

REVIEW OF THE 1998-2001 VETERANS BENEFITS DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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INTRODUCTION

This Article reviews Federal Circuit decisions in veterans benefits appeals from the United States Court of Appeals for Veterans Claims from 1998 to September 2001.¹ It does not, however, address decisions regarding claims for attorney fees under the Equal Access to Justice Act. Articles in the Federal Circuit review issue generally address case law decided during the preceding year in the United States Court of Appeals for the Federal Circuit. Because this is the first review of veterans benefits cases to be published in the Federal Circuit review issue, this Article will cover a longer time period.

I. 1988-2001—A BRIEF OVERVIEW²

Judicial review of veterans benefits decisions in the Federal Circuit is a fairly recent phenomenon, having commenced little more than a decade ago. Before 1988, a claimant seeking veterans benefits could appeal, following an adverse decision at the agency Regional Office level, to the Board of Veterans' Appeals ("Board").³ No judicial review of the Board's decisions existed, however, until 1988.

In 1988, the Veterans' Judicial Review Act⁴ created the United States Court of Veterans Appeals,⁵ an Article I court.⁶ On November 11, 1998, that court underwent a name change, becoming the United

1. This Article does not address the Federal Circuit's opinion in *Schism v. United States*, 239 F.3d 1280 (Fed. Cir. 2001). *Schism* was an appeal from a U.S. district court decision granting summary judgment in favor of the U.S. Government and Secretary of Defense, against retired veterans contending that the Government breached its contractual obligation by failing to provide free, lifetime health care to petitioner veterans and their dependants. *Id.* at 1282; see also Lt. Col. Elling Major Broyles, *Military Retiree Medical Care—Broken Promises or Failure to Read The Fine Print?*, 1998 ARMY LAW. 62, 63 (1998).

2. Portions of this Part are adapted from Gary E. O'Connor, *Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Benefits Appeals Process*, 49 AM. U. L. REV. 1279 (Aug. 2000).

3. See 38 U.S.C. § 7104(a) (2002) (providing that all questions in a matter shall be subject to one review on appeal to the Secretary of Veterans Affairs and that final decisions on such appeal shall be made by the Board); see also 38 C.F.R. § 20.101 (2002) (outlining the jurisdiction of the Board).

4. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. § 7251 (1994)).

5. See Veterans' Judicial Review Act, Pub. L. No. 100-687, § 4051, 102 Stat. 4105, 4113 (establishing a new Article I "court of record"); see also WILLIAM F. FOX, JR., *THE UNITED STATES COURT OF VETERANS APPEALS: AN ANALYSIS OF THE JURISPRUDENCE, ORGANIZATION, AND OPERATION OF THE NEWEST ARTICLE ONE COURT* 13-27 (2d ed. 1998).

6. See 38 U.S.C. § 7253 (1994 & Supp. V 1999) (setting forth the exact composition of the new court and discussing the manner of judicial appointment); see also FOX, *supra* note 5, at 19-20 (discussing the Court of Appeals for Veterans Claims as an Article I court).

States Court of Appeals for Veterans Claims ("CAVC").⁷ The 1988 Act made possible review of the decisions of the CAVC in the Federal Circuit.⁸ Congress, however, limited the Federal Circuit's jurisdiction over decisions of the CAVC, to appeals challenging the validity of any statute, regulation, or any interpretations thereof,⁹ or appeals raising constitutional issues.¹⁰ Additionally, an issue otherwise within the Federal Circuit's jurisdiction must be one upon which the CAVC relied in making its decision.¹¹

Although the CAVC issued its first published opinion in January 1990,¹² it was not until March 1991 that the Federal Circuit issued its first published opinion involving an appeal from the CAVC.¹³ For the first several years that the Federal Circuit reviewed CAVC decisions, there were relatively few appeals and the Federal Circuit generally did not disturb the CAVC's case law. From 1991 to 1996, veterans benefits appeals averaged approximately five percent of the filings in the Federal Circuit.¹⁴ Beginning in 1997, however, the number of filings increased dramatically—a forty-two percent increase in 1997,¹⁵

7. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (codified at 38 U.S.C. § 7251 (1994 & Supp. V 1999)).

8. See Veterans' Judicial Review Act § 4092(a) (codified at 38 U.S.C. § 7292(a)) (providing authority to United States Court of Appeals for the Federal Circuit to exercise jurisdiction over cases on review from the CAVC).

9. 38 U.S.C. § 7292(a), (d)(1).

10. *Id.* § 7292(d)(1).

11. *Id.* § 7292(a).

12. The CAVC's first published opinion was *In re Quigley*, 1 Vet. App. 1 (1990).

13. *Machado v. Derwinski*, 928 F.2d 389 (Fed. Cir. 1991), marked the first published opinion in which the Federal Circuit decided an appeal from the CAVC.

14. The Administrative Office of the United States Courts annually prepares statistical reports showing the number of veterans benefits appeals filed in the Federal Circuit for various twelve-month periods, as well as noting the total number of all appeals filed in the Federal Circuit during that same period. In 1991, veterans benefits claims comprised 40 (or 2.70%) of the 1,484 appeals filed in the Federal Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1991 REPORT OF THE DIRECTOR 185 app. I, tbl. B-8 (1991). In 1992, they comprised 88 (or 5.17%) of the 1,702 appeals filed. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 171 app. I, tbl. B-8 (1992) [hereinafter ANNUAL REPORT]. In 1993, veterans benefits appeals constituted 138 (or 8.08%) of the total 1,708 Federal Circuit filings. See ANNUAL REPORT AI-43 app. I, tbl. B-8 (1993). Veterans benefits filings in 1994 dropped to 118 (or 6.92%) of the total 1,705 appeals filed. See ANNUAL REPORT AI-43 app. I, tbl. B-8 (1994). In 1995, that figure dropped again, to 75 (or 4.06%) of the total 1,847 appeals filed in the Federal Circuit. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 127 app. I, tbl. B-8 (1995). In 1996, parties seeking veterans benefits made up 59 (or 4.41%) of the total 1,337 appeals filed in the U.S. Court of Appeals for the Federal Circuit. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR 124 app. I, tbl. B-8 (1996) [hereinafter 1996 REPORT].

15. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,

another forty-five percent increase in 1998,¹⁶ and an additional fifty-nine percent increase in 1999.¹⁷ During the same period, the total filings in the Federal Circuit remained relatively constant, averaging around 1,500 per year.¹⁸ Therefore, veterans benefits cases increased, in a three-year span, from representing approximately four percent of the total number of appeals filed in the Federal Circuit to representing approximately twelve percent.¹⁹

In 2000, Congress enacted the Veterans Claims Assistance Act of 2000 ("VCAA"),²⁰ effectuating the most comprehensive legislative change in veterans benefits law since the Veterans' Judicial Review Act in 1988. The VCAA both reaffirmed and broadened the agency's duties to assist and inform claimants for veterans benefits.²¹ In particular, the VCAA eliminated the "well grounded claim" requirement.²² Courts had interpreted the Veterans Judicial Review

JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1997 REPORT OF THE DIRECTOR 117 app. I, tbl. B-8 (1997) [hereinafter 1997 REPORT] (showing 84 (or 5.76%) veterans benefits appeals filed among total 1,458 filings in Federal Circuit). Eighty-four filings in 1997 represents a 42% increase over the 59 veterans benefits appeals filed in 1996. See 1996 REPORT, *supra* note 14.

16. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1998 REPORT OF THE DIRECTOR 131 app. I, tbl. B-8 (1998) [hereinafter 1998 REPORT] (indicating that of 1,454 claims filed in the Federal Circuit in 1998, 122 (or 8.39%) were veterans benefits appeals). This constitutes a 45% rise since 1997 in the number of cases actually filed and appealed from the CAVC. See 1997 REPORT, *supra* note 15.

17. See STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 REPORT OF THE DIRECTOR 125 app. I, tbl. B-8 (1999) [hereinafter 1999 REPORT] (discussing appeals filed, terminated, and pending in the U.S. Court of Appeals for the Federal Circuit for a twelve-month period ending September 30, 1999, and citing 194 (or 12.57%) veterans benefits appeals raised among a total 1,543 filings in Federal Circuit). The 1999 figure represents a 59% increase over the 122 veterans benefits appeals filed in 1998. See 1998 REPORT, *supra* note 16. But see STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 REPORT OF THE DIRECTOR 119 app. I, tbl. B-8 (2000) (noting that veterans benefits appeals comprised 186 (or 12.33%) of 1,509 total filings in the Federal Circuit in 2000). Whereas 194 veterans benefits appeals were filed in the Federal Circuit in 1999, only 186 were similarly filed in 2000, thus constituting a 4% decrease in the number of claims on appeal from the CAVC at the end of 2000 as opposed to 1999. See 1999 REPORT, *supra* note 17.

18. See 1997 REPORT, *supra* note 15 (noting 1,458 total filings in the Federal Circuit in 1997); 1998 REPORT, *supra* note 16 (1,454 total filings in 1998); 1999 REPORT, *supra* note 17 (1,543 total filings in 1999).

19. Compare 1996 REPORT, *supra* note 14 (indicating that veterans benefits appeals in 1996 constituted 4.41% of the total number of cases filed in the Federal Circuit), with 1999 REPORT, *supra* note 17 (showing that 12.57% of all appeals filed in the Federal Circuit in 1999 derived from the CAVC).

20. Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000).

21. See *id.* (stating that the purpose of the Act is to "reaffirm and clarify the duty of the Secretary of Veterans Affairs to assist claimants for benefits").

22. Compare 38 U.S.C. § 5107(a) (1994) (imposing a burden on persons claiming benefits under the 1988 Veterans' Judicial Review Act to "submit[] evidence [to the secretary] sufficient to justify a belief by a fair and impartial individual that the claim

Act as requiring a claimant to submit a “well grounded claim” (a prima facie case of entitlement to a particular benefit) before the agency’s duty to assist was triggered.²³ Because the VCAA eliminated this requirement, this Article will not discuss in detail Federal Circuit cases addressing the issue of well groundedness.²⁴

II. JURISDICTION, EXHAUSTION, AND STANDARD OF REVIEW

A. *Finality*

Generally, only final decisions may be reviewed on appeal.²⁵ In a number of decisions, the Federal Circuit addressed finality for the purpose of judicial review.

1. *Remands*

In several cases, the Federal Circuit has addressed whether a remand by the CAVC constitutes a final decision. In *Caesar v. West*,²⁶ the court noted that it does not usually contemplate an order remanding a case to an administrative agency, such as the Board, as a final decision for the purposes of establishing jurisdiction because a remand ordinarily signals a continuation of the case.²⁷ In *Caesar*, the

is well grounded”), with Veterans Claims Assistance Act of 2000 § 5107(a) (omitting the use of the term “well grounded” and requiring claimants only to “present and support a claim for benefits under laws administered by the Secretary”).

