⁷ He rejected the majority’s assertion that *Chevron* deference was required, and countered that, “[t]o the extent that any ambiguity does exist in § 1114(s)—as the majority suggests—it should be resolved in favor of the veteran” under *Gardner*.²¹⁸

The majority’s paragraph addressing Judge Gajarsa’s opinion focused on his *Gardner* argument. The majority noted that the Federal Circuit had “rejected the argument that the pro-veteran canon of construction overrides the deference due to the DVA’s reasonable interpretation of an ambiguous statute.”²¹⁹ Thus, the majority affirmed the CAVC opinion over the dissent’s objection that the matter should be remanded to the BVA to determine whether the appellant would be entitled to a 100% disability rating based upon the combined effects of his conditions other than PTSD.²²⁰

Perhaps the most interesting aspect of *Guerra* is that the majority cited the statement in *Sears* that *Chevron* trumps *Gardner*. As Linda Jellum highlighted, the Federal Circuit and the CAVC rarely address a square conflict between the two cases.²²¹ She noted that both courts have expressed the essential conclusion stated in *Sears*, but that “neither court has explained why or whether *Gardner*’s [p]resumption retains any vitality in light of this conclusion.”²²² Neither the brief citation to *Sears* in the majority opinion of *Guerra* nor the dismissal of *Chevron* by the dissent does anything to dispel the uncertainty that Jellum has explored at length. Perhaps not surprisingly, the appellant in *Guerra* filed a petition for certiorari—supported by Paralyzed Veterans of America, the American Legion, the National Veterans Legal Services Program, and the Federal Circuit Bar Association—which would have given the Supreme Court an opportunity to squarely resolve the tension between the cases.²²³ Unfortunately, the Court denied certiorari, despite substantial support for the petition.²²⁴

217. *Id.* at 1053–54.

218. *Id.* at 1054 (citing *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994)).

219. *Id.* at 1051 (majority opinion) (citing *Sears v. Principi*, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003)).

220. *Id.* at 1052; *id.* at 1054–55 (Gajarsa, J., dissenting).

221. Jellum, *supra* note 70, at 75–88 (analyzing numerous cases from the two courts).

222. *Id.* at 88.

223. Petition for Writ of Certiorari, *Guerra v. Shinseki*, No. 11-773 (U.S. Dec. 19, 2011); see SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-773.htm> (last visited Mar. 19, 2012) (docket for *Guerra v. Shinseki*).

224. *Guerra v. Shinseki*, No. 11-773, 2012 WL 986851, at *1 (U.S. Mar. 26, 2012).

3. *Protected disability ratings*

The final disability rating case of 2011 involves VA's ability to modify a protected disability rating. Pursuant to 38 U.S.C. § 1159, "[s]ervice connection for any disability . . . which has been in force for ten or more years shall not be severed," unless there is a showing of fraud or inadequate character of service.²²⁵ In *Read v. Shinseki*,²²⁶ the court had to address whether this provision was violated when VA modified a veteran's disability rating to change the location of a disability from one muscle group to another.²²⁷

The veteran in *Read* suffered a gunshot wound in 1968 and was granted service connection in 1995 based upon his stated "residuals, gunshot wound, right thigh."²²⁸ The diagnostic code used to rate his condition (DC 5313) was for injuries to muscle group XIII, the posterior thigh group.²²⁹ However, the award was not based on any objective testing to determine the precise location of the injury that was causing his functional limitations.²³⁰

Just over ten years later, during the processing of a claim for an increased rating, the appellant had a VA physical that identified the location of his injury as muscle group XV instead of XIII.²³¹ The appellant then received a rating decision that maintained his 10% disability rating, but VA switched the diagnostic code to reflect the new evaluation of the location of the injury.²³² The CAVC affirmed the propriety of this action in a single-judge decision that concluded that the veteran's 1995 rating was not improperly severed by changing the identified location of the disability.²³³

In a panel opinion authored by Judge Linn, the Federal Circuit also affirmed the action. The court's opinion is unusual in that it began with an extensive discussion of the historical context that led to the enactment of § 1159.²³⁴ The opinion opened by noting that, "[d]uring World War II, the Veteran's Administration, now known as [the VA], often granted service connection for disabilities 'without properly checking records and in many instances approved service

225. 38 U.S.C. § 1159 (2006).

226. 651 F.3d 1296 (Fed. Cir. 2011).

227. *Id.* at 1300.

228. *Id.* at 1298.

229. *Id.*

230. *Id.* at 1299.

231. *Id.*

232. *Id.*

233. *Id.* (citing *Read v. Shinseki*, No. 07-3461, 2009 WL 3367647, at *1 (Vet. App. Oct. 21, 2009), *aff'd*, 651 F.3d 1296 (Fed. Cir. 2011)).

234. *Id.* at 1297-98.

connection when it was not warranted.”²³⁵ It continued to discuss how a 1954 review of over one million claims led to thousands of severances and reductions, which provoked a backlash that led to the passage of § 1159.²³⁶ The opinion concluded its historical prelude by stating that “Congress intended by this statute to ‘merely freeze[] the determination of service connection, that is . . . the finding by the Veterans Administration that the disability was incurred or aggravated by military service.’”²³⁷

The formal analysis of the *Read* opinion follows logically from the background provided before the recitation of the facts. The court concluded that the protection statute applies to only the element of service connection and not to the details of the disability rating awarded.²³⁸ Thus, the court stated that, “[b]ecause § 1159 does not protect the fact of a disability . . . the change in the determination of the applicable Diagnostic Code likewise is unprotected.”²³⁹ This conclusion, however, was not enough to put an end to the matter.

Rather, the opinion continued to address in detail the appellant’s contention that the change in diagnostic code had the effect of severing service connection for his disability to Muscle Group XIII, even though the change effectively granted service connection for a disability to a different muscle group.²⁴⁰ The Federal Circuit rejected this argument for three reasons. First, it held, based upon the applicable regulation, that “the disability for which service connection is protected is more generally associated with the veteran’s inability to perform certain acts.”²⁴¹ Accordingly, changing the diagnostic code was permissible when the new code was still associated with the same limitations. Second, the court concluded that this interpretation was consistent with the legislative purpose, which “was to protect veterans with long-standing determinations of service connection from suddenly having the determination of service-connection stripped.”²⁴² Third, the court determined that two precedential opinions of VA’s Office of General Counsel were

235. *Id.* (quoting *Miscellaneous Compensation Legislation: Hearing on H.R. 113 and H.R. 660 Before the Subcomm. on Compensation and Pensions of the H. Comm. on Veterans Affairs*, 86th Cong. 2208, 2198–99 (1960) (statement of Rep. Frank E. Smith, author of H.R. 660)).

236. *Id.*

237. *Id.* at 1298 (quoting S. REP. NO. 86-1394, at 1 (1960), *reprinted in* 1960 U.S.C.A.N. 2338 (1960)).

238. *Id.* at 1300.

239. *Id.*

240. *Id.* at 1301.

241. *Id.* (citing 38 C.F.R. § 4.40 (2011)).

242. *Id.*

entitled to deference under *Skidmore v. Swift & Co.*,²⁴³ to the extent that they concluded that correcting an inaccurate location or diagnosis was a non-substantive change.²⁴⁴

Read is an interesting and unusual case because, instead of applying the *Gardner* presumption as to Congress's intent, the court analyzed the legislative history of the provision to determine its specific intent as to the provision at hand. That the court performs this type of analysis so infrequently is a testament to how much of the history of the statute and regulation are lost because of its New Deal origins,²⁴⁵ and because there was little need for documentation during the Iron Triangle era.²⁴⁶ Moreover, what history was created was not well preserved in an era in which there was virtually no litigation about the meaning of the laws that existed. In recent years, various legal research companies have begun to unbox much of the legislative archives from the twentieth century and make it available online. To the extent that some parts of Title 38 have legislative histories that are being unearthed, it will be interesting to see if the Federal Circuit will spend more time looking at such histories than relying on the *Gardner* presumption.

E. Procedure

In 2011, the Federal Circuit published four opinions concerning the procedures used to process veterans claims. Whereas most of the other published decisions of the court were reviews of unpublished, single-judge CAVC decisions, it is indicative of the importance of procedure to the veterans benefits system that three of the four cases on procedure reviewed divided, en banc opinions by the CAVC.

