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ENDING THE SECOND "SPLENDID ISOLATION"? VETERANS LAW AT THE FEDERAL CIRCUIT IN 2013

VICTORIA HADFIELD MOSHIASHWILI*

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INTRODUCTION

This Article continues the trend of reviewing the veterans benefits case law of the U.S. Court of Appeals for the Federal Circuit and related developments over the preceding calendar year.[1] Part I provides context for the issues raised by the cases before the Federal Circuit in 2013. Part II of this Article reviews changes in the

1. Previous articles include James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037 (2013) [hereinafter Ridgway, *Fresh Eyes*]; James D. Ridgway, *Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 AM. U. L. REV. 1175 (2012) [hereinafter Ridgway, *Changing Voices*]; 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); and Miguel F. Eaton et al., *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155 (2010). Although no journal produces an annual review of veterans law at the U.S. Court of Appeals for Veterans Claims ("the Veterans Court") level, its case law until 2010 has been examined by Michael Allen. *See generally* 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).

composition of the Federal Circuit that have been ongoing since 2011. Part III contains a review of the veterans law cases decided by the Federal Circuit in 2013. Part IV discusses some of the themes and possible future directions raised by the cases.[2] This Article concludes with an addendum that continues the statistical look at veterans law in the Federal Circuit.[3]

I. BACKGROUND TO THE FEDERAL CIRCUIT'S 2013 VETERANS LAW CASES

The Federal Circuit reviews final decisions of the U.S. Court of Appeals for Veterans Claims ("the Veterans Court"). These cases originate when claims for veterans benefits are submitted online or in person at one of the U.S. Department of Veterans Affairs (VA) regional offices ("ROs"), and are processed, developed, and adjudicated at one of those offices.[4] VA will assist the veteran in developing evidence in support of the claim, and once all evidentiary development is deemed complete, VA will adjudicate the claim.[5] If a claim is denied, the RO will issue a Rating Decision informing the veteran of the results of the adjudication and the underlying reasons for the denial.[6] A veteran who is dissatisfied with any part of the result can submit a Notice of Disagreement, in which case VA will prepare a Statement of the Case ("SOC").[7] After submitting a Notice of Disagreement, the veteran has several options: ask for a de novo review of the claim at the RO level; or, "perfect the appeal" by filing a substantive appeal with the Board of Veterans' Appeals[8] ("the Board").

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2. In past years, the themes of articles have been the "changing voices in a familiar conversation," suggesting that under the surface of the Federal Circuit's jurisprudence lies a familiar rules-versus-standards debate reflecting different views about what it means for the system to be "veteran friendly," Ridgway, *Changing Voices*, *supra* note 1, at 1176, and have "fresh eyes on persistent issues," noting that "[w]ith a substantially different line-up of judges, practitioners have entered the latest era of the Federal Circuit by revisiting the fundamental role of the courts in veterans law," Ridgway, *Fresh Eyes*, *supra* note 1, at 1037–38.

3. *See, e.g.*, Gugliuzza, *supra* note 1, at 1258–63 (statistical review); Ridgway, *Changing Voices*, *supra* note 1, at 1224–33 (same); Ridgway, *Fresh Eyes*, *supra* note 1, at 1096–1103 (same).

4. In 2013, there were fifty-six regional offices in the United States, Puerto Rico, and the Philippines. *About VBA*, VETERANS BENEFITS ADMIN., http://www.benefits.va.gov/BENEFITS/about.asp (last visited May 14, 2014).

5. *See generally* Gugliuzza, *supra* note 1, at 1203–10 (detailing the procedure and Veterans Benefits Administration (VBA) determinations made as part of the claim adjudication process).

6. *Id.* at 1206.

7. *See id.*

8. 38 U.S.C. §§ 5110, 7105(d)(1) (2012).

The Board is an internal VA body that provides review of RO decisions within the Agency.[9] It issued 34,028 decisions in 2000, but as with the rest of VA, its workload has increased dramatically: it issued 39,076 decisions in 2006; 43,757 decisions in 2008; 49,127 decisions in 2010; 48,588 decisions in 2011; and 44,300 decisions in 2012.[10] Showcasing one of the various differences between the worlds of civil law and veterans law, the Board—although an appellate body—has the power to develop evidence and to find facts de novo.[11] The Board must "account for the [persuasiveness of the evidence] . . . , analyze the credibility and probative value of all material evidence . . . , and provide the reasons for its rejection of any such evidence."[12]

Until 1988, VA was the only agency insulated by statute from judicial review, and, due to its perceived "paternalistic" nature,[13] it was not even subject to the Administrative Procedure Act (APA).[14] In

9. *Id.* § 7101 (2012).

10. BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012, at 23 (2013) [hereinafter 2012 BOARD REPORT], *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2011, at 23 (2012), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2010, at 3 (2011), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2008, at 23 (2009), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2008AR.pdf; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2006, at 2 (2007), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2006AR.pdf; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2000, at 33 (2001), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2000AR.pdf. The decrease in 2011 and 2012 was reported to be "primarily a function of a reduction in full time equivalent (FTE) employees . . . to prepare for operating in the constrained fiscal environment affecting the entire Federal government in Fiscal Year 2013 and beyond." 2012 BOARD REPORT, *supra*, at 4. The authors expect the Board's productivity to increase in 2014 due to the Board's April 2013 announcement that it plans to hire 100 new attorneys. *See* Steve Vogel, *Veterans Face Another Backlog as a Quarter-Million Appeal Disability Claims*, WASH. POST (Sept. 10, 2013), http://www.washingtonpost.com/politics/veterans-face-another-backlog-as-a-quarter-million-appeal-disability-claims/2013/09/10/0078154a-15ba-11e3-804b-d3a1a3a18f2c_story.html.

11. *See* Madden v. Gober, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (discussing the Board's duty "to analyze the credibility and probative value of evidence"); Owens v. Brown, 7 Vet. App. 429, 433 (1995) (stating that the Board must weigh and assess the evidence of record).

12. Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

13. Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2 (2009).

14. 5 U.S.C. § 500; *see* Robert Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. PA. L. REV. 621, 621–22 (1947) (outlining the particular APA provisions to which VA is not subject).

1988, Congress passed the Veterans' Judicial Review Act,[15] which established the Veterans Court[16] as an Article I court with judges appointed for fifteen-year terms.[17] The Veterans Court may decide cases by non-precedential single-judge decisions, precedential three-judge panels, or full-court opinions.[18] The Veterans Court reviews the Board's factual findings under a "clearly erroneous" standard,[19] reviews the Board's interpretations of statutes and regulations under a de novo standard,[20] and reviews the Board's legal conclusions under an "arbitrary, capricious, . . . abuse of discretion, or otherwise not in accordance with law" standard.[21] The Veterans Court also reviews a Board decision to determine whether it is supported by an adequate statement of reasons or bases for its findings and conclusions.[22]

Whereas VA's system is designed to be non-adversarial and claimant-friendly, the Veterans Court is an adversarial forum.[23] However, only claimants may appeal to the Veterans Court,[24] which means that the substantive law created by the court tends to "act[] as a one-way ratchet," with the ability to add rules that favor veterans but a highly limited ability to create rules that favor VA.[25] The forum and

15. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

16. The Veterans Court was originally named the U.S. Court of Veterans Appeals and was renamed in the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341.

17. *See* 38 U.S.C. §§ 7251, 7253 (restating the codified language of the Veterans' Judicial Review Act of 1988).

18. *See id.* § 7254 (restating the codified language of the Veterans' Judicial Review Act of 1988).

19. Hood v. Shinseki, 23 Vet. App. 295, 299 (2009); *see also* Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990) (holding that the "clearly erroneous" standard in the Veterans' Appeals court is the same as the standard in Article III courts: "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

20. 38 U.S.C. § 7261(a)(1) (granting the Veterans Court the authority to decide "all relevant questions of law" and define statutory and regulatory language); *see also* Lane v. Principi, 339 F.3d 1331, 1339 (Fed. Cir. 2003) (requiring the Veterans Court to review de novo Board interpretation of a regulation); *cf.* Butts v. Brown, 5 Vet. App. 532, 539 (1993) (en banc) (holding that the Board's choice of a particular diagnostic code is subject to arbitrary and capricious standard of review because it is a "question of the application of the law to the facts and not a question of law".

21. 38 U.S.C. § 7261(a)(3)(A); *see also* Foster v. Derwinski, 1 Vet. App. 393, 394 (1991) (per curiam) (holding that failure to comment on a veteran's testimony at a hearing does not constitute "arbitrary, capricious, or otherwise not in accordance with law").

22. 38 U.S.C. § 7104(d)(1).

23. Gugliuzza, *supra* note 1, at 1209–10.

24. 38 U.S.C. § 7252(a).

25. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefit System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 257 (2010) [hereinafter Ridgway, *New Complexities*].

procedures of the court create an odd interplay of power that also leads to increased complexity in the laws that govern the process.[26]

If either side is dissatisfied with a Veterans Court decision, each party has an appeal of right to the Federal Circuit.[27] The decision by the Veterans Court marks the first stage in the claims adjudication process at which VA may appeal a decision.[28] Although either side may appeal from a decision of the Veterans Court, the Federal Circuit can only review questions of law, including constitutional challenges and, less frequently, challenges to VA rulemaking under the APA.[29]

One of the most important aspects of VA's claims processing system is that it is not only non-adversarial at the agency level, but it is intentionally designed to be "claimant-friendly."[30] The system was originally established as a way for a grateful nation to ensure that those who had served in the military would be well-cared for if they were injured.[31] As such, an adversarial system made no sense because "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them."[32]

However, navigating VA claims processing system can be complex and, as a result, has the potential to provide only a limited advantage to veterans if it is too complicated for them to access.[33] To counter that possibility, Congress has established that VA has "the affirmative duty to assist claimants by informing veterans of the benefits available

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26. Ridgway, *Fresh Eyes*, *supra* note 1, at 1039, 1044–45 (discussing the focus on procedure over factual development of cases and the paradoxical effect of trying to make the system more veteran friendly, but actually causing severe delays in claims processing).

27. 38 U.S.C. § 7292(a).

28. Gugliuzza, *supra* note 1, at 1210.

29. 38 U.S.C. § 7292(d).

30. *See* Henderson v. Shinseki, 131 S. Ct. 1197, 1200 (2011) (reiterating that the VA's adjudicatory process is meant to function "with a high degree of informality and solicitude for the claimant" (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985))); Jaquay v. Principi, 304 F.3d 1276, 1280 (Fed. Cir. 2002) (en banc) ("Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform.").

31. WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3–5 (3d ed. 2002) (discussing the early days of veterans benefits from their origins in Sir Francis Drake's victory over the Spanish Armada to their role in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to 1988, when the benefits began to be viewed as more than "mere gratuities"); *see also* Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 308–09 (2004) (describing the origins of the modern veterans benefits).

32. Barrett v. Nicholson, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

33. Ridgway, *Fresh Eyes*, *supra* note 1, at 1044–45 (discussing complexity); *see* DeLisio v. Shinseki, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring) ("There is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year.").

to them and assisting them in developing claims they may have,"[34] including obtaining records under governmental control,[35] assisting the veteran in obtaining private records,[36] and providing the veteran with a medical opinion if one is necessary to decide the claim.[37]

Another important aspect of VA's duty to assist is to read a plaintiff's pleadings "sympathetically" to "'determine all potential claims raised by the evidence,'" regardless of how those claims are labeled in the application for benefits.[38] Furthermore, various legal presumptions make it easier for veterans to prove certain types of claims by eliminating the key requirement that they submit evidence of a connection between their disability and their military service.[39]

Veterans law uses a lower burden of proof than other areas of the law,[40] as well as radically different procedural standards.[41] For

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34. Jaquay, 304 F.3d at 1280 ("Congress recently passed the Veterans Claims Assistance Act of 2000 'to reaffirm and clarify the duty of the Secretary of Veterans Affairs to assist claimants for benefits under laws administered by the Secretary . . . .'" (omission in original) (citation omitted)); *see also* Comer v. Peake, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009) (reaffirming the duty of the Board to assist veterans or those making claims on their behalf and declaring this duty antecedent to ensuring that all issues are properly raised on appeal).

35. 38 U.S.C. § 5103A(b)(3) (2012); 38 C.F.R. §§ 3.159(c)(2), (e) (2013).

36. 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159(e); *see also* Loving v. Nicholson, 19 Vet. App. 96, 102 (2005) (holding that the duty to assist requires VA to "make reasonable efforts to assist a claimant in obtaining [relevant] evidence" (quoting 38 U.S.C. § 5103A(a),(b))).

37. 38 U.S.C. § 5103A(d); *see* Green v. Derwinski, 1 Vet. App. 121, 124 (1991) (requiring a "thorough and contemporaneous medical examination" that also takes into account past medical records); *see also* McLendon v. Nicholson, 20 Vet. App. 79, 80–83 (2006) (discussing the four elements needed to trigger the duty).

38. Szemraj v. Principi, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting Cook v. Principi, 318 F.3d 1334, 1347 (Fed. Cir. 2002) (en banc)); *see also* 38 U.S.C. § 7104(a), (d)(1); Robinson v. Mansfield, 21 Vet. App. 545, 552 (2008) ("[T]he Board is required to consider all issues raised either by the claimant or by the evidence of record . . . ." (citations omitted)), *aff'd*, 557 F.3d 1355 (Fed. Cir. 2009).

39. For example, veterans who served in Vietnam are generally presumed to have been exposed to Agent Orange and thus do not have to present evidence of an injury or event that occurred during service. 38 C.F.R. § 3.307(a)(6)(iii). In addition, certain types of disabilities are also presumed to be connected to a veteran's presumptive exposure to Agent Orange, thus eliminating, in those cases, the requirement that a veteran submit evidence of a causal connection between the disability and an in-service injury or event. *See id.* §§ 1116(a), 3.307(a)(6), 3.309(e). Chronic diseases and certain tropical diseases can also be automatically service-connected. *See, e.g.*, 38 U.S.C. § 1101(3) (chronic diseases); *id.* § 1112(a)(2) (tropical diseases); *id.* § 1133 (presumptions for tropical diseases); *see also* 38 C.F.R. § 3.307(a)(4) (tropical diseases); *id.* § 3.309(a) (chronic diseases); *id.* § 3.309(b) (tropical diseases).

40. The "benefit of the doubt" doctrine is unique to veterans law, and dictates that a claim will be granted if the evidence for and against the claim is in "relative equipoise" and will only be denied if a fair preponderance of the evidence is against the claim. *See* 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."); Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990) (likening the benefit of the doubt rule to "the rule deeply embedded in

example, a veteran can continue to submit information during the pendency of a claim and, if this happens, the claim can be delayed while the RO re-assesses and re-adjudicates in order to issue an updated decision to the veteran.[42] In addition, although a decision may be deemed "final" if a veteran fails to appeal within the prescribed time period, there are several ways to challenge a decision even if it has become "final."[43] In many ways, there is no such thing as finality in a veterans case.[44]

Despite its intentionally "veteran-friendly" design, the system for processing veterans benefits claims has, by all accounts, been functioning inadequately for decades.[45] VA is a vast and extraordinarily complex bureaucracy that has grown organically through the incorporation of three separate agencies in the more than eighty years since it was created.[46] As a result, its current processes are often coincidences of history rather than the result of planning or design. Nowhere is this clearer than in VA's disability compensation claims processing system, including the patchwork of statutes and regulations that govern the system.[47] The system may be

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sandlot baseball folklore that 'the tie goes to the runner'"); 38 C.F.R. § 3.102 (stating that reasonable doubt must be resolved in favor of the claimant).

41. *See, e.g.*, 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, 115–16 (2009) [hereinafter Ridgway, *Why So Many Remands?*] (explaining that, unlike causes of action in other contexts, veterans benefits claims typically arise years after the individual stops serving in the military, which causes incredibly complicated factual scenarios).

42. *Id.* at 126.

43. *Id.* at 128.

44. *See id.* at 126 (suggesting that, if the veteran continues to submit new evidence then his claim can be re-adjudicated over the span of several years before the Board is able to rule on the appeal).

45. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, B-118660, MANAGEMENT PRACTICES USED BY THE VETERANS ADMINISTRATION'S DENVER REGIONAL OFFICE IN ASSISTING VETERANS 1, 6–8, 10–11 (1974) (investigating complaints that the telephones were constantly busy, veterans' calls were being routed on a "haphazard" basis, and there were excessive delays in resolving problems); Duncan D. Hunter & Peter Hegseth, Editorial, *The VA Needs a New Leader*, WASH. POST, Apr. 11, 2013, at A17 (recommending Secretary Shinseki resign so another appointee can resolve VA's struggle with slow claims processing).

46. The three agencies are the Veterans Bureau, the Bureau of Pensions of the Interior Department, and the National Home for Disabled Volunteer Soldiers. *History—VA History*, U.S. DEP'T VETERANS AFF., http://www.va.gov/about_va/vahistory.asp (last visited May 14, 2014).

47. James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 145 (2011); *see, e.g.*, William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 339 (2004); Reynolds Holding, *Insult to Injury*, LEGAL AFF. March–April 2005, at 26, 27; James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed To Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 224 (2001); *see also An Examination of Poorly Performing U.S. Dep't of Veterans Affairs Reg'l Offices: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H.*

overburdened but the laws and regulations that govern it are also becoming increasingly complex.[48] The increased complexity leads to inaccuracy: claims decisions made across the system have a historically low accuracy rate.[49] This poor accuracy rate leads to lost or improperly granted benefits, which in turn leads to a repeating process of appeals and remands.

Despite its stated good intentions, VA has continually failed to make headway against the backlog of benefits claims.[50] The bases of these problems are multiple and systemic.[51] One problem is that some of the principles underlying the veterans benefits system—that is, that the system should be pro-claimant and thus completely unique from underlying mainstream legal principles—have essentially required that the law of veterans benefits develop in relative isolation, even after the establishment of judicial review in 1988.[52]

Comm. on Veterans' Affairs, 112 Cong. 44 (2011) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States) ("[M]ost people within [VA's claims processing system] want to do a good job. However, conditions beyond their individual control keep them from achieving consistently good work."). *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-562-T, PROCESSING OF CLAIMS CONTINUES TO PRESENT CHALLENGES 3 (2007) (explaining that several factors are continuing to create challenges for VA's claims, including increased claims filed by veterans of the Iraq and Afghanistan conflicts); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-749T, CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENT MAY BE DIFFICULT 3 (2005) (stating that VA's disability programs have not been updated to reflect the current state of science, medicine, technology, and labor market conditions); Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L.Q. 889, 895 (1989) (discussing the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)).

48. Ridgway, *Fresh Eyes*, *supra* note 1, at 1044–45, 1094.

49. *Adjudicating VA's Most Complex Disability Claims: Ensuring Quality, Accuracy, and Consistency on Complicated Issues: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. On Veterans' Affairs*, 113 Cong. 2–3 (2013) (statement of Zach Hearn, Deputy Director for Claims, The American Legion), *available at* http://docs.house.gov/meetings/VR/VR09/20131204/101539/HHRG-113-VR09-Wstate-HearnZ-20131204.pdf (noting that a recent American Legion survey found errors in 55% of 260 claims that were reviewed).

50. *See* Hunter & Hegseth, *supra* note 45 (noting that a recent study showed that wait times are approximately one year for a claim to process, lagging by as much as 600 days in New York or Los Angeles).

51. In addition to an increasing number of claims submitted and the historically poor accuracy rates at some ROs, the structure of the adjudication system itself is based on antiquated premises. For example, the diagnostic codes are based on medical principles that are decades out of date. James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 424 (2009). Another problem that must be addressed is the need for VA to develop "new, robust evidence-gathering procedures." *Id.* at 406.

52. On November 18, 1988, President Reagan signed into law the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), which established the U.S. Court of Veterans Appeals. Pursuant to the Veterans Programs Enhancement Act of 1998, effective March 1, 1999, the court's name was changed to the U.S. Court of Appeals for Veterans Claims. *See* Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341.

Criticism of VA's claims processing system increased in 2013. A February 2013 audit by VA's Office of Inspector General, which was completed while reviewing the Agency's transition to a paperless environment, stated that while the new system could not be completely evaluated because of its incremental implementation, it nonetheless had "system performance issues," lacked a detailed plan for the "scanning and digitization of veterans' claims," and would continue to face challenges in "eliminating the backlog of disability claims by 2015."[53] In March 2013, the Government Accountability Office (GAO) issued a report entitled *Veterans' Disability Benefits: Challenges to Timely Processing Persist.*[54] It concluded that

> the extent to which VA is positioned to meet its ambitious processing timeliness goal remains uncertain . . . . [A]t the time of our review, [VA] could not provide us with a plan that met established criteria for sound planning, such as articulating performance measures for each initiative, including their intended impact on the claims backlog.[55]

On March 19, 2013, Representative Jeff Miller, chair of the House Committee on Veterans' Affairs, criticized VA leadership for "a lack of transparency, lengthening delays and a [greatly increased] number of veterans disability claims."[56] Despite the turmoil, the Secretary of Veterans Affairs, Eric Shinseki, continues to stand behind the goal he established in 2010: that, by 2015, the Agency will have eliminated the disability claims backlog and will be processing all claims with an accuracy rate of 98%.[57]

The veterans benefits system was designed to be non-adversarial and "claimant-friendly," and its procedures are intended to reflect this aim.[58] There may be many disagreements about *how* to achieve

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53. OFFICE OF AUDITS & EVALUATIONS, VETERANS AFFAIRS OFFICE OF INSPECTOR GEN., 11-04376-81, VETERANS BENEFITS ADMINISTRATION: REVIEW OF TRANSITION TO A PAPERLESS CLAIMS PROCESSING ENVIRONMENT 2 (2013).

54. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-453T, VETERANS' DISABILITY BENEFITS: CHALLENGES TO TIMELY PROCESSING PERSIST 2 (2013).

55. *Id.*

56. Aaron Glantz, *House Committee Leader Calls for Head of VA Benefits To Resign*, CENTER FOR INVESTIGATIVE REPORTING (May 19, 2013), http://cironline.org/reports/house-committee-leader-calls-head-va-benefits-resign-4302.

57. *U.S. Department of Veterans Affairs FY 2012 Budget for the Veterans Benefits Administration, National Cemetery Administration, and Related Agencies: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 112 Cong. 27–28 (2011) (statement of Michael Walcoff, Acting Under Secretary for Benefits, Veterans Benefits Administration, U.S. Department of Veterans Affairs). However, it is currently far from meeting this target. *Id.* at 1–2 (statement of Jon Runyan, Chairman of the U.S. House of Representatives' Subcommittee on Disability Assistance and Memorial Affairs for the Committee on Veterans Affairs).

58. Ridgway, *Changing Voices*, *supra* note 1, at 1186–87 (describing the multi-faceted meaning of "veteran friendly").

this goal, but a dysfunctional system is not "veteran-friendly" by any definition. It is within this context of increased regulatory complexity, criticism from oversight organizations, and tension about what it means for the system to be "veteran friendly," that the Federal Circuit issued its precedential veterans law cases in 2013.

II. ONGOING TRANSITIONS AT THE FEDERAL CIRCUIT

Since 2011, the composition of the Federal Circuit has continued to change significantly after years of relative stability. In 2011, three judges left the court, two assumed senior status, and three new judges were confirmed.[59] In 2012, Judge Richard Linn assumed senior status, creating another vacant seat on the court.[60]

The court's composition continued to change in 2013. On January 7, 2013, Judge William Curtis Bryson assumed senior status, creating an additional vacancy.[61] On February 7, 2013, Raymond T. Chen and Todd M. Hughes were nominated to the two remaining vacancies on the Federal Circuit.[62] On March 15, 2013, sixteen months after his nomination,[63] Judge Richard G. Taranto was confirmed and began active service on the court.[64] Judge Taranto, an intellectual property

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59. *Id.* at 1177–80; *see also* Ridgway, *Fresh Eyes*, *supra* note 1, at 1038 n.1 ("In 2011, the Federal Circuit saw the retirement of Chief Judge Paul Michel, the deaths of Judge Daniel M. Friedman and Judge Glenn Archer, and the assumption of senior status by Judge Haldane Robert Mayer and Judge Arthur J. Gajarsa. Several of these judges, who were veterans themselves, were replaced by new judges with perspectives outside of veterans law." (citation omitted)). The Veterans Court underwent significant transitions in 2012 and 2013 as well. The number of active judges on the Veterans Court has increased from six to nine with the confirmations of Coral Wong Pietsch, Margaret Bartley, and William S. Greenberg. *See Judge Coral W. Pietsch*, U.S. CT. APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/pietsch.php (last visited May 5, 2014); *Judge Margaret Bartley*, U.S. CT. APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/bartley.php (last visited May 5, 2014); *Judge William S. Greenberg*, U.S. CT. APPEALS FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/greenberg.php (last visited May 5, 2014).

60. *Circuit Judge Linn To Assume Senior Status on November 4, 2012*, U.S. CT. APPEALS FOR FED. CIR., http://www.cafc.uscourts.gov/2012/circuit-judge-linn-to-assume-senior-status-on-november-1-2012.html (last visited May 6, 2014).

61. *Circuit Judge Bryson Assumed Senior Status on January 7, 2013*, U.S. CT. APPEALS FOR FED. CIR., http://www.cafc.uscourts.gov/2013/circuit-judge-bryson-assumed-senior-status-on-january-7-2013.html (last visited May 6, 2014).

62. *President Obama Nominates Two To Serve on the U.S. Court of Appeals for the Federal Circuit*, WHITE HOUSE (Feb. 7, 2013) [hereinafter *President Obama Federal Circuit Nominees*], http://www.whitehouse.gov/the-press-office/2013/02/07/president-obama-nominates-two-serve-us-court-appeals-federal-circuit.

63. Judge Taranto was nominated on November 10, 2011, to fill the then-final vacancy on the court. *See President Obama Nominates Richard Gary Taranto To Serve on the U.S. Court of Appeals*, 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.

64. *See* Todd Ruger, *After 17 Months, Senate Confirms New Federal Circuit Judge*, BLOG LEGAL TIMES (Mar. 11, 2013, 6:13 PM), http://legaltimes.typepad.com/blt/2013/03

specialist and experienced U.S. Supreme Court advocate,[65] authored his first published veterans law opinion on October 10, 2013, in *Tyrues v. Shinseki*.[66]

Judge Chen was confirmed on August 1, 2013, after a career in intellectual property litigation.[67] Finally, on September 24, 2013, Judge Hughes was confirmed as the final member of the Federal Circuit.[68] Judge Hughes has an extensive background in commercial litigation, including a career at the U.S. Department of Justice where he handled matters of federal personnel law, veterans benefits, international trade, and government contracts.[69] His unanimous confirmation also set a historic precedent as he became the first openly gay judge to serve on a federal court of appeals.[70] Neither Judge Chen nor Judge Hughes authored any veterans law opinions in 2013.

III. THE 2013 VETERANS BENEFITS DECISIONS OF THE FEDERAL CIRCUIT

This Part considers the veterans law cases decided by the Federal Circuit in 2013. The Federal Circuit issued twenty-one precedential decisions on veterans law in 2013,[71] significantly more than the sixteen precedential decisions issued in 2012,[72] almost double the number of precedential decisions issued in 2011,[73] and considerably more than the fourteen precedential decisions issued in 2010.[74]

The Federal Circuit's review of Veterans Court decisions is limited by statute.[75] The court has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any

/after-17-months-senate-confirms-new-federal-circuit-judge.html.

65. *President Obama Federal Circuit Nominees*, *supra* note 62.

66. 732 F.3d 1351 (Fed. Cir. 2013).

67. *See* Todd Ruger, *Senate Confirms New Federal Circuit* Judge, BLOG LEGAL TIMES (Aug. 1, 2013 12:32 PM), http://legaltimes.typepad.com/blt/2013/08/senate-confirms-new-federal-circuit-judge.html.

68. Todd Ruger, *Senate Confirms First Openly Gay Appeals Judge*, BLOG LEGAL TIMES (Sept. 24, 2013, 1:05 PM), http://legaltimes.typepad.com/blt/2013/09/senate-confirms-first-openly-gay-appeals-judge.html.

69. *Id.*

70. *See* Kathryn Ruemmler, *Senate Votes To Confirm Todd Hughes To Serve on the U.S. Court of Appeals for the Federal Circuit*, WHITE HOUSE BLOG (Sept. 23, 2013, 12:35 PM), http://www.whitehouse.gov/blog/2013/09/24/senate-votes-confirm-todd-hughes-serve-united-states-court-appeals-federal-circuit.

71. The Federal Circuit also issued published opinions on two Veterans Court decisions on attorney fee petitions under the Equal Access to Justice Act, 28 U.S.C. § 2412(b) (2012). *See* Wagner v. Shinseki, 733 F.3d 1343 (Fed. Cir. 2013); Cameron v. Shinseki, 721 F.3d 1365 (Fed. Cir. 2013). However, this Article does not discuss these cases because they do not pertain to the law governing veterans benefits.

72. Ridgway, *Fresh Eyes*, *supra* note 1, at 1055.

73. Ridgway, *Changing Voices*, *supra* note 1, at 1190.

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

75. 38 U.S.C. § 7292.

interpretation thereof [by the Veterans Court], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision."[76] Therefore, except for constitutional issues, the Federal Circuit may only review issues of law and has no power to resolve any factual matters that arose in a case decided by the Veterans Court.[77] Presented here, the cases are organized by relevant issues and in the order that they would be heard during the benefits review process.

A. Scope of Judicial Review

The Federal Circuit's precedential veterans law decisions from 2012 were exceptional in that fully half of them concerned "issues related to the rules of judicial review applied by the courts, rather than disputes about the substance of veterans law."[78] This year, while the Federal Circuit maintained some focus on these issues, they did not comprise an overwhelming portion of the court's total precedential decisions.

1. The Veterans Court's jurisdictional limits

In *Kyhn v. Shinseki*,[79] the Federal Circuit held that the Veterans Court acted beyond its jurisdiction, both by relying on evidence not in the record before the Board and by engaging in fact finding in the first instance.[80] The Veterans Court has exclusive jurisdiction "to review decisions of the Board . . . on the record of the proceedings before the Secretary and the Board."[81] This jurisdiction is limited by 38 U.S.C. § 7261, which provides that the Veterans Court may review "questions of law de novo, questions of fact for clear error, and certain other issues under the 'arbitrary, capricious, abuse of discretion, [or] not otherwise in accordance with law' standard."[82] The Veterans Court is expressly prohibited from "making factual

76. *Id.* § 7292(c).
77. *Id.* § 7292(d)(1); *see also* Forshey v. Principi, 284 F.3d 1335, 1345–47 (Fed. Cir. 2002) (en banc) (noting this limitation on the court's jurisdiction to review factual determinations).
78. Ridgway, *Fresh Eyes*, *supra* note 1, at 1055–56.
79. 716 F.3d 572 (Fed. Cir. 2013).
80. *Id.* at 575, 577.
81. 38 U.S.C. § 7252(a)–(b); *see also* Henderson v. Shinseki, 589 F.3d 1201, 1212 (Fed. Cir. 2009) (en banc) ("[T]he Veterans Court reviews each case that comes before it on a record that is limited to the record developed before the RO and the Board."), *rev'd on other grounds sub nom.* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197 (2011).
82. Garrison v. Nicholson, 494 F.3d 1366, 1368 (Fed. Cir. 2007) (citing 38 U.S.C. § 7261(a)).

findings in the first instance"[83] and from reviewing de novo any findings of fact made by the Board.[84]

In this case, the veteran, Arnold C. Kyhn, was denied disability benefits for tinnitus after he failed to attend a VA medical examination.[85] Before the Veterans Court, Mr. Kyhn argued—for the first time—that there was good cause for his failure to attend the examination because VA had never provided him with notice that the examination had been scheduled.[86] The Veterans Court applied the presumption of regularity and presumed that notice had been received and affirmed the Board's denial of benefits.[87] However, in determining whether the presumption of regularity applied in this case, the Veterans Court did not rely on previously published materials.[88] Instead, the court ordered the Secretary to provide information about VA's regular process for informing veterans that examinations had been scheduled.[89] In response, the Secretary submitted affidavits from two VA employees describing the scheduling process, to the best of their knowledge.[90] Relying on this information, the Veterans Court held that the presumption of regularity applied, presumed that Mr. Kyhn had received notification of the missed examination, and affirmed the Board's denial of benefits.[91] Mr. Kyhn submitted a motion for rehearing and full court review, arguing that the panel had improperly relied on evidence from outside the record before the Board.[92] The motion was denied, although two judges dissented on the basis that the full court should address the issue.[93]

On appeal, the Federal Circuit noted that the case "raises the legal question of whether the Veterans Court acted beyond its jurisdiction when it relied on evidence not in the record before the Board and engaged in first-instance fact finding."[94] The Federal Circuit rejected

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83. Andre v. Principi, 301 F.3d 1354, 1362 (Fed. Cir. 2002).
84. 38 U.S.C. § 7261(c).
85. *Kyhn*, 716 F.3d at 573–74; *see also* 38 C.F.R. § 3.655 (2013) (allowing the Board to rate a claim based on the evidence of record if a veteran fails to attend a scheduled examination).
86. *Kyhn*, 716 F.3d at 574.
87. *Id.*
88. *See id.* (relying solely on the Secretary's reports).
89. *Id.*
90. *Id.* The two affidavits seemed to provide conflicting information, and only one affidavit contained information from a VA employee claiming to have personal knowledge of the process. *Id.* at 574 & n.2. That employee's affidavit, however, seemed to have been internally inconsistent. *Id.* at 576 n.6.
91. *Id.* at 574.
92. *Id.*
93. *Id.* at 574–75.
94. *Id.* at 575.

the Secretary's argument that Rule 201 of the Federal Rules of Evidence authorized the Veterans Court to take judicial notice of VA's notification procedures.[95] The Federal Circuit noted that the Veterans Court had relied in the past on Rule 201 to justify consideration of extra-record materials.[96] However, the Federal Circuit described the affidavits in question as "evidentiary in nature" and distinguished them from sources that are "generally known" and "whose accuracy cannot reasonably be questioned."[97]

The Federal Circuit also held that the Veterans Court erred by engaging in fact finding in the first instance when it relied on the extra-record affidavits to find that "VA does have an established procedure for notifying claimants of [VA] examinations."[98] The Federal Circuit rejected the Veterans Court's explanation that it "considered the affidavits solely '[a]s part of the de novo process for determining whether the presumption of regularity attaches.'"[99] Again, the Federal Circuit relied on the evidentiary nature of the affidavits rather than situations "where the presumption of regularity was premised upon independent legal authority."[100] The majority noted that the Veterans Court was unable to conclude that VA had a regular notification practice without weighing and evaluating the affidavits, which constituted fact finding in the first instance.[101] Therefore, the court concluded: "The Veterans Court's application of the presumption of regularity to this factual finding does not convert the underlying finding into a legal conclusion."[102]

Judge Lourie, in his dissent, disagreed with the majority's conclusions that the Veterans Court erred when requesting information from VA about its regular practice for notifying veterans regarding medical examinations and that the Veterans Court had engaged in prohibited fact finding in the first instance when it determined that Mr. Kyhn received notification of the examination he missed.[103] Judge Lourie noted that, under 38 U.S.C. § 7252(b), "[t]he Veterans Court has jurisdiction over a number of areas of seemingly first-instance factual inquiry that were not 'on the record of the proceedings before the Secretary and the Board.'"[104] Judge

95. *Id.* at 576.
96. *Id.* at 576 n.5 (citing D'Aries v. Peake, 22 Vet. App. 97, 105 (2008)).
97. *Id.* at 576.
98. *Id.* at 577 (quoting Kyhn v. Shinseki, 24 Vet. App. 228, 234 (2011) (per curiam)).
99. *Id.* (alteration in original) (quoting *Kyhn*, 24 Vet. App. at 233–34).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 578 (Lourie, J., dissenting).
104. *Id.* at 578–79.

Lourie concluded that the Veterans Court had not erred in requesting or relying on the affidavits in this case because, "[a]s with jurisdictional matters, evidence regarding regularity is not used to adjudicate the merits of a claim [but, rather,] is only used to establish whether a presumption of regularity attaches."[105] Judge Lourie noted that he believed the prohibition in 38 U.S.C. § 7261(c) against de novo review by the Veterans Court concerning factual findings by the Board was inapplicable because, in this case, the veteran had never raised the issue of non-receipt of notification until he was before the Veterans Court; thus, the Board never had the opportunity to make any factual findings on the matter.[106] Finally, Judge Lourie observed that, although the Federal Circuit considered the question of the presumption of regularity to be a matter of application of law to facts, it was "the long-standing practice" of the Veterans Court to consider the question as a matter of law, and therefore to apply de novo review.[107]

2. The Federal Circuit's jurisdiction to review questions of fact

In *Prinkey v. Shinseki*,[108] the Federal Circuit addressed its jurisdiction to assess the adequacy of medical evidence used to sever an award of benefits based on service connection.[109] Robert D. Prinkey was a Vietnam veteran who was diagnosed with diabetes in 1996.[110] In 2003, he submitted a claim for VA disability benefits for his diabetes and related conditions.[111] He asserted that he had been exposed to Agent Orange ("AO") in Vietnam and was therefore entitled to the legal presumption of service connection for diabetes—a disease previously established as statistically correlated to AO exposure.[112] In June 2003, a VA medical examiner concluded that Mr. Prinkey's diabetes "[could] be related to the Agent Orange exposure."[113] VA granted service connection for Mr. Prinkey's diabetes as secondary to AO exposure and for other disabilities secondary to the service-connected diabetes.[114]

In April 2006, VA conducted a medical examination to determine whether Mr. Prinkey was eligible for benefits as a result of having his employability severely impaired.[115] The nurse practitioner who

105. *Id.* at 579.
106. *Id.* at 578, 580.
107. *Id.* at 580.
108. 735 F.3d 1375 (Fed. Cir. 2013).
109. *Id.* at 1377.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 1378.

conducted the examination reviewed Mr. Prinkey's full claims file and discovered information that had not been available to previous examiners: that Mr. Prinkey had surgery in 1994 to remove his pancreas.[116] Such an operation would most likely cause inadequate insulin secretion, and the nurse practitioner concluded that "it is more likely than not that the diabetes . . . resulted from the pancreatectomy" instead of exposure to AO.[117] An endocrinologist reviewed the case and concluded that "[Mr. Prinkey's] pancreatic failure and pancreatic resection [had] nothing to do with Agent Orange exposure."[118] Based on the above opinions, VA proposed and implemented severance of service connection for Mr. Prinkey's diabetes and the other disabilities secondary to his diabetes, including his claim for benefits based on unemployability.[119]

Mr. Prinkey appealed this decision, and the Board eventually upheld the decision, finding that the June 2003 examination, on which the grant of service connection was based, was inadequate because the examiner did not have sufficient facts to come to an accurate conclusion about whether Mr. Prinkey's diabetes was linked to his military service.[120] Therefore, the Board concluded that VA had established clear and unmistakable error ("CUE") in the 2003 decision that originally granted service connection for diabetes.[121]

Mr. Prinkey appealed to the Veterans Court, arguing that the Board had engaged in impermissible weighing of evidence when it found the 2003 medical examination inadequate.[122] He argued that the April 2006 opinions, on which severance of service connection was based, failed to consider a 2001 CT scan and were not supported by an adequate rationale explaining the decision.[123] The Veterans Court affirmed the Board, noting that the information in the 2001 CT scan was duplicated in other documents available to the examiners and that all opinions were supported by an adequate rationale.[124]

Mr. Prinkey appealed to the Federal Circuit, directly challenging the adequacy of the April 2006 medical opinions that led to the severance of his service-connected disability benefits.[125] However, the Federal Circuit, in an opinion authored by Judge Clevenger,

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1377, 1379.
120. *Id.* at 1380–81.
121. *Id.* at 1381.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1381–82.

compared the situation to numerous other cases in which it had declined to judge the sufficiency of a medical opinion because the issue of whether a medical opinion is adequate is a question of fact and, therefore, beyond the court's jurisdictional reach.[126] Judge Clevenger therefore concluded that the Federal Circuit did not have jurisdiction to review the facts underlying an assessment of CUE by the Veterans Court.[127]

B. Informal Claims

VA regulations provide that "[a]ny communication or action, indicating an intent to apply for one or more benefits . . . from a claimant . . . may be considered an informal claim. Such [an] informal claim must identify the benefit sought."[128] The key inquiries in determining whether a written communication or action qualifies as an informal claim are (1) whether there is an indication of intent to apply for one or more benefits, and (2) whether the claimant has identified the benefit sought.[129] Moreover, "VA has a duty to fully and sympathetically develop a . . . claim to its optimum" by "determin[ing] all potential claims raised by the evidence [and] applying all relevant laws and regulations."[130]

1. When pro se filings raise an informal claim

In *Harris v. Shinseki*,[131] the Federal Circuit explained that the legal standard establishing VA's "duty . . . to generously construe the evidence" to determine all potentially raised claims before deciding a claim on the merits, is distinct from its duty to consider whether the benefit-of-the-doubt doctrine applies after assessing the evidence of record during the merits adjudication.[132] In a decision authored by Judge Plager, the court reviewed a trio of precedential cases

126. *Id.* at 1377, 1383.
127. *Id.* at 1383. The court concluded that the veteran's other two arguments—that the Veterans Court misconstrued 38 C.F.R. § 3.015(d) and that his constitutional rights were violated—were without merit. *Id.* at 1383–84.
128. 38 C.F.R. § 3.155(a) (2013); *see also id.* § 3.1(p) (defining a claim as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement[] to a benefit").
129. Reeves v. Shinseki, 682 F.3d 988, 993 (Fed. Cir. 2012); *accord* Ellington v. Nicholson, 22 Vet. App. 141, 145 (2007), *aff'd*, 541 F.3d 1364 (Fed. Cir. 2008).
130. Moody v. Principi, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (citations omitted) (internal quotation marks omitted).
131. 704 F.3d 946 (Fed. Cir. 2013).
132. *Id.* at 948–49; *see also infra* note 136 and accompanying text (discussing the benefit-of-the-doubt doctrine).

establishing that documents filed by pro se appellants must be read and construed liberally.[133] The court stated:

> In *Roberson*, we held that the VA has a duty to fully develop any filing made by a *pro se* veteran by determining all potential claims raised by the evidence. We reiterated this requirement in *Szemraj*, when we stated that the VA must generously construe a *pro se* veteran's filing to discern all possible claims raised by the evidence. Finally, in *Moody*, we held that any ambiguity in a *pro se* filing that could be construed as an informal claim must be resolved in the veteran's favor.[134]

The court clarified that VA's duty to liberally read and construe a pro se veteran's pleadings "stems from the 'uniquely pro-claimant' character of the veterans' benefits system and requires VA 'to fully and sympathetically develop the veteran's claim to its optimum *before deciding it on the merits*.'"[135] In contrast, the benefit-of-the-doubt doctrine "assists the VA in deciding a veteran's claim on the merits *after the claim has been fully developed*."[136]