23. See, e.g., *Epps v. Gober*, 126 F.3d 1464, 1468-69 (Fed. Cir. 1997) (analyzing statutory obligations imposed on the Department of Veterans Affairs and concluding that the agency has a duty to assist only those claimants who have established “well grounded” or “plausible” claims); cf. 38 U.S.C. § 5107(a) (1994) (“[A] person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence . . . that the claim is well grounded[.]”).

24. Several cases in the Federal Circuit specifically address the issue of a sufficiently well grounded claim. See, e.g., *Summers v. Gober*, 225 F.3d 1293, 1297 (Fed. Cir. 2000) (upholding the CAVC’s denial of a veteran’s claim on the ground that the Board did not err when it refused to assist the veteran because the veteran did not establish the statutorily-required “well grounded claim”); *Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (holding that CAVC misinterpreted statute when it addressed whether claimant had presented a well grounded claim); *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000) (recognizing that inquiry as to the well groundedness of a claim carries a “uniquely low” evidentiary threshold); cf. *Winters v. Gober*, 219 F.3d 1375, 1380-81 (Fed. Cir. 2000) (implicitly addressing the well groundedness issue, yet vacating and remanding the CAVC’s decision on the basis that the court surpassed its statutory authority by re-questioning the sufficiency of the veteran’s claim and erroneously relying on different reasoning than that utilized by the Board).

25. See *Travelstead v. Derwinski*, 978 F.2d 1244, 1248 (Fed. Cir. 1992) (conducting statutory analysis to determine when the Federal Circuit has jurisdiction to review an appeal and concluding that a case is appealable only upon final judgment).

26. 195 F.3d 1373 (Fed. Cir. 1999).

27. *Id.* at 1374.

claimant did not argue that the CAVC's decision to remand his case constituted a final order giving the Federal Circuit jurisdiction.²⁸ Rather, the claimant urged the court to consider the CAVC's decision as final because it fell within the "collateral order exception."²⁹ Under this exception, a court has jurisdiction to review matters from a non-final judgment when the "important legal issues [to be raised] would otherwise become effectively unreviewable" at a later phase in the litigation.³⁰ The court, having noted the rarity with which the collateral order exception applies,³¹ outlined the three requirements for applying the exception in a particular case. First, the order on appeal "must conclusively determine the question;"³² second, the appealed order "must resolve a significant issue completely separate from the merits of the action;"³³ and finally, "the order must be effectively unreviewable from a final judgment in the case."³⁴

The court concluded that the claimant could not take advantage of the collateral order exception because Caesar's case did not meet the requisite factors.³⁵ The court stated first that the issue on appeal, which turned on a determination of whether Caesar had the necessary statutory evidence to reopen his claim for service connection, was "obviously not resolved by the remand decision below."³⁶ Next, the court explained that Caesar's question as to the sufficiency of his new and material evidence was clearly intertwined, and therefore not separate from, his ongoing attempt to be awarded compensation for the injuries he suffered during World War II.³⁷ Finally, the court rejected Caesar's invocation of the collateral order exception because nothing in the CAVC's decision precluded Caesar from introducing his arguments at a later phase in the dispute.³⁸

In a number of other decisions, however, the Federal Circuit has held that a CAVC remand was a final decision. In *Dambach v. Gober*,³⁹ the Federal Circuit held that a remand was a final decision, because

28. *Id.*

29. *Id.*

30. *See id.* (reviewing the definition of "collateral order exception" and exploring appropriate application of the exception).

31. *Id.* at 1375.

32. *Caesar*, 195 F.3d at 1375.

33. *Id.* (citation omitted).

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* (observing that the question raised on appeal was "plainly deeply intertwined" with ongoing litigation).

38. *See Caesar*, 195 F.3d at 1375 (ultimately denying Caesar's claim asserting jurisdiction in the Federal Circuit).

39. 223 F.3d 1376 (Fed. Cir. 2000).

the CAVC's construction of a statute would alter the evidentiary burdens in the remand and might make the statutory-construction determination unreviewable.⁴⁰ In *Allen v. Principi*,⁴¹ the court considered a statutory construction argument in a case that the CAVC had decided to remand.⁴² The court noted that the CAVC's interpretation of the statute would have a "clear[]"⁴³ and "unquestionabl[e]"⁴⁴ effect on the remand proceedings.⁴⁵ The Federal Circuit further determined that it was also possible that it "would not have the opportunity to review the statutory interpretation issue later in the litigation."⁴⁶ For these reasons, the court found that the CAVC's remand order constituted a final decision, thereby establishing jurisdiction for purposes of the Federal Circuit's review.

In *Adams v. Principi*,⁴⁷ the court concluded that a remand was a final decision for purposes of appeal.⁴⁸ There, the veteran contended that the agency failed to offer sufficient proof to overcome the presumption of sound condition and, consequently, that the CAVC should have resolved the issue by ruling, rather than remanding, the case.⁴⁹ The Federal Circuit noted that if the claimant was "correct on the merits that he has a right to judgment without a remand, the order of the Veterans Court requiring him to undergo a remand before obtaining appellate relief would defeat the very right he asserts"⁵⁰ The court then emphasized that its ruling on the remand in no way suggests that all future orders from the CAVC shall be considered appealable to the Federal Circuit.⁵¹ The court clarified

40. See *id.* at 1379 (rejecting the government's motion to dismiss the case for lack of final decision and reiterating the position that the Federal Circuit has jurisdiction when "there is statutory interpretation that will affect the remand proceeding and that legal issue might evade [the court's] future review").

41. 237 F.3d 1368 (Fed. Cir. 2001).

42. See *id.* at 1370 (granting jurisdiction over the CAVC's remand decision because that court's particular reading of the statute would impact remand proceedings below as well as to threaten the possibility of future review).

43. *Id.* at 1373.

44. *Id.*

45. See *id.* (characterizing CAVC's interpretation of the statute as "erroneous" and reasoning that the lower court's statutory reading would certainly affect remand proceedings below, because it entirely precludes the veteran from making his argument).

46. *Id.*

47. 256 F.3d 1318 (Fed. Cir. 2001).

48. See *id.* at 1321 (finding it "appropriate" to review the merits of the veteran's appeal).

49. See *id.* (describing the veteran's claim on appeal as a dispute over the propriety of the CAVC's decision to remand case to the Board).

50. *Id.*

51. See *id.* (indicating that although the court considered a remand in this case to constitute final judgment sufficient to confer the Federal Circuit with jurisdiction

that the remand order was “appealable only because the remand deprives Mr. Adams of his claimed right to a decision in his favor on the record as it now stands and might result in that issue becoming moot after further proceedings in the Board of Veterans’ Appeals.”⁵² Thus, the court’s “normal policy” of considering only final judgments of the court below did not preclude the Federal Circuit from reviewing Adams’s claim in this particular instance.⁵³

2. *Multiple claims*

Veterans benefits appeals before the CAVC frequently involve claims for benefits for more than one disability. In *Elkins v. Gober*,⁵⁴ the court addressed the situation of a CAVC decision that remanded some claims but not others. The court held that the decision as to the claims that were not remanded was final, thereby providing it with jurisdiction to consider them. The court noted that “it would be unfair to deny the veteran an immediate appeal of a final decision as to one or more of his claims simply because an additional claim is remanded for further proceedings.”⁵⁵ The court recognized that its holding “may lead to less efficient use of judicial resources,”⁵⁶ but indicated that “[s]uch a result . . . is inevitable given the pro-claimant, nonadversarial, ex parte system that supplies veterans benefits.”⁵⁷

In *Smith v. Gober*,⁵⁸ the claimant prompted the Federal Circuit to determine “under what circumstances veterans’ claims may be deemed separable for purposes of appeal to this court, so that some claims may be appealed despite the remand of other claims raised in the same case.”⁵⁹ The court held that the claimant’s two separate claims were “sufficiently intertwined that they should be considered together.”⁶⁰ Thus, a decision on one of the claims did not constitute final judgment for purposes of an appeal, even as to the claim upon which there had been no judgment.⁶¹ In so holding, the Federal

over the appeal, the court’s “ruling does not imply that all remand orders of the Veterans Court are appealable” to the Federal Circuit).

52. *Id.*

53. *See id.* (settling a dispute in favor of the veteran claimant and noting the Federal Circuit’s jurisdiction to review an appeal after remand to the CAVC).

54. 229 F.3d 1369 (Fed. Cir. 2000).

55. *Id.* at 1376.

56. *Id.*

57. *Id.*

58. 236 F.3d 1370 (Fed. Cir. 2001).

59. *Id.* at 1372.

60. *Id.*

61. *See id.* (concluding that “because the underlying facts of the two claims are so intimately connected . . . in the interest of judicial economy and avoidance of piecemeal litigation, they should be appealed together”).

Circuit noted that the relevant question is “whether the two claims are separate claims, which may be appealed separately, or whether they are parts of the same claim, which must be appealed together.”⁶²

3. *Agency procedural errors*

In *Hayre v. West*,⁶³ the Federal Circuit significantly changed the rules governing finality of agency decisions.⁶⁴ Under Veterans Affairs (“VA”) statutes, there are two ways to reargue a previously denied claim. First, a claimant may collaterally attack a prior final decision by showing that the decision was clearly and unmistakably erroneous.⁶⁵ Second, a claimant may seek to reopen a finally denied claim by submitting new and material evidence.⁶⁶

Hayre added a third method that was not based on VA statutes. The court held that in cases of “grave procedural error,”⁶⁷ such as the breach of the duty to assist, the agency decision is not final for purposes of appeal.⁶⁸ In particular, the court held a breach of the duty to assist, in which the VA failed to obtain pertinent service medical records requested by the claimant and failed to provide the claimant with notice explaining the deficiency, renders a decision non-final for purposes of appeal.⁶⁹

The court reasoned that the failure to obtain pertinent service medical records specifically requested by the claimant and the failure to provide the claimant with notice explaining the deficiency are examples of procedural error.⁷⁰ Such error is at least comparable to the failure to notify a claimant of an adverse decision “that vitiates the finality of a Regional Office decision for purposes of direct appeal.”⁷¹ The court noted that regardless of the reason for this neglect, the lack of notice jeopardizes the interests of the veteran because it “extinguishes the claimant’s right to judicial review.”⁷²

The Federal Circuit narrowed the scope of *Hayre* in *Cook v. Principi*.⁷³ The court rejected the argument that the failure to give a

62. *Id.* at 1371-72.