On the surface, the procedure for deciding veterans claims is straightforward. Claimants receive an initial decision from the local regional office (RO).²⁴⁷ They may dispute an unfavorable decision by

243. 323 U.S. 134 (1944).

244. *Read*, 651 F.3d at 1302 (citing *Wanless v. Shinseki*, 618 F.3d 1333, 1338 (Fed. Cir. 2010) (applying the standard of deference required by *Skidmore v. Swift & Co.*, 323 U.S. at 140)).

245. Much of the statutory language traces to executive orders issued in the wake of the Economy Act of 1933. See *Ridgway*, *supra* note 49, at 181 n.306 (comparing the language of those orders to the current provisions of Title 38). However, the true authorship of those orders remains unknown. *Id.* (citing WILLIAM PYRLE DILLINGHAM, *FEDERAL AID TO VETERANS 1917–1941*, at 38, 74–75 (1952)).

246. See *id.* at 188–89 (discussing the Iron Triangle); see also PAUL C. LIGHT, *FORGING LEGISLATION 5* (1992) (describing the Iron Triangle of the veterans lobby, the Veterans Administration, and the House and Senate Veterans committees as “a political force to be reckoned with”).

247. DOUGLAS REID WEIMER, *CONG. RESEARCH SERV.*, RL 33704, *VETERANS AFFAIRS: THE APPEAL PROCESS FOR VETERANS' CLAIMS* 1 n.3 (2011).

filing a Notice of Disagreement (NOD) within a year of that decision.²⁴⁸ A claimant may submit new evidence before, with, or after filing a NOD.²⁴⁹ However, if the claim were not granted, then the RO would issue a Statement of the Case (SOC), which would summarize the evidence and the law so that the claimant could better understand the decision.²⁵⁰ The claimant would next perfect an appeal by filing a Substantive Appeal with the BVA.²⁵¹ The BVA then would issue a decision, which must address not only all the issues raised by the claimant, but also any issue reasonably raised by the record.²⁵² If the BVA were to deny a claim, then the BVA decision may be appealed to the CAVC by filing a Notice of Appeal within 120 days of the BVA decision.²⁵³ However, the process could be complicated by a number of factors due to the informal nature of the system, the myriad of additional procedures designed to protect claimants, and the difficulties that arise when the veteran has multiple claims that may or may not be processed together.²⁵⁴ The veterans law cases in 2011 provide a good sample of the issues that can surface.

1. *Notice of Disagreement*

One of the first issues that arises is determining exactly which RO actions are properly classified as decisions that can be appealed. In *Hargrove v. Shinseki*,²⁵⁵ the court held that the CAVC acted properly in denying a pro se petition for mandamus asking VA to treat correspondence filed prior to a final RO determination as an NOD.²⁵⁶ The veteran in *Hargrove* received a letter proposing to reduce his disability rating and notifying him that he had sixty days to submit evidence demonstrating that his rating should not be reduced.²⁵⁷ In response, the veteran sent three different letters, which objected to the reduction, submitted additional evidence, and asked for copies of the evidence supporting the reduction.²⁵⁸ The regional office did not treat any of these letters as an NOD, nor otherwise place the issue

248. 38 C.F.R. § 20.302 (2011).

249. *Id.* § 20.800.

250. *Id.* § 19.29.

251. *Id.* § 19.30.

252. *Id.* § 19.7.

253. WEIMER, *supra* note 247, at 12.

254. See generally Ridgway, *supra* note 72, at 273–78 (describing how the system struggles to balance complexity and informality).

255. 629 F.3d 1377 (Fed. Cir. 2011).

256. *Id.* at 1379.

257. *Id.* at 1378.

258. *Id.*

into appellate status.²⁵⁹ Eventually, the RO issued a final decision reducing the veteran's rating.²⁶⁰

Rather than filing an indisputable NOD as to the final rating decision, the veteran filed a pro se petition for a writ of mandamus with the CAVC.²⁶¹ The petition sought recognition of the veteran's pre-decision correspondence as a NOD and an order requiring VA to issue a SOC.²⁶² The CAVC denied the petition in a single-judge order.²⁶³ The order concluded that the veteran had an adequate remedy without a writ because, at the time the CAVC issued its order, the time period for filing an NOD had not yet expired.²⁶⁴ The veteran appealed pro se to the Federal Circuit.²⁶⁵

On appeal, the Federal Circuit agreed with the CAVC in a short opinion by Judge Moore: "In light of the fact that Mr. Hargrove had an adequate alternative means to attain the relief he requested, the Veterans Court properly denied the writ of mandamus."²⁶⁶ However, Judge Moore was careful not to express an opinion as to whether VA should have or could have treated the pre-decisional correspondence as a NOD.²⁶⁷ Instead, the opinion focused on the conclusion that mandamus was properly denied because the veteran did not need court intervention at that point to achieve his goal of appealing his claim.

Judge Newman dissented. Whereas the majority characterized the appellant's letters as "disagreeing with the proposed reduction,"²⁶⁸ Judge Newman's dissent referred to each one as a "Notice of Disagreement."²⁶⁹ In Judge Newman's view, even if the NODs were defective, VA would be obligated to respond and explain that there was a problem.²⁷⁰ She contended that it was unacceptable for the Federal Circuit to "ratif[y] the VA inaction whereby the three Notices of Disagreement were ignored by the Regional Office, with no notice to the veteran," and the court's decision was "an affront to 'the

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Hargrove v. Shinseki*, No. 09-2657, 2009 WL 3493019, at *3 (Vet. App. Oct. 27, 2009), *aff'd*, 629 F.3d 1377 (Fed. Cir. 2011).

264. *Hargrove*, 629 F.3d at 1378.

265. *Id.*

266. *Id.* at 1379.

267. *Id.*

268. *Id.* at 1378.

269. The precise phrasing of the letters is not clear from either the Federal Circuit's or the CAVC's decisions.

270. *Hargrove*, 629 F.3d at 1381 (Newman, J., dissenting).

principles underlying this uniquely pro-claimant system.”²⁷¹

Hargrove highlights two approaches to the veterans benefits system and what it means to be “veteran friendly.” The approach that the majority used focuses on the law and its requirements. Under that approach, veteran friendliness helps claimants complete the process even though their submissions are imperfect. In contrast, Judge Newman’s view focuses on the intent of the claimant. In that view, veteran friendliness requires front-line adjudicators to analyze clearly defective submissions and respond with guidance as to how the claimant might achieve his or her apparent goal. Obviously, the law-centric and claimant-centric views of how lay adjudicators should behave in an informal system sometimes produce different outcomes. However, it is not clear that the Federal Circuit’s jurisprudence consistently chooses one view over the other.

2. *Substantive Appeal*

Rivera v. Shinseki,²⁷² an example of a more claimant-centric view of the system, contrasts nicely with *Hargrove*. *Rivera* dealt with the requirement that a claimant must file a Substantive Appeal to perfect an appeal to the BVA, as this requirement existed prior to the passage of the VJRA.²⁷³ Then, as now, Title 38 required an appellant to “set out specific allegations of error of fact or law, such allegations [being] related to specific items in the statement of the case,” and gave the BVA the discretion to “dismiss any appeal which fail[ed] to allege specific error of fact or law in the determination being appealed.”²⁷⁴ In addition, prior to the VJRA, the law contained a presumption that “[t]he appellant will . . . [agree] with any statement of fact contained in the statement of the case to which no exception is taken.”²⁷⁵

In 1979, the veteran in *Rivera* sought to reopen a previously denied claim, but VA denied the request because the evidence submitted was merely cumulative.²⁷⁶ The veteran filed a NOD, the VA issued a SOC, and eventually the veteran sent a letter asking about the status of his appeal.²⁷⁷ VA instructed the veteran to file a Substantive Appeal, but he replied that he had already filed one and asked the RO to search

271. *Id.* (quoting *Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Cir. 2010)).

272. 654 F.3d 1377 (Fed. Cir. 2011).

273. *Id.* at 1379–80.

274. 38 U.S.C. §§ 7105(d)(3), (5) (2006).

275. *Id.* § 4005(d)(4).

276. *Rivera*, 654 F.3d at 1378.