The court concluded that, although the Board stated that it had considered the benefit-of-the-doubt doctrine, neither the Board nor the Veterans Court had considered or discussed *the relevant case law*, nor acknowledged in any way that VA had a duty to generously construe the evidence and determine whether any informal claims were raised.[137] Accordingly, the Federal Circuit vacated the Veterans Court decision and remanded the matter for further consideration.[138]

2. When medical records raise a claim for an increased disability evaluation

In *Massie v. Shinseki*,[139] the Federal Circuit addressed when a medical report may raise an informal claim for an increased disability evaluation.[140] In general, 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."[141] An

133. *Harris*, 704 F.3d at 948.
134. *Id.* (citing Moody v. Principi, 360 F.3d 1306, 1310 (Fed. Cir. 2004); Szemraj v. Principi, 357 F.3d 1370, 1373 (Fed. Cir. 2004); Roberson v. Principi, 251 F.3d 1378, 1384 (Fed. Cir. 2001)).
135. *Id.* (quoting *Roberson*, 251 F.3d at 1384).
136. *Id.* (emphasis added); *see also* 38 U.S.C. § 5107(b) (2012) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").
137. *Harris*, 704 F.3d at 948.
138. *Id.* at 949.
139. 724 F.3d 1325 (Fed. Cir. 2013).
140. *Id.* at 1328.
141. 38 U.S.C. § 5110(a); *see also* 38 C.F.R. § 3.400 (2013).

exception to this general rule occurs in a claim for increased compensation.[142] An effective date for such a claim may date back to one year before the formal application for increase, but only if it is factually "ascertainable that an increase in disability had occurred" within that time frame.[143] However, when service connection has already been established, the date of a "report of [VA] examination or hospitalization . . . will be accepted as the date of receipt of a claim" that a medical condition has increased in severity.[144]

Veteran Terrance D. Massie received service-connected disability compensation for varicose veins and related surgery, initially evaluated as 10% disabling and then increased to 50% disabling as of March 1990.[145] On April 4, 2001, Mr. Massie requested another increased disability evaluation by submitting a May 1999 letter from a VA physician who stated that the veteran's "chronic venous insufficiency" had not improved despite surgical treatment and that Mr. Massie experienced "significant pain" as a result.[146] Based on this letter and other evidence, VA re-evaluated the venous condition as 100% disabling, effective April 4, 2001—the date Mr. Massie submitted his request for an increased disability evaluation.[147]

Mr. Massie disagreed with the assigned effective date and argued that, based on the May 1999 physician's letter, his condition should be evaluated as 100% disabling as of April 4, 2000—a year before his formal request for an increase—based on 38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2), which permit an effective date up to one year before the filing of a claim.[148] The Board disagreed, noting that the physician's letter in question was dated more than one year before the request for increase was submitted and that it only reflected treatment for Mr. Massie's ongoing, chronic disability.[149]

Mr. Massie appealed to the Veterans Court, arguing for the first time that the Board should have analyzed whether the May 1999 physician's letter was an informal claim under 38 C.F.R. § 3.157(b)(1) and that it would therefore support an effective date of

142. 38 C.F.R. § 3.400(o)(1).
143. 38 U.S.C. § 5110(b)(2); *see also* Gaston v. Shinseki, 605 F.3d 979, 983 (Fed. Cir. 2010) (stating that § 5110(b)(2) only permits an earlier effective date for increased disability compensation if that disability occurred within one year before filing a claim); Harper v. Brown, 10 Vet. App. 125, 126 (1997) (quoting § 5110(b)(2) to support the same proposition); 38 C.F.R. § 3.400(o)(2) (same).
144. 38 C.F.R. § 3.157(b)(1).
145. Massie v. Shinseki, 724 F.3d 1325, 1326 (Fed. Cir. 2013).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

May 1999 for his increased disability evaluation.[150] The Veterans Court's decision extensively analyzed whether it should remand the matter to the Board to consider Mr. Massie's new argument in the first instance,[151] but eventually concluded that it could review the case on the merits to determine whether the Board had erred by failing to consider a matter that was "reasonably raised" by the record.[152] The Veterans Court concluded that the physician's letter did not reasonably raise the question of an increased disability evaluation: the letter was not a "report of examination" under 38 C.F.R § 3.157(b)(1) "because it (1) did not describe the results of a 'specific, particular examination' and (2) did not suggest that Massie's condition had worsened."[153]

On appeal to the Federal Circuit, Mr. Massie argued that the Veterans Court interpreted § 3.157(b)(1) too narrowly by requiring a physician's letter to refer to a specific examination and to explicitly state that the medical condition in question had worsened.[154] In a decision authored by Judge Lourie, the court reviewed the language of the regulation and agreed with the Veterans Court's interpretation.[155] Judge Lourie noted that the Veterans Court had also reviewed VA's internal guidelines, as set forth in the *Veterans Benefits Administration Adjudication Procedures Manual* ("M21-1MR"), which lists eight factors for VA to use when determining if a medical report should be considered an informal claim under § 3.157(b)(1).[156] Like the Veterans Court, the Federal Circuit, through Judge Lourie, agreed that "for a medical record to qualify as a 'report of examination' under § 3.157(b)(1), it could be far less detailed" than required by the M21-1MR.[157] The Federal Circuit affirmed the Veterans Court decision and concluded that the lower

150. *See id.* (arguing that the physician's letter from 1999 was the date of the report of examination under 38 C.F.R. § 3.157(b)(1) and that that date should be accepted as the date of receipt of the claim).

151. *See* Maggitt v. West, 202 F.3d 1370, 1377–78 (Fed. Cir. 2000) (explaining that the Veterans Court has discretion to hear newly raised arguments on appeal or to invoke the exhaustion doctrine, which requires a claimant to exhaust his or her administrative remedies before appearing before the court, and remand the matter to the Board for initial consideration of the newly raised arguments).

152. *Massie*, 724 F.3d at 1327 (citing Robinson v. Shinseki, 557 F.3d 1355, 1359 (Fed. Cir. 2009)).

153. *Id.*

154. *Id.* at 1328–29.

155. *Id.* at 1326, 1328–29.

156. *Id.* at 1329 n.1 (referring to VETERANS BENEFITS ADMINISTRATION, U.S. DEP'T OF VETERANS AFFAIRS, M2-12-1, ADJUDICATION PROCEDURES, *available at* http://www.benefits.va.gov/WARMS/M21_1mr1.asp).

157. *Id.*

court did not err in interpreting the regulatory requirements for an informal claim for increased benefits based on a medical report.[158]

C. VA's Duty To Assist the Veteran

In 2013, the Federal Circuit decided three cases addressing the scope of VA's duty to assist veterans by providing a medical examination and opinion.[159] VA's duty is codified in 38 U.S.C. § 5103A, which requires VA to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim"[160] and to obtain a medical opinion when it is necessary to decide a claim.[161]

1. The presumption of regularity when choosing who renders a medical opinion

In *Parks v. Shinseki*,[162] the Federal Circuit held that a veteran had waived his right to rebut the presumption that VA had properly chosen a nurse practitioner to provide competent medical evidence because, even though he was pro se at the time, he had not raised any objection that challenged the presumption of regularity until his claim was before the Veterans Court.[163] Pro se veteran Arnold J. Parks's claim for service-connected disability compensation was denied by a VA RO.[164] The Board upheld the decision, in part because the only competent medical evidence on the record was an opinion from an advanced registered nurse practitioner ("ARNP") who stated that it was "less likely than not" that Mr. Parks's medical conditions were connected to his military service.[165]

Mr. Parks retained counsel and appealed to the Veterans Court where he argued, for the first time, that the ARNP's report was not "competent medical evidence" under 38 C.F.R. § 3.159(a)(1).[166] Rather than remanding to the Board so that it could consider the ARNP's qualifications, the Veterans Court held, as a matter of law, that a nurse practitioner is capable of providing a competent medical opinion.[167]

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158. *Id.* at 1329.
159. Sprinkle v. Shinseki, 733 F.3d 1180 (Fed. Cir. 2013); Parks v. Shinseki, 716 F.3d 581 (Fed. Cir. 2013); Beasley v. Shinseki, 709 F.3d 1154 (Fed. Cir. 2013).
160. 38 U.S.C. § 5103A(a) (2012).
161. *Id.* § 5103A(d)(1).
162. 716 F.3d 581 (Fed. Cir. 2013).
163. *Id.* at 585–86.
164. *Id.* at 582.
165. *Id.* at 583.
166. *Id.*
167. *Id.* (citing Cox v. Nicholson, 20 Vet. App. 563, 569 (2007)).

On appeal, the Federal Circuit noted that "[t]he presumption is not whether all nurse practitioners are qualified to give any medical opinion because of how the dictionary defines their capabilities."[168] Rather, the court found that the issue before it was "whether Mr. Parks waived his right to overcome the presumption that the selection of a particular medical professional means that the person is qualified for the task."[169] The court cited *Sickels v. Shinseki*[170] for the proposition that "[i]n the case of competent medical evidence, . . . VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case."[171] The court explained that, "[v]iewed correctly, the presumption is not about the person or a job title; it is about the process."[172]

As to whether the presumption had been rebutted, the Federal Circuit declined to comment on the factual matter of whether an ARNP with the qualifications in this case was qualified to opine on the matter at hand.[173] However, the court noted that, even when a veteran is proceeding pro se, the first step in rebutting the presumption is to actually raise an objection.[174] It rejected Mr. Parks's argument that, under *Comer v. Peake*,[175] the record should be construed sympathetically in his favor because he was pro se when he initially filed his claim.[176] The court distinguished *Comer*, in which the pro se veteran had advanced arguments that could sympathetically be read as asserting an earlier effective date for a higher disability evaluation, from the case at hand, in which Mr. Parks had raised no objection whatsoever to the nurse practitioner until he was no longer pro se and was proceeding before the Veterans Court with counsel.[177] Accordingly, the Federal Circuit affirmed the judgment of the Veterans Court.[178]

This case demonstrates that there are necessarily limits to the procedural aspects of the system that make it claimant friendly. The Federal Circuit set a limit—or perhaps simply reiterated an obvious limit—to the sympathetic reading doctrine when it observed: "[I]t is one thing to read a record sympathetically, as required by *Comer*; it is

168. *Id.* at 584.
169. *Id.*
170. 643 F.3d 1362 (Fed. Cir. 2011).
171. *Parks*, 716 F.3d at 585 (citing *Sickels*, 643 F.3d at 1366).
172. *Id.*
173. *Id.* at 585–86.
174. *Id.* at 585.
175. 552 F.3d 1362 (Fed. Cir. 2009).
176. *Parks*, 716 F.3d at 586.
177. *Id.*
178. *Id.*

quite another to read into the record an argument that had never been made."[179]

2. Claimant's right to an opinion from a specific VA physician

In *Beasley v. Shinseki*,[180] the Federal Circuit clarified that a veteran's right to receive a VA medical opinion to assist in the adjudication of a claim does not include the right to a medical opinion from a VA provider of the veteran's own choosing.[181] Veteran Johnnie H. Beasley was awarded service-connected disability benefits for post-traumatic stress disorder (PTSD), which was initially evaluated as 30% disabling, effective July 1990.[182] After further adjudication, the Board assigned an earlier effective date of July 1987 and directed the RO to obtain a retrospective medical opinion as to what level of disability evaluation should be assigned for the earlier date.[183] After reviewing the results of the retroactive medical opinion, the RO evaluated Mr. Beasley's service-connected PTSD as 50% disabling since July 1987.[184] Mr. Beasley appealed, arguing that a higher evaluation was appropriate.[185]

Through his attorney, Mr. Beasley contacted his VA treating physician and requested a medical opinion that would support his efforts to demonstrate that his PTSD was at least 70% disabling from May 1985 and that he should be awarded a total disability evaluation from January 1992.[186] A VA attorney responded by letter, noting that it was the Agency's policy to counsel VA treating physicians[187] not to provide such letters in order to avoid "a conflict of interest," and that the Agency had directed Mr. Beasley's treating physician not to reply to the veteran's request.[188] The letter noted that such requests were to be submitted to the Veterans Benefits Administration (VBA) and encouraged Mr. Beasley to "follow the appropriate appeals procedure[s]."[189]

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179. *Id.* at 586.
180. 709 F.3d 1154 (Fed. Cir. 2013).
181. *Id.* at 1159.
182. *Id.* at 1155.
183. *Id.*
184. *Id.*
185. *Id.* at 1156.
186. *Id.*
187. VA physicians who provide ongoing medical care and treatment to veterans are part of the Veterans Health Administration and not part of the VBA. VBA physicians receive specific training about how to conduct compensation and pension examinations and how the medical evidence obtained at such examinations informs the medical opinions they provide for the purposes of benefits adjudication.
188. *Beasley*, 709 F.3d at 1156.
189. *Id.*

Rather than wait for a RO decision and then appeal to the Board and the Veterans Court, Mr. Beasley petitioned the Veterans Court for a writ of mandamus ordering VA to direct his treating physician to provide a letter opining on the severity of his service-connected PTSD.[190] He argued that VA had breached its duty to assist under 38 U.S.C. § 5103A(a)(1) by refusing to provide him with a medical opinion.[191] The Veterans Court denied the petition and found that Mr. Beasley had not satisfied the requirements for a writ because he had failed to show why an appeal would not provide adequate relief.[192] On the merits, the Veterans Court also noted that 38 U.S.C. § 5103(d)(1) requires VA to provide a medical opinion when it is needed to decide a claim but does not entitle a veteran to a medical opinion by a VA treating physician of the veteran's own choice.[193] Mr. Beasley appealed the denial of his writ.[194]

In an opinion by Judge Bryson, the Federal Circuit first established that it had jurisdiction to review the matter, finding that "[the] claim raise[d] a question regarding the scope of the legal obligation imposed on [VA] under section 5103A," regardless of the fact that the legal question had been presented in the form of a petition for mandamus.[195] The Federal Circuit concluded: "This court has jurisdiction to review the [Veterans Court]'s decision whether to grant a mandamus petition that raises a non-frivolous legal question . . . . We may not review the factual merits of the veteran's claim, but we may determine whether the petitioner has satisfied the legal standard for issuing the writ."[196]

On the merits, Judge Bryson noted that "neither section 5103A(a)(1) nor section 5103A(d)(1) imposes an open-ended obligation on [VA] to provide a medical examination or opinion on demand," and that it was not clear whether Mr. Beasley was entitled to a new medical opinion as a matter of law because even the Board's 2010 order only required the RO "to 'consider' providing [Mr. Beasley with] a clinical evaluation, a retrospective medical evaluation, or both."[197] Finally, Judge Bryson noted that if Mr. Beasley's request was granted by allowing his petition, it would advance his claim at the

190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 1157.
196. *Id.* at 1158.
197. *Id.* at 1159.

cost of delay to other veterans who were using the appeals process as it was intended.[198] The judge concluded:

> [W]idespread use of the writ of mandamus as a substitute for the ordinary appeals process mandated by Congress, at least in cases in which the veteran claims that the [VA] breached its duty to assist . . . is not a result that would be beneficial to the system as a whole, and it is certainly not one contemplated by Congress.[199]

Judge Newman dissented. She agreed that the Federal Circuit had jurisdiction to review the matter, but, unlike the majority, focused on VA's stated reasons for instructing Mr. Beasley's treating physician not to provide a medical opinion.[200] She reviewed VA's attorney's letter and expressed disbelief that allowing a VA treating physician to provide information about a patient who had specifically requested it could be a conflict of interest: "Is the VA preventing the VA physician from presenting an opinion that could favor the veteran, on the theory that such an opinion presents a conflict of interest? This cannot be correct."[201] She concluded that for VA to "prohibit a veteran's VA physician from reviewing the veteran's evidence of service connection . . . cannot be what Congress intended by the 'duty to assist.'"[202]

This case is another illustration of how easy it is to disagree about what it means for a system to be "veteran friendly." The majority focused on one aspect of the procedure—the use of a writ of mandamus to advance a veteran's claim more quickly than the traditional appeals process—and reasonably concluded that allowing a veteran to use a writ in this way would be unfair to the many other veterans who also face long waiting times as their claims are adjudicated and appealed.[203] The dissent focused on a different aspect of the procedure—VA's duty to assist the veteran by supplying a medical opinion that provides competent medical evidence relating to the claim—and reasonably concluded that, on its face, it seemed like ludicrous policy for VA to prevent the veteran's treating physician, who presumably is most familiar with the severity of his condition, from providing an opinion on the matter.[204]

198. *Id.*
199. *Id.*
200. *Id.* at 1159–60 (Newman, J., concurring in part, dissenting in part).
201. *Id.* at 1160.
202. *Id.*
203. *Id.* at 1159 (majority opinion).
204. *Id.* at 1160 (Newman, J., dissenting).

3. Fair process and the procedure for responding to a VA medical opinion

In *Sprinkle v. Shinseki*,[205] the Federal Circuit addressed "whether fair process requires that the Board allow [a] claimant an additional 60 days to respond to evidence obtained on remand after the claimant declines to respond to a summary of that evidence in a Supplemental Statement of the Case"[206] ("SSOC"). By statute, the veterans benefits adjudication system provides for two levels of review of a veteran's claim: first at the RO and then at the Board.[207] In general, all evidence related to a claim must be considered by the RO in the first instance.[208] At the Board level, "[i]f further evidence, clarification of evidence . . . or any other action is essential for a proper appellate decision," then the Board must remand the claim to the RO and specify what action is required.[209] If, after such a remand, the RO denies the benefits sought, it must issue an SSOC addressing the additional evidence submitted and the claimant must be given thirty days to respond to the SSOC before the RO returns the matter to the Board.[210] After the appeal is certified to the Board, the claimant must be given an additional ninety days to submit new evidence to the RO.[211]

Although it was not established until 2009 that the Due Process Clause of the Fifth Amendment applied to proceedings in which veterans apply for benefits from VA,[212] the Veterans Court created the fair process doctrine in 1993 based on principles underlying VA adjudication procedures.[213] This doctrine established that, before the Board may rely on any evidence developed or obtained after the claimant has received the most recent SOC or SSOC, the Board must "provide [the] claimant with reasonable notice of such evidence . . . and a reasonable opportunity for the claimant to respond to it."[214] Later case law clarified that the claimant must be permitted to

205. 733 F.3d 1180 (Fed. Cir. 2013).
206. *Id.* at 1184–85.
207. *See* 38 U.S.C. § 7104(a) (2012) (Board); *id.* § 7105(d)(1) (RO or agency). *See generally id.* § 7105(b)(1) (outlining the procedural and timeliness requirements for filing a notice of disagreement and initiating appellate review).
208. *Id.* § 7104(a).
209. 38 C.F.R. § 19.9 (2013).
210. *Id.* §§ 19.31(a), 19.38.
211. *Id.* § 20.1304(a).
212. *See* Cushman v. Shinseki, 576 F.3d 1290, 1292 (Fed. Cir. 2009) (holding explicitly that entitlement to a disability claim is a property interest protected by the Due Process Clause of the Fifth Amendment such that an applicant "has a constitutional right to a fundamentally fair adjudication of his claim").
213. Thurber v. Brown, 5 Vet. App. 119, 126 (1993).
214. *Id.* at 126.

respond not only with argument and comment, but also must be given the opportunity to provide additional evidence.[215]

Veteran Jimmy R. Sprinkle applied for service-connected disability benefits for mitral valve prolapse and myoclonus.[216] He received a VA medical examination, after which the RO denied his claim.[217] On appeal, the Board remanded for an additional medical examination and that examination took place in October 2009.[218] Thereafter, the RO continued to deny service-connected benefits in an October 21, 2009, SSOC.[219] Mr. Sprinkle was notified that he had thirty days to respond with additional comments or evidence before the matter would be returned to the Board.[220] Instead, two weeks later, he elected to have his appeal returned directly to the Board without submitting any additional information.[221] Nine days after that, Mr. Sprinkle was notified that his appeal had been certified to the Board and that his file was being transferred to that office.[222] He was informed that he had "90 days, or until the Board issued a decision in his case" to send additional evidence about his appeal to the Board.[223] A week later, Mr. Sprinkle, then represented by an attorney, formally disagreed with the SSOC, requested that the case be transferred to the Board, and asked that the RO send him a copy of all evidence obtained after December 2004—including the October 2009 negative medical linkage opinion.[224] Because the file had been transferred to the Board, this request, which was subsequently twice-repeated, had to be forwarded from the RO to the Board.[225]

On May 6, 2010, Mr. Sprinkle's attorney received copies of Mr. Sprinkle's appeals documents from the Board, including the October 2009 negative medical linkage opinion.[226] On June 3, 2010, less than thirty days later, the Board denied the service-connected benefits that Mr. Sprinkle sought.[227]

Mr. Sprinkle appealed to the Veterans Court, arguing that "the Board failed to afford him fair process in the adjudication of his

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215. Austin v. Brown, 6 Vet. App. 547, 551 (1994) (clarifying the fair process doctrine).
216. Sprinkle v. Shinseki, 733 F.3d 1180, 1182 (Fed. Cir. 2013).
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 1182–83.
222. *Id.* at 1183.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

claims by not providing him with a copy of the October 7, 2009, medical examiner's opinion until fewer than 30 days before the Board's decision."[228] The Veterans Court disagreed and affirmed the Board's denial of benefits; Mr. Sprinkle then appealed to the Federal Circuit.[229]