63. 188 F.3d 1327 (Fed. Cir. 1999).

64. *See id.* (discussing *Hayre*’s appeal of an order from the CAVC).

65. 38 U.S.C. § 5109A (1994).

66. *Id.* § 5108.

67. *Hayre*, 188 F.3d at 1333.

68. *Id.*

69. *Id.* at 1334.

70. *Id.* at 1333.

71. *Id.*

72. *Id.* (explaining that veterans’ interests are compromised “[w]hether this lack of notice is the product of inadvertence or design”).

73. 258 F.3d 1311 (Fed. Cir. 2001). In January 2002, the court granted a petition to rehear the petition appeal en banc and withdrew its earlier opinion. *See Cook v.*

medical examination at the time of the challenged opinion was an error that rendered a decision non-final.⁷⁴ First, the court emphasized that *Hayre* was “an extremely narrow decision.”⁷⁵ Second, the court stated that *Hayre* dealt with “wholly objective issues,”⁷⁶ which included: (1) whether the veteran requested the Regional Office to obtain his service records; (2) whether the Regional Office made a second request after the first was not satisfied; and (3) whether it told the veteran what had happened.⁷⁷ Unlike *Hayre*, the court in *Cook* opined that “the [instant] inquiry involves almost entirely matters of judgment,”⁷⁸ as opposed to objective issues.

4. *Notice by agency*

The Federal Circuit rejected a number of challenges to the adequacy of the notice of appellate rights accompanying an agency Board decision.⁷⁹ For example, the court rejected arguments that the agency was required to inform claimants about the option of filing a motion for reconsideration; that claimants may seek legal representation before the CAVC; and that attorneys fees for an appeal may be paid by the agency if the agency’s position was not substantially justified.⁸⁰

B. *Jurisdiction*

This section discusses the statutory prerequisites to bring an appeal before the agency Board, the CAVC, and the Federal Circuit. Issue exhaustion—the requirement of having raised a particular issue below—is discussed in the next section.

1. *Board of Veterans’ Appeals*

Once the Regional Office has rendered a decision regarding a claim that is adverse to the claimant, the claimant may appeal to the Board,⁸¹ which is part of the Department of Veterans Affairs.⁸² The

Principi, 275 F.3d 1365 (Fed. Cir. 2002).

74. See *Cook*, 258 F.3d at 1312.

75. *Id.* at 1314 (“[A]lthough the [*Hayre*] opinion contained some broad language, the holding was limited . . .”).

76. *Id.*

77. *Id.* According to the court, the issues in *Hayre* “could be answered on the basis of undisputed objective facts and did not require any exercise of judgment.” *Id.*

78. *Id.*

79. See, e.g., *Cummings v. West*, 136 F.3d 1468 (Fed. Cir. 1998) (holding that the notice sent to the claimant was adequate despite the fact that it did not inform the claimant of her right to appeal within 120 days).

80. *Id.* at 1472-73.

81. 38 U.S.C. § 7104(a) (providing that all questions in a matter shall be subject to one review on appeal to the Secretary and final decisions on such appeal shall be

first step in the appeals process is the filing of a timely "Notice of Disagreement" by the claimant.⁸³ A Notice of Disagreement is "[a] written communication from a claimant or his or her representative expressing dissatisfaction with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result."⁸⁴ The claimant must file the Notice of Disagreement within one year of the agency's mailing of notice of the decision to be appealed.⁸⁵ The filing of a timely Notice of Disagreement is a jurisdictional requirement for obtaining appellate review.⁸⁶

The Federal Circuit has addressed the method by which a claimant must properly raise an issue in a Notice of Disagreement. In *Ledford v. West*,⁸⁷ the court noted that while the Notice of Disagreement need not contain the legal reasoning supporting a challenge to an agency determination, it "must have indicated disagreement with a specific determination."⁸⁸ In *Collaro v. West*,⁸⁹ the court held that a "vague" Notice of Disagreement was sufficient where the claimant later "cut the rough stone of his [Notice of Disagreement] to reveal the statutory and constitutional radix of his issue that lay within."⁹⁰ The court noted that, because the Notice of Disagreement was vague, the claimant had not specifically limited the issue he was appealing.⁹¹

made by the Board); see also 38 C.F.R. § 20.101 (1999) (outlining the jurisdiction of the Board).

82. See REPORT OF THE CHAIRMAN, BOARD OF VETERANS' APPEALS, FISCAL YEAR 1999 1 (1999) (explaining the relationship between the Board and the Department of Veterans Affairs). The DVA administers the laws providing benefits and other services to veterans and their families. The Board is part of the DVA and is tasked with reviewing benefits claim determinations made by the Regional Offices and issues decisions on appeals.

83. See 38 U.S.C. § 7105 (1994) (establishing the requirements for filing a Notice of Disagreement and appeal). Appellate review of a claim is initiated by the filing of a Notice of Disagreement followed by a statement of the case prepared by the agency and is completed by a substantive appeal. *Id.*

84. 38 C.F.R. § 20.201 (1999).

85. See *id.* § 20.302 ("Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her."); see also 38 U.S.C. § 7105(b)(1) (1994) ("A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.").

86. See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988) (codified at 38 U.S.C. § 7105 (1994)) (stating that an agency's action or determination will become final if a Notice of Disagreement is not filed within the prescribed period and the claim will not thereafter be reopened except as otherwise allowed by the regulations).

87. 136 F.3d 776 (Fed. Cir. 1998).

88. *Id.* at 779.

89. 136 F.3d 1304 (Fed. Cir. 1998).

90. *Id.* at 1309.

91. *Id.*

2. *Court of Appeals for Veterans Claims*

By statute, a claimant has 120 days from the date of the mailing of notice of a Board decision to file a notice of appeal with the CAVC.⁹² In *Bailey v. West*,⁹³ the court dramatically changed the law governing the timeliness of appeals to the CAVC by allowing equitable tolling of the 120-day deadline for filing a notice of appeal.⁹⁴ The court acknowledged that previous opinions implied that the statutory 120-day time limit was “mandatory, jurisdictional and not subject to equitable tolling.”⁹⁵ The court had issued opinions with such implications in 1991,⁹⁶ 1992,⁹⁷ 1994,⁹⁸ and 1998.⁹⁹ The court, however, reconsidered its prior reasoning and overruled “previous statements that equitable tolling is unavailable.”¹⁰⁰ In a concurrence, Judge Michel underscored the “limited scope” of this decision and wrote that the “decision does not decide, nor even purport to address, whether other tribunals may toll their particular filing deadlines.”¹⁰¹

In *Linville v. West*,¹⁰² the court again considered the issue of the timeliness of a Notice of Appeal from a final decision of the Board.¹⁰³ After the Board denied the claimant’s reconsideration motion, and within 120 days of denial of reconsideration, “but well beyond the 120-day period following the Board’s final decision,” the claimant filed a Notice of Appeal with the CAVC.¹⁰⁴ The court held that the postmark of the appellant’s reconsideration motion within 120 days

92. See 38 U.S.C. § 7266(a).

93. 160 F.3d 1360 (Fed. Cir. 1998).

94. See *id.* at 1368 (explaining how Bailey, after being denied reopening of his claim, decided to take issue with the timeliness of his appeal, and ultimately won). See also BLACK’S LAW DICTIONARY 560 (7th ed. 1999) (defining equitable tolling as “the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired”).

95. *Bailey*, 160 F.3d at 1368.

96. See *Machado v. Derwinski*, 928 F.2d 389, 391 (Fed. Cir. 1991) (denying claimant’s appeal as untimely because the statute “plainly makes compliance with the 120-day limit a prerequisite to Veterans Court review and does not authorize the court to extend that time”).

97. See *Butler v. Derwinski*, 960 F.2d 139, 140-41 (Fed. Cir. 1992) (explaining that Congress did not empower the Court of Veterans Appeals to extend the statute of limitations).

98. See *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) (denying an appeal because the 120-day limitations period cannot be extended or waived).

99. See *Cummings v. West*, 136 F.3d 1468, 1472 n.2 (Fed. Cir. 1998) (rejecting the argument that the doctrine of equitable tolling should be applied to extend the filing period).

100. *Id.*

101. *Bailey*, 160 F.3d at 1368.

102. 165 F.3d 1382 (Fed. Cir. 1999).

103. In *Linville*, the claimant filed a motion for reconsideration with the Board 112 days after the Board’s final decision. *Id.* at 1382.

104. *Id.* at 1383-84.

after the mailing of that notice had tolled the running of that filing period.¹⁰⁵

3. *Federal Circuit*

The Federal Circuit addressed jurisdiction in two cases. In an attorney discipline case, *In re Bailey*,¹⁰⁶ the court held that it had jurisdiction to consider a “free-standing” constitutional issue—an issue that did not involve a challenge to the interpretation or validity of a statute or regulation—as long as the other jurisdictional requirements were met.¹⁰⁷ In *Leonard v. Gober*,¹⁰⁸ however, the court found that it did not have jurisdiction in a case in which the appellant filed her appeal one day late. The claimant provided various reasons for her failure to file on time and requested that the court toll the statute of limitations.¹⁰⁹ The court held that it lacked jurisdiction to consider an equitable tolling argument because the argument improperly challenged the application of law to facts.¹¹⁰

C. *Issue Exhaustion*

The general rule in appeals from administrative agencies is that the reviewing court will not consider an issue not raised below.¹¹¹ The Federal Circuit has considered the application of this general rule to veterans benefits appeals in a number of cases.

1. *Failure to raise an issue before agency*¹¹²

The Federal Circuit has addressed whether a particular issue must be raised before the agency in order for the CAVC to consider it. In *Maggitt v. West*,¹¹³ the Federal Circuit considered whether the CAVC erred in holding that it lacked the authority to hear the claimant’s challenges because he had not presented those issues earlier in the claims process.¹¹⁴ The court stated that “to the extent the Veterans

105. *Id.* at 1386.

106. 182 F.3d 860 (Fed. Cir. 1999).

107. *Id.* at 865.

108. 223 F.3d 1374 (Fed. Cir. 2000).

109. *Id.* at 1375.

110. *Id.* at 1375-76.

111. See generally 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.8, at 341 (3d ed. 1994) (discussing appeals from administrative agencies).

112. Portions of this Part are adapted from Gary E. O’Connor, *Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Benefits Appeals Process*, 49 AM. U. L. REV. 1279 (2000).

113. 202 F.3d 1370 (Fed. Cir. 2000).