277. *Id.*

for it.²⁷⁸ The RO replied that it did not have one on file and informed him that he needed to submit a Substantive Appeal within thirty days or no further action would be taken.²⁷⁹ The veteran did not respond to that letter.²⁸⁰ Fourteen years later, the veteran reopened his claim again and prevailed.²⁸¹ He then disputed the effective date assigned on the basis that his 1979 claim had been pending until his present claim was granted.²⁸²

In a lengthy en banc opinion, a majority of the CAVC determined that the veteran's 1979 claim was not pending.²⁸³ The essential issue was whether the letter insisting that a Substantive Appeal had already been filed could, by itself, qualify as a Substantive Appeal.²⁸⁴ The majority concluded that it could not for a number of reasons.²⁸⁵ The majority noted that the Substantive Appeal requirement was added in 1962 and explained that

[t]he act required VA for the first time to fully explain its decisions through a new procedure called the Statement of the Case. However, the act balanced this new disclosure rule with a requirement that claimants respond to the SOC with a Substantive Appeal that must clearly identify the benefits sought and should set out specific allegations of error of fact or law . . . related to specific items in the [S]tatement of the [C]ase.²⁸⁶

As a result, the CAVC determined that, “[b]ased on the language, history, and complete structure of the statute creating the Substantive Appeal procedure,” the statute was to be “interpreted as placing a burden on claimants to expand upon their initial disagreement with the RO decision by setting forth—however inartfully—a particular theory of error for the Board to decide.”²⁸⁷ In so holding, the veterans court noted that the Federal Circuit described the Substantive Appeal requirement in *Collaro v. West*²⁸⁸ by explaining

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* For a detailed discussion of the pending claim doctrine, see John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145 (2010).

283. *Ortiz v. Shinseki*, 23 Vet. App. 353 (2010) (en banc), *rev'd sub nom.* *Rivera v. Shinseki*, 654 F.3d 1377 (Fed. Cir. 2011). The veteran died during the pendency of the case; therefore, the Federal Circuit case is captioned with his widow's name. *Rivera*, 654 F.3d at 1379.

284. *Ortiz*, 23 Vet. App. at 359.

285. *Id.*

286. *Id.* at 357 (quoting Pub. L. No. 87-666, § 1, 76 Stat. 553, 553–54 (1962)) (internal quotation marks omitted).

287. *Id.*

288. 136 F.3d 1304 (Fed. Cir. 1998).

“that the ‘statutory and regulatory regime that Congress created to protect veterans’ allows a claimant to file a ‘vague NOD’ and at a later time ‘cut the rough stone of his NOD to reveal the radix of his issue that lay within.’”²⁸⁹

In more general terms, the majority opinion explained its reasoning: “Fundamentally, a liberal reading is a relative concept. It does not eliminate the relevant procedural requirement. However, it does require VA to be generous in interpreting a submission in light of what the Secretary needs from the claimant to continue the process.”²⁹⁰ The court concluded that the information required to process a Substantive Appeal falls in between that of a NOD, which requires only the basic intent to dispute a decision, and that of a clear-and-unmistakable-error motion, which requires a specific error and an explanation of how the outcome of the decision would have been different.²⁹¹ The majority also buttressed this part of its discussion by observing that the Federal Circuit’s decision in *Robinson v. Shinseki*²⁹² cited the requirements of a valid Substantive Appeal in support of the proposition that the veteran-friendly nature of the system does not “entirely relieve[]” veterans of the “obligation to raise issues in the first instance before the VA.”²⁹³

In applying its reasoning, the majority noted that it was clear that the veteran was dissatisfied with the decisions, but that “mere dissatisfaction is the essence of an NOD.”²⁹⁴ Therefore, “[i]n the absence of an identifiable error for the Board to address, [the veterans court could not] conclude that this correspondence satisfie[d] the requirements of a Substantive Appeal.”²⁹⁵

The CAVC opinion provoked two dissenting opinions. First, Judge Kasold, joined by Chief Judge Greene, asserted that the appellant was not required to set forth any allegations of error because the statutory term “should” does not mean the same as the term “must.”²⁹⁶ Judge Kasold noted that such a reading is not always required and argued that an interpretation more favorable to veterans was required under *Gardner*.²⁹⁷ Judge Kasold’s dissent also argued that a liberal reading of the veteran’s correspondence, asserting that he had already filed a

289. *Ortiz*, 23 Vet. App. at 357 (quoting *Collaro*, 136 F.3d at 1308–09).

290. *Id.* at 358.

291. *Id.* at 358–59.

292. 557 F.3d 1355 (Fed. Cir. 2009).

293. *Id.* at 1361.

294. *Ortiz*, 23 Vet. App. at 360.

295. *Id.*

296. *Id.* at 363 (Kasold, J., dissenting).

297. *Id.* at 364.

Substantive Appeal, allowed the court to perceive that the requirement was satisfied because there was only one issue that the veteran could have been disputing: the determination that he had not submitted new and material evidence.²⁹⁸ Second, Chief Judge Greene filed a separate dissent arguing that, regardless of the adequacy of the submission, the 1979 claim remained pending because VA had not followed proper procedure, as it had not forwarded the matter to the BVA for a final decision on the timeliness question.²⁹⁹

The CAVC majority rejected Judge Kasold's liberal-reading argument, noting that

there are any number of possible errors that could be alleged. For example, the appellant could have asserted that the RO failed to address a particular piece of evidence in the record, that the RO erred in its interpretation of the new evidence it discussed, that the original decision was never final, or that some aspect of the substantive law was misapplied. Accordingly, the fact that the Board could identify the claim does not demonstrate that it could identify any particular substantive, procedural, developmental, or notice error.³⁰⁰

The majority also rejected Chief Judge Greene's argument in a footnote, noting that the timeliness dispute was separate from the underlying merits, so any delay in ruling on it did not keep the original claim alive.³⁰¹

In a panel opinion authored by Judge Bryson, the Federal Circuit reversed the CAVC's opinion.³⁰² The analysis began by noting that the familiar principle that a veteran's submissions must be read sympathetically existed even prior to the VJRA.³⁰³ The court then characterized the CAVC's holding as "requir[ing] an appellant to present 'a particular theory of error for the Board to decide' and to 'explain why the [Statement of the Case] was in error,'"³⁰⁴ before it shifted to the heart of its analysis.

Most of the Federal Circuit opinion was devoted to discussing how the CAVC opinion was flawed in substantial part because it misread

298. *Id.*

299. *Id.* at 366 (Greene, C.J., dissenting).

300. *Id.* at 360 (majority opinion).

301. *Id.* at 362 n.2.

302. *Rivera v. Shinseki*, 654 F.3d 1377 (Fed. Cir. 2011).

303. *Id.* at 1380 (citing 38 C.F.R. § 19.116 (1980)).

304. *Id.* (quoting *Ortiz*, 23 Vet. App. at 357, 362). The quotation in the Federal Circuit's opinion notably omitted the "however inartfully" language that the CAVC used in the sentence from which the first part of the quote was taken.

the legislative history of the Substantive Appeal provision.³⁰⁵ The Federal Circuit's decision observed that "the requirement that claimants set out specific allegations of error in their substantive appeals was not adopted to balance the agency's obligation to issue a statement of the case, but was of much earlier vintage."³⁰⁶ The court explained that the original executive order establishing the BVA in 1933 had language similar to the current substantive appeal requirement.³⁰⁷ "Accordingly, before 1962, veterans were required to identify specific errors of fact or law for the Board to review, even though they did not have the benefit of the agency's statement of the case explaining the reason for the regional office's decision."³⁰⁸

Judge Bryson's opinion then presented a different view of the purpose of the Substantive Appeal requirement. He noted that multiple claims are often decided together, and that specificity in an appeal is important in such a circumstance.³⁰⁹ In contrast, "less specificity is necessary when the regional office's decision turns on only a single issue and the nature of the claimed error with respect to that issue is obvious from the decision itself."³¹⁰ In Judge Bryson's view, "when the regional office decides only one issue and references only one issue in the statement of the case, the veteran's expression of a desire to appeal from the regional office's decision effectively identifies the issue to be decided by the Board."³¹¹ Thus, the Federal Circuit sided with Judge Kasold's dissent in the CAVC's consideration of the case.