Judge Reyna, writing for the majority, noted that the fair process doctrine "is only triggered when 'evidence [is] developed or obtained by [the Board] subsequent to the issuance of the most recent [SOC] or [SSOC] with respect to such claim."[230] He concluded that the case at hand was distinguishable from *Thurber v. Brown*[231] and other cases in which the fair process doctrine applied because Mr. Sprinkle did receive a summary of the new evidence developed by the RO, in the form of an SSOC that described the October 2009 negative medical opinion.[232] Judge Reyna further found that Mr. Sprinkle himself had affirmatively declined to respond to the SSOC and had not, at any point, challenged the adequacy of the summary of evidence in the SSOC.[233] Therefore, the fair process doctrine was not implicated.[234]

Nor was this a case like *Young v. Shinseki*,[235] in which the veteran did not receive a copy of the medical opinion until after the Board decision was issued, because Mr. Sprinkle received the documents he requested several weeks before the Board's decision.[236] The majority concluded that "[w]hile it [was] regrettable that there was less than 30 days between when Mr. Sprinkle's counsel received the medical exam he subsequently requested and when the Board issued its decision, Mr. Sprinkle was not prejudiced by any action of the agency" because it was he who affirmatively chose to have the appeal immediately returned to the Board, had seven months to submit new evidence, and never challenged the adequacy of the RO's summary of the medical examination during that time.[237] Accordingly, the Federal Circuit affirmed the Veterans Court's conclusion that Mr. Sprinkle was not denied fair process.[238]

Judge Taranto dissented and opined that the case should be remanded because "[t]he Veterans Court's discussion leaves

228. *Id.*
229. *Id.*
230. *Id.* at 1185 (internal quotation marks omitted).
231. 5 Vet. App. 119 (1993).
232. *Sprinkle*, 733 F.3d at 1186.
233. *Id.* at 1185.
234. *Id.* at 1186.
235. 22 Vet. App. 461 (2009).
236. *Sprinkle*, 733 F.3d at 1186.
237. *Id.* at 1186–87.
238. *Id.* at 1187.

uncertain how it interpreted the doctrine" and "[o]n this 'rule of law' issue, it is advisable for the Veterans Court to provide clarification in the first instance."[239] He called the analysis by the Veterans Court "troublingly incomplete about its understanding of the 'fair process' doctrine"[240] and noted that such an analysis would not generally be considered sufficient in a more mainstream legal context:

> [T]he Veterans Court did not discuss the obvious issues raised . . . . In our legal system, where a tribunal relies on evidence in a way that is adverse to a party, it is virtually never sufficient to have told the party in advance that the evidence exists, or even to have provided a description of it; the party is broadly entitled, upon request, to scrutinize the evidence directly and not be forced to rely on the accuracy or completeness of another's description of it. This principle is fundamental to notions of fair process even in the constitutional context.[241]

Judge Taranto then tied these concepts back to the specific context of veterans law, noting that the nature of the veterans benefits system means that such general notions of fair process should be even more applicable in this area, rather than less:

> It is hard to see how it could not be fundamental in a claimant-friendly adjudicatory system like the one established for veterans' benefits. Perhaps in some settings an argument might be made for withholding evidence from a party even if the tribunal relies on it. This case involves no such argument: the government acknowledges that Mr. Sprinkle was entitled to be given the evidence upon request.[242]

Judge Taranto's dissent focused on the veteran's right to receive the evidence and VA's duty to provide it, but did not address the veteran's actions in affirmatively requesting that his appeal be certified to the Board while stating that he had no further evidence or argument to submit.[243] The judge's concern about the "troublingly incomplete" analysis in the Veterans Court decision, as compared to other areas of federal law, seems to overlook the fact that the majority of Veterans Court decisions are single-judge adjudications and non-precedential.[244]

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239. *Id.* (Taranto, J., dissenting) (citing 38 U.S.C. § 7292(a) (2012)).
240. *Id.* at 1188.
241. *Id.* at 1189 (citations omitted).
242. *Id.*
243. *Id.* (Taranto, J., dissenting); *see also* Wood v. Derwinski, 1 Vet. App. 190, 193 (1991) (noting that the "duty to assist is not a one-way street").
244. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2012 ANNUAL REPORT 1–2 (2012) [hereinafter 2012 ANNUAL REPORT], *available at* http://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf (showing that, in 2012, the vast majority of appeals came before a single judge, as opposed to a

The Veterans Court traditionally has one of the highest appeal rates in the entire federal judiciary; it is only by using its statutory ability to issue such non-precedential decisions that the court is able to manage such an overwhelming workload.[245] As a result, its single-judge, non-precedential decisions are often concise and do not exhaustively explain every aspect of the law they address because such decisions affect only one individual claimant and do not establish precedential law.[246]

4. "Combined effects" medical examination for total disability evaluation based on individual unemployability

In *Geib v. Shinseki*,[247] the Federal Circuit considered whether a veteran with multiple service-connected conditions who applies for a total disability evaluation based on individual unemployability ("TDIU") is entitled to a "comprehensive" or "combined effects" medical examination to consider all service-connected disabilities together, or whether VA's duty to assist is met by providing a separate medical examination for each condition.[248] If a veteran is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities," then VA must assign TDIU.[249] The Veterans Court has clarified that "a request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate [evaluation] for a disability or disabilities, . . . [including] as part of a claim for increased compensation."[250]

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multi-judge panel or the full Veterans Court); *see also* 38 U.S.C. § 7254(b) ("The Court may hear cases by judges sitting alone or in panels . . . .").

245. *See* 2012 ANNUAL REPORT, *supra* note 244, at 5 (finding the average of 244 appeals decided per active Veterans Court judge to be "the second highest number of merits decisions per active judge" amongst the twelve circuit courts of appeals).

246. Ridgway, *supra* note 41, at 154 ("[T]he court's panel decisions serve its role as a law giver while the single-judge decisions correct errors."). In addition, the veteran waiting for a decision from the Veterans Court has often been stuck on what has been called the "hamster wheel" of VA's adjudication system for years, if not decades, before his or her appeal even reaches the Veterans Court. Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 390–91 (2011). Most of the claims are for disability compensation, and many of the claimants served in either World War II or the Korean or Vietnam conflicts, which means that the average claimant at the Veterans Court is both disabled and possibly elderly, or the surviving spouse of such a veteran. *Id.*

247. 733 F.3d 1350 (Fed. Cir. 2013).

248. *See id.* at 1352–53 ("Geib applied for total disability based on individual unemployability," and, on appeal, he argued "that the Board was required to obtain a single medical opinion that addressed the impact of all his service-connected disabilities on employability.").

249. 38 C.F.R. § 4.16 (2013).

250. Rice v. Shinseki, 22 Vet. App. 447, 453–54 (2009) (per curiam); *see also* Comer v. Peake, 552 F.3d 1362, 1367 (Fed. Cir. 2009) (recognizing that a claim for

Edward W. Geib, a World War II veteran, applied for TDIU on the basis that his service-connected trenchfoot,[251] bilateral hearing loss, and tinnitus made him unable to obtain or retain gainful employment.[252] At the time, his combined disability evaluation was 70%.[253] The RO denied TDIU but the Board remanded the matter "with orders to provide Mr. Geib with medical examinations and to re-adjudicate his TDIU claim."[254] After an examination to assess Mr. Geib's service-connected bilateral hearing loss and tinnitus, an audiologist opined that these conditions did not prevent Mr. Geib from "seeking or maintaining gainful physical or sedentary employment . . . in a loosely-supervised situation, requiring minimal interaction with the public."[255] After a second examination to assess the service-connected trenchfoot, the medical examiner noted that "Mr. Geib's employment would certainly be affected by his trenchfoot, and . . . he could not do a mildly or moderately physical job that would include standing or walking for long periods of time."[256] However, the examiner concluded that "Mr. Geib should be able to obtain and maintain gainful employment at a sedentary job."[257]

After considering these two medical opinions, the VA RO increased the disability evaluation for Mr. Geib's hearing loss and tinnitus from 50% to 80%, which brought his combined disability evaluation to 90%.[258] However, the RO continued to deny a TDIU evaluation.[259] On appeal, the Board agreed that Mr. Geib was not entitled to a TDIU, finding that although his service-connected disabilities "do affect his employability," they "do not prevent him from being employed."[260]

On appeal to the Veterans Court, Mr. Geib argued "that the Board was required to obtain a single medical opinion that addressed the impact of all his service-connected disabilities on employability."[261]

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increased disability evaluation coupled with evidence of unemployability raises claim for TDIU).

251. "Trenchfoot" is "a type of immersion foot resembling frostbite, caused by prolonged action of cold water on the skin combined with circulatory disturbance due to cold and inaction." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 728 (32d ed. 2011).

252. *Geib*, 733 F.3d at 1351–52.

253. *Id.* at 1352.

254. *Id.*

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

256. *Id.*

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

258. *Id.* at 1352–53.

259. *Id.* at 1353.

260. *Id.* (citation omitted).

261. *Id.* (citation omitted).

The Veterans Court rejected this argument[262] and concluded that the Board itself properly considered the combined effects of the two separate medical opinions when it concluded that Mr. Geib was capable of sedentary employment in the type of situation described by the audiologist.[263]

On appeal to the Federal Circuit, Mr. Geib argued that when a veteran is service-connected for multiple disabilities, VA's duty to assist implicitly "requires a *single* medical opinion addressing the aggregate effect of all disabilities on employability."[264] He argued that, "when a medical opinion does not address all these factors, the VA may not fill in the gaps by providing its own 'expert' opinion regarding the combined effect of the veteran's disabilities."[265]

The Federal Circuit did not find these arguments persuasive. It agreed with the Veterans Court and stated: "Where, as here, separate medical opinions address the impact on employability resulting from independent disabilities, the VA is authorized to assess the aggregate effect of all disabilities, as it did."[266] However, the court established no categorical rule about *when* a combined-effects opinion would be necessary.[267]

Within days after the Federal Circuit issued its decision in *Geib*, the Veterans Court issued a precedential decision in *Floore v. Shinseki*[268] on virtually the same issue.[269] Although the Veterans Court majority, like the Federal Circuit in *Geib*, concluded that a combined-effects medical examination or opinion was not required by statute or regulation,[270] the concurrence raised several key issues that were not

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262. Geib v. Shinseki, No. 11-1501, 2012 WL 2050416, at *3 (Vet. App. June 7, 2012), *aff'd*, 733 F.3d 1350.

263. *Id.* at *3–4; *see id.* at *3 (finding that the Board complied with the Veterans Court precedent "that the Board must interpret all evidence of record, medical or otherwise, and then assess the combined effect of the veteran's service-connected disabilities on his or her ability to engage in substantially gainful employment").

264. *Geib*, 733 F.3d at 1353 (emphasis added).

265. *Id.* at 1354 (citation omitted).

266. *Id.*

267. *Cf.* Floore v. Shinseki, 26 Vet. App. 376, 384 (2013) (Bartley, J., concurring) (stating, in a decision decided after *Geib*, that there should be an expert opinion on the overall functional impairment for TDIU entitlement when there are multiple compensable service-connected disabilities that affect different body systems).

268. 26 Vet. App. 376 (2013).

269. *Id.* at 377 ("Floore appeals . . . [the] decision of the Board of Veteran's Appeals . . . that denied entitlement to a [TDIU] due to multiple service-connected disabilities [arguing] that for a claimant with multiple service-connected disabilities, a medical opinion addressing the combined effects of all service-connected disabilities is required for the Board to render a decision on entitlement to TDIU . . . .").

270. *See id.* at 381 ("There is no statute or regulation which requires the Secretary . . . to use experts to resolve the issue of unemployability." (quoting Gary v. Brown, 7 Vet. App. 229, 231–32 (1994))). Floore relied on, inter alia, VA Fast Letter

addressed in the Federal Circuit's majority opinion.[271] The concurrence noted that when a medical examiner provides an opinion about whether a veteran is unemployable as a result of service-connected disabilities, the examiner must furnish a full description of the effects of the disability upon the veteran's ordinary activities, including work.[272] The opinion observed that, in this case, Mr. Floore had service-connected disabilities that were evaluated as 90% disabling and that the seven disabilities affected four different body systems.[273] Under such circumstances, even if there was no bright-line rule requiring a combined-effects opinion in every case, the concurrence opined that, "as a practical matter where there are multiple compensable service-connected disabilities, especially affecting different body systems, expert opinion on the overall functional impairment, including occupational impairment, caused by the combination of service-connected disabilities *will be necessary for an adequately reasoned decision as to TDIU entitlement*."[274] By focusing on the need for adequate reasoning, the *Geib* concurrence may have left the door open for veterans to argue that their situation warrants a combined-effects medical opinion, even if such an opinion is not required in every case.

D. Service Connection

At least initially, most disability compensation claims turn on whether a veteran can establish that his or her current disability can be linked to military service.[275] There are numerous ways that service connection may be proven. Establishing "direct" service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service

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13-13 for his assertion that VA is required to administer a combined-effects medical examination whenever a veteran files a TDIU claim. *Id.* at 380–81. Ironically, however, the Fast Letter "specifically state[d] that VA is not required to provide a general medical examination in connection with every TDIU claim." *Id.* at 381 (internal quotation marks omitted).

271. *Id.* at 384–85 (Bartley, J., concurring).

272. *Floore*, 26 Vet. App. at 384 (citing 38 C.F.R. § 4.10 (2013)).

273. *Id.* at 385.

274. *Id.* at 384 (citing 38 C.F.R. § 4.10).

275. *See* 38 U.S.C. § 101(13) (2012) ("The term 'compensation' means a monthly payment made by the Secretary [of Veterans Affairs] to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran . . . ."); *id.* § 101(16) (defining "service-connected" as meaning that "such disability was incurred or aggravated" in service); *see also id.* § 1110 (2012) (defining wartime disability compensation, in part, as payment "[f]or disability resulting from personal injury suffered or disease contracted in line of duty").

disease or injury and the present disability.[276] "Secondary" service connection is awarded when a disability "is proximately due to or the result of a service-connected disease or injury."[277] "Additional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310(a)."[278] There are also regulations that create exceptions to the evidentiary hurdles for specific groups of veterans.[279]

1. Establishing service connection by continuity of symptomatology

Early in 2013, the Federal Circuit substantially limited one of the long-standing routes by which veterans were previously able to establish that their disabilities were linked to service: showing symptoms of a disability continuously since service.[280] Also, later in the year, the Federal Circuit clarified that lay testimony is sufficient to establish the existence of observable symptoms and can be adequate, by itself, to establish service connection.[281]

In *Walker v. Shinseki*,[282] the Federal Circuit substantially limited the "theory of continuity of symptomatology" when it held that this method of establishing service connection only applied to the chronic diseases listed in 38 C.F.R. § 3.309(a).[283] The first applicable

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276. Hickson v. West, 12 Vet. App. 247, 253 (1999) (citing Caluza v. Brown, 7 Vet. App. 498, 506 (1995)); *see also* Davidson v. Shinseki, 581 F.3d 1313, 1315 (Fed. Cir. 2009) ("In the case of any veteran who engaged in combat with the enemy in active service with [the U.S.] military . . . , the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease . . . ." (emphasis omitted) (internal quotation marks omitted)); 38 C.F.R. § 3.303(a) ("Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein.").

277. 38 C.F.R. § 3.310(a).

278. Libertine v. Brown, 9 Vet. App. 521, 522 (1996).

279. *See, e.g.*, 38 C.F.R. § 3.309(a)–(c) (identifying certain diseases and other conditions that, if certain requirements are satisfied, are presumed to be service-connected for those who contracted enumerated chronic or tropical diseases or were prisoners of war).

280. *See, e.g.*, *Hickson*, 12 Vet. App. at 253 (holding that 38 C.F.R. § 3.303(b) allows veterans to show entitlement to disability compensation when they do not suffer from a chronic disease enumerated in § 3.309(a) if they can show continuity of symptomatology through medical evidence or lay testimony).

281. *See* Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (identifying three standards for when "[l]ay evidence can be competent and sufficient to establish a diagnosis of a condition" (internal quotation marks omitted)); Buchanan v. Nicholson, 451 F.3d 1331, 1335 (Fed. Cir. 2006) (stating that lay evidence must be considered and can be sufficient in and of itself).

282. 708 F.3d 1331 (Fed. Cir. 2013).

283. *Id.* at 1338.

regulation, 38 C.F.R. § 3.303(a), sets forth basic principles relating to service connection, including that it may be established "by affirmatively showing inception or aggravation during service or through the application of statutory presumptions."[284] The sub-section that follows immediately thereafter sets forth two additional ways to establish service connection: chronicity and continuity. The first section states that "[w]ith chronic disease shown as such in service (or within the presumptive period under [38 C.F.R] § 3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes."[285] Later text in the same sub-section clarifies that "where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned," then an evidentiary showing of continuity of symptoms since service is required.[286]

Veteran Julius E. Walker submitted a claim for disability compensation for bilateral hearing loss that was denied by the RO and the Board on the basis of a VA audiologist's opinion finding no linkage to service and attributing the veteran's hearing loss to age and noise from recreational hunting.[287] The veteran died during the pendency of his appeal to the Veterans Court, and his son (Mr. Walker) was substituted as a potential accrued benefits claimant.[288] Before the Veterans Court, Mr. Walker argued that the linkage opinion was inadequate because the audiologist did not review lay statements from the veteran's family indicating that the veteran suffered from "continuous long-standing symptomatology."[289] He also argued that the Board failed to consider the same lay

284. 38 C.F.R. § 3.303(a).
285. 38 C.F.R. § 3.303(b). The sub-section continues:

> This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear-cut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity.

Id.
286. *Id.*
287. *Walker*, 708 F.3d at 1332–33.
288. *Id.* at 1332.
289. *Id.* at 1333–34.

statements.[290] The Veterans Court conducted a standard three-part analysis for service connection and concluded that the Board had not committed any clear error when it weighed the lay evidence against the opinion of the VA audiologist.[291] The court did not consider whether service connection could be established under a theory of continuity of symptomatology and affirmed the Board's denial.[292]

Mr. Walker appealed to the Federal Circuit.[293] In an opinion by Judge Clevenger, the court noted that the lack of a cross-reference to 38 C.F.R § 3.309(a) in § 3.303(b) created ambiguity as to whether § 3.309(a)'s list of chronic conditions limited the application of § 3.303(b)'s path to service connection under a theory of continuity of symptomatology.[294] The Secretary argued that "diseases that would be considered 'chronic' in a medical sense, but which are not listed in § 3.309(a), could qualify for service connection only under the three-element test under § 3.303(a)"[295] as explained in early Veterans Court cases.[296] However, such diseases would not qualify for service connection under a theory of continuity of symptomatology unless they were explicitly listed in 38 C.F.R § 3.309(a).[297] Judge Clevenger determined that the Agency's position was "reasonable" and rejected Mr. Walker's broader assertion that continuity of symptomatology could establish service connection even for diseases or injuries that are not chronic.[298]

2. Establishing stressor requirement for PTSD based on military sexual trauma

a. Probative value of negative evidence

In two consolidated cases with similar facts, the Federal Circuit addressed military sexual trauma ("MST")—an issue frequently in the

290. *Id.* at 1334.
291. *Id.*
292. *Id.*
293. *Id.* at 1332.
294. *Id.* at 1338.
295. *Id.*
296. *See* Hickson v. West, 12 Vet. App. 247 (1999) (enumerating the three ways to show service connection for VA disability compensation: (1) showing "medical evidence of a current disability"; (2) providing "medical or, in certain circumstances, lay evidence of incurrence or aggravation of a disease or injury in service"; and (3) introducing "medical evidence of a nexus between the claimed in-service injury or disease and the current disability."); Caluza v. Brown, 7 Vet. App. 498 (1995) (describing how claimants can show service connection through medical or lay evidence to connect current disabilities with activities while in the military).
297. *Walker*, 708 F.3d at 1337.
298. *Id.* at 1338–40.

news in 2013.[299] The court held that neither the absence of service records documenting a sexual assault during military service nor a veteran's failure to report an in-service sexual assault at the time of occurrence could be considered as pertinent evidence that a sexual assault did not occur.[300]

Establishing service connection for PTSD is similar to establishing service connection for any disability but also requires that the veteran provide evidence that he or she experienced an "in-service stressor" and establish, by medical evidence, a causal link between the veteran's current symptoms and the stressor.[301] The existence of the in-service stressor may, in some situations, be proven by lay evidence.[302] However, recognizing that victims of in-service assaults, particularly sexual assaults, face additional difficulties in corroborating their assault as a stressor, VA has promulgated specific regulations to address this evidentiary problem. When a PTSD claim is based on "in-service personal assault," which includes sexual assault, the regulation provides that

> evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident. Examples of such evidence include, but are not limited to: records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy.[303]

Supporting evidence found in such sources, if credible and pertinent, is positive evidence of the in-service stressor and VA is required to consider such evidence.[304]

Veterans AZ and AY sought disability compensation for PTSD based on sexual assaults they stated happened during their military service.[305] In both cases, the veterans' service records had no

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299. *See, e.g.*, Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES (Nov. 7, 2013), http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html?_r=0 (discussing the increase of sexual assaults in the military over the 2013 fiscal year).

300. AZ v. Shinseki, 731 F.3d 1303, 1318, 1322 (Fed. Cir. 2013).

301. *See* 38 C.F.R. § 3.304(f) (2013) (establishing that service connection for PTSD requires (1) a medical diagnosis of PTSD; (2) "a link, established by medical evidence, between [the] current symptoms and an in-service stressor"; and (3) "credible supporting evidence that the claimed in-service stressor occurred").