114. See *id.* at 1377 (addressing the question of exhaustion of remedies and noting that the CAVC held that it lacked the authority to hear the claimant’s Administrative Procedure Act (“APA”) challenge because he had not presented the issue earlier).

Court decision in this case implies that the exhaustion doctrine is jurisdictional in nature, it is incorrect.”¹¹⁵ The court also indicated that a decision on the exhaustion issue should be “case-specific in balancing the competing interests of the veteran and the government.”¹¹⁶

Relying on *McCarthy v. Madigan*,¹¹⁷ the court reasoned that when Congress has not clearly mandated the exhaustion of particular administrative remedies, the exhaustion doctrine is not jurisdictional, but rather is a matter for the exercise of “sound judicial discretion [t]he exercise of that discretion, requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.”¹¹⁸ The Federal Circuit further noted that the CAVC is “uniquely positioned to balance and decide the considerations regarding exhaustion in a particular case”¹¹⁹ and that “this case presents the opportunity for the Court of Appeals for Veterans Claims to articulate the grounds upon which the exhaustion doctrine should, or should not, be invoked.”¹²⁰

Several aspects of the reasoning in *Maggitt*, however, were inconsistent with an earlier decision addressing a similar issue, *Ledford v. West*.¹²¹ First, the two opinions are inconsistent as to the issue of whether the doctrine of exhaustion of administrative remedies applies to veterans benefits cases. The court in *Ledford* held that the claimant was required to exhaust administrative remedies.¹²² The court stated that “[t]he legislative history provides no basis for us to conclude that the doctrine of exhaustion of administrative remedies does not apply here.”¹²³ In *Maggitt*, where the claimant made arguments for the first time on appeal that were similar to arguments made in *Ledford*,¹²⁴ the court noted that “it is open to question whether application of an exhaustion requirement is consistent with the statutory purposes underlying the veterans benefits laws”¹²⁵

Second, the decisions are inconsistent regarding the exceptions to the exhaustion doctrine. In *Ledford*, the court rejected the claimant’s

115. *Id.*

116. *Id.* at 1378.

117. 503 U.S. 140, 144 (1992).

118. *Id.* (quoting *McCarthy*, 503 U.S. at 144).

119. *Id.* at 1378.

120. *Id.*

121. 136 F.3d 776 (Fed. Cir. 1998).

122. See *id.* at 780-82 (concluding that there is no legal basis for suspending application of the doctrine of exhaustion of remedies in veterans benefits cases).

123. *Id.* at 782.

124. See *Maggitt*, 202 F.3d at 1377 (challenging the CAVC summary adjudication of whether exhaustion is required in the circumstances of the case).

125. *Id.* at 1378.

argument that exhaustion was not required because the Board did not have the power to invalidate the circular he challenged.¹²⁶ The court noted that “[a] lack of agency power to provide a remedy concerning issues beyond its charter does not necessarily relieve a claimant from presenting those issues as part of a challenge to an agency decision.”¹²⁷ In *Maggitt*, however, the court indicated that if there is “some doubt as to whether the agency was empowered to grant effective relief,”¹²⁸ the doctrine should not be invoked.¹²⁹

2. *Failure to timely raise an issue before CAVC*

a. *Issue raised before CAVC, but not in principal brief*

In *Carbino v. West*,¹³⁰ the Federal Circuit addressed whether failure to raise an argument in a principal brief before the CAVC results in waiver of that argument. The CAVC had declined to consider an argument regarding the effect of an internal agency manual, which was cited and relied upon for the first time in a reply brief.¹³¹ The Federal Circuit concluded that the CAVC was correct in declining to hear the veteran’s untimely contentions.¹³² The court noted that “[a]n improper or late presentation of an issue or argument under the court’s rules need not be considered and, in fact, ordinarily should not be considered.”¹³³ The court reasoned that there were “cogent reasons for not permitting an appellant to raise issues or arguments in a reply brief.”¹³⁴ These reasons include the “unfairness to the appellee who does not have an opportunity to respond and the added burden on the court that a contrary practice would entail.”¹³⁵

126. See *Ledford*, 136 F.3d at 780 (stating that “[claimant’s] assertion that the agency cannot invalidate the circular does not relieve him of the obligation of presenting his constitutional and APA challenges to the agency.”).

127. *Id.*

128. *Maggitt*, 202 F.3d at 1377 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146-48 (1992)).

129. See *id.* (discussing “three broad sets of circumstances” where it is inappropriate to invoke the doctrine against an individual).

130. 168 F.3d 32 (Fed. Cir. 1999).

131. See *id.* at 33 (stating that the “sole issue on appeal is whether the [CAVC] erred as a matter of law when it declined to consider the effect of [the] internal manual”).

132. See *id.* at 35 (explaining that because the statutory language requires the CAVC to decide legal issues “when presented,” suggesting “the compelling precedent that appellate courts should not consider issue[s] raised for the first time in a reply brief,” the CAVC properly declined to consider the issue).

133. *Id.* at 34.

134. *Id.*

135. *Id.* at 35.

b. Issue not raised before CAVC

In *Boggs v. West*,¹³⁶ the Federal Circuit held that where a claimant did not raise a statutory construction argument before the CAVC, it would not consider the argument in the first instance.¹³⁷ The court reasoned that although the relevant jurisdictional statute might give it jurisdiction to consider the argument, it did not require the court “to decide an issue that has been waived.”¹³⁸ This was especially true in light of a statute¹³⁹ governing the right of appeal that contained the qualifying language “that was relied on below.”¹⁴⁰ The court concluded that “Boggs has no statutory right of appeal on an issue that was not raised and relied on below.”¹⁴¹ Judge Newman dissented, arguing that the court should have considered the issue.¹⁴²

In *Smith v. West*,¹⁴³ the court again refused to consider statutory construction and due process claims that were not raised before the CAVC.¹⁴⁴ The court noted that “[a]n appellant who has not settled on an appealable issue until he or she reaches this court has thus missed the train.”¹⁴⁵ The court stated that its jurisdictional statute¹⁴⁶ was a bar to consideration of a legal issue or argument (one directed to the validity of a statute or regulation) on appeal absent one of two conditions.¹⁴⁷ These conditions are: (1) the CAVC addressed the issue or argument, or (2) the issue or argument was raised by a party to the CAVC.¹⁴⁸

136. 188 F.3d 1335 (Fed. Cir. 1999).

137. *See id.* at 1338 (stating that the proper forum in which Boggs should have raised his argument concerning the interpretation of the statute at issue was the CAVC, and denying consideration of the issue).

138. *Id.*

139. *See* 38 U.S.C. § 7292(a) (1994) (providing that any party to the case may obtain a review of the decision regarding the validity of or interpretation of a statute or regulation that was used to make the decision).

140. *Boggs*, 188 F.3d at 1338 (explaining that the present court is not required to hear issues that have been waived by the court below).

141. *Id.*

142. *See id.* at 1339 (Newman, J., dissenting) (contending that the court is permitted, and further obligated, to consider Boggs' argument).

143. 214 F.3d 1331 (Fed. Cir. 2000). In an April 2002 en banc opinion, the Federal Circuit modified this opinion. *See infra* note 156.

144. *See id.* at 1334 (concluding that the court cannot address issues that were not presented to the court below).

145. *Id.* at 1333.

146. 38 U.S.C. § 7292(a) (1994).

147. *See Smith*, 214 F.3d at 1333 (explaining that the Federal Circuit's jurisdiction is limited to issues raised in the lower court).

148. *See id.* (explaining that compliance with the jurisdictional statute requires that the issue of validity of interpretation raised on appeal was either relied on by the lower court or brought to the attention of the lower court).

Additionally, in *Belcher v. West*,¹⁴⁹ the court refused to consider a regulatory construction argument that was not raised before the CAVC. Adhering to its holdings in *Boggs* and *Smith*, the court reasoned that “where the [CAVC] neither addresses a legal issue nor has such an issue presented to it, that court cannot be said to have ‘relied on’ the issue or argument in ‘making its decision.’”¹⁵⁰ The court concluded that because the claimant’s issue was not presented to the CAVC, it did not have jurisdiction to hear that argument.¹⁵¹

In *Forshey v. Gober*,¹⁵² however, the court did consider an issue raised for the first time on appeal. The issue was the proper evidentiary standard for determining whether a certain statutory presumption had been rebutted.¹⁵³ The court noted that “[w]e generally refrain from examining questions not raised below, but under certain circumstances, it is appropriate.”¹⁵⁴ The “appropriate circumstances” include: “the issue is one of pure law; the proper resolution is beyond all doubt; there was no opportunity to raise the objection below; it is a significant question of general impact or public concern; or it is in the interest of substantial justice.”¹⁵⁵ The court noted that “[o]f signal importance” was the “greater latitude accorded claimants in informal and nonadversarial proceedings.”¹⁵⁶

D. Fact Questions and the Standard of Review

In discussing the review of the Board’s decisions by the Article I court—the CAVC—the Federal Circuit has emphasized their respective roles in the veterans benefits claims and appeals process. In particular, the court has noted that it is the Board’s role to make factual findings.¹⁵⁷

149. 214 F.3d 1335 (Fed. Cir. 2000). In an April 2002 en banc opinion, the Federal Circuit modified this opinion. See *infra* note 156.

150. *Id.* at 1337.

151. See *id.* (refusing to hear claimant’s argument because it was not first addressed by the CAVC).

152. 226 F.3d 1299 (Fed. Cir. 2000).

153. See *id.* at 1305 (considering the appropriate standard of proof for the statutory presumption at issue).

154. *Id.* at 1302 (citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

155. *Id.* at 1302-03.

156. *Id.* at 1303. In February 2001, the court granted a petition to hear an appeal en banc, ordering the parties to brief, inter alia, whether *Smith* and *Belcher* should be overruled, and withdrew its earlier opinion. See *Forshey v. Principi*, 239 F.3d 1224 (Fed. Cir. 2001). The court issued its en banc opinion in April 2002. See *Forshey v. Principi*, 284 F.3d 1335 (Fed. Cir. 2002) (holding that “even when jurisdiction exists, prudential considerations should severely limit the exercise of our authority to consider issues not raised or decided below.”). The court also modified its opinions in *Smith* and *Belcher* to the extent, if any, that they are inconsistent with this new approach on jurisdictional issues. *Id.* at 1342-48.