Perhaps the most notable part of *Rivera* is how it engaged only with specific parts of the CAVC opinion and did not discuss key aspects of the government's argument on appeal. The government's argument emphasized both the pre-VJRA presumption that an appellant agrees with any factual finding that was not specifically disputed and the Secretary's interpretation of the disputed language as set forth in the implementing regulations.³¹² However, the court did not even address these issues. Furthermore, the opinion also did not discuss the portions of *Collero* and *Robinson* cited by the CAVC. This focus on the CAVC's opinion rather than the arguments presented is quite

305. *Id.* at 1380–81.

306. *Id.* at 1380.

307. *Id.* at 1380–81 (citing Exec. Order No. 6230, pt. 2, § 1 (1933)).

308. *Id.* at 1381.

309. *Id.*

310. *Id.*

311. *Id.*

312. Brief for Respondent-Appellee at 22–27, *Rivera*, 654 F.3d 1377 (No. 06-932), 2011 WL 882039, at *23–27.

different from the final two opinions that will be discussed.

3. Board decision

Once an appeal is perfected and decided by the BVA, it may be appealed to the CAVC. However, the BVA routinely addresses a wide variety of topics and remands some, but not all, of the matters addressed. When this occurs, it is not always clear how much of the BVA decision is final and therefore immediately appealable to the CAVC.

In *Tyrues v. Shinseki*,³¹³ the Federal Circuit, in a decision by Chief Judge Rader, rejected the argument that the finality of a BVA decision can be indeterminate and subject to the claimant's discretion as to whether to appeal.³¹⁴ Mr. Tyrues served in the Persian Gulf War.³¹⁵ Three years later, he developed tonsillitis and pneumonia.³¹⁶ In 1995, he applied for compensation benefits under 38 U.S.C. § 1110; in 1996, he applied for compensation for Persian Gulf Syndrome under 38 U.S.C. § 1117.³¹⁷ The two matters were handled together, and the BVA denied direct compensation and remanded the question of Persian Gulf Syndrome in 1998.³¹⁸ The BVA again denied Mr. Tyrues's Persian Gulf claim, and the BVA affirmed the denial in 2004.³¹⁹

On appeal to the CAVC, Mr. Tyrues tried to raise arguments relying on § 1110. In a sharply divided opinion, the en banc CAVC held that it did not have jurisdiction to hear those arguments.³²⁰ Six of the seven judges agreed that the two theories of compensation were part of the same claim because they pertained to the same disability.³²¹ That majority split, however, on the issue of how to

313. 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 75 (2011) (mem.).

314. *Id.* at 1383.

315. *Id.* at 1381.

316. *Id.*

317. *Id.* at 1382.

318. *Id.*

319. *Id.*

320. *Tyrues v. Shinseki*, 23 Vet. App. 166, 168 (2009) (en banc), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 75 (2011) (mem.).

321. The CAVC previously held that the scope of the claim is not limited to the theory originally advanced by the lay claimant:

For purposes of the claim and its adjudication, it matters little that the appellant believes his symptoms should be diagnosed as [one condition] if the medical evidence establishes that his symptoms are actually something different. And, the fact that the appellant may be wrong about the nature of his condition does not relieve the Secretary of his duty to properly adjudicate the claim.

Clemons v. Shinseki, 23 Vet. App. 1, 6 (2009) (per curiam); *see also* *Ingram v. Nicholson*, 21 Vet. App. 232, 256–57 (2007) (per curiam) (“[I]t is the Secretary who knows the provisions of title 38 and can evaluate whether there is potential under the

interpret the CAVC's jurisdiction in the frequently-occurring cases in which the BVA issues a decision denying one theory within a claim, but remanding another.³²² The CAVC majority held that, in such a situation, the denied theory must be appealed immediately.³²³ The majority reasoned that requiring an immediate appeal would provide claimants with prompt review, and that such decisions provide claimants with reasonable notice that the denied theory must be immediately appealed.³²⁴ The dissenting judges disputed the argument that all claimants would reasonably understand the need to immediately appeal one aspect of a claim when another aspect was being remanded for further proceedings.³²⁵ The dissent also argued that the theory-based rule of finality could not be workably applied to many of the procedural provisions in Title 38 that speak in terms of claims.³²⁶

The Federal Circuit's opinion is somewhat confusing. Although the central dispute at the CAVC was how to handle a single claim that had been bifurcated, in exploring the facts, the Federal Circuit opinion described the situation as involving two separate claims.³²⁷ This may have had something to do with the fact that Mr. Tyrues did not side with any of the competing opinions in the CAVC's opinion. Instead, he argued that the veteran had the discretion either to appeal a denial in a "mixed decision" immediately or wait until the remanded portion is resolved.³²⁸

Chief Judge Rader's opinion for the Federal Circuit rejected the appellant's argument. It relied heavily on *Elkins v. Gobe*³²⁹ in holding that "[s]eparate claims are separately appealable."³³⁰ As to the critical issue of timing, the opinion emphasized that "[p]ublic policy supports allowing veterans to appeal denied claims as quickly as

law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission.").

322. *Tyrues*, 23 Vet. App. at 178–79.

323. *Id.* at 179, 181.

324. *Id.*

325. *Id.* at 194 (Lance, J., dissenting).

326. *Id.* at 195 ("[T]he majority opinion fails to address any of these [procedural] issues, [and] it puts the Court on course to simply mark out every instance of the word 'claim' in title 38 and pencil in 'theory' in order to make the statute functional.").

327. *Tyrues v. Shinseki*, 631 F.3d 1380, 1382 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 75 (2011) (mem.).

328. *Id.* at 1383. The misstatement of the posture of the case may be related to the phrasing of the appellant's brief, which is phrased throughout in terms of the CAVC's jurisdiction over "mixed decision" claims. Appellant's Opening Brief at 9, 15, 18, 24, *Tyrues*, 631 F.3d 1380 (No. 04-584), 2010 WL 617385, at *9, *15, *18, *24.

329. 229 F.3d 1369 (Fed. Cir. 2000).

330. *Tyrues*, 631 F.3d at 1383.

possible.”³³¹ It then reasoned that “this paramount goal is best achieved by allowing appeals once the Board makes an individual claim final.”³³² Accordingly, the opinion concluded that “all final decisions, even those appearing as part of a mixed decision, must be appealed within 120 days from the date of mailing of notice of the decision.”³³³

Notably, the opinion did not wade into the practical and interpretive disagreements that divided the CAVC below. Instead, the opinion commented that the Federal Circuit “encourages the Veterans Court to exercise its jurisdiction as needed to promote judicial efficiency and fairness when handling mixed decisions.”³³⁴

The Federal Circuit will have a second opportunity to address the case, however, and perhaps wade into the issues that divided the court below. This term, the Supreme Court, in light of *Henderson v. Shinseki*,³³⁵ granted certiorari in *Tyrues*, vacated the opinion, and remanded the case for reconsideration.³³⁶ In particular, the petition for certiorari was filed by new counsel, who framed the issue as it had been by the CAVC: “[W]hether the time limit in Section 7266(a) requires the filing of an appeal when only one of two theories of entitlement had been finally adjudicated, or whether the veteran has the discretion to defer an appeal until all theories of entitlement have been finally decided.”³³⁷ This case is certainly worth keeping an eye on in 2012.

4. Severance of benefits

The final veterans law case of 2011 was also a procedural case and a split, en banc decision by the CAVC. In *Roberts v. Shinseki*,³³⁸ the CAVC was divided in its determination of the procedures that VA must follow in severing an award of service connection that has been in effect for more than ten years.³³⁹ Pursuant to 38 U.S.C. § 1159, a

331. *Id.* at 1384.

332. *Id.*

333. *Id.* at 1385.

334. *Id.* at 1384.

335. 131 S. Ct. 1197 (2011).

336. *Tyrues v. Shinseki*, 132 S. Ct. 75 (2011) (mem.).

337. Petition for Writ of Certiorari at i, *Tyrues*, 132 S. Ct. 75 (No. 10-1405), 2011 WL 1853076, at *i.

338. 23 Vet. App. 416 (2010) (en banc), *aff'd in part, rev'd in part*, 647 F.3d 1334 (Fed. Cir. 2011), *reh'g and reh'g en banc denied*, 647 F.3d 1334 (Fed. Cir. 2011), *cert. denied*, No. 11-603, 2012 WL 895974 (U.S. Mar. 19, 2012).