302. *See* Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 330 F.3d 1345, 1352 (Fed. Cir. 2003) (upholding the validity of 38 C.F.R. § 3.304(f) because it does not prohibit consideration of lay evidence).

303. 38 C.F.R. § 3.304(f)(5).

304. *Id.*

305. AZ v. Shinseki, 731 F.3d 1303, 1305 (Fed. Cir. 2013).

indication they had been treated for, or that they had reported, a sexual assault during service.[306]

AZ claimed that her PTSD was the result of sexual and physical abuse by a higher-ranking, non-commissioned officer.[307] Her three siblings submitted affidavits that she told them about the abuse in the spring of 1974 and that AZ was afraid to report the assaults to military authorities who she did not think would believe her.[308] AZ herself stated that "she did not report these incidents to the military legal authorities because she was a young girl, sexually assaulted, verbally abused and beaten by a superior [officer] and she was in fear of her life."[309]

The claim was denied by the RO and, eventually, by the Board—in part because service records did not include reports of the alleged assaults and in part because the assaults were never reported to military authorities.[310] "The Board stated that under the applicable regulations, [s]ervice department records *must support and not contradict*, the veteran's testimony regarding non-combat stressors."[311] The Board discounted the probative value of the three lay affidavits from AZ's siblings on the basis that they had not witnessed the assaults taking place.[312]

AY claimed that her PTSD was the result of a sexual assault by another soldier during military training.[313] Her service records did not report treatment for any assault and AY confirmed that she did not report the incident to military authorities when it occurred.[314] However, she did submit a statement from her husband, who stated that AY told him about the assault when they were in service together.[315] She later submitted three more lay statements from people who knew her during service.[316] A fellow soldier stationed with AY during training reported that AY told her about the assault the day after it happened; AY's roommate at her next duty assignment reported that AY attempted suicide and received

306. *Id.* at 1305, 1307.
307. *Id.* at 1306.
308. *Id.*
309. *Id.* (alteration in original) (internal quotation marks omitted).
310. *Id.*
311. *Id.* at 1307 (internal quotation marks omitted).
312. *Id.*
313. *Id.* at 1308.
314. *Id.*
315. *Id.*
316. *Id.*

treatment at the base hospital; and AY's sister stated that AY's personality completely changed after her time in the military.[317]

The RO denied the claim,[318] finding that although "AY had 'provided statements from [four individuals] who support that they knew [her] while in service and that [she] told them about the rape," the statements were insufficient because the affiants did not witness the incident.[319] On appeal, the Board "also acknowledged the [four] lay statements, but found that they were directly contradicted by other evidence" because AY had not reported the assault at the time nor received any psychiatric treatment.[320]

The Veterans Court affirmed both decisions in a single-judge memorandum.[321] It concluded that the Board's weighing of the evidence was permissible and that the Board had provided adequate reasons or bases for finding the veterans' statements not credible.[322]

In an opinion authored by Judge Dyk, the Federal Circuit vacated and remanded both cases.[323] The majority engaged in a very lengthy analysis that began by noting that VA is obligated to consider all evidence that is "'pertinent' to service connection."[324] It referred to the rules established in *Buchanan v. Nicholson*[325] that the lack of contemporaneous medical records "does not, in and of itself, render lay evidence not credible," although "'the lack of [such] records may be a fact that the Board can consider and weigh against a veteran's lay evidence.'"[326]

Regarding the first issue—whether the absence of a service record documenting an unreported sexual assault is pertinent evidence that the sexual assault did not occur—the majority noted that the appellants were arguing that the absence of such service records is not pertinent evidence because it is unreasonable to expect that such records would exist.[327] Judge Dyk's majority decision stated that "VA does not dispute that, in the great majority of cases, such incidents are not reported to military authorities, and therefore such records do not exist."[328] The decision also acknowledged that "[s]ervicemen

317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 1309.
321. AY v. Shinseki, No. 10-2390, 2011 WL 5966264, at *1 (Vet. App. Aug. 17, 2011).
322. *AZ*, 731 F.3d at 1309.
323. *Id.* at 1306.
324. *Id.* at 1311 (citing Fagan v. Shinseki, 573 F.3d 1282, 1287–88 (Fed. Cir. 2009)).
325. 451 F.3d 1331 (Fed. Cir. 2006).
326. *AZ*, 731 F.3d at 1311 (quoting *Buchanan*, 451 F.3d at 1336).
327. *Id.*
328. *Id.* at 1312.

and servicewomen who experience inservice sexual assaults face 'unique' disincentives to report."[329] To support this conclusion, the majority decision referred to the victims' "fear of retaliation or reprisals,"[330] fear of punishment for any other misconduct that may have been occurring at the time of the assault, the stigma that may be associated with reporting a sexual assault, and fear that reporting such an assault may make the victims appear weak or incapable of performing their job.[331]

The majority reviewed the common law evidentiary rule that the absence of evidence is only admissible as negative evidence if the event in question is of the type that would normally be documented.[332] The court explained that "[t]he absence of a record of an event *which would ordinarily be recorded* gives rise to a legitimate negative inference that the event did not occur"[333] and, "[c]orrespondingly, courts have refused to admit evidence of the absence of a record to show that an event did not occur, where it was not reasonable to expect the event to have been recorded."[334] After reviewing the development of common law evidentiary rules, as followed by the Supreme Court and lower federal courts and codified by the FRE, the majority decided not to admit "unreliable record evidence.[335] The majority concluded that "basic evidentiary principles preclude treating the absence of a record of an unreported sexual assault as evidence of the nonoccurrence of the assault."[336] On the first issue before it, the Federal Circuit held: "[W]here an alleged [in-service] sexual assault . . . is not reported, the absence of service records documenting the alleged assault is not pertinent evidence that the assault did not occur."[337]

Regarding the second issue—whether a veteran's failure to report an in-service sexual assault to military authorities constitutes pertinent evidence that such an assault did not occur—the court held that "VA may not treat a claimant's failure to report an alleged sexual assault to military authorities as pertinent evidence that the sexual assault did not occur."[338] As with the first issue, the decision looked beyond the confines of veterans law for its rationale. The majority's opinion

329. *Id.* at 1313.
330. *Id.* (internal quotation marks omitted).
331. *Id.*
332. *Id.* at 1315 (citation omitted).
333. *Id.* (alteration in original) (internal quotation marks omitted).
334. *Id.* at 1316.
335. *Id.* at 1317.
336. *Id.* at 1318.
337. *Id.*
338. *Id.* at 1322.

started by noting the historic belief that "in the context of criminal rape trials, . . . it [wa]s so natural as to be almost inevitable that a rape victim would 'make immediate complaint [about the rape] to her mother or other confidential friend.'"[339] Therefore, under this historic presumption, "it was thought that a victim's failure to promptly report the rape to anyone was a 'suspicious inconsistency.'"[340]

The majority concluded that this "common law theory of pertinence" was inapposite for five reasons. First, it noted that even when it was applicable, the historic presumption was only appropriate if a victim had failed to report a rape *to anyone at all*, and it did not apply when the victim reported a rape to family or friends.[341] Second, the decision reviewed legislative reports and recent case law from numerous jurisdictions and concluded that "modern courts are skeptical that the lack of a prompt report has probative value" and that "[i]t is now known that sexual assault is generally underreported."[342] The court also noted that, unlike criminal cases in which defendants have a right to cross-examine a witness about potential omissions, "[i]n the context of a non-adversarial civil benefits proceeding, such as a VA benefits proceeding, there is no criminal defendant, and these constitutional concerns are inapposite."[343] Third, the court noted that both civil and criminal courts have held that testimony about the failure to make a report is inadmissible when "there is reason to suspect that no report or other statement would have been made."[344] Fourth, the court observed that reporting an in-service sexual assault carries a "unique deterrent" in the form of immediate reprisals from superior officers who almost certainly know the alleged perpetrator personally—an uncommon phenomenon in criminal cases.[345] Finally, the majority reasoned that "the veteran's benefits system is based on 'solicitude for the claimant,'"[346] and, given that the Secretary of Veterans Affairs had determined, based on empirical evidence, that many in-service sexual assaults will not be reported to authorities, it would "hardly comport with [such] a [pro-claimant] system" to create a penalty against service members who failed to report an in-service assault.[347]

339. *Id.* at 1318–19 (quoting Baccio v. New York, 41 N.Y. 265, 268 (1869)).
340. *Id.* at 1319 (citation omitted).
341. *Id.* at 1319.
342. *Id.* at 1319–20 (citation omitted).
343. *Id.* at 1320.
344. *Id.* at 1320 (comparing this principle to the rule on omissions from unreliable records).
345. *Id.* at 1322.
346. *Id.* (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985)).
347. *Id.*

Accordingly, the court remanded the cases and held that the approach taken by the Board and ratified by the Veterans Court was "unsupported by the applicable statute and regulations, contradicted by the empirical evidence, and contrary to general evidence law."[348]

Judge Moore dissented, objecting to the majority's decision on several grounds. First, she observed that, while the veterans in these two cases were certainly sympathetic claimants, this did not change the fact that "our jurisdiction prevents us from reviewing fact findings or even applications of law to fact."[349] She suggested that the majority actually disagreed with the Board's weighing of the evidence in these two cases and that, "as such, [it] was forced to adopt this new, categorical rule of law."[350]

Judge Moore also objected to the majority's reliance on extra-record information, observing that "none of the studies cited by the majority were a part of the record below, and the VA was not given an opportunity to explain their import to the cases before us."[351] Her main objection to the substance of the majority's analysis was that it prevented any probative value from being assigned to a failure to report an in-service sexual assault, rather than allowing the Agency's fact finder to consider what weight would be appropriate—the correct adjudication avenue as established by previous Federal Circuit case law.[352] Judge Moore stated, in reference to *Buchanan v. Nicholson*,[353] that "[w]e cannot ignore this binding precedent."[354] Before citing *Buchanan*, however, Judge Moore, like the majority, reviewed case law from other jurisdictions and general evidentiary principles and then concluded that the majority's "new, categorical rule of law . . . is at odds with other courts, which have consistently found that non-reporting of sexual assault is relevant."[355]

Judge Moore admitted that "as a judge, a woman, and a human being, I am dubious about the weighing of the evidence and the fact findings of the VA in this case. But the applicable statutes and basic principles of evidence law leave us without power to help them."[356] She concluded that "[t]oday, the majority usurps Congress's role with its broad proclamation on the admissibility of certain evidence in the

348. *Id.* at 1323.
349. *Id.* (Moore, J., dissenting).
350. *Id.*
351. *Id.* at 1324.
352. *Id.* at 1324–26.
353. 451 F.3d 1331 (Fed. Cir. 2006).
354. *AZ*, 731 F.3d at 1326 (Moore, J., dissenting).
355. *Id.* at 1323.
356. *Id.* at 1326.

VA system" and that "[s]olicitude for veterans does not justify making up rules as we go along."[357]

As noted by the dissent, this decision relied on a great deal of material that was not part of the record before the Agency, with much of the material drawn from general legal principles as opposed to being specific to veterans law.[358] In its analysis, the majority referred to the regulatory history of 38 C.F.R. § 3.304(f)(5), which was "enacted in part to address the fact that '[m]any incidents of in-service personal assault are not officially reported'"[359] and noted that this applies even more so to incidents of in-service personal assaults that are sexual in nature.[360] The majority reviewed annual reports documenting the number of in-service sexual assaults that are officially reported to the Department of Defense (DOD) and that are required to be submitted to Congress.[361] The number of in-service sexual assaults that are reported is very low—only 11% in 2012, 14% in 2010, and 7% in 2006—as compared to the DOD's estimated number of how many assaults actually occurred.[362] Thus, in the majority opinion, the veteran-specific context of unique disincentives faced by service members who experience an in-service sexual assault was not the starting point of the analysis. Instead, it appeared at the end of an extensive discussion of general evidentiary principles and supporting data from social science research to support the rule that the majority decision had already reached.[363]

b. Evidentiary exceptions for PTSD as a result of fear of hostile or terrorist activity

In *Hall v. Shinseki*,[364] the Federal Circuit reviewed the applicability of 38 C.F.R. § 3.304(f)(3), which creates an evidentiary exception for veterans who claim that they have PTSD as a result of "fear of hostile military or terrorist activity."[365] The court determined that this section did not apply to claims of PTSD based on an alleged assault

357. *Id.*
358. *See id.* at 1324 (asserting that the majority's decision was based almost entirely on studies and common law that were not part of the record below and that, as the appellate court, the Federal Circuit does not have the authority to act as fact finder and make decisions based on facts that were not before the lower court).
359. *Id.* at 1312 (majority opinion) (alteration in original) (quoting Post-Traumatic Stress Disorder Claims Based on Personal Assault, 65 Fed. Reg. 61,132, 61,132 (proposed Oct. 16, 2009) (to be codified at 38 C.F.R. pt. 3)).
360. *Id.*
361. *Id.*
362. *Id.*
363. *See id.* at 1312–15 (discussing the disincentives to report).
364. 717 F.3d 1369 (Fed. Cir. 2013).
365. 38 C.F.R. § 3.304(f)(3) (2013).

by a fellow service member.[366] Section 3.304(f)(3) provides that a veteran's lay testimony alone may prove that an in-service stressor occurred if the stressor "is related to the veteran's fear of hostile military or terrorist activity."[367] The regulation specifies:

> For the purposes of this paragraph, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.[368]

Veteran Tony Hall served in the U.S. Army in 1990, during which time he "refused to go to basic training, . . . asked to go home, . . . threatened to hurt either himself or someone else, demonstrated a phobia of people in general, and admitted to receiving one year's probation after an arrest for carrying a gun."[369] After a psychiatric evaluation suggested that he might suffer from an "avoidant personality disorder," the veteran was officially discharged fifteen days after he entered military service.[370]

In 2006, the veteran submitted a claim for disability compensation for PTSD, based on an alleged in-service sexual assault by a superior officer.[371] The RO denied the claim, in part because the veteran had "failed to demonstrate a verifiable military stressor."[372] The Board agreed with the RO and affirmed the denial.[373] The Board explained that, as a matter of law, the veteran could not rely solely on his own lay statements to establish his in-service stressor because 38 C.F.R. § 3.304(f)(3) did not apply to sexual assault as an in-service

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366. *Hall*, 717 F.3d at 1371.
367. 38 C.F.R. § 3.304(f)(3). The regulation also requires that a
> psychiatrist or psychologist . . . confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service.

Id.
368. *Id.*
369. *Hall*, 717 F.3d at 1370 (internal quotation marks omitted).
370. *Id.*
371. *Id.*
372. *Id.* at 1370–71 (internal quotation marks omitted).
373. *Id.* at 1371.

stressor.[374] On the facts, the Board also found that the veteran's statements were not credible for multiple reasons.[375] On appeal, the Veterans Court rejected the veteran's argument and concluded that § 3.304(f)(3) did not apply to the type of stressor he alleged.[376]

Mr. Hall appealed to the Federal Circuit, continuing to argue that § 3.304(f)(3) could be applied to PTSD based on an in-service sexual assault and that this argument was not precluded by the existence of § 3.304(f)(5), which specifically provides evidentiary exceptions to veterans whose PTSD claims are based on in-service personal assaults, including sexual assaults.[377] In a decision authored by Judge Prost, the court examined the plain language of the regulation, which refers to a "fear of hostile military or terrorist activity."[378] It concluded that the examples listed in § 3.304(f)(3) contextualized the word "hostile" and clarified that the stressor must be the result of terrorist activity or hostile military activity by an enemy, not a fellow service member.[379] The court also concluded that this reading was consistent with the rest of § 3.304(f), which provides evidentiary exceptions to veterans in other types of situations.[380] Finally, the court noted that during the notice and comment period for this regulation, VA had specifically rejected public comments suggesting that subsection (f)(3) should cover in-service sexual assaults because those acts were outside the scope of the specified subsection.[381] Accordingly, the Federal Circuit affirmed the opinion of the Veterans Court.[382]

E. Disability Compensation for Injuries Caused by VA

In 2013, the Federal Circuit revisited the law that applies when an injury may have been caused by VA hospital care or medical treatment. Generally, under 38 U.S.C. § 1151, VA will pay disability

374. *Id.*
375. *Id.* The Board noted that the veteran had never mentioned a sexual assault when he initially filed his claim, that he was diagnosed with psychotic symptoms including paranoid delusions, that one of his statements placed the in-service sexual assault as occurring four days after he was discharged from the military, that he had twice claimed to have served in the military for three years, that he falsely claimed to have engaged in combat during his military service, and that the few medical reports that suggested a linkage between the veteran's PTSD and his military service were based on the veteran's own unreliable oral history. *Id.*
376. *Id.*
377. *Id.* at 1373 n.5.
378. *Id.* at 1372 (internal quotation marks omitted).
379. *Id.*
380. *Id.* at 1373.
381. *Id.*
382. *Id.* at 1373–74.

compensation as if a veteran had a service connected injury when the veteran suffers a "qualifying additional disability" that was not the result of wilful misconduct and was caused by VA medical or surgical treatment or hospital care.[383] The statute also specifies that the proximate cause of the injury must be "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault" by VA, or "an event not reasonably foreseeable."[384]

In *Viegas v. Shinseki*,[385] the Federal Circuit addressed whether an injury incurred at a VA facility, but not directly caused by VA medical treatment or by VA personnel, should be eligible for disability benefits under § 1151.[386] Veteran John L. Viegas suffered from incomplete quadriplegia as a result of a diving accident that was not related to his military service.[387] He was receiving aquatic therapy at a VA medical center.[388] After a therapy session, he was using a restroom in a VA facility when a grab bar he was using to support himself separated from the wall.[389] Mr. Viegas fell and suffered additional injuries, after which his quadriplegia worsened and he was no longer able to walk with a walker.[390]

Mr. Viegas submitted a claim for benefits under § 1151, claiming that his additional injury was caused by his fall in the VA restroom.[391] A VA RO denied the claim, asserting that the veteran was "not in direct VA care at the time of [his] fall."[392] The Board affirmed the denial, explaining that § 1151 benefits were only available when an

> additional disability [is] the result of injury that was part of the natural sequence of cause and effect flowing directly from the actual provision of hospital care, medical or surgical treatment, or examination furnished by [the] VA and . . . such additional disability was directly caused by that VA activity.[393]

The Veterans Court affirmed the Board decision, concluding that the additional disability caused by Mr. Viegas's fall at a VA facility was "simply not covered by section 1151" because it was not caused directly by medical care provided by VA.[394]

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383. 38 U.S.C. § 1151 (2012); *see also* Roberson v. Shinseki, 607 F.3d 809, 813 (Fed. Cir. 2010) (detailing the statute's requirements).
384. 38 U.S.C. § 1151(a)(1)(A)–(B).
385. 705 F.3d 1374 (Fed. Cir. 2013).
386. *Id.* at 1378.
387. *Id.* at 1376.
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* (alteration in original).
393. *Id.* (alterations in original).
394. *Id.* at 1376–77.

On appeal, the Federal Circuit explained that § 1151 included two causation elements: (1) that a veteran's disability must be "caused by" VA hospital care or medical treatment, and (2) also must be "proximate[ly] cause[d]" by VA's fault or an unforeseen event.[395] The court noted that "[t]he sole issue presented on appeal [wa]s whether [the] injury was 'caused by' the medical treatment or hospital care [Viegas] received from . . . VA."[396] The parties offered widely differing interpretations of the phrase "caused by."[397] The Secretary argued that the statute required an injury be "'directly' caused by the 'actual' medical care provided by VA personnel."[398] Mr. Viegas, on the other hand, asserted that even injuries caused by "remote consequences" of VA medical care were covered by § 1151 and that benefits were available to any veteran who suffered any injury while at a VA medical facility.[399]

The Federal Circuit found neither interpretation wholly compelling. It examined the statutory text and noted the disjunctive structure stating that an additional disability must be caused by care "'either by a [VA] employee or in a [VA] facility.'"[400] The court concluded, therefore, that "Congress intended to encompass not simply the actual care provided by VA medical personnel, but also treatment-related incidents that occur in the physical premises controlled and maintained by . . . VA."[401] In the case at hand, Mr. Viegas was injured "because the VA failed to properly install and maintain the equipment necessary to provide him with medical treatment."[402] The court concluded that providing handicapped-accessible restrooms is an essential part of the health care service that VA provides to veterans.[403] Finally, the court noted that there was nothing in the plain language of § 1151 requiring that an injury be "directly" caused by medical care provided by VA staff and that even if it were a "close case," *Brown v. Gardner*[404] would require interpreting the statute in the veteran's favor.[405]

395. *Id.* at 1377–78.
396. *Id.* at 1378.
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.* at 1379.
403. *Id.*
404. 513 U.S. 115 (1994).
405. *Viegas*, 705 F.3d at 1380.