157. See *Elkins v. Gober*, 229 F.3d 1369, 1377 (Fed. Cir. 2000) (“Fact-finding in

The Federal Circuit has also addressed the standard of review applicable to the CAVC's review of the Board's factual findings. In reviewing factual questions, the CAVC frequently states that it will affirm the agency's finding if there is a "plausible basis" in the record for the Board's finding.¹⁵⁸ In *Sanchez-Benitez v. Principi*,¹⁵⁹ the veteran argued that the "plausible basis" standard of review was a misapplication of the statutory "clearly erroneous" standard.¹⁶⁰

The Federal Circuit noted that the Supreme Court's interpretation of the term "clearly erroneous," for the purposes of review of a lower court's fact-finding, was "an analogous situation to the Veterans Court's review of a Board decision"¹⁶¹ In *Anderson v. City of Bessemer City*, the Supreme Court stated that "the meaning of the phrase 'clearly erroneous' is not immediately apparent."¹⁶² The foremost principle governing the standard is as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."¹⁶³ The Federal Circuit found the CAVC's reliance on the Board's decision was well-supported, based on the record on appeal, the appellant's original and reply briefs, the Secretary's brief, and the parties' oral arguments.¹⁶⁴ Therefore, the CAVC's "conclusion that there was a 'plausible basis in the record for the Board's decision' was [not] a misapplication of the 'clearly erroneous' standard of review."¹⁶⁵

III. CONSTITUTIONAL ISSUES

A. Due Process

The Federal Circuit considered a procedural due process challenge

veterans cases is to be done by the expert BVA, not by the Veterans Court."); *Winters v. Gober*, 219 F.3d 1375, 1380 (Fed. Cir. 2000) ("The Court of Appeals for Veterans Claims' attempts to address the well-groundedness of the claim may also have required it to make improper de novo findings of fact."); *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (noting "the general rule that appellate tribunals are not appropriate fora for initial fact-finding").

158. See, e.g., *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (explaining that under the "clearly erroneous" standard, the court cannot substitute its factual judgments for that of the BVA).

159. 259 F.3d 1356 (Fed. Cir. 2001).

160. See 38 U.S.C. § 7261(a)(4) (1994) (codifying the idea that the CAVC should set aside the agency's finding if the finding is clearly erroneous).

161. *Sanchez-Benitez*, 259 F.3d at 1360.

162. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

163. *Id.* at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

164. *Sanchez-Benitez*, 259 F.3d at 1361.

165. *Id.* at 1361 (citations omitted).

in *Richard v. West*.¹⁶⁶ In *Richard*, the claimant argued that any construction of any provision under Title 38 of the United States Code “that compels a conclusion that a veteran’s claim to disability compensation terminates at death [would] bring the statute into conflict with the constitutional requirement of procedural due process.”¹⁶⁷ The court noted that to raise a due process question, a claimant has to demonstrate a protected property interest in such protections.¹⁶⁸ Under VA statutes, a veteran’s claim is terminated upon the veteran’s death; therefore the property interest also terminates and a veteran’s estate does not have a protected property interest in such compensation.¹⁶⁹

In *Jackson v. Principi*,¹⁷⁰ the court rejected a veteran’s argument that he was unfairly prejudiced when the Board considered the issue of new and material evidence without providing notice to him.¹⁷¹

The court recognized that, in *Nolen v. Gober*,¹⁷² it had stated that fundamental principles of fairness were implicated when the CAVC decided an issue that neither party raised and about which neither party had notice.¹⁷³ The court reasoned, however, that “the general principles of fairness that we found consistent with the statutory scheme in *Nolen* [could] not compel a procedure that conflicts with the statutory scheme that authorizes the Board to make all final decisions on behalf of the Secretary that are necessary to a decision.”¹⁷⁴ The court further distinguished *Nolen* on the ground that “[t]he fairness issues relating to an adversarial proceeding before an independent court that were important in *Nolen* [are] not implicated when the appeal is to the Board, where the Secretary is asked to re-examine the Regional Office’s decision and decide the proper disposition of the veteran’s claim.”¹⁷⁵ The court also noted that “[t]he issue of whether Mr. Jackson’s evidence justified a ruling in his favor on the merits, which he addressed in his appeal before

166. 161 F.3d 719 (Fed. Cir. 1998).

167. *Id.* at 723.

168. *Id.*

169. *See id.* (explaining that property interests are defined by existing rules and understandings, and because a veteran’s claim to disability compensation terminates at death under Title 38, a veteran does not have a protected property interest arising from existing rules or understandings).

170. 265 F.3d 1366 (Fed. Cir. 2001).

171. *See id.* at 1371 (rejecting claimant’s contention that the Board’s procedure violated his due process rights).

172. 222 F.3d 1356 (Fed. Cir. 2000).

173. *See id.* at 1360-61 (noting that such a result would have been a “complete surprise” to claimant, who had no chance to directly address the issue in question).

174. *Jackson*, 265 F.3d at 1370.

175. *Id.*

the Board, largely overlapped with the issue of whether the evidence he offered to the Regional Office was new and material.”¹⁷⁶ Thus, the court rejected the argument that the procedure followed by the Board violated Jackson’s due process rights.

B. Vagueness and Overbreadth

The Federal Circuit has also considered vagueness challenges. In *Yeoman v. West*,¹⁷⁷ the court held that agency regulations regarding willful misconduct were not unconstitutionally vague.¹⁷⁸ The court noted that the “vagueness doctrine does not require that regulations achieve near mathematical certainty,”¹⁷⁹ and that “statutes and regulations must necessarily be written in such a way as to be able to ‘deal with untold and unforeseen variations in factual situations.’”¹⁸⁰ The court concluded that a claimant’s consumption of six to eight beers and lack of sleep for approximately forty-five hours prior to an automobile accident constituted willful misconduct.¹⁸¹ The court reasoned that the regulations were “sufficiently articulated” that an ordinary service member “could understand and comply with them through the exercise of ordinary common sense.”¹⁸²

In *Lofton v. West*,¹⁸³ the Federal Circuit addressed an agency regulation barring benefits to “[a]ny person who has intentionally and wrongfully caused the death of another person,”¹⁸⁴ and found the regulation was not impermissibly overbroad or vague.¹⁸⁵ The claimant’s primary argument was that the regulation failed to define the terms “intentionally” or “wrongfully” and thus could pertain to all situations in which the claimant caused the veteran’s death.¹⁸⁶ The court noted that terms such as “intentionally” and “wrongfully” are frequently used in the law without further definition.¹⁸⁷ The court

176. *Id.* at 1370-71.

177. 140 F.3d 1443 (Fed. Cir. 1998).

178. *See id.* at 1448 (addressing the claimant-appellant’s final argument that the Department of Veteran Affairs regulations concerning willful misconduct were unconstitutionally vague and should be void because they did not provide fair notice as to what actions preclude a veteran from receiving benefits).

179. *Id.*

180. *Id.* (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952)).

181. *See id.* (concluding that any “ordinary service member” should understand that a person cannot drive for so long after so much alcohol and so little sleep without committing willful misconduct).

182. *Id.*

183. 198 F.3d 846 (Fed. Cir. 1999).

184. 38 C.F.R. § 3.11 (2001).

185. *Lofton*, 198 F.3d at 850-51.

186. *Id.* at 850.

187. *See id.* (noting the frequency of the use of the two words “intentionally” and “wrongfully,” and failing to find these words unconstitutional).

indicated that it examines vagueness challenges in light of the facts of the case if First Amendment rights are not invoked.¹⁸⁸ The court noted that, on her guilty plea, Ms. Lofton was convicted of the crime of voluntary manslaughter.¹⁸⁹ Thus, her conviction lawfully established that she intentionally and wrongfully killed her husband.¹⁹⁰

Ms. Lofton also argued that the regulation was overbroad because it could prohibit the payment of benefits to a surviving spouse that mistook her husband for a burglar and mistakenly shot and killed him.¹⁹¹ The court rejected that argument, noting that "the fact that close cases may arise under the regulation does not render the regulation invalid in cases such as this one that are not close."¹⁹² The court further opined that the overbreadth doctrine applies when constitutional rights are at stake, but is inapplicable in cases that involve only a statutory claim for financial benefits.¹⁹³

IV. ADMINISTRATIVE-LAW ISSUES

Appeals of adverse decisions regarding veterans' benefits begin in a federal administrative agency; therefore, a number of Federal Circuit decisions discuss administrative-law principles.¹⁹⁴

A. *Challenging Validity of Regulations in the Federal Circuit*

VA statutes allow parties to challenge the validity of regulations in

188. *Id.*

189. *See id.* at 847 (detailing the procedural posture of the criminal litigation that arose from the death of Ms. Lofton's former husband). Ms. Lofton was originally convicted of second degree murder. *Id.* That charge was reversed on a jury instruction error and Ms. Lofton subsequently pled guilty to a voluntary manslaughter charge. *Id.* Ms. Lofton was sentenced to ten years imprisonment as a result. *Id.*

190. *See id.* at 857.

191. *Id.*

192. *Id.* (dismissing the applicability of § 3.11 to a defense of mistake case because this type of case lacks the "wrongfully" element of the regulation).

193. *Id.* (citations omitted).

194. *See E. Paralyzed Veterans Ass'n v. Principi*, 257 F.3d 1352, 1364 (Fed. Cir. 2001) ("An agency directive is not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), and may be modified or rescinded at any time."); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 690 (Fed. Cir. 2000) (holding that an action for judicial review of an agency rule or regulation must be filed within sixty days of the issuance of the rule or regulation); *Mortgage Investors Corp. v. Gober*, 220 F.3d 1375, 1378 (Fed. Cir. 2000) (stating that to determine if an agency action is arbitrary or capricious, the court must examine whether the agency considered relevant factors or clearly erred in its judgment); *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000) (distinguishing between substantive and interpretive rules); *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) (same).

the Federal Circuit.¹⁹⁵ The Federal Circuit has held, based on its own court rules, that such challenges must be brought within sixty days after the issuance of the rule or regulation at issue.¹⁹⁶ The court held that “issuance” means the date that the rule becomes effective, not the date of publication.¹⁹⁷ Further, the court held that a veterans organization had associational standing to challenge the rules.¹⁹⁸ The Administrative Procedure Act (“APA”) standard of review of agency rules is highly deferential to the actions of the agency.¹⁹⁹

The Federal Circuit has considered challenges to various agency rules. In *Mortgage Investors Corp. v. Gober*,²⁰⁰ the court concluded that a modification of an agency rule regarding the loan guaranty program was not arbitrary and capricious.²⁰¹ By statute, the agency can guarantee a percentage of a veteran’s private mortgage loan.²⁰² An agency program continues that guarantee in situations when the veteran refinances the loan to obtain a lower interest rate.²⁰³ In the past, refinancing required no agency review or approval if the original loan was not more than three payments past due.²⁰⁴ The modified rule clarified that the veteran could not skip any monthly loan payments before the refinancing, and effectively converted the three-payment grace period into a one-payment grace period.²⁰⁵ The court noted that “[i]n an informal rule-making procedure such as this, the agency need only supply a record adequate to show compliance with APA requirements.”²⁰⁶ The court concluded that the agency’s record was adequate and complied with APA procedures.²⁰⁷

The Federal Circuit examined regulations implementing the Veterans’ Health Care Eligibility Reform Act of 1996 in *Eastern Paralyzed Veterans Association, Inc. v. Principi*,²⁰⁸ ultimately rejecting the

195. See 38 U.S.C. § 502 (1994) (stating that an action by the Secretary is subject to judicial review in the U.S. Court of Appeals for the Federal Circuit).

196. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 690 (Fed. Cir. 2000).

197. *Id.* at 690-91.

198. *Id.* at 689-90.

199. *Id.* at 691.

200. 220 F.3d 1375 (Fed. Cir. 2000).

201. See *id.* at 1381 (“Therefore, this court finds the new rule to be not arbitrary and capricious, and DVA to have followed the APA’s procedural requirements in adopting it.”).

202. See 38 U.S.C. § 3703(a)(1)(A) (1994) (“Any loan to a veteran eligible for benefits . . . is automatically guaranteed by the United States . . .”).

203. See *Mortgage Investors Corp.*, 220 F.3d at 1376 (discussing the Interest Rate Reduction Refinancing Loan program initiated by the Department of Veteran Affairs).

204. *Id.*

205. *Id.* at 1377.

206. *Id.* at 1380.

207. *Id.*

208. 257 F.3d 1352 (Fed. Cir. 2001).

challenges to the regulations.²⁰⁹ In a concurrence, Circuit Judge Gajarsa emphasized that the decision upheld the constitutionality of the regulations on their face, not in their application.²¹⁰

In *National Organization of Veteran's Advocates v. Principi*,²¹¹ the Federal Circuit considered challenges to the validity of regulatory changes to a dependency and indemnity compensation ("DIC") regulation.²¹² The court noted that two agency regulations interpreted nearly identical language in two different statutes inconsistently.²¹³ The court directed the agency to conduct an expedited rulemaking in which the agency would either "provide a reasonable explanation" for its decision to interpret the statutes "in inconsistent ways," or revise the regulations to be consistent.²¹⁴

B. Substantive Rules

The Administrative Procedure Act²¹⁵ requires agencies to publish certain rules.²¹⁶ According to the Act, agencies must publish: rules of procedure; substantive rules of general applicability adopted as authorized by law; statements of general policy; interpretations of general applicability formulated and adopted by the agency; and each amendment, revision, or repeal of such a rule.²¹⁷

In a number of cases, the Federal Circuit has addressed whether a particular rule is "substantive" (or "legislative"), in an effort to determine whether the rule is subject to APA publication requirements. In *Paralyzed Veterans of America v. West*,²¹⁸ the Federal Circuit rejected the argument that the agency erred in failing to follow APA notice and comment procedures in repealing a

209. See *id.* at 1354 (rejecting the notion that the regulations implementing the Veterans' Health Care Eligibility Reform Act of 1996 deny veterans due process, are inconsistent with the Act, and are arbitrary, capricious and an abuse of discretion).

210. *Id.* at 1363 (Gajarsa, J., concurring).

211. 260 F.3d 1365 (Fed. Cir. 2001).

212. See *id.* at 1367 (stating that the regulation restricts the award of DIC benefits to certain survivors of deceased veterans).

213. See *id.* at 1368 (finding that the revised regulation is inconsistent with the way that 38 C.F.R. § 20.1106 interprets 38 U.S.C. § 1311(a)(2), a strikingly similar veterans benefit statute).

214. See *id.* at 1380-81 (instructing the DVA to either provide a reasonable explanation as to why it made the decision to interpret sections 1311 and 1318 inconsistently or to revise 38 C.F.R. § 3.22 to harmonize that regulation with the court's interpretation of 38 U.S.C. § 20.1106).

215. 5 U.S.C. § 553 (1994).

216. See *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) (quoting the Administrative Procedure Act, 5 U.S.C. § 553 (1994), to state that proposed rules must be published in the Federal Register).

217. See *id.*

218. 138 F.3d 1434 (Fed. Cir. 1998).

regulation.²¹⁹ The court noted that case law has defined “substantive rules” as those that effect a change in existing law or policy, or that affect individual rights and obligations.²²⁰ “Interpretative rules,” on the other hand, clarify or explain existing law or regulations and are exempt from notice and comment requirements under the APA.²²¹ The court quoted the D.C. Circuit’s explanation: “[A]n interpretative statement simply indicates an agency’s reading of a statute or a rule. It does not intend to create new rights or duties, but only reminds affected parties of existing duties.”²²² The court concluded that the repeal was not a “substantive change,” reasoning that the regulation simply clarified and explained existing law.²²³

In *Splane v. West*,²²⁴ the Federal Circuit considered whether an agency general counsel opinion was a substantive rule or an interpretive rule within the meaning of the APA and the Freedom of Information Act.²²⁵ The court concluded that the general counsel opinion was interpretive because it was “the agency’s reading of the statutes and rules rather than an attempt to make new law or modify existing law.”²²⁶

Finally, in *National Organization of Veterans’ Advocates v. Principi*,²²⁷ the Federal Circuit determined that changes to a regulation appearing in the Code of Federal Regulations were interpretive and thus were not invalid for failure to comply with notice and comment procedures.²²⁸ The court rejected the argument that the changes were substantive because they modified existing law, namely, various decisions of the CAVC interpreting the regulation.²²⁹ The court

219. *Id.* at 1436 (stating that the DVA did not have to provide advance public notice and a comment period before its repeal of 38 C.F.R. § 3.101 because it was an interpretive rule, rather than a substantive rule).

220. *Id.* (citing *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991)).

221. *Id.* (citing *Animal Legal Defense Fund*, 932 F.2d at 927).

222. *Id.* (quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (citations omitted)).

223. *Paralyzed Veterans of Am.*, 138 F.3d at 1436.

224. 216 F.3d 1058 (Fed. Cir. 2000).

225. *See id.* at 1063 (noting that the court was using the APA and FOIA as guidance in its decision making); 5 U.S.C. § 552 (1994).

226. *Id.*

227. 260 F.3d 1365 (Fed. Cir. 2001).

228. *See id.* at 1377 (finding that 38 C.F.R. § 3.22 clarifies the agency’s earlier interpretation of 38 U.S.C. § 1318, is therefore interpretive, and thus is not subject to the notice and comment requirements of the APA).

229. *See id.* at 1375-76 (rejecting the petitioner’s argument that three cases decided by the Court of Appeals for Veterans Claims, *Green v. Brown*, 10 Vet. App. 111 (1997), *Wingo v. West*, 11 Vet. App. 307 (1998), and *Carpenter v. West*, 11 Vet. App. 140 (1998), are directly analogous to the *National Association of Veterans’ Advocates* case).

reasoned that past CAVC decisions rested in large part on the interpretation of an earlier version of the regulation.²³⁰ Furthermore, the agency promulgated the regulatory changes to make clear that those decisions did not accurately reflect the agency's intention in issuing the regulation.²³¹ Thus, the revisions "merely clarified the Department of Veterans' Affairs interpretation."²³² Moreover, "a rule that does no more than clarify the interpretation of a statute is necessarily interpretive in character, even if that interpretation has consequences for the rights of the parties."²³³

C. *Presumption of Administrative Regularity*

The Federal Circuit has applied the presumption of administrative regularity in a number of veterans benefits appeals. In *Gonzales v. West*,²³⁴ the court considered a regulation requiring certain agency determinations to be "based on 'review' of the 'entire evidence' of record"²³⁵ The court concluded that, absent specific evidence indicating otherwise, "all evidence contained in the record at the time of the Regional Office's determination of the service connection must be presumed to have been reviewed by the Department of Veterans Affairs, and no further proof of such review is needed."²³⁶

In *Pierce v. Principi*,²³⁷ the court applied this presumption to the issue of whether an agency Regional Office had made a required finding in reaching its decision.²³⁸ In *Butler v. Principi*,²³⁹ the court held that the presumption of administrative regularity applied to the mailing of a copy of a notice of appeal rights to a veteran.²⁴⁰

D. *Deference to Agency Rules (Chevron)*

The Federal Circuit has indicated that the agency has substantive rule-making power with respect to veterans benefits and thus *Chevron*²⁴¹ deference applies.²⁴² Under the *Chevron* analysis, the court

230. See *id.* at 1375-76 (noting that a previous version of the regulation had been in effect during the litigation of these cases on which the petitioners rely).

231. Nat'l Org. of Veteran's Advocates v. West, 260 F.3d 1365, 1375-76 (Fed. Cir. 2001) (distinguishing *Green*, *Wingo*, and *Carpenter*).

232. *Id.* at 1376.

233. *Id.*

234. 218 F.3d 1378 (Fed. Cir. 2000).

235. *Id.* at 1380.

236. *Id.* at 1381.

237. 240 F.3d 1348 (Fed. Cir. 2001).

238. See *id.* at 1355-56 (noting that at the time of the original rating, a Regional Office was not required to set forth findings of fact in its decision).

239. 244 F.3d 1337 (Fed. Cir. 2001).

240. *Id.* at 1355-56.

241. *Id.*

reviews an agency's construction of the statute which it administers, and thereafter confronts two questions.²⁴³ The first question is whether Congress has directly spoken to the precise question at issue.²⁴⁴ If congressional intent is clear, the court—as well as the agency—must effectuate the unambiguously expressed intent of Congress.²⁴⁵ If, however, Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as it otherwise would in the absence of an administrative interpretation.²⁴⁶ Rather, if the statute is silent or ambiguous regarding the specific issue, the court inquires whether the agency's answer is based on a permissible construction of the statute.²⁴⁷

Thus, the agency may fill a “gap” left by the statute.²⁴⁸ The Federal Circuit has indicated that “[a] regulation does not contradict the statutory scheme, however, simply because it addresses an issue on which the scheme is silent.”²⁴⁹ As long as the regulation constitutes a reasonable “gap-filling” measure, the agency “may promulgate such a regulation without violating its statutory mandate.”²⁵⁰

In addition, the agency may resolve ambiguities of interpretation left by Congress as long as the agency's action is reasonable and consistent in light of the statute and congressional intent.²⁵¹ Courts modify the traditional *Chevron* analysis when interpreting ambiguities in veterans' benefit statutes, concluding that “interpretative doubt is to be resolved in the veteran's favor.”²⁵² As noted below, this doctrine of resolving ambiguities in the veteran's favor has limits.