339. Compare *id.* at 425 (finding that severance based on fraud was an exception to normal substantive due process procedures), with *id.* at 439 (Hagel, J., concurring in part and dissenting in part) (arguing that a finding of fraud alone should not deprive a veteran of certain due process protections).

grant of service connection that is greater than ten years old may not be severed “except upon a showing that the original grant of service connection was based on fraud.”³⁴⁰ The implementing regulation states in part that “[t]he 10-year period will be computed from the effective date of the Department of Veterans Affairs finding of service connection to the effective date of the rating decision severing service connection, after compliance with section 3.105(d).”³⁴¹ In turn, section 3.105(d), which is not specific to protected ratings, provides that “[s]ubject to the limitations contained in . . . [section] 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government).”³⁴²

The specific issue raised by the facts in *Roberts* was whether VA was obligated to investigate and adjudicate alternative bases of entitlement prior to severing benefits after determining that the basis of the original award was fraudulent.³⁴³ The veteran in *Roberts* was awarded service connection for PTSD based upon his alleged presence at an accident where another service member was killed.³⁴⁴ A decade after the initial award of benefits, the veteran complained to VA’s Office of the Inspector General that his claim was being mishandled, but the investigation of the claim ultimately uncovered copious evidence that the veteran was not actually present at the accident upon which he based his claim.³⁴⁵ VA acted to sever his benefits and referred the matter to the U.S. Attorney’s Office for the Eastern District of Wisconsin, eventually resulting in the conviction of the veteran on five counts of wire fraud.³⁴⁶

On appeal to the CAVC, the appellant argued that there was evidence in the record suggesting that he could have been awarded service connection for PTSD based upon an alternative stressor.³⁴⁷ In the appellant’s view, section 3.105(d) required VA to show that the

340. 38 U.S.C. § 1159 (2006). The statute also allows for severance upon a showing that the claimant “did not have the requisite service or character of discharge.” *Id.*

341. 38 C.F.R. § 3.957 (2011).

342. *Id.* § 3.105(d).

343. *Roberts v. Shinseki*, 647 F.3d 1334, 1335 (Fed. Cir. 2011), *reh’g and reh’g en banc denied*, 647 F.3d 1334 (Fed. Cir. 2011), *cert. denied*, No. 11-603, 2012 WL 895974 (U.S. Mar. 19, 2012).

344. *Id.* at 1337.

345. *Id.* at 1337–38.

346. *Id.* at 1338–39.

347. *Roberts v. Shinseki*, 23 Vet. App. 416, 441 (2010) (en banc) (Hagel, J., concurring in part and dissenting in part), *aff’d in part, rev’d in part*, 647 F.3d 1334 (Fed. Cir. 2011), *reh’g and reh’g en banc denied*, 647 F.3d 1334 (Fed. Cir. 2011), *cert. denied*, No. 11-603, 2012 WL 895974 (U.S. Mar. 19, 2012).

award was clearly and unmistakably erroneous after considering all possible theories of entitlement.³⁴⁸ The majority of the CAVC rejected the argument that section 3.105(d) had any application at all, based upon the introductory sentence indicating that section 3.957 was an exception.³⁴⁹ The opinion went on to discuss the history of two regulations in great detail as further support.³⁵⁰ Accordingly, the court concluded that “the provisions of section 3.105 do not apply to cases involving severance of service connection based upon fraud.”³⁵¹

Judge Hagel disputed the majority’s conclusion about the applicability of section 3.105(d) and the scope of VA’s duties when severing service connection, filing a dissenting opinion that was joined by Judge Schoelen.³⁵² The dissent responded to the majority’s regulatory history with several pages of its own analysis,³⁵³ and also disputed the majority’s interpretation of section 3.957.³⁵⁴ The dissent concluded that the severance was improper and should be reversed because the evidence was insufficient to show clearly and unmistakably that the veteran was not entitled to service connection for PTSD under any theory.³⁵⁵

The appellant also argued that the matter should not have been adjudicated by VA, but should have been referred to an external administrative law judge pursuant to the Program Fraud Civil Remedies Act (PFCRA).³⁵⁶ However, the CAVC unanimously agreed in one paragraph that the PFCRA did not apply because the amount involved was greater than \$150,000, which put the case outside the reach of the Act.³⁵⁷

Finally, the CAVC concluded that the BVA erred in not addressing the appellant’s entitlement to service connection for dysthymia and depression independent of PTSD.³⁵⁸ This conclusion provoked a dissent from Judge Lance, who argued that remand was unjustified because the appellant never argued for a remand on that basis.³⁵⁹

On appeal to the Federal Circuit, the court affirmed the CAVC’s

348. *Id.* at 424 (majority opinion).

349. *Id.* at 424–25.

350. *Id.* at 426–27.

351. *Id.* at 428.

352. *Id.* at 432 (Hagel, J., concurring in part and dissenting in part).

353. *Id.* at 432–39.

354. *Id.* at 439–40.

355. *Id.* at 440–49.

356. Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, 100 Stat. 1934 (codified at 31 U.S.C. §§ 3801–12 (2006)).

357. *Roberts*, 23 Vet. App. at 424.

358. *Id.* at 430–31.

359. *Id.* at 450 (Lance, J., concurring in part and dissenting in part).

decision in Judge O'Malley's first precedential opinion on veterans law. However, the focus of the Federal Circuit's opinion was substantially different. Initially, the opinion noted that "[the court] express[ed] no opinion on those portions of the opinion that the parties have not challenged on appeal. Specifically, [it] pass[ed] no judgment on the Veterans Court's holding that severance of benefits based on fraud is not subject to a clear and unmistakable error (CUE) analysis under 38 C.F.R. § 3.105(d)."³⁶⁰ Later, the court explained that it would not address the portion of the decision that resulted in Judge Lance's dissent because the government was not challenging it.³⁶¹

Instead, the court focused most of its analysis on the PFCRA issue that consumed only one paragraph of the thirty-four pages of opinions below. Judge O'Malley's opinion went into substantially greater detail than the CAVC opinion, but reached the same conclusion. It noted that the PFCRA is a "sister scheme" to the False Claims Act, but that "[t]he legislative history of the PFCRA indicates that it was intended to address 'small-dollar cases' of fraud against the government because, in such cases, the 'cost of litigation generally exceeds the amount recovered, thus making it economically impractical for the Justice Department to go to court.'"³⁶² Accordingly, the Act has been expressly limited to claims involving \$150,000 or less.³⁶³ The opinion rejected the appellant's argument that the dollar amount was not a jurisdictional limit; it noted that the case relied upon for that proposition involved an amount over \$150,000 only because the final award included additional penalties and damages that had been added to the original amount of the fraud.³⁶⁴

In addition to the jurisdictional limit addressed by both courts, the Federal Circuit also held that the remedies provided by the PFCRA were not exclusive, but rather were "in addition to any other remedy that may be prescribed by law."³⁶⁵ It rejected the argument that the appellant was denied due process because the PFCRA's procedures

360. *Roberts v. Shinseki*, 647 F.3d 1334, 1335 n.1 (Fed. Cir. 2011), *reh'g and reh'g en banc denied*, 647 F.3d 1334 (Fed. Cir. 2011), *cert. denied*, No. 11-603, 2012 WL 895974 (U.S. Mar. 19, 2012).

361. *Id.* at 1338 n.3.

362. *Id.* at 1340 (quoting H.R. REP. NO. 99-1012, at 257-59 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3868, 3902-04).

363. *Id.*

364. *Id.* at 1341 (discussing *Orfanos v. Dep't of Health & Human Servs.*, 896 F. Supp. 23 (D.D.C. 1995)).