The court also examined its holding in *Jackson v. Nicholson*[406] and noted that "[t]he fact that VA medical treatment normally involves interaction with VA personnel . . . does not mean that such treatment only encompasses the actions of VA employees."[407] Thus, it rejected the government's argument that, under § 1151, "medical treatment" required direct contact with VA employees.[408] Finally, the court reviewed § 1151's long legislative history and concluded that it did not include any indication that Congress intended to exclude "injuries stemming from . . . VA's failure to properly install and maintain the equipment necessary to provide health care service" from coverage under § 1151.[409]

However, the Federal Circuit also limited its expansion of § 1151's coverage by rejecting Mr. Viegas's argument that any injury at a VA facility should be covered by § 1151.[410] The court explained: "*Gardner* makes clear that the statute does not extend to the 'remote consequences' of the hospital care or medical treatment provided by the VA."[411] However, the court concluded that, in this case, Mr. Viegas's injury was not a "remote consequence" and it therefore reversed and remanded the judgment of the Veterans Court.[412]

F. Evaluating the Severity of a Disability

In 2013, the Federal Circuit issued three opinions dealing with disability evaluations—as compared to zero in 2012 and three in 2011.[413] Chapter 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."[414] If the diagnostic codes are insufficient, the Code of Federal Regulations also provides for "extra-schedular ratings and special monthly compensation to further tailor the monthly

406. 433 F.3d 822 (Fed. Cir. 2005).
407. *Viegas*, 704 F.3d at 1381.
408. *Id.*
409. *Id.*
410. *Id.* at 1383.
411. *Id.* (quoting Brown v. Gardner, 513 U.S. 115, 119 (1994)).
412. *Id.*
413. *See* Ridgway, *Changing Voices*, *supra* note 1, at 1199 (noting that "[t]he 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"). *See generally* Ridgway, *Fresh Eyes*, *supra* note 1 (reviewing veterans law cases in 2012; opinions regarding disability evaluations are absent from the summary).
414. Ridgway, *Changing Voices*, *supra* note 1, at 1199; *see, e.g.*, 38 U.S.C. § 1155 (2012) (granting authority to adopt a schedule of ratings ranging from 0% to 100%); 38 C.F.R. § 4.1 (2013) (establishing the rating schedule).

payments."[415] This area of law perfectly illustrates how complex the veterans law regulatory scheme can be.[416]

1. Evaluating PTSD

In *Vazquez-Claudio v. Shinseki*,[417] the Federal Circuit addressed the correct regulatory interpretation required to assign a 70% disability evaluation for PTSD.[418] Under the applicable regulations, a veteran's service-connected PTSD will be assessed as 50% disabling when it causes "[o]ccupational and social impairment *with reduced reliability and productivity*."[419] This impairment must be

> due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.[420]

However, service-connected PTSD will be assessed as 70% disabling when it causes "[o]ccupational and social impairment, *with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood*."[421] This impairment must be

> due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.[422]

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415. Ridgway, *Changing Voices*, *supra* note 1, at 1199; *see also* 38 U.S.C. § 1114(k)–(p) (detailing the extra rates of wartime disability compensation).

416. Ridgway, *Fresh Eyes*, *supra* note 1, at 1051–52 (describing the complexity of the veterans benefits system as deriving from multiple sources including procedural issues, medical advances creating increased complexity in diagnosing veterans, and the congressional practice of increasing the amount of statutes to address specific issues—e.g., Agent Orange exposure after the Vietnam War).

417. 713 F.3d 112 (Fed. Cir. 2013).

418. *Id.* at 115–17.

419. *Id.* at 114 (emphasis added) (quoting 38 C.F.R. § 4.130).

420. *Id.* (quoting 38 C.F.R. § 4.130).

421. *Id.* (emphasis added) (quoting 38 C.F.R. § 4.130).

422. *Id.* (quoting 38 C.F.R. § 4.130).

Veteran Genaro Vazquez-Claudio was granted service connection for PTSD that was initially evaluated as 50% disabling.[423] He appealed to the Board, which thoroughly considered his psychiatric history and noted that he suffered from serious PTSD-related symptoms, but it concluded that "other than occasional suicidal ideation, social isolation, and some difficulty adapting to stressful situations, none of his symptoms corresponded to impairment greater than 50[%]."[424] Accordingly, the Board upheld the initial assignment of a 50% disability evaluation.[425]

Mr. Vazquez-Claudio appealed to the Veterans Court, arguing that the Board's analysis erroneously considered whether his symptoms matched the list of symptoms associated with a 70% disability evaluation, rather than considering whether the symptoms he did have caused deficiencies in "most areas, such as work, school, family relations, judgment, thinking, or mood."[426] The Veterans Court stated that the correct legal issue "was not how many 'areas' Mr. Vazquez-Claudio ha[d] demonstrated deficiencies in but, rather, the frequency, severity, and duration of the psychiatric symptoms, the length of remissions, and Mr. Vazquez-Claudio's capacity for adjustment during periods of remission."[427] Therefore, the Veterans Court affirmed the Board's denial of a disability evaluation greater than 50%.[428]

At the Federal Circuit, Judge Clevenger noted that the appeal raised two issues: (1) "whether a 70[%] disability rating is restricted by its associated list of symptoms," and (2) "whether the fact-finder must make findings regarding the veteran's occupational and social impairment in 'most areas' when evaluating entitlement to a 70[%] disability rating."[429] On the first issue, Judge Clevenger noted that the list of symptoms required for a 70% disability evaluation is non-exhaustive, as indicated by the phrase "such as" that precedes it.[430] He observed that, for a veteran like Mr. Vazquez-Claudio, whose symptoms were generally not as severe as those listed in the 70% category, but who did experience impairment in multiple areas listed in the 70% category, his claim turned on whether the disability evaluation should be based on the existence of particular symptoms

423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.* at 114–15 (internal quotation marks omitted).
427. *Id.* at 115 (internal quotation marks omitted).
428. *Id.*
429. *Id.* at 115, 117.
430. *Id.* at 115.

or a finding of impairment in "most" of the listed "areas" regardless of symptoms.[431]

The court reviewed the criteria for finding disability evaluations at the other levels and concluded that the diagnostic code focused on "the frequency, severity, and duration of [the] associated symptoms."[432] It therefore concluded that, although the "frequency, severity, and duration" of a veteran's psychiatric symptoms "must play an important role" in assigning a disability evaluation, "the regulation's plain language highlights its symptom-driven nature."[433] The court held that any given disability evaluation for PTSD may only be assigned if the veteran "demonstrat[es] the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration."[434] The court concluded that, to the extent the Veterans Court had implied that it was irrelevant whether a veteran demonstrated deficiencies in "most areas," the Veterans Court misinterpreted the regulation.[435] However, the Federal Circuit also concluded that the Board had conducted an appropriate analysis and that the Veterans Court's misinterpretation was harmless error.[436] Accordingly, it affirmed the Veterans Court's decision.[437]

In this case, the Federal Circuit clarified the interpretation of a regulation that is frequently the subject of disputes at all levels of adjudicating veterans benefits.[438] The court essentially set forth a two-part test that requires the fact finder to: (1) initially determine whether the veteran displays symptoms that are of the type listed in the regulation, and then (2) assess whether the present symptoms result in occupational and social impairment with deficiencies in most areas.[439] This was a classic veterans case at the Federal Circuit that did not need to look beyond the confines of veterans law statutes, regulations, and precedential caselaw for the required analysis.

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431. *Id.*
432. *Id.* at 116.
433. *Id.* at 116–17.
434. *Id.* at 117.
435. *Id.* at 117–18.
436. *Id.* at 118.
437. *Id.* at 119.
438. *See* Ridgway, *Changing Voices*, *supra* note 1, at 1199 (stating that "[t]he relative attention granted to [disability ratings] 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").
439. *Vazquez-Claudio*, 713 F.3d at 118.

2. Multiple evaluations under one diagnostic code

In *Yonek v. Shinseki*,[440] the Federal Circuit affirmed the Veterans Court and Board's denial of a disability evaluation greater than 20% for a veteran's service-connected right shoulder disability.[441] In 1992, veteran Stephen F. Yonek was granted service connection for a right shoulder disability, assessed as 10% disabling, that permanently limited the motion of his right arm.[442] Mr. Yonek received about fifteen examinations over a seventeen-year period to assess the extent to which the in-service injury limited his range of motion.[443] The diagnostic code ("DC") under which his condition was evaluated, DC 5201, assesses limitation of motion in two planes: flexion and abduction.[444] The examinations provided conflicting results in both planes.[445] In September 1999, the RO assessed Mr. Yonek's right shoulder disability as 20% disabling.[446]

Mr. Yonek appealed to the Board, which denied a disability evaluation greater than 20%.[447] He then appealed to the Veterans Court, arguing that the fact that he experienced limited motion in both the flexion and abduction planes meant that he was entitled to receive two separate disability evaluations under DC 5201 and that his shoulder condition should, as a result, be assessed as more than 20% disabling.[448] The Veterans Court disagreed, concluding that DC 5201 must be interpreted as allowing only a single evaluation for limitation of motion and that "the plane in which the limitation of motion manifests itself is irrelevant."[449] Mr. Yonek appealed to the Federal Circuit.[450]

In an opinion authored by Judge Dyk, the court conducted a classic regulatory interpretation analysis. It considered DC 5201 and concluded that the plain language of the regulation "confirms that a veteran is only entitled to a single disability rating under diagnostic code 5201 for each arm that suffers from limited motion at the shoulder joint."[451] To arrive at this conclusion, the court compared

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440. 722 F.3d 1355 (Fed. Cir. 2013).
441. *Id.* at 1360.
442. *Id.* at 1357.
443. *Id.*
444. *See id.* (defining flexion as the "elevation of the arm in a forward direction" and abduction as the "elevation of the arm outward from the side of the body"); *see also* 38 C.F.R. § 4.71 (2013) (depicting illustrations of flexion and abduction).
445. *Yonek*, 722 F.3d at 1357.
446. *Id.*
447. *Id.* at 1358.
448. *Id.*
449. *Id.*
450. *Id.* at 1356.
451. *Id.* at 1358.

the language of DC 5201 to other DCs under 38 C.F.R. § 4.71a, which assessed the limitation of motion of the thigh, knee, and elbow, and concluded that

> [i]n light of section 4.71a's assignment of separate diagnostic codes to limitation of motion in different planes (or in different directions within a single plane) of the thigh, knee, and elbow, its failure to assign separate diagnostic codes to limitation of motion of the arm at the shoulder joint in the flexion and abduction planes is noteworthy.[452]

After determining that none of the other sources cited by Mr. Yonek supported his argument, the court concluded, in affirming the decision of the Veteran's Court, that "the plain language of diagnostic code 5201 governs, and allows only a single rating for limitation of motion of an arm."[453] Like *Vazquez-Claudio*, *Yonek* is an example of where veterans law need not borrow mainstream law to achieve the analysis required to resolve a veterans dispute.[454]

3. Disability evaluation analysis for diabetes

In *Middleton v. Shinseki*,[455] the Federal Circuit clarified the correct analysis to use when a veteran attempts to establish that his service-connected diabetes is 40% disabling.[456] Under VA's schedule for rating service-connected disabilities, diabetes mellitus is assessed as 20% disabling if it requires "insulin and [a] restricted diet" or "[an] oral hypoglycemic agent and [a] restricted diet."[457] It is assessed as 40% disabling if it requires "insulin, [a] restricted diet, and regulation of activities."[458]

The rating schedule also includes general guidance about its proper application. Initially, the regulations state that the "General Policy in Rating" is that "th[e] rating schedule is primarily a guide in the evaluation of disabilit[ies]."[459] The regulations also remind the reader of the policy they are designed to implement:

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452. *Id.* at 1358–59; *see also id.* ("Where [an agency] includes particular language in one section of a [regulation] but omits it in another . . . , it is generally presumed that [the agency] acts intentionally and purposely in the disparate inclusion or exclusion." (alterations in original) (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993))).

453. *Id.* at 1359 (internal quotation marks omitted).

454. *See supra* notes 432–36 and accompanying text (explaining how the court in *Vazquez-Claudio* found a solution to the issue at hand without looking outside the relevant regulations and veterans case law).

455. 727 F.3d 1172 (Fed. Cir. 2013).

456. *Id.* at 1173.

457. 38 C.F.R. § 4.119, Diagnostic Code (DC) 7913 (2013).

458. *Id.*

459. *Id.* § 4.1.

> It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.[460]

The regulations clarify that "it is not expected . . . that all cases will show all the findings specified."[461] Finally, the "General Policy in Rating" states that "[w]here there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned."[462]

Veteran Birdeye L. Middleton was awarded service connection for diabetes mellitus, evaluated as 20% disabling.[463] He sought an increased disability evaluation, which was denied by the RO.[464] The Board affirmed the denial, finding that although the veteran's diabetes caused (1) a restricted diet and (2) regulation of activities, he did not meet the third regulatory criterion for a 40% evaluation because his diabetes did not require him to take insulin.[465] To manage his diabetes, Mr. Middleton took oral hypoglycemic agents and daily injections of a drug that induced the body to secrete endogenous insulin, and he argued that this was analogous to requiring insulin.[466] The Board disagreed, finding that the "[u]se of insulin is a necessary element for the 40[%] rating."[467]

Mr. Middleton raised the same arguments on appeal and the Veterans Court affirmed the Board.[468] The court held that the plain language of the diagnostic code required "insulin" and not a substitute or analogous medication.[469] It also rejected the argument that the veteran's diabetes "more nearly approximate[d]" the criteria for a 40% rating.[470]

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460. *Id.* § 4.3.
461. *Id.* § 4.21.
462. *Id.* § 4.7.
463. Middleton v. Shinseki, 727 F.3d 1172, 1174 (Fed. Cir. 2013).
464. *Id.*
465. *Id.* (citing 38 C.F.R. § 4.119, DC 7913 (2013)).
466. *Id.* at 1175.
467. *Id.* (first alteration in original).
468. Middleton v. Shinseki, No. 10-4222, 2012 WL 20180580 (Vet. App. June 15, 2012).
469. *Id.* at *2.
470. *Id.* at *2–3. In making this determination, the court distinguished its precedent from *Camacho v. Nicholson*, 21 Vet. App. 360 (2007) which held that a veteran could receive a 40% disability evaluation for diabetes when he only satisfied two of the three listed criteria.

On appeal to the Federal Circuit, Mr. Middleton argued that the Veterans Court had misinterpreted the regulatory criterion of "requiring insulin" to require a specific method of obtaining insulin.[471] He asserted that he "required insulin" because the medications he took caused his body to secrete its own insulin.[472] He argued that limiting the regulation by requiring a specific medication was inconsistent with the regulatory history, which focused on the severity of the condition and how well it was controlled.[473] He also claimed that any ambiguity in the rating schedule should be resolved by referring to symptoms rather than specific medications because over time those treatments may become obsolete.[474] However, the Federal Circuit relied on the regulation's plain language and upheld the Veterans Court decision, concluding that the plain language of DC 7913 "clearly requires that the veteran is administered insulin."[475]

Judge Plager dissented and placed emphasis on the "foundational concepts [built] into the rating schedule" in 37 C.F.R. §§ 4.1, 4.3, and 4.7, rather than on the plain language of the regulation.[476] Noting that the rating schedule is just a guide, that the law is to be interpreted broadly and reasonable doubt resolved in favor of the claimant, and that the higher evaluation will be assigned if there is a question as to which one applies, Judge Plager concluded that if strict compliance with the language of the diagnostic codes was always required, then "§ 4.7 has no meaning."[477]

This case provides an example of the tension inherent in the veterans law system. On one hand, any organization that must process as many complex applications as VA receives will complete that task more quickly and consistently if it has clear guidelines to follow. On the other hand, Congress has explicitly established a benefits scheme that expresses great solicitude for the special position that military veterans occupy in our society.[478] Many of the legal disputes in this field result from the grey area created by the different results achieved by these two competing goals.

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471. *Middleton*, 727 F.3d at 1176.
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.* at 1179–81 (Plager, J., dissenting).
477. *Id.* at 1180.
478. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.); *see also* Ridgway, *Why So Many Remands?*, *supra* note 41, at 117.

G. Benefits for a Surviving Spouse

When a veteran dies, his or her surviving spouse may be eligible for dependency and indemnity compensation ("DIC") if the veteran died of a service-connected disability.[479] One of the conditions for eligibility is that the couple must have been married for a year or more before the veteran's death.[480]

1. Burden of proof when establishing a common law marriage

In *Burden v. Shinseki*,[481] the Federal Circuit upheld the Veterans Court's determination that "state law, including state law evidentiary burdens, must be applied in determining the validity of a purported common law marriage."[482] Louis Burden was a Vietnam veteran who married his wife in a ceremonial marriage in April 2004.[483] He died two months later and Mrs. Burden subsequently applied for DIC benefits.[484] The RO denied the claim on the basis that Mrs. Burden was ineligible for benefits because she had been married to the veteran for less than a year.[485] Mrs. Burden appealed, asserting that the couple had been living in a common law marriage for five years before the veteran's death.[486] The Board did not find that Mrs. Burden met the "clear and convincing" standard required under Alabama law to establish a valid common law marriage, despite the evidence submitted by Mrs. Burden.[487]

Mrs. Burden appealed to the Veterans Court, asserting that the Board erred when it applied Alabama state law and argued that instead it should have applied the "benefit of the doubt" rule to all questions related to her eligibility for DIC benefits.[488] The Veterans

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479. *See* 38 U.S.C. § 1102(a)(2) (2012) ("No compensation shall be paid to the surviving spouse of a veteran under this chapter unless such surviving spouse was married to such veteran . . . for one year or more . . . .").
480. *Id.*
481. 727 F.3d 1161 (Fed. Cir. 2013).
482. *Id.* at 1164.
483. *Id.*
484. *Id.*
485. *Id.*; *see also* 38 U.S.C. § 1102(a) (requiring a marriage of a year or more for compensation to be paid to a surviving spouse).
486. *Burden*, 727 F.3d at 1164.
487. *Id.* The evidence supporting Mrs. Burden's claim included lay statements from friends that the couple had lived "as husband and wife" for at least six years and "a photocopy of a church raffle ticket" in the names of "Lou and Michele Burden." *Id.* The evidence against the claim included 1998, 1999, and 2002 statements by Mr. Burden to his private physician that he was single and "did not 'want to get too involved,'" that he had a girlfriend, or that his brother was his closest relative. *Id.*
488. *Id.*; *see also* 38 U.S.C. § 5107(b) ("Benefit of the Doubt—The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any

Court affirmed the Board decision, concluding that the Board had properly applied Alabama's "clear and convincing" standard to the question of whether the Burdens had entered into a valid common law marriage before their ceremonial marriage in 2004.[489] The court concluded that the "benefit of the doubt" rule did not apply to the factual question of whether a common law marriage was valid because "Congress specifically addressed the standard of proof that must be applied" when it enacted 38 U.S.C. § 103(c).[490]

Willie L. Coleman served in the U.S. Army from October 1960 to December 1963.[491] He and Mrs. Coleman were married in November 1969 and had eight children before their divorce in 1982.[492] The veteran died in June 2001 and Mrs. Coleman applied for DIC benefits, along with a death pension and accrued benefits.[493] She asserted that the couple had reconciled after their divorce and had lived together in a common law marriage until the veteran's death.[494] The RO denied the claim and, on appeal, the Board upheld the denial.[495] The Board explained that, because the Colemans resided in Alabama, that state's law must be applied to the question of whether they had entered into a valid common law marriage.[496] The Board acknowledged that the Colemans had lived together at times after their divorce and that Mr. Coleman's death certificate indicated that he was married at the time of his death, but the Board nonetheless concluded that evidence presented to establish a common law marriage had not met the "clear and convincing proof" standard required under Alabama law.[497]

Mrs. Coleman appealed to the Veterans Court, arguing that the Board had failed to consider all the record evidence.[498] That court affirmed the Board's decision on the basis that a marriage is substantially subject to social customs and norms and is a local and domestic prerogative; therefore, the decision of how to define a

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issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").

489. *Burden*, 727 F.3d at 1165.
490. *Id.*
491. *Id.*
492. *Id.*
493. *Id.*
494. *Id.*
495. *Id.*
496. *Id.*
497. *See id.* (indicating, for example, that Mr. Coleman lived alone, had stated he was divorced on a hospitalization report, and Mrs. Coleman maintained she was Mr. Coleman's ex-wife on a claim seeking apportionment of VA disability benefits).
498. *Id.*

marriage must be left to the state.[499] Accordingly, the "benefit of the doubt" rule does not prevent VA from using the state definitions of marriage.[500]

In an opinion authored by Judge Mayer, the Federal Circuit considered both of these cases and held that "state law, including state law evidentiary burdens, must be applied in determining the validity of a purported common law marriage."[501] Both Ms. Burden and Ms. Coleman acknowledged that 38 U.S.C. § 103(c) required VA to use Alabama law to determine the validity of their claimed common law marriages.[502] However, they argued that evidentiary issues should be determined based on federal law and that the veteran-specific "benefit of the doubt" rule should apply.[503]

The Federal Circuit disagreed, noting that the plain language of the statute unambiguously expressed Congress's intent that the validity of a marriage be determined by state law.[504] The court observed that Congress had written some statutory provisions of the veterans benefits system to give VA "broad discretion to determine the evidence necessary to substantiate . . . the award of VA benefits," but that § 103(c) was not one of those provisions.[505] In fact, the requirement that the validity of a marriage be "'proven' according to state law" was so clear that the court saw "nothing in the text of section 103(c) that would permit . . . VA to disregard [the state law] standard of proof for establishing a valid common law marriage."[506] The Federal Circuit found this reading consistent with the general principle that domestic matters such as marriage have usually been governed by state law, even when federal benefits are implicated.[507] It observed that "marital status, as defined by state law, frequently plays a prominent role in determining eligibility for benefits from the federal government" and cited examples from the Social Security Act, the Federal Coal Mine and Safety Act, the Family Medical and Leave Act, and the Federal Tort Claims Act.[508]

Additionally, the Federal Circuit rejected the claimants' argument that the pro-claimant nature of the veterans benefits system and the need to resolve interpretive doubt in favor of the veteran required

499. *Id.* at 1165, 1167–70.
500. *Id.* at 1169.
501. *Id.* at 1164.
502. *Id.* at 1166.
503. *Id.* (citing 38 U.S.C. § 5107(b) (2006)).
504. *Id.* at 1167.
505. *Id.*
506. *Id.*
507. *Id.* at 1168.
508. *Id.*

that VA use federal law to determine the validity of a common law marriage.[509] The court acknowledged the pro-veteran nature of the benefits system but observed that, in this case, neither competing interpretation was necessarily more "pro-veteran" than the other.[510] If the marriages were determined to be invalid, then the benefits sought by the veterans' widows would be awarded to the veterans' children.[511] The Federal Circuit stated: "Although we are required to resolve interpretive doubt in the veteran's favor . . . we have no obligation to construe section 103(c) in a manner that would favor the interests of a veteran's purported common law spouse over those of his children."[512] Therefore, state law must be applied to determine the validity—although not necessarily other aspects—of a veteran's purported common law marriage.[513]

In general, case law on the burden of proof for establishing a common law marriage shows that marriage is nearly impossible to define without looking to state law.[514] Therefore, in these cases, VA is sometimes forced to look beyond the confines of veterans law to process the claims it receives. Like recent cases involving powers of attorney, and their interaction with state law,[515] this promises to be an area worth watching in the future.