In addition, agency interpretations that do not result from formal adjudications or notice-and-comment rulemaking “do not warrant *Chevron*-style deference.”²⁵³ Courts grant some deference to such

242. *Id.* at 1356.

243. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

244. *Id.* at 842.

245. *Id.* at 842-43.

246. *Id.* at 843.

247. *See Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000) (“If a statute is silent or ambiguous about a matter, the court gives deference to interpretations of the agency charged with the duty to administer it.”).

248. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 691 (Fed. Cir. 2000) (“An agency that has been granted authority to promulgate regulations necessary to the administration of a program it oversees may fill gaps in the statutory scheme left by Congress.”) (quoting *Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000)).

249. *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999).

250. *Id.* at 850 (citing *Gilpin v. West*, 155 F.3d 1353, 1355-56 (Fed. Cir. 1998)).

251. *Disabled Am. Veterans*, 234 F.3d at 691 (citing *Gilpin*, 155 F.3d at 1355-56).

252. *Id.* at 692 (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

253. *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (quoting *Christenson v. Harris County*, 529 U.S. 576, 587

interpretations, however, given the Department of Veterans Affairs' "specialized experience" and the "broader investigations and information" available to that agency.²⁵⁴ The degree of deference depends on the interpretation's "power to persuade."²⁵⁵

E. Affirming an Agency Decision on a Different Ground (Chenery)

The Federal Circuit has addressed the application of *SEC v. Chenery*²⁵⁶ to veterans benefits appeals. *Chenery* stands for the principle that a reviewing court generally should not decide a case on a ground not relied on by the agency.²⁵⁷ The court noted in *Fleshman v. West* that the *Chenery* doctrine "is not applied inflexibly."²⁵⁸ Reviewing courts may affirm an agency decision on a ground different from the one used by the agency if the new ground does not demand "a determination or judgment which an administrative agency alone is authorized to make."²⁵⁹

The court further explained that the *Chenery* doctrine does not require a remand to the agency if it is clear that "the agency would have reached the same ultimate result" had it considered the new ground.²⁶⁰ Thus, the court rejected the claimant's argument that the case should be remanded for the agency to consider the issue in the first instance.²⁶¹

V. OTHER FEDERAL DISABILITY BENEFITS SCHEMES

Sometimes analogies are drawn between Social Security disability benefits and veterans benefits. This is not surprising, because both are federal benefits schemes premised on a claimant's disability. For example, at oral argument before the Supreme Court in *Sims v. Apfel*,²⁶² a case addressing issue exhaustion in a Social Security benefits appeal, veterans benefits were mentioned a number of times.²⁶³

(2000)).

254. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

255. *Id.*

256. 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); see also *Winters v. Gober*, 219 F.3d 1375, 1380 (Fed. Cir. 2000) (citing *Fleshman* as "recognizing the potential application of the *Chenery* doctrine to the Court of Appeals for Veterans Claims.").

257. *Chenery*, 318 U.S. at 87.

258. *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998).

259. *Id.*

260. *Id.* (quoting *Ward v. Merit Sys. Protection Bd.*, 981 F.2d 521, 528 (Fed. Cir. 1992)).

261. *Id.*

262. 530 U.S. 103 (2000).

263. Appellant's Oral Argument at 8-9, *Sims v. Apfel*, 530 U.S. 103 (2000) (No. 98-9537).

Recently, an administrative law scholar proposed replacing the current veterans benefits appeals system with the Social Security benefits appeals system.²⁶⁴

In *Hodge v. West*,²⁶⁵ discussed below, the Federal Circuit criticized the CAVC for using a test derived from Social Security cases.²⁶⁶ In Social Security cases, courts apply the “treating physician” rule.²⁶⁷ Under that rule, the opinion of the claimant’s physician on the subject of disability is “binding on the factfinder unless contradicted by some substantial evidence” and is “entitled to some extra weight.”²⁶⁸ The courts designed the rule to address the situation in which a claimant’s treating physician’s diagnosis conflicts with the diagnosis of the agency’s consulting physician.²⁶⁹ In *White v. Principi*,²⁷⁰ the Federal Circuit rejected the argument that the “benefit of the doubt” statute requires adoption of the “treating physician” rule in VA cases.²⁷¹

VI. CONSTRUCTION OF STATUTES AND REGULATIONS

The Federal Circuit has discussed statutory and regulatory construction principles in a number of cases. Given its narrow scope of review,²⁷² its approach to statutory construction issues is particularly important in veterans benefits appeals.

A. General Canons of Construction

In construing statutes, the court tries to give effect to Congress’ intent.²⁷³ In determining intent, the court uses the “traditional tools of statutory construction;”²⁷⁴ examines the statute’s text, structure,

264. See James O’Reilly, *Burying Caesar: Replacement of the Veteran Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 255 (2001) (contending that the VA system sometimes “ignores” and “evades” the law); see also Gary O’Connor, *Rendering to Caesar: A Response to Professor O’Reilly*, 53 ADMIN. L. REV. 343 (2001) (responding that aspects unique to veterans’ benefits law are not adequately addressed by such a remedy).

265. 155 F.3d 1356 (Fed. Cir. 1998).

266. See *id.* at 1362 (“The underlying systems being inconsistent in purpose and procedure, it seems inappropriate to adopt wholesale the test for materiality from one benefits scheme for application in the other.”).

267. *White v. Principi*, 243 F.3d 1378, 1380 (Fed. Cir. 2001).

268. *Id.* (quoting *Schisler v. Heckler*, 787 F.2d 76, 81 (2d Cir. 1986)).

269. *Id.* at 1380-81.

270. 243 F.3d 1378 (Fed. Cir. 2001).

271. *Id.* at 1381.

272. See 38 U.S.C. § 7292(a), (d)(1) (1994 & Supp. IV 1998) (instructing the Federal Circuit Court of Appeals to set aside an agency decision that is arbitrary and capricious, contrary to constitutional right, in excess of statutory authority, or without observance of procedure).

273. *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000).

274. *Id.* (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir.

and legislative history; and applies the relevant canons of interpretation.²⁷⁵

In construing the text, the court emphasizes the importance of giving effect to all terms.²⁷⁶ In construing particular terms, the court notes that, with some exceptions, "identical words used in different parts of the same act are intended to have the same meaning."²⁷⁷ The court has also cited dictionary definitions in construing particular terms.²⁷⁸

One possible exception to the rule of giving effect to all terms is when the statute uses hortatory language. In *Rodriguez v. West*,²⁷⁹ the Federal Circuit cast doubt on whether agency statutes, which provided that the agency "shall" provide certain kinds of assistance, created enforceable rights.²⁸⁰ A number of CAVC decisions had indicated that they did.²⁸¹ The Federal Circuit reasoned that such provisions "create no enforceable rights for a benefits applicant who did not receive assistance in presenting a claim."²⁸² The provisions simply did not prescribe a remedy for breach.²⁸³ The provisions "appear to be hortatory rather than to impose enforceable legal obligations upon the Secretary."²⁸⁴

The court has also looked more broadly, examining the design of the statute,²⁸⁵ similar statutes²⁸⁶ and the overall purpose of the statutory scheme.²⁸⁷

2000)).

275. *Id.*

276. *See* *Splane v. West*, 216 F.3d 1058, 1068-69 (Fed. Cir. 2000) (avoiding an interpretation of the statute's language that would render any portion "meaningless or superfluous"); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) ("Glover's interpretation of the regulation renders these conditions meaningless, a result contrary to the canons of statutory interpretation.").

277. *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1379 (Fed. Cir. 2001) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)).

278. *See Westberry v. Principi*, 255 F.3d 1377, 1382 (Fed. Cir. 2001) ("The dictionary definition of the term 'apparent' supports the Secretary's construction.").

279. 189 F.3d 1351 (Fed. Cir. 1999).

280. *Id.* at 1355.

281. *Id.*

282. *Id.* (emphasizing the exhortive nature of the language in the statute).

283. *Id.*

284. *Id.*

285. *See Pierce v. Principi*, 240 F.3d 1348, 1352-53 (Fed. Cir. 2001) (determining from the design of a veteran's benefits statute that the legislature intended to limit evidence that can be used in a clear and unmistakable error challenge).

286. *See Splane v. West*, 216 F.3d 1058, 1068-69 (Fed. Cir. 2000) (finding that 38 U.S.C. § 1119(a)(2), relating to tropical diseases, is not *in pari materia* with (a)(4), relating to multiple sclerosis, so that the statutory time limitations for tropical diseases cannot be extended to claims for MS).

287. *See Meeks v. West*, 216 F.3d 1363, 1366-67 (Fed. Cir. 2000) (stating that "statutory interpretation is a holistic endeavor that requires consideration of a statutory scheme in its entirety" and that the court "[must] not be guided by a single

B. Veterans-Benefits-Specific Canons

The Federal Circuit frequently emphasizes that the scheme for awarding veterans benefits is “uniquely pro-claimant.”²⁸⁸ Because the scheme is so pro-claimant, in interpreting veterans benefits statutes, courts often apply the canon that “interpretive doubt is to be resolved in the veteran’s favor.”²⁸⁹ There exist limits, however, to the application of this canon. The Federal Circuit has repeatedly indicated that claimants “cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.”²⁹⁰

sentence, or member of a sentence, but look to the provisions of the whole law . . .”); *see also* *Pierce*, 240 F.3d at 1353 (explaining that the “overall statutory scheme for reviewing veterans’ benefits decisions” indicates congressional intent to limit evidence used in a clear and unmistakable error challenge to the evidence that was of record at the time the decision was made).

288. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (recognizing that the Federal Circuit and the Supreme Court both view the nature of veterans’ benefits statutes as “strongly and uniquely pro-claimant.”); *see also* *Elkins v. Gober*, 229 F.3d 1369, 1376 (Fed. Cir. 2000) (explaining that although treating veterans claims separately on appeal “may lead to less efficient use of judicial resources,” it “is inevitable given the pro-claimant, nonadversarial, ex parte system that supplies veterans benefits.”); *Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (stating that giving claimants notice of the deficiencies in their claims is important because “in the veterans’ uniquely claimant friendly system of awarding compensation, systemic justice and fundamental considerations of procedural fairness carry great significance.”).