365. *Id.* (quoting 31 U.S.C. § 3802(a)(1) (2006)).

were not employed.³⁶⁶ It detailed the procedures followed by VA, and found no justification for any conclusion that they do not satisfy constitutional requirements.³⁶⁷

The opinion concluded with a short discussion of the appellant's argument that the BVA was obligated to consider other potential stressors before severing his benefits for PTSD.³⁶⁸ After detailing the BVA's finding and quoting the CAVC's conclusion on the issue, the opinion simply stated: "We agree with the Veterans Court."³⁶⁹

Roberts is notable for its similarity to *Tyrues* as opposed to *Rivera*. In both *Roberts* and *Tyrues*, the Federal Circuit focused on the appellant's arguments and did not go beyond them to address the sharp divisions within the CAVC that were expressed in lengthy and detailed opinions. As the *Tyrues* court said little more than that it encouraged the CAVC to promote fairness and efficiency,³⁷⁰ *Roberts* simply agreed with the CAVC majority without elaboration.³⁷¹ The Federal Circuit's restraint is not particularly surprising, but it does have implications that are addressed further in the statistical addendum below.³⁷²

CONCLUSION

The tiny sample of cases decided by the Federal Circuit in 2011 is much too small upon which to draw any definitive conclusions on the rules-versus-standards debate. Any preference that the Federal Circuit may have would be relative at best, and the court disagreed with the CAVC and the Secretary in only two cases in 2011, *Bond* and *Rivera*.³⁷³ Even those two cases do not provide clear data. The choice between rules and standards is not binary; rather the outcomes exist on a spectrum, and it is not always obvious how best to classify a ruling.

Bond appears to reject two different rules offered by the Secretary: (1) that the veteran's characterization of his submission is controlling;

366. *Id.* at 1343.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Tyrues v. Shinseki*, 631 F.3d 1380, 1384 (Fed. Cir. 2011), *vacated*, 132 S. Ct. 75 (2011) (mem.).

371. *Roberts*, 647 F.3d at 1343.

372. See *infra* notes 381–384 and accompanying text (tracking different judges' participation in authored opinions).

373. Of course, *Menegassi* was affirmed on the grounds that the CAVC's error was not prejudicial. *Menegassi v. Shinseki*, 638 F.3d 1379, 1383–84 (Fed. Cir. 2011). However, the legal ruling offers little insight because it was based upon an explicit example in the Federal Register and the Secretary conceded that the example given during the promulgation of the regulation showed that the veteran's interpretation was accurate. See *supra* Part III.B (discussing *Menegassi*).

and (2) that the BVA must be presumed to have determined that the evidence was not new and material.³⁷⁴ However, it is not clear how standard-like the court's outcome is. The first ruling arguably favors a fuzzier, holistic approach to interpreting a submission. The second ruling, which requires the BVA to address the issue on remand,³⁷⁵ seems more rule-like, but feels less so when contrasted with *Sickles*, which held that the BVA did not have to address an issue that was not raised to it.³⁷⁶ Accordingly, *Bond* could be classified as a case in which the court favored standards over rules in ruling against the Secretary.

Rivera fits less comfortably into this narrative. The CAVC's ruling was that a valid Substantive Appeal must set forth, "however inartfully, a particular theory of error."³⁷⁷ This standard is explicitly factual and certainly fuzzy. However, the Federal Circuit's rejection of this standard may not be significantly more rule-like. The court held that no specificity is required when a decision turns on only a single issue.³⁷⁸ Although that holding sounds more rule-like, the meaning of the word "issue" is not without ambiguity. The CAVC has noted that words such as "issue," "matter," "claim," and "theory" often have been used imprecisely in veterans law, which has led to confusion in practice.³⁷⁹ Thus, the fuzziness may have simply moved from interpreting the veteran's submission to interpreting the regional office decision that is being disputed.

Using the alternative lenses still yields tantalizing results at best. Under the *Chevron-versus-Gardner* perspective, both *Bond* and *Rivera* favor sympathetically reading veteran's submissions over granting deference to the Secretary's arguments as to how the system should operate. In turn, both of these cases represent a triumph of the case-specific interpretation of veteran friendliness over that of the system-wide viewpoint. In the end, however, two cases are far too few to make any definitive statements about the comparative preferences of the Federal Circuit.

Nonetheless, with more data, these tools may well provide a

374. See *supra* notes 154–166 and accompanying text (examining the issues in *Bond*).

375. *Bond v. Shinseki*, 659 F.3d 1362, 1369 (Fed. Cir. 2011).

376. *Sickles v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011).

377. See *supra* note 287 and accompanying text.

378. See *supra* note 311 and accompanying text (noting that when a single issue has been decided by a regional office, a veteran's appeal also conveys the nature of the issue to be appealed).

379. See *Hillyard v. Shinseki*, 24 Vet. App. 343, 355 (2011) (defining each term). In particular, the CAVC's decision in *Hillyard* noted that, "in *Disabled American Veterans v. Gober*, the Federal Circuit equated the word 'issue' with a 'claim' and *not* a theory or an element of a claim." *Id.* (citing 234 F.3d 682, 694 (2000)). However, it is not clear that *Rivera* was using the word "issue" to mean "claim."

valuable perspective in understanding the Federal Circuit's approach to veterans law. Moreover, they might be particularly useful in following its evolution. As noted above in the Introduction, the Federal Circuit is just embarking on a substantially new era and there is certainly no guarantee that it would continue in the same direction based upon any trends that might be discerned from its past cases. Even if the court's membership were to remain constant, it may be argued that appellate courts naturally vacillate over time between standard-like directives and rule-like legal commands when trying to provide guidance to lower courts.³⁸⁰ Thus, the project of truly comprehending the rules-versus-standards debate underlying veterans law is much larger than a project to digest a year's worth of cases. Even so, this Article has begun the project and, hopefully, it will eventually come to fruition.

380. See Scott Baker & Pauline T. Kim, *A Dynamic Model of Doctrinal Choice* 17–18 (Wash. Univ. in St. Louis Legal Studies Research Paper No. 12-01-04, 2011), available at <http://ssrn.com/abstract=1983446> (using game theory to argue for such a natural vacillation).

ADDENDUM

In last year's annual survey of veterans law at the Federal Circuit, Gugliuzza began a practice of providing a statistical addendum consistent with those provided in other annual surveys of the court's jurisprudence.³⁸¹ This Addendum continues that practice by providing an empirical overview of the past year along with cumulative charts that build upon the work done by Gugliuzza. To the extent that these tables and graphs use the same format, the detailed explanations of the data will not be repeated here. Of course, as noted last year, there is a great deal of room for additional data gathering and analysis.³⁸²

*Table 1: Results of Precedential Veterans Opinions,
January 1, 2011 to December 31, 2011*³⁸³

<i>Result</i>	<i>Number of Cases</i>
Affirmed	9
Reversed	1
Vacated and remanded	1
Total	11

Table 1 summarizes the outcomes of the veterans law cases at the Federal Circuit in terms of the court's agreement with the CAVC. The 81.8% affirmance rate (9 of 11) is even higher than the 78.6% rate (11 of 14) in 2010.³⁸⁴ Of course, *Menegassi* was affirmed on the grounds that the CAVC's error was not prejudicial.³⁸⁵ Nonetheless, even at 72.7% on the merits, in the realm of veterans law, the two courts continue to have a relatively high rate of agreement. As Gugliuzza noted last year, the general affirmance rate for regional circuits reviewing district court or agency decisions is 62%.³⁸⁶ However, it should also be noted that the Federal Circuit reversed and remanded three of the four EAJA decisions of the CAVC it reviewed.³⁸⁷ This would bring the CAVC's affirmance rate down to

381. See Gugliuzza, *supra* note 1, at 1258 (explaining how this addendum summarizes the Federal Circuit's veterans opinions over the past decade).

382. *Id.*

383. This table does not include Equal Access to Justice Act (EAJA) decisions.

384. Gugliuzza, *supra* note 1, at 1258.

385. *Menegassi v. Shinseki*, 638 F.3d 1379, 1383–84 (Fed. Cir. 2011).

386. Gugliuzza, *supra* note 1, at 1258–59.

387. See *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011) (reversing and remanding to determine whether the government carried its burden of proving that its position was substantially justified); *Padgett v. Shinseki*, 643 F.3d 950 (Fed. Cir.

66.7% (10 of 15). Even so, this would still be slightly above the average affirmance rate for the regional circuit courts of appeal.