2. Enhanced DIC and hypothetical entitlement

In *Kernea v. Shinseki*,[516] the Federal Circuit finally clarified that "hypothetical entitlement" will not suffice to support a DIC claim.[517] The appellant, Flora L. Kernea, was the surviving spouse of World War II veteran Donald E. Kernea.[518] The veteran suffered from diabetes mellitus that was determined to be service-connected, and

509. *Id.* at 1169.
510. *Id.*
511. *Id.*
512. *Id.*
513. *Id.* at 1170. The court noted that § 5107(b) would apply to aspects of a marriage other than its validity, such as its duration, the date the marriage began, and whether any children were born to the marriage.
514. *E.g.*, *id.* at 1168.
515. *See, e.g.*, Solze v. Shinseki, 26 Vet. App. 118 (2013) (per curiam) (denying a petition for writ of mandamus where a veteran's daughter held a durable financial power of attorney under Maine law for her father for ten years, but VA appointed a federal fiduciary who took a percentage fee from the veteran's compensation rather than directing the veteran's VA benefits to the daughter); *see also* Freeman v. Shinseki, 24 Vet. App. 404 (2011) (per curiam) (holding that a selection and appointment of a fiduciary is a matter reviewable by the Board and by the Veterans Court).
516. 724 F.3d 1374 (Fed. Cir. 2013).
517. *See id.* at 1377, 1379, 1381 (describing "hypothetical entitlement" as a process that disregards prior claims during the veteran's lifetime and determines de novo whether the veteran was in fact disabled and entitled to DIC benefits).
518. *Id.* at 1375.

he was evaluated as 100% disabled since December 1965.[519] After the veteran died in February 1969 due to complications from his service-connected diabetes, Ms. Kernea applied for and was granted DIC benefits under 38 U.S.C. § 1310.[520]

In June 2003, Ms. Kernea applied for increased DIC benefits under 38 U.S.C. § 1311(a)(2), which applies to a veteran's surviving spouse when a veteran received "or was entitled to receive . . . compensation for a service-connected disability that was rated totally disabling for a continuous period of *at least eight years* immediately preceding death."[521] Despite the fact that her late husband had been evaluated as totally disabled for less than four years at the time of his death, Ms. Kernea stated that the veteran "was 100% for over 8 years."[522] The following month, VA denied increased DIC benefits.[523]

Ms. Kernea continued to pursue her claim on appeal, based on two main theories.[524] First, she alleged that VA rating decisions made during the veteran's lifetime contained CUE and that the veteran should have been evaluated as 100% disabled for at least the last eight years of his life.[525] Second, she argued that her claim was supported by "hypothetical entitlement"—in other words, she argued that she could demonstrate, without regard to the actual claims decisions during the veteran's lifetime, that her husband had been totally disabled for the last eight years of his life.[526]

The Board affirmed VA's finding that none of the earlier decisions were the product of CUE, noting "that Ms. Kernea had not identified a specific error, or even a specific rating decision, that she believes contains CUE" and that the only support for her allegation of CUE was her own belief and statements that her husband should have been evaluated as 100% disabled at an earlier date.[527] Regarding the hypothetical entitlement analysis, the Board noted that VA had promulgated 38 C.F.R. § 3.10(f)(3) in 2005 to interpret 38 U.S.C. § 1311(a)(2)'s phrase "entitled to receive" as prohibiting claims based on hypothetical entitlement.[528] Accordingly, the Board undertook a thorough retroactivity analysis using the framework set

519. *Id.*
520. *Id.*
521. *Id.* at 1375–76 (quoting 38 U.S.C. § 1311(a)(2) (2012)).
522. *Id.* at 1376.
523. *Id.*
524. *Id.*
525. *Id.*
526. *Id.*
527. *Id.* (internal quotation marks omitted).
528. *Id.*

forth by the Federal Circuit in *Princess Cruises, Inc. v. United States*.[529] The Board concluded that retroactive application of § 3.10(f)(3) was not unlawful and that the regulation, therefore, barred granting any claims based on hypothetical reliance.[530] Accordingly, the Board denied the claim.[531] The Veterans Court affirmed the Board decision and Ms. Kernea appealed.[532]

On appeal, the Federal Circuit reviewed the history of hypothetical claims, noting that such claims were permitted in 2000.[533] In 2003, the court had affirmed VA's interpretation of 38 U.S.C. § 1311(a)(2) as barring such claims but also required VA to conduct further rulemaking to adequately implement the statute.[534] In response, VA promulgated 38 C.F.R. § 3.10(f)(3), which clarified that § 1311(a)(2)'s phrase "entitled to receive" prohibited hypothetical claims.[535] This rule became effective on December 2, 2005.[536] The case at hand required the Federal Circuit to determine whether hypothetical claims that had been filed before the amended regulation became effective were also prohibited.[537]

To do this, the court analyzed the retroactive application of § 3.10(f)(3) using the three-part *Princess Cruises* analysis.[538] Like the Board, the Federal Circuit first determined that when Ms. Kernea filed her claim in 2003, the law permitting hypothetical claims was already changing and, therefore, § 3.10(f)(3) did not effect a substantial change.[539] Second, the court found that Ms. Kernea had not relied on the prior interpretation of the statute because "there is nothing [she] could have done differently had she known the effect of the 2005 amendment when she filed her claim" in 2003.[540] Finally, the court concluded "'familiar considerations of fair notice, reasonable reliance, and settled expectations'" did not prohibit retroactive application of the statute because, as it had previously found, "it was already apparent when Ms. Kernea filed her claim in 2003 that hypothetical entitlement claims would no longer be

529. 397 F.3d 1358 (Fed. Cir. 2005).
530. *Kernea*, 724 F.3d at 1376.
531. *Id.* at 1377.
532. *Id.*
533. *Id.* at 1377–78.
534. *Id.* at 1378 (citing Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 314 F.3d 1373, 1378 (Fed. Cir. 2003)).
535. *Id.*
536. *Id.*
537. *Id.*
538. *Id.* at 1379–82.
539. *Id.* at 1379.
540. *Id.* at 1381 (quoting Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1366 (Fed. Cir. 2005)).

permitted under § 1311(a)(2)."[541] Therefore, "[u]nder these circumstances, Ms. Kernea must be deemed to have had fair notice that her hypothetical entitlement claim might be disallowed."[542]

H. Procedure

In 2013, the Federal Circuit published five opinions concerning the procedures used to process veterans claims. As discussed in Part I,[543] veterans benefits law is procedurally complex and it is therefore predictable that many of the Veterans Court decisions reviewed by the Federal Circuit deal with issues of procedure.[544]

1. Effect of revising a prior decision on subsequent final decisions

In *Pirkl v. Shinseki*,[545] the Federal Circuit examined the effect of revising a prior decision based on a finding of CUE and determined what effect such a revision would have on subsequent final decisions regarding the same disability.[546] A final decision by a RO or the Board may be collaterally attacked, even decades later, if the appellant establishes that there was CUE in the decision.[547] In such a case, the claimant must provide "some degree of specificity as to what the alleged error is and, unless it is the kind of error . . . that, if true, would be CUE on its face, persuasive reasons must be given as to why the result would have been *manifestly* different but for the alleged error."[548] A determination of CUE "must be based on the record . . . that existed at the time of the prior [RO] . . . decision."[549] Because of this requirement, it is well established that a failure to fulfill the duty to assist cannot constitute CUE.[550]

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541. *Id.*
542. *Id.*
543. *See supra* notes 45–48, 77 and accompanying text (explaining that complex bureaucracy is overburdening the processes surrounding the laws and regulations). *See generally* Ridgway, *New Complexities*, *supra* note 25, at 252 (discussing procedurally complex rules meant to cover all possible fact patterns).
544. *See* Ridgway, *Changing Voices*, *supra* note 1, at 1207 ("Whereas most of the other published decisions of the [Federal Circuit in 2011] were reviews of unpublished, single-judge [Veterans Court] 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 [Veterans Court].").
545. 718 F.3d 1379 (Fed. Cir. 2013).
546. *See id.* at 1380 (vacating the lower court's decision for failing to consider the effects of regulations governing a reduction of a total disability rating).
547. *Id.* at 1384; *see also* Disabled Am. Veterans v. Gober, 234 F.3d 682, 696–98 (Fed. Cir. 2000) (stating that a final decision by an RO may be attacked collaterally by a claim of CUE).
548. Fugo v. Brown, 6 Vet. App. 40, 44 (1993).
549. Russell v. Principi, 3 Vet. App. 310, 314 (1992).
550. *See* Caffrey v. Brown, 6 Vet. App. 377, 387 (1994). *Caffrey* was cited with approval in *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002) (en banc), for the

Veteran Pirkl was awarded service connection for schizophrenia in 1949.[551] His condition was initially evaluated as 10% disabling and increased to 100% disabling in 1952.[552] His disability evaluation was reduced to 70% in 1953, then to 50% in 1956, and further reduced to 30% in 1966.[553] After additional procedural history, his condition was again evaluated as 100% disabling, effective November 1988.[554]

In 2001, Mr. Pirkl filed a motion to revise the three RO decisions that reduced his disability evaluation from 100% in 1953, 1956, and 1966.[555] Eventually, in August 2006, the Board concluded that the 1953 RO decision that reduced Mr. Pirkl's disability evaluation from 100% to 70% did contain CUE.[556] However, the RO decision that implemented the Board's decision concluded that the Board's finding of CUE did not affect the subsequent rating decisions, thus leaving in place the 1956 and 1966 reductions.[557] Mr. Pirkl appealed, asserting that the CUE finding also affected the finality of the subsequent 1956 and 1966 reductions and that his 100% rating should have been continued from 1953 to 1988.[558] The Board disagreed, noting that Mr. Pirkl's original CUE motion and appeal had not included a challenge to those later decisions.[559]

Mr. Pirkl appealed to the Veterans Court, which affirmed the Board decision.[560] The court observed that the 1956 and 1966 decisions were independently based on newly acquired VA medical examinations and found, therefore, that neither the 1956 decision nor the 1966 decision (and the 1967 Board decision that affirmed and subsumed it) were premised on the CUE that had been identified in the 1953 decision.[561]

On appeal to the Federal Circuit, Mr. Pirkl argued, first, that the Veterans Court misinterpreted the statutory provision establishing that the revision of a prior decision on the basis of a finding of CUE "has the same effect as if the [revised] decision had been made on

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proposition that failure to fulfill the duty to assist does not constitute CUE, *id.* at 1343–45; *see also* 38 C.F.R. § 20.1403(d) (2013) (stating that failure to fulfill the duty to assist is not CUE).

551. *Pirkl*, 718 F.3d at 1380.
552. *Id.*
553. *Id.*
554. *Id.*
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.* at 1381–82.
560. *Id.* at 1382.
561. *Id.*

the date of the prior decision."[562] In the alternative, he argued that the 1956 and 1966 reductions were void because the revised 1953 decision triggered the regulatory provision requiring "material improvement" before a 100% evaluation can be reduced.[563] The Secretary argued that the 1956 RO decision and the 1967 Board decision were independent final decisions and that, because there had been no independent finding of CUE in those decisions, they were unaffected by a finding of CUE in the 1953 decision.[564]

The Federal Circuit relied on the section of the statute stating that when CUE is established in a prior decision, the revised decision must be treated as if it had been made on the date of the original decision.[565] The court concluded that "[t]his necessarily implies retroactive effect."[566] It therefore held that, although a CUE finding will not necessarily initiate a "chain reaction" and nullify subsequent decisions, when VA implements a finding of CUE, it is "required to consider the effects of that CUE finding on the legal and factual basis of . . . subsequent rating decisions."[567] In the case at hand, that meant that VA was required to consider the applicability of 38 C.F.R. § 3170 from 1949 and its successor regulations to determine whether there had been a finding of "material improvement" in Mr. Pirkl's condition before the 1956 and 1966 reductions.[568]

2. Remand or reversal at the Veterans Court

In *Deloach v. Shinseki*,[569] the Federal Circuit clarified when it is appropriate for the Veterans Court to reverse, rather than remand, a matter before it.[570] The Federal Circuit first addressed whether it had jurisdiction to hear the two consolidated cases because both veterans were appealing from Veterans Court decisions that had remanded their claims.[571] Under most circumstances, a remand is not considered a final decision, and therefore is not ripe for Federal Circuit review.[572] However, because the Federal Circuit's statutory grant of jurisdiction over Veterans Court decisions is worded slightly

562. *Id.* at 1383 (citing 38 U.S.C. § 5109A(b) (2006)).
563. *Id.* (quoting 38 C.F.R. § 3.170 (1949)).
564. *Id.*
565. *Id.* at 1384.
566. *Id.*
567. *Id.*
568. *Id.* at 1384–85.
569. 704 F.3d 1370 (Fed. Cir. 2013).
570. *See id.* at 1376, 1379, 1381 (expressing the confusion that was finally addressed by Congress in 2002).
571. *Id.* at 1375.
572. *Id.* at 1375–76.

differently than the statutes conferring jurisdiction to other federal appellate courts, the Federal Circuit has recognized a narrow exception in which a non-final decision is appealable.[573] This exception only applies when three conditions, known as the *Williams* conditions, are met.[574]

The Federal Circuit concluded that the exception applied in the two consolidated cases appealed in *Deloach*, in part because the Veterans Court explicitly concluded that it lacked the authority to issue a reversal—thus providing the Federal Circuit with an appealable legal issue within its jurisdiction.[575] Despite the applicability of the exception, however, the Federal Circuit went on to conclude that remand was appropriate in the appealed consolidated cases.[576]

This decision is notable because the Federal Circuit went out of its way to make the point that the Veterans Court is fully authorized to reverse Board decisions, despite the fact that the Veterans Court traditionally reverses less than 6% of the Board decisions it reviews.[577] In fact, it is hard to interpret the amount of space devoted to the issue—almost a full page of a 10-page decision—as anything other than the Federal Circuit intentionally making a statement to the Veterans Court.[578] The decision reviews in detail the language of the Veterans Benefits Act of 2002, which explicitly empowered the Veterans Court to "reverse adverse findings of material fact that are 'clearly erroneous.'"[579] Because that power was already implicit in the Veteran Court's foundation, this decision is easily interpreted—with

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573. *Id.* at 1376. *Compare* 28 U.S.C. § 1295(a)(1) (2012) (conferring jurisdiction over "an appeal from a final decision of a district court"), *with* 38 U.S.C. § 7292(a) ("After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision . . . .").

574. *Deloach*, 704 F.3d at 1376. The *Williams* conditions, derived from *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002), are:

> (1) there must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and, (3) there must be a substantial risk that the decision would not survive a remand, i.e., that the remand proceeding may moot the issue.

Id. at 1364 (footnotes omitted).

575. *Deloach*, 704 F.3d at 1377–78.

576. *Id.* at 1381.

577. Ridgway, *Why So Many Remands?*, *supra* note 41, at 155; *see Deloach*, 704 F.3d at 1380.

578. *See Deloach*, 704 F.3d at 1379 (using direct language and clarifying specific powers the Veterans Court has).

579. *Id.*

ample support in the Congressional Record—as intending to spur the Veterans Court to issue more reversals.[580]

3. Appeal of a bifurcated claim to the Veterans Court

In *Tyrues v. Shinseki*, a case with a long and complex procedural history, the Federal Circuit examined the finality of Board decisions that bifurcate one claim into several components.[581] The court determined that the proper time to appeal each component of a claim is within the appeals period for that individual component, rather than the claim as a whole.[582] Once an appeal is decided by the Board, it may be appealed to the Veterans Court within 120 days.[583] However, Board decisions routinely address multiple issues, and any given decision may remand some—but not necessarily all—of the matters addressed.[584] When this occurs, it is not always clear how much of the Board decision is final and immediately appealable to the Veterans Court.[585]

Mr. Tyrues served in the Persian Gulf War and developed tonsillitis and pneumonia three years later.[586] In 1995, he applied for compensation benefits under 38 U.S.C. § 1110, and, in 1996, he applied for compensation for Persian Gulf Syndrome under 38 U.S.C. § 1117.[587] The two matters were handled together by the RO and the Board, with the Board denying direct compensation and remanding the question of Persian Gulf Syndrome in 1998.[588] The RO denied the Persian Gulf claim again and the Board affirmed the denial in 2004.[589]

On appeal to the Veterans Court, Mr. Tyrues tried to raise arguments under § 1110 even though the claim he submitted under that section had been denied in 1998.[590] In a sharply divided opinion, the en banc Veterans Court held that it did not have jurisdiction to hear the § 1110 arguments.[591] Six of the seven judges agreed that the two theories of compensation were part of the same

580. *See id.* ("It was Congress' intent to clarify the Court of Appeals for Veterans Claims' authority and expressly instruct the court that it had the power to reverse.").
581. 732 F.3d 1351, 1355–56 (Fed. Cir. 2013).
582. *Id.*
583. *Id.* at 1357.
584. *Id.* at 1355.
585. *See id.* (explaining that the denial portion of a mixed decision is a final decision that may be immediately reviewed on appeal to the Veterans Court unless the denial portion is inextricably intertwined with the portion ordering a remand).
586. *Id.* at 1353.
587. *Id.*
588. *Id.*
589. *Id.* at 1354.
590. *Id.* (referring to Tyrues v. Shinseki, 23 Vet. App. 166, 170 (2009) (en banc)).
591. *Tyrues*, 23 Vet. App. at 168.

claim because they pertained to the same disability.[592] That majority divided, however, on the issue of how to interpret the Veterans Court's jurisdiction in the frequent cases in which the Board issues a decision denying one theory of how to establish benefits for a medical condition but remands for a different theory.[593] The majority held that, in such a situation, the denied theory must be appealed immediately.[594] The majority reasoned that requiring an immediate appeal would provide claimants with prompt review.[595] It also stated that such decisions do provide claimants with reasonable notice that the denied theory must be immediately appealed because each decision includes an appended form providing the claimant with notice of his or her appellate rights.[596]

The dissenting judges disagreed with the majority's assertion 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.[597] 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 are written in terms of "claims."[598]

In a decision by Chief Judge Rader, the Federal Circuit rejected the veteran's argument that the finality of a Board decision could be indeterminate and, therefore, subject to the claimant's discretion as to when to appeal.[599] Although the central dispute at the Veterans Court was how to handle a single claim that had been bifurcated, the Federal Circuit described the situation as involving two separate

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592. *Id.* at 191. The Veterans Court had 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); *see also* Ingram v. Nicholson, 21 Vet. App. 232, 256–57 (2007) ("[I]t 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.").

593. *Tyrues*, 23 Vet. App. at 172–74.

594. *Id.* at 179–82.

595. *Id.*

596. *Id.*

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

598. *Id.* at 195 ("[T]he majority opinion fails to address any of these [procedural] issues [and] 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.").

599. Tyrues v. Shinseki, 631 F.3d 1380, 1383 (Fed. Cir.), *vacated*, 132 S. Ct. 75 (2011).

claims.[600] This may have been because Mr. Tyrues himself did not accept any of the competing Veterans Court's opinions but, instead, argued that veterans have the discretion either to immediately appeal a denial in a "mixed decision" or to wait until the remanded portion is resolved and then appeal both matters together.[601]

The court relied heavily on Judge Rader's 2011 decision in *Elkins v. Gober*[602] to hold that "[s]eparate claims are separately appealable."[603] As to the critical issue of timing, the decision emphasized that "[p]ublic policy supports allowing veterans to appeal denied claims as quickly as possible."[604] It then reasoned that this "[wa]s best achieved by allowing appeals once the Board makes an individual claim final."[605] Accordingly, the Federal Circuit 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."[606]

Notably, the Federal Circuit did not venture into the practical and interpretive disagreements that divided the Veterans Court.[607] Instead, the decision "encourage[d] the Veterans Court to exercise its jurisdiction as needed to promote judicial efficiency and fairness when handling mixed decisions."[608]

In *Henderson v. Shinseki*,[609] the Supreme Court held that the 120-day deadline for filing an appeal with the Veterans Court was "an important procedural rule" but not jurisdictional and, therefore, did not preclude equitable tolling.[610] In 2011, in light of *Henderson*,[611] the Supreme Court granted certiorari in *Tyrues*, vacated the opinion, and remanded the case for reconsideration.[612] The petition for certiorari was filed by new counsel, who framed the issue as it had been analyzed at the Veterans Court: "[W]hether the time limit in [38 U.S.C. §] 7266(a) requires the filing of an appeal when only one of

600. *Id.* at 1382.
601. *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 Veterans Court's jurisdiction over "claim(s)." Appellant's Opening Brief at 9–10, *Tyrues*, 631 F.3d 1380 (No. 2010-7011), 2010 WL 617385.
602. 229 F.3d 1369 (Fed. Cir. 2000).
603. *Tyrues*, 631 F.3d at 1383.
604. *Id.* at 1384.
605. *Id.*
606. *Id.* at 1385 (emphasis added).
607. *See* Tyrues v. Shinseki, 23 Vet. App. 166, 172–74 (2009) (en banc) (discussing the divided majority opinion on the interpretation of the court's jurisdiction in cases where the Board has issued a decision denying one theory but remanding for another theory).
608. *Tyrues*, 631 F.3d at 1384.
609. 131 S. Ct. 1197 (2011).
610. *Id.* at 1206.
611. *Id.*
612. Tyrues v. Shinseki, 132 S. Ct. 75 (2011).