*Table 2: Precedential Veterans Opinions by Judge, January 1, 2011 to December 31, 2011*³⁸⁸

<i>Judge</i>	<i>Number Authored</i>	<i>Number on Panel</i>	<i>Percentage Authored</i>	<i>Number of Separate Opinions</i>	<i>Number Authored Generating Separate Opinions</i>
Rader	1	4	25.0%	0	0
Newman	0	2	0.0%	1	0
Lourie	0	0	—	0	0
Bryson	2	3	66.7%	0	1
Linn	1	4	25.0%	0	0
Dyk	1	5	20.0%	1	0
Prost	2	3	66.7%	0	1
Moore	1	3	33.3%	0	1
O'Malley	2	3	66.7%	0	0
Reyna	0	0	—	0	0
Wallach	0	0	—	0	0
Mayer	0	0	—	0	0
Plager	0	2	0.0%	0	0
Clevenger	1	2	50.0%	0	0
Schall	0	0	—	0	0
Gajarsa	0	2	0.0%	1	0
Per Curiam	0	0	—	0	0
Total	11	33	33.3%	3	3

Unlike last year, when Judges Dyk, Friedman, and Gajarsa authored over half of the veterans law opinions of the court,³⁸⁹ the distribution

2011) (reversing a CAVC order denying a surviving spouse's application for attorney fees and expenses); *Wagner v. Shinseki*, 640 F.3d 1255 (Fed. Cir. 2011) (finding that the CAVC incorrectly denied a veteran supplemental attorney fees incurred defending his initial application for fees under EAJA).

388. This table does not include EAJA decisions.

389. *Gugliuzza*, *supra* note 1, at 1260.

this year was much more balanced. The eleven opinions were authored by eight different judges, and no judge authored more than two opinions. However, the distribution of judges participating in veterans law panels was somewhat less even, and Judge Dyk, once again, participated in more such panels than any other judge.³⁹⁰ Rather than looking at 2011 in isolation, though, combining this year's data with that already collected from the previous year provides a fuller picture, as shown below in Table 3.

390. *Id.*

*Table 3: Precedential Veterans Opinions by Judge,
January 1, 2010 to December 31, 2011³⁹¹*

<i>Judge</i>	<i>Number Authored</i>	<i>Number on Panel</i>	<i>Percentage Authored</i>	<i>Number of Separate Opinions</i>	<i>Number Authored Generating Separate Opinions</i>
Rader	1	7	14.3%	0	0
Newman	0	7	0.0%	3	0
Lourie	0	1	0.0%	0	0
Michel	0	0	—	0	0
Bryson	3	10	30.0%	0	1
Linn	1	4	25.0%	0	0
Dyk	5	11	45.5%	1	0
Prost	2	7	28.6%	0	1
Moore	2	7	28.6%	0	1
O'Malley	2	3	66.7%	0	0
Reyna	0	0	—	0	0
Wallach	0	0	—	0	0
Mayer	1	3	33.3%	0	0
Plager	1	3	33.3%	0	0
Clevenger	1	3	33.3%	0	0
Schall	0	0	—	0	0
Gajarsa	2	5	40%	1	0
Per Curiam	1	—	—	0	1
Total	25	72	—	5	5

The aggregate numbers confirm the trends that Gugliuzza observed last year. Despite the fact that judges are assigned to panels at random, there is a substantial disparity in the number of published veterans law opinions in which the different judges are involved. As mentioned above, Judge Dyk (11 cases) continues to be the most likely to be on a panel that decides to publish an opinion. He has also authored more than twice as many opinions (5) as any other

391. This table does not include EAJA decisions.

judge except Judge Bryson (3). Accordingly, an additional year of data continues to support the hypothesis that he is the judge most active in shaping veterans law at the Federal Circuit, and is consistent with other data cited by Gugliuzza that Judge Dyk is generally more inclined to push for publication of opinions with which he is involved.³⁹²

However, the other judges are not uniform in their participation. Judge Dyk's eleven precedential panels are followed closely by Judge Bryson's ten. Judge Bryson is also the only other judge to author greater than two opinions. Therefore, he also appears to be a judge to watch in the area. Notably, Judge O'Malley was involved in three published panel opinions in her first year on the court and authored two of those opinions. Accordingly, it will be interesting to see if her level of activity will trend toward that of Judges Dyk and Bryson, or will fall more in line with the remainder of the court.

Finally, the aggregate data continues to support the observation that Judge Newman is the most likely to write separately. After two years, she has authored more than half the separate opinions in the area of veterans law (3 of 5), and each separate opinion has been attached to a different majority author. No other judge has authored more than one separate opinion. Finally, no judge has authored more than one majority opinion that resulted in a concurring or dissenting opinion.

392. Gugliuzza, *supra* note 1, at 1260 (citing Gregory A. Castanias, Lawrence D. Rosenberg, Michael S. Fried & Todd R. Geremia, *Survey of the Federal Circuit's Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue with the Supreme Court*, 56 AM. U. L. REV. 793, 977 (2007)).

Table 4: Precedential Veterans Opinions by Type of CAVC Decision and Appellant, January 1, 2010 to December 31, 2011³⁹³

Type of CAVC Opinion	Number of Cases	Appealing Party (Veteran/ Secretary)	Result (Affirmed/Not Affirmed)
En Banc	3	3/0	2/1
Panel	1	1/0	1/0
Single Judge	7 ³⁹⁴	7/0	6 ³⁹⁵ /1
Total	11	11/0	9/2

These statistics were not gathered or examined by Gugliuzza, but they are worth exploring. The Federal Circuit's review of the CAVC is the only situation in the federal system, aside from Supreme Court review, in which one appellate court conducts direct review of the decisions of another.³⁹⁶ As Michael Allen has pointed out, the different types of decisions issued by the CAVC—single-judge, panel, and en banc—serve different purposes. Single-judge decisions are used primarily for error correction, whereas panel and en banc decisions tend to serve the role of law giving.³⁹⁷ Of course, the published opinions of the Federal Circuit also serve the role of law giving. Therefore, it is worth considering the correspondence between the courts in the types of review they provide.

Initially, it is noteworthy that nearly two-thirds (7 of 11) of the published opinions in veterans law cases at the Federal Circuit were in cases that were decided by a single judge below. Furthermore, in only one of those cases did the Federal Circuit's opinion indicate that the single-judge decision was clearly bound by a panel opinion of the CAVC and that the Federal Circuit would, therefore, review the relevant CAVC panel decision. Accordingly, it would seem from this small sample that the Federal Circuit tends to make law most frequently when reviewing CAVC decisions that were not intended to make law.³⁹⁸ On the one hand, it is not surprising given the volume

393. This table does not include EAJA decisions.

394. This includes *Guerra*, which expressly relied upon *Bradley*. See *supra* note 197 and accompanying text.

395. This includes *Menegassi*, which affirmed on the basis of harmless error. See *supra* notes 147–151 and accompanying text.

396. Eaton, *supra* note 1, at 1161.

397. See Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 514–18 (2007) (suggesting that the CAVC should reconsider its single-judge procedures in order to strike a better balance between law-giving and error correction).

398. The CAVC's criteria for deciding a case by a single judge are set forth in *Frankel v. Derwinski*, and include a requirement that such a case may not establish a

of cases decided by a single judge at the CAVC.³⁹⁹ On the other hand, it seems somewhat curious that only a single Federal Circuit opinion stems from direct review of a CAVC panel decision.⁴⁰⁰ Whether this small sample is representative and whether it has any important implications are beyond the scope of this Article, but it is a trend worth following.

Another specific trend that merits further examination is the Federal Circuit's treatment of en banc CAVC decisions. The CAVC decided four cases en banc in 2009 and 2010 combined. In 2011, the Federal Circuit issued published opinions in three of those cases, and the fourth remains pending after oral argument in October.⁴⁰¹ This indicates that an en banc opinion by the CAVC is a strong predictor that the Federal Circuit will review it and publish an opinion.⁴⁰²

At first blush, this is an obvious correlation to expect. It is easy to understand that the issues that the CAVC finds so momentous as to merit an en banc opinion would tend to be important enough for the Federal Circuit to address in published opinions. Indeed, William F. Fox has observed that the Federal Circuit can leave veterans law in a state of uncertainty when it casts doubt on portions of en banc CAVC decisions that it does not directly address.⁴⁰³ However, the three Federal Circuit opinions in 2011 reviewing en banc CAVC opinions undermined the hypothesis that prompt rulings by the Federal Circuit help to resolve the issues that divide the CAVC. As discussed above, those Federal Circuit opinions focused on the arguments raised by counsel with no real discussion of the CAVC opinions, while a third addressed only a portion of the authorities relied upon by the CAVC. Accordingly, these issues remain open for dispute and will likely be raised in future cases.⁴⁰⁴ Whether these issues will reemerge

new rule of law. 1 Vet. App. 23, 25 (1990).

399. See James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 151–57 (2009) (noting that the CAVC logged 614 single-judge decisions after the first twenty-one weeks of 2008).

400. This is not to say that the low number must stem from the Federal Circuit's choices about what opinions to publish. It may be that these opinions simply are not being directly appealed for some reason.

401. *Chandler v. Shinseki*, No. 2011-7030 (argued Oct. 4, 2011) (reviewing *Chandler v. Shinseki*, 24 Vet. App. 23 (2010) (en banc)).

402. As discussed above, all of the en banc CAVC opinions were divided, with at least two judges on each dissenting. Therefore, there is no data on whether a unanimous en banc opinion by the CAVC is as likely to produce a published opinion.

403. See WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 222–23 (3d ed. 2002) (discussing how *Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997), *sub silentio*, called into question CAVC's en banc decision in *West v. Brown*, 7 Vet. App. 329 (1995) (en banc)).

404. See *Nat'l Cable Television Ass'n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) (“When an issue is not argued or is ignored in a decision, such

at the Federal Circuit in the future and, if so, how the court will react, are both questions worth watching for in the future.

Finally, it is worth mentioning that the claimant was the appellant in all eleven cases that the Federal Circuit decided by precedential opinion in 2011. Although VA is not permitted to appeal BVA decisions to the CAVC,⁴⁰⁵ it may appeal adverse CAVC decisions to the Federal Circuit.⁴⁰⁶ Indeed, claimants prevail in a substantial majority of cases decided by the CAVC,⁴⁰⁷ but it appears that it is the claimants who lose the minority of cases at the CAVC who actually dominate veterans law at the Federal Circuit.

It is not surprising that appeals by the Secretary would be relatively rare. VA is certainly a sophisticated party that must understand the jurisdictional limitations of the Federal Circuit. Accordingly, it is to be expected that appeals by the Secretary would be less frequent. Yet, it would also be expected that when the Secretary does appeal a CAVC decision, it would raise a substantial legal question that merits a published opinion. Thus, it is interesting that not a single published opinion in 2011 was based upon an appeal by the Secretary.

This also raises some interesting institutional issues for the Federal Circuit. CAVC appeals are overwhelmingly resolved in favor of claimants,⁴⁰⁸ but the Federal Circuit sees only cases in which the CAVC ruled for VA; as a result, does that present the Federal Circuit a skewed perspective on the system?⁴⁰⁹ As the Federal Circuit's veterans law docket is almost exclusively appeals by appellants, does that tend to convert the court into a one-way ratchet, similar to the

decision is not precedent to be followed in a subsequent case in which the issue arises."); *see also* *Boggs v. West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999) (quoting *National Cable Television Ass'n* in the context of a veterans law case).

405. 38 U.S.C. § 7252(a) (2006).

406. *Id.* § 7292(a).

407. *See* *Ridgway*, *supra* note 399, at 154 (finding that the CAVC fully affirmed less than thirty-five percent of BVA decisions it considered).

408. It is also worth noting that the denials seen by the CAVC are not representative of the system as a whole, which grants at least some benefit to 88% of applicants. *See* *Ridgway*, *supra* note 72, at 266 (explaining how VA grants this percentage of claims for disability compensation for at least one disabling condition).

409. A similar selection issue occurs in criminal law, where double jeopardy prevents the government from appealing cases where the defendant was acquitted. *See, e.g.*, Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 343 (2002) (arguing that limiting the ability of the government to appeal acquittals on double jeopardy grounds creates incentives that cause systemic problems that may lead to more false convictions). *But see* Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1, 6–10 (2008) (arguing the problems caused by asymmetric appellate access are overblown).

CAVC?⁴¹⁰ Further attention to such structural issues underlying appeals from the CAVC to the Federal Circuit may prove a fruitful avenue of research.

*Figure 1: Precedential Opinions Reviewing the Court of Appeals for Veterans Claims, 2000 to 2011*⁴¹¹

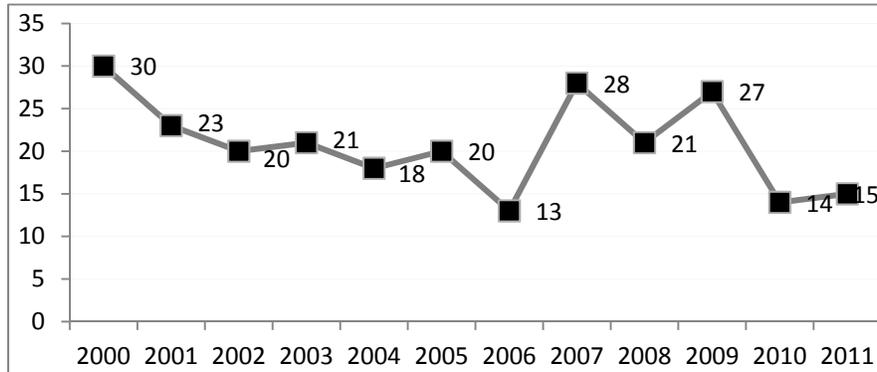


Figure 1 shows that the number of precedential veterans law opinions issued by the Federal Circuit continues to be at an ebb. Even adding the four EAJA opinions to the substantive veterans law cases still leaves 2011 near the bottom and below the average for the period.

410. See Ridgway, *supra* note 72, at 257 (noting that the CAVC has the power to affirm the status quo or move the system in favor of veterans, but cannot move the system in favor of the Secretary because the Secretary cannot appeal to argue that the BVA erred in the veteran's favor).

411. This table includes EAJA decisions. EAJA decisions are included in this data because EAJA decisions are included in the data from earlier years and in the comparative data.

Figure 2: Precedential Veterans Opinions Compared to Total Number of Dispositions by Judges Reviewing the CAVC, 2006 to 2011⁴¹²

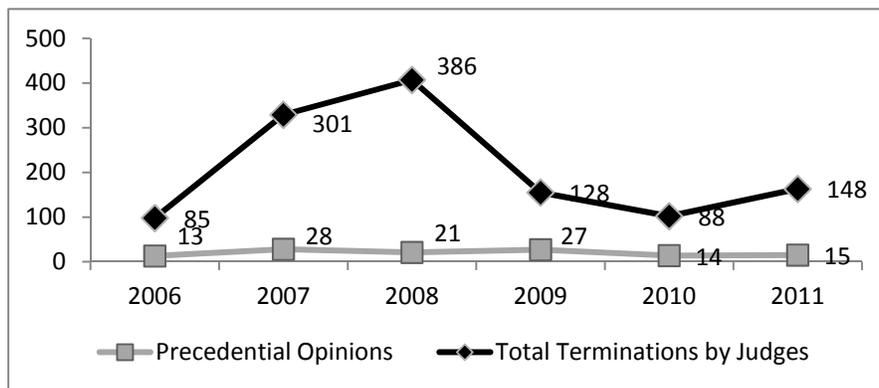


Figure 2 compares the precedential opinions reviewing decisions of the CAVC to the total number of appeals from the CAVC disposed of by judges of the Federal Circuit.⁴¹³ Given that four of the published opinions reviewing CAVC decisions addressed EAJA rather than veterans law (as opposed to last year when there were none), 2011 represents the least productive year for veterans law opinions for some time. Last year's relatively low production corresponded with a low output overall, as did the total of 13 decisions in 2006. However, it appears that even though the number of appeals from the CAVC increased recently, that has not translated into a corresponding increase in published veterans law opinions. Whether the numbers will increase in 2012, only time will tell.

412. This table includes EAJA decisions. EAJA decisions are included in this data because EAJA decisions are included in the data from earlier years and in the comparative data.

413. This methodology is different from Gugliuzza's addendum last year, which compared the total number of precedential opinions to the total number of *merits* decisions in CAVC appeals for the corresponding fiscal year. See Gugliuzza, *supra* note 1, at 1262 (depicting a chart containing both precedential opinions and total merits adjudications from 2006 to 2010). This is because the Federal Circuit has changed the data available on its website and now reports the total number of terminations by judges, apparently regardless of whether the termination was jurisdictional or on the merits. *Statistics*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/statistics.html> (click appropriate pdfs under "Appeals Filed, Terminated, and Pending" heading) (last visited Mar. 19, 2012). The totals reflect a similar trend, but are substantially higher because of the substantial number of appeals from the CAVC that are dismissed on jurisdictional grounds due to the nature of the argument presented.