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."[613] The Federal Circuit vacated the Veterans Court's judgment and remanded the decision for consideration of whether *Henderson* required a different result.[614]

On remand, the Veterans Court found that Mr. Tyrues had not presented any reason to equitably toll the filing deadline and dismissed the appeal from the September 1998 Board decision.[615] Mr. Tyrues again appealed to the Federal Circuit.

Judge Taranto wrote for the majority, noting that the appeal raised two issues of statutory interpretation.[616] The issues were:

> When the Board has clearly rejected a request for benefits under one statutory standard and designated that rejection as subject to immediate appeal, while separately remanding the matter for consideration of the claimant's request for benefits on other statutory grounds, (1) can the denial be appealed immediately, *i.e.*, without waiting for completion of the remand, and (2) must the denial be appealed immediately, *i.e.*, within the 120 days specified in section 7266(a), in the absence of equitable tolling?[617]

On the first issue, the Federal Circuit held that a veteran could appeal the denial portion of a mixed decision immediately.[618] It concluded that such a denial "is a final decision available for Veterans Court review where the Board makes clear the finality of that denial."[619] The court noted that this rule "fits the statutory language and context" and also that it placed the onus on the Board to provide clarity about when a decision was final.[620] On the second issue, the court relied on the plain language of the statute and held that "[a] veteran not only can appeal immediately, but must bring any appeal from the denial portion within the 120-day period allowed by statute."[621]

On both issues, the Federal Circuit found additional support for its holdings by comparing mixed Board decisions to partial-case remands in federal district courts, which "suppl[y] an instructive model for interpreting the provisions governing the analogous

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613. Petition for a Writ of Certiorari at i, *Tyrues*, 132 S. Ct. 75 (No. 10-1405), 2011 WL 1853076.
614. Tyrues v. Shinseki, 467 F. App'x 889, 890 (Fed. Cir. 2012).
615. Tyrues v. Shinseki, 26 Vet. App. 31, 33–34 (2012).
616. Tyrues v. Shinseki, 732 F.3d 1351, 1355 (Fed. Cir. 2013).
617. *Id.*
618. *Id.*
619. *Id.* at 1356.
620. *Id.*
621. *Id.* at 1357.

situation here."[622] The Federal Circuit noted that, under Federal Rule of Civil Procedure 54(b), a district court had the authority to "'direct entry of a final judgment as to one or more, but fewer than all, claims or parties," if appropriate, and that such a final judgment was appealable under 28 U.S.C. §§ 1291 and 1295.[623]

Judge Newman dissented, stating that the majority's holding was "incorrect procedural law in any context, and [wa]s particularly inapt as applied to veterans' claim procedure."[624] She opined that veterans should receive the more flexible treatment afforded by administrative proceedings, even at the judicial level of the Veterans Court.[625] She also stated that, even if the Federal Rules of Civil Procedure could be applied to appeals from Board decisions, the requirements of Rule 54(b) were not met in the case at hand.[626]

4. Equitable tolling of deadline to appeal to the Veterans Court

In *Sneed v. Shinseki*,[627] the Federal Circuit held that "attorney abandonment can justify equitably tolling the deadline for filing an appeal to the Veterans Court."[628] Equitable tolling of the deadline to file an appeal at the Veterans Court may be applied

> when circumstances preclude[] a timely filing despite the exercise of due diligence, such as (1) a mental illness rendering one incapable of handling one's own affairs or other extraordinary circumstances beyond one's control, (2) reliance on the incorrect statement of a VA official, or (3) a misfiling at the regional office or the Board.[629]

Marva Sneed, the surviving spouse of veteran Reginald A. Sneed, received a Board decision denying her claim for survivor benefits.[630] She "promptly" contacted an attorney to discuss representing her before the Veterans Court.[631] One day before the deadline for filing an appeal, she received a letter from the attorney she had contacted.[632] The letter informed Ms. Sneed that the attorney would be unable to take the case and that she should seek an opinion from another attorney or file a notice of appeal herself.[633] The letter also

622. *Id.*
623. *Id.* (quoting FED. R. CIV. P. 54(b)).
624. *Id.* at 1359 (Newman, J., dissenting).
625. *Id.* at 1364.
626. *Id.* at 1366.
627. 737 F.3d 719 (Fed. Cir. 2013).
628. *Id.* at 721.
629. Bove v. Shinseki, 25 Vet. App. 136, 140 (2011).
630. *Sneed*, 737 F.3d at 721.
631. *Id.* at 722.
632. *Id.*
633. *Id.*

incorrectly identified the deadline to appeal the decision as being two days after the actual deadline.[634]

Twenty-nine days after the deadline, Ms. Sneed filed a notice of appeal with the Veterans Court.[635] In a letter that followed the notice, she stated that she had tried without success to find another attorney who would take the case.[636] She wrote: "I thought I had an attorney, this attorney was sent all of my papers about this appeal in a timely manner, in fact I contact[ed] the attorney office as soon as I got my decision letter. I even ke[pt] in contact with the attorney office."[637] Ms. Sneed concluded that she did not believe it was her fault that she had missed the filing deadline.[638]

Shortly thereafter, Ms. Sneed retained an attorney and argued that her reliance on the first attorney had been reasonable and that the attorney's conduct created "extraordinary circumstances beyond [Ms. Sneed's] control," justifying equitable tolling of the filing deadline.[639] The Veterans Court disagreed and dismissed the appeal.[640] The court noted that the attorney who declined to take the case had informed Ms. Sneed that she could file the notice of appeal herself.[641] The court therefore concluded that the late filing "evidence[d] general negligence or procrastination" and precluded equitable tolling.[642]

On appeal to the Federal Circuit, Ms. Sneed argued that the Veterans Court "incorrectly interpreted § 7266(a) by ruling out attorney abandonment as a potential basis for equitable tolling."[643] The majority reviewed the law on equitable tolling of the deadline to file an appeal at the Veterans Court, noting that the Supreme Court's decision in *Henderson* had emphasized the "dramatic" difference between "'ordinary civil litigation' and the system for adjudicating veterans benefits claims."[644] The court concluded that the Veterans Court had erred when it failed to ask whether the attorney's conduct constituted extraordinary circumstances and that the court "improperly treated the listed examples . . . as the exclusive 'parameters' of equitable tolling."[645] The Federal Circuit criticized

634. *Id.*
635. *Id.*
636. *Id.*
637. *Id.* (alterations in original).
638. *Id.*
639. *Id.* at 722–23.
640. *Id.* at 723
641. *Id.*
642. *Id.*
643. *Id.*
644. *Id.* at 725 (quoting Henderson v. Shinseki, 131 S. Ct. 1197, 1205–06 (2011)).
645. *Id.* at 726.

the Veterans Court for "improperly fail[ing] to consider whether attorney misconduct . . . may constitute a basis for equitable tolling"[646] and held that attorney abandonment could indeed support equitably tolling the 120-day deadline.[647]

Judge Prost wrote a strongly worded dissent, asserting that "[t]he majority's pronouncements on attorney abandonment are pure dicta."[648] She believed that attorney abandonment was irrelevant to the late notice of appeal ("NOA") because any misinformation Ms. Sneed received from the attorney only explained two days of delay, rather than the thirty days it took Ms. Sneed to file the NOA.[649] She also observed that the majority's holding seemed unnecessary because "the Veterans Court has long recognized that egregious attorney misconduct—including abandonment—can justify equitable tolling of the NOA deadline."[650]

IV. THEMES RAISED BY THE FEDERAL CIRCUIT'S 2013 VETERANS LAW CASES

Once under judicial review, VA was forced to recognize that a number of the procedures it had developed during its many years of "splendid isolation" had not kept up with developing legal norms and procedures.[651] In its early years, the Veterans Court established new duties for VA in order to bring the Agency into compliance with modern notions of due process.[652] Many of these obligations, however, also had the effect of slowing down the process of claims adjudication and increasing the complexity of the process.[653]

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646. *Id.*
647. *Id.* at 728.
648. *Id.* at 729 (Prost, J., dissenting).
649. *Id.*
650. *Id.* at 731.
651. Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 44 (1994).
652. In *Colvin v. Derwinski*, 1 Vet. App. 171 (1991), the court held that Board decisions were not to be based on the medical opinion of the physician on the three-member panel—which was often relied on but not explained—but could only be based on independent medical evidence, *id.* at 175; *see also* 38 U.S.C. § 7104(d)(1) (2012) ("Each decision of the Board shall include—(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record . . . ."). *But see* Hagel & Horan, *supra* note 651, at 48 (arguing that the Veterans Court only enforced already existing due process requirements on the Board, which were often ignored by VA and its regulations).
653. Ridgway, *New Complexities*, *supra* note 25, at 268 ("[T]he overall value of judicial review has also been questioned, primarily because the adjudication process takes dramatically longer to complete without a corresponding increase in accuracy."); *see also* Fox, *supra* note 47, at 342 (discussing the increased criticism resulting from time-consuming reviews since judicial review began).

Despite judicial review, and early changes to conform to more mainstream law,[654] veterans benefits law has largely developed independently since 1998, when the Federal Circuit established that the unique nature of the pro-claimant veterans benefits system precluded borrowing legal concepts from other areas of the law.[655]

In 1997, the Veterans Court decided a case called *Hodge v. West*,[656] in which it adopted a legal test from social security benefits case law to interpret the regulatory term "new and material evidence."[657] On appeal, the Federal Circuit emphatically overturned the case, concluding that the Veterans Court had failed to defer to the reasonable agency definition of a statutory term.[658] More broadly, the court held that "the test set forth by the [Veterans Court] may be inconsistent with the underlying purposes and procedures of the veterans' benefits award scheme."[659]

The Federal Circuit discussed this issue at length, emphasizing that social security benefits were "an entirely different benefits scheme" and that the veterans benefits system had a "unique character and structure" that was designed by Congress to be explicitly pro-claimant, even after the establishment of judicial review.[660] It criticized the Veterans Court for "inexplicably borrow[ing] a definition of materiality . . . rather than relying on the character of and precedents from the veterans' benefits system it was charged by Congress to review."[661] The court expressed concern that, "where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight."[662] It speculated that using the test established by the Veterans Court would "undermine public confidence, particularly among veterans" and that it could even "undermine the operation of the veterans' benefits system by altering its traditional character."[663]

Given such a strong criticism of a decision based on other, potentially analogous, areas of law, it is unsurprising that veterans law following *Hodge* evolved primarily as dictated by the Federal Circuit in that case: by "relying on the character of and precedents from the

654. *See* Hagel & Horan, *supra* note 651, at 46–49 (discussing changes the reviewing courts imposed on VA and the Board).
655. Hodge v. West, 155 F.3d 1356, 1361 (Fed. Cir. 1998).
656. 155 F.3d 1356 (Fed. Cir. 1998).
657. *Id.* at 1357–58.
658. *Id.* at 1360.
659. *Id.*
660. *Id.* at 1361–64.
661. *Id.* at 1361.
662. *Id.* at 1363.
663. *Id.* at 1363–64.

veterans' benefits system it was charged by Congress to review."[664] Therefore, other than minor deviations, veterans law has historically developed in relative isolation.

CONCLUSION

The year 2013 saw an increasing retreat from the isolation in which veterans law had developed since *Hodge*. Some of the Federal Circuit's cases in 2013 had no need to venture outside the confines of veterans law for their holdings. For example, the court in *Hall* used a classic regulatory analysis that assessed the plain language of the regulation, reviewed examples provided in the rule to determine context, confirmed that the suggested interpretation was consistent with the rest of § 3.304(f), and looked at regulatory history as demonstrated by the Agency's response to comments during the notice and comment period for the proposed regulation. Likewise, the court in *Viegas* and *Yonek* relied on straightforward statutory or regulatory analysis to reach their holdings.

In other decisions, the Federal Circuit ventured further afield. Some cases, such as those involving common law marriages or fiduciary appointments, require VA to consider state law. However, the court did not always restrict itself to considering outside law only on essential issues. In *Burden*, for example, the Federal Circuit went beyond the need to consult Alabama's law on the validity of common law marriages. It cited the Social Security Act, the Federal Coal Mine and Safety Act, the Family Medical and Leave Act, and the Federal Tort Claims Act, as examples of analogous situations when state law defines marital status to determine eligibility for federal benefits. Likewise, the court's decision in *Tyrues* could easily have conducted its analysis and reached the same result without resorting to a comparison to the Federal Rules of Civil Procedure.

Perhaps the most radical departure from strict reliance on veterans benefits precedent was the court's decision in *AZ*. As noted above, the majority's analysis relied on sources including: common law evidentiary rules as developed by the Supreme Court and lower federal courts, and as codified in the FRE; the history of criminal rape trials, legislative reports, and criminal law from various jurisdictions; and holdings from both civil and criminal courts about when the failure to make a report is inadmissible. This wide range of sources beyond the precedents of veterans law, combined with explicit acknowledgement of the unique nature of the pro-claimant

664. *Id.* at 1361.

veterans benefits system, would be a very interesting direction for the Federal Circuit to take in the future.

It is worth seriously considering whether it is truly veteran-friendly and pro-claimant for veterans law to remain isolated from mainstream legal systems and processes. Given that the current system is not working very efficiently or effectively,[665] perhaps it is time for the courts to look beyond veterans law to see if principles or processes from other legal regimes may have useful lessons.

At the Veterans Court's Twelfth Judicial Conference, Justice Scalia noted that the "thumb on the scale" that is supposed to apply to veterans benefits adjudications more often resembles a "fist" on the scale.[666] Even if the veterans benefits system starts to look beyond its current "splendid isolation" to see whether other legal systems may provide useful lessons, veterans are still viewed with much solicitude, and this is unlikely to change.

665. *See* James Dao, *Criticism of Veterans Affairs Secretary Mounts over Backlog in Claims*, N.Y. TIMES (May 18, 2013, 10:33 AM), http://www.nytimes.com/2013/05/19/us/shinseki-faces-mounting-criticism-over-backlog-of-benefit-claims.html?smid=pl-share (noting that over 600,000 VA claims have been pending for more than 125 days).

666. *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, VETERANS L.J., Summer 2013, at 1, *available at* http://www.cavcbar.net/Summer%202013%20VLJ%20Web.pdf.

ADDENDUM

This year's Article continues the practice of providing a statistical addendum of the Federal Circuit's jurisprudence for the year.[667]

Table 1: Results of Precedential Veterans Opinions, January 1, 2013, to December 31, 2013[668]

Result	*Number of Cases*
Affirmed	15
Reversed and remanded	1
Vacated and remanded	5
Total	**21**

Table 1 summarizes the outcomes of the veterans law cases at the Federal Circuit in terms of the court's agreement with the Veterans Court. The 71.4% affirmance rate (15 of 21) is higher than the 66.7% rate (8 of 12 decisions) in 2012, fairly similar to the 72.7% rate (8 of 11 decisions affirmed on the merits) in 2011, and lower than the 78.6% rate (11 of 14) in 2010.[669] As noted in previous years, in the realm of veterans law, the Federal Circuit and the Veterans Court continue to have a relatively high rate of agreement.[670] The general affirmance rate for regional circuits reviewing district courts or agency decisions is 62%.[671]

667. *E.g.*, Gugliuzza, *supra* note 1, at 1258. To the extent these tables and graphs use the same format, the detailed explanations of the data will not be repeated here. As noted in past years, there is room for additional data gathering and analysis.

668. This Table does not include the Federal Circuit's Equal Access to Justice Act (EAJA) decisions.

669. Gugliuzza, *supra* note 1, at 1258; Ridgway, *Changing Voices*, *supra* note 1, at 1224–25; Ridgway, *Fresh Eyes*, *supra* note 1, at 1096–97.

670. *See* Ridgway, *Changing Voices*, *supra* note 1, at 1224 (noting the relatively high rate of agreement between the Federal Circuit and the Veterans Court).

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

Table 2: Precedential Veterans Opinions by Judge, January 1, 2013, to December 31, 2013[672]

Judge	*Number Authored*	*Number Participated in*	*Percentage Authored*	*Number of Separate Opinions*	*Number Authored Generating Separate Opinions*
Rader	1	6	16.7%	0	0
Newman	0	7	0.0%	2	0
Lourie	2	4	50.0%	1	1
Dyk	2	8	25.0%	0	1
Prost	2	5	40.0%	0	0
Moore	0	4	0.0%	1	0
O'Malley	0	4	0.0%	0	0
Reyna	4	4	100.0%	0	1
Wallach	2	3	66.7%	0	1
Taranto	1	4	25.0%	1	1
Chen	0	0	0.0%	0	0
Hughes	0	0	0.0%	0	0
Mayer	2	3	66.7%	0	0
Plager	1	2	50.0%	1	0
Clevenger	3	5	60.0%	0	0
Schall	0	2	0.0%	0	0
Gajarsa	0	0	0.0%	0	0
Linn	0	0	0.0%	0	0
Bryson	1	2	50.0%	0	1
Per Curiam	0	0	0.0%	0	0
Visiting	0	0	0.0%	0	0
Total	**21**	**63**	**—**	**6**	**6**

672. This Table does not include EAJA decisions.

Figure 1: Precedential Opinions Reviewing the Court of Appeals for Veterans Claims, 2000 to 2013[673]

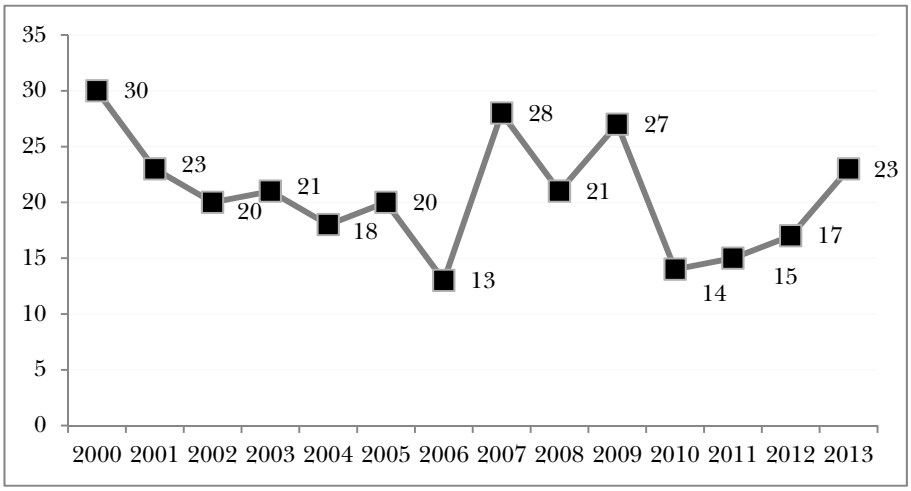
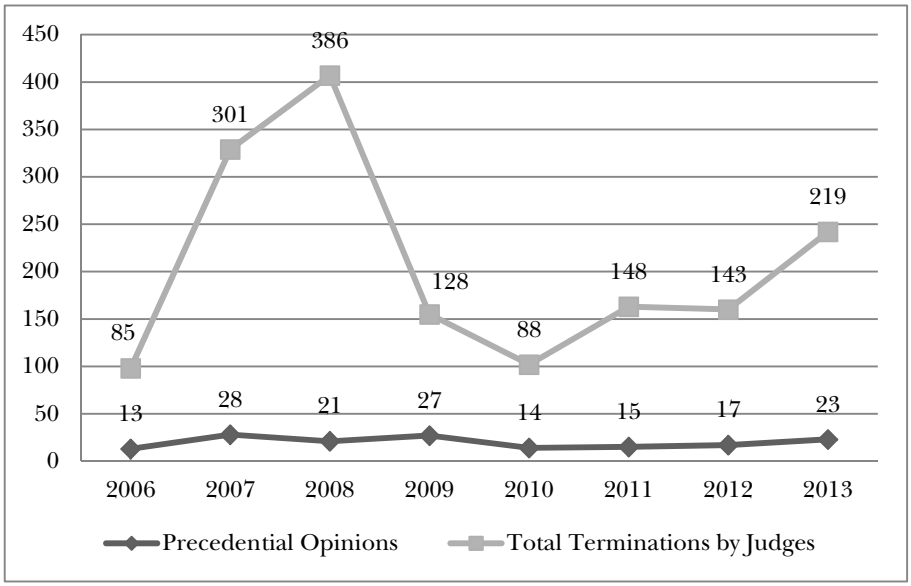


Figure 2: Precedential Veterans Opinions Compared to Total Number of Dispositions by Judges Reviewing the Veterans Court, 2006 to 2013[674]



673. This Figure includes EAJA decisions, which are included in the data from earlier years and in the comparative data.

674. This Figure includes EAJA decisions, which are included in the data from earlier years and in the comparative data.