289. *Nat’l Org. of Veterans’ Advocates v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)); *see also* *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (recognizing that the doctrine of resolving ambiguities in veterans’ benefits statutes in favor of the veteran has modified the traditional *Chevron* analysis); *Forshey v. Gober*, 226 F.3d 1299, 1305 (Fed. Cir. 2000) (explaining that the idea that the meaning of language in a statute be resolved in the veteran’s favor “derives from an appreciation of the benevolent intent behind the veterans system.”); *Hix v. Gober*, 225 F.3d 1377, 1380 (Fed. Cir. 2000) (noting that “veterans benefits statutes are construed liberally in favor of the veteran”).

290. *Disabled Am. Veterans*, 234 F.3d at 692; *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000); *Haines v. West*, 154 F.3d 1298, 1301 (Fed. Cir. 1998); *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998); *see also* *Jackson v. Principi*, 265 F.3d 1366, 1370 (Fed. Cir. 2001) (noting that the principles of fairness used to interpret statutes in previous veterans cases cannot force the court to ignore clear statutory language that may not be in the claimant’s favor); *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) (“Although the veterans benefits adjudication system is nonadversarial and paternalistic, the veteran still has certain legal procedural requirements to move forward with a claim.”); *Meeks*, 216 F.3d at 1367 (explaining that the duty to assist is limited and “does not include granting benefits that cannot be supported in law and by the facts of the particular case.”); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) (recognizing that although veteran’s benefits statutes should be construed in favor of the claimant, the plain language of a regulation cannot be ignored).

C. Legislative History

In construing agency statutes and regulations, the Federal Circuit has sometimes reviewed legislative history.²⁹¹ Although "the starting point in every case involving construction of a statute is the language itself,"²⁹² the court will then look to the legislative history "if the statutory language is unclear."²⁹³ In discussing particular types of legislative history, the court has noted that "the remarks of a single legislator, even the sponsor, are not controlling in analyzing the legislative history,"²⁹⁴ but that such statements "must be considered with the Reports of both Houses and the statements of other Congressmen."²⁹⁵ The court has cited Senate reports and the "Explanatory Statement of Compromise Agreement" in analyzing legislative history.²⁹⁶

D. Common Law

The court has also considered the applicability of common-law principles. In *Lofton v. West*,²⁹⁷ the court rejected a challenge to a VA regulation that bars a veteran's survivor from obtaining dependency and indemnity compensation benefits if the survivor intentionally and wrongfully killed the veteran.²⁹⁸ Even though the statute was "silent as to the issue addressed by the regulation,"²⁹⁹ the court noted that "Congress legislates against a common law background."³⁰⁰ The

291. See *Nat'l Org. of Veterans' Advocates*, 260 F.3d at 1377-78 (noting that the legislative history appeared to favor the government's position); *Pierce*, 240 F.3d at 1352 (considering the legislative history of a veterans benefits statute concerning evidence that can be admitted in a clear and unmistakable error claim and finding that the statute limits evidence to that of record at the time the decision was made); *Gilpin v. West*, 155 F.3d 1353, 1355 (Fed. Cir. 1998) (finding no guidance in the legislative history to define the time a veteran must be disabled to receive compensation for a service connected injury); *Ledford v. West*, 136 F.3d 776, 782 (Fed. Cir. 1998) (finding no basis in the legislative history for concluding that the doctrine of exhaustion of administrative remedies does not apply).

292. *Allen v. Principi*, 237 F.3d 1368, 1375 (Fed. Cir. 2001) (quoting *Madison Galleries v. United States*, 870 F.2d 627, 629 (Fed. Cir. 1989)).

293. *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

294. *Pierce*, 240 F.3d at 1353 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)).

295. *Id.*

296. *Nat'l Org. of Veterans' Advocates*, 260 F.3d at 1378.

297. 198 F.3d 846 (Fed. Cir. 1999).

298. See *id.* at 849 (holding that a widow who sought dependency and indemnity compensation (DIC) for the death of her husband cannot reopen claim because she had intentionally shot him, causing his death).

299. *Id.* at 850 (reviewing claimant's argument that a regulation denying veteran's benefits to those who intentionally killed the veteran was invalid because the statute that extends DIC benefits to survivors does not state the same exception).

300. *Id.* (explaining that it is unlikely that Congress would have intended to extend DIC benefits to persons who would receive them as a result of their own homicidal acts).

regulation simply codified a well-known common law principle known as the “slayer’s rule,” which denies insurance and benefits to those who expect to receive them as a result of wrongful acts, such as homicide.³⁰¹ Thus, “[i]n light of the universality of the common law rule and the fact that Congress did not foreclose its application,”³⁰² the court concluded that the regulation was “an entirely reasonable gap-filling measure.”³⁰³ The court held that the agency “acted reasonably in promulgating a regulation codifying the slayer’s rule and applying it to DIC benefits.”³⁰⁴

E. Practical Considerations

In at least one case, *Rodriguez v. West*,³⁰⁵ the Federal Circuit’s regulatory-construction analysis was driven by pragmatism.³⁰⁶ In deciding whether an informal claim had to be in writing, the court noted that its conclusion was “supported not only by the language and structure of the regulations, but also by practical considerations.”³⁰⁷ The court reasoned that because such a large number of claims are filed with the agency, it would be almost impossible to determine the date a claim was filed or what benefits the claimant desired, without written evidence of the claim.³⁰⁸ Allowing a claimant to file an oral statement would make the administration of veterans benefits difficult and inefficient.³⁰⁹ As the court stated, “[i]t would often be impossible for the Department’s personnel who handle and process these claims to recollect many of the oral applications made, let alone the details of those claims.”³¹⁰ Thus, the court concluded that the CAVC correctly held that according to the DVA regulations, an informal claim application must be in writing.³¹¹

301. *Lofton*, 198 F.3d at 850 (defining the slayer’s rule).

302. *Id.*

303. *Id.*

304. *Id.*

305. 189 F.3d 1351 (Fed. Cir. 1999).

306. *Id.* at 1354 (interpreting a DVA regulation to determine that an informal claim for benefits must be in writing).

307. *Id.*

308. *See id.* (considering the difficulties that would arise if informal claims were not required to be submitted in writing).

309. *Id.* (describing the difficulties the agency would encounter if claimants were permitted to file informal claims with oral statements).

310. *Id.*

311. *Id.*

VII. AGENCY STATUTES AND REGULATIONS

A. *Elements of a Disability-Benefits Claim*

A veteran's claim for service-connected disability benefits has five elements: (1) veteran status; (2) existence of a current disability; (3) a connection between the veteran's service and the disability; (4) degree of disability; and (5) effective date of the disability.³¹² Recent Federal Circuit decisions have addressed these elements.

In *Gilpin v. West*,³¹³ the Federal Circuit upheld a regulation which requires a showing of a current disability in order to establish service connection.³¹⁴ The court noted that the relevant statute was "not plain on its face"³¹⁵ and that "all that can be fairly said about the statute is that it is silent on the matter of when the disabled veteran must be disabled."³¹⁶ The court concluded, "the requirement of current symptomatology was a rational and permissible way of filling the 'gap' in the statute."³¹⁷

In *Sanchez-Benitez v. Principi*,³¹⁸ the court considered whether pain alone is a "disability."³¹⁹ The CAVC had held that "pain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted."³²⁰

The court noted that this was "an interesting, indeed perplexing, question, but not one that we need or can decide in this appeal"³²¹ because of the facts of the case. The court indicated, however, that "[e]ven assuming *arguendo* that free-standing pain wholly unrelated to any current disability is a compensable disability, such pain cannot be compensable in the absence of proof of an in-service disease or injury to which the current pain can be connected by medical evidence."³²² The court found that a "pain alone" claim fails when a claimant does

312. *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000).

313. 155 F.3d 1353 (Fed. Cir. 1998).

314. *See id.* at 1354 (holding that statute requires "current symptomatology" at the time claim is filed in order to receive compensation for post traumatic stress disorder).

315. *Id.* at 1355.

316. *Id.*

317. *Id.* at 1355-56 (finding that the requirement of current symptomatology is supported in light of other statutes involving the same statutory provision).

318. 259 F.3d 1356 (Fed. Cir. 2001).

319. *See id.* at 1357-59 (holding that compensation could not be awarded for neck pain where the complainant demonstrated no nexus between the current pain and the neck trauma experienced while in service).

320. *Sanchez-Benitez v. West*, 13 Vet. App. 282, 285 (1999).

321. *Id.* at 1361.

322. *Id.*

not show a connection between the pain and an in-service injury.³²³ In *Sanchez-Benitez*, there was “clear fact-finding by the Board, affirmed by the Veterans Court, that Mr. Sanchez-Benitez’s current pain cannot be attributed to the neck trauma he experienced while in service.”³²⁴ Thus, “[w]ithout a factual finding of a medical nexus between the pain and the neck trauma,”³²⁵ the court could not decide whether he could be compensated for his current pain.³²⁶

B. Bars to Receiving Benefits in General

1. Drug and alcohol abuse

Veterans benefits statutes provide that “no compensation shall be paid if the disability is a result of the veteran’s own willful misconduct or abuse of alcohol or drugs.”³²⁷ The CAVC held that this provision barred compensation in cases in which veterans claimed that a service-connected disability, such as post-traumatic stress disorder, caused them to abuse alcohol or drugs.³²⁸ In *Allen v. Principi*,³²⁹ the Federal Circuit reversed, holding that the statute “does not preclude a veteran from receiving compensation for an alcohol or drug abuse disability acquired as secondary to, or as a symptom of, a veteran’s service-connected disability.”³³⁰

The court emphasized that compensation was permitted only “where there is indeed a causal relationship between a service-connected disability, such as PTSD, and an alcohol or drug abuse disability.”³³¹ Furthermore, the court stated, “[i]t is up to the VA to determine how to assess whether an alcohol or drug abuse disability is actually caused by a service-connected disability.”³³² The court further indicated, however, that “the holding of the case is quite limited.”³³³ The court explained this limitation, noting that it would only grant compensation in cases where there exists “clear medical evidence establishing that the alcohol or drug abuse disability is indeed caused

323. *Id.* at 1361-62.

324. *Id.* at 1362.

325. *Id.*

326. *See id.*

327. 38 U.S.C. § 1110 (1994).

328. *Barela v. West*, 11 Vet. App. 280, 283 (1998), *overruled by Allen v. Principi*, 237 F.3d 1368 (Fed. Cir. 2001).

329. 237 F.3d 1368 (Fed. Cir. 2001).

330. *Id.* at 1375.

331. *Id.* at 1378.

332. *Id.* (explaining that upon examining a claim, the Board could decide that the alcohol or drug abuse disability was willful and not caused by the service-connected disability).

333. *Id.* at 1381.

by a veteran's primary service-connected disability" and is not due to willful wrongdoing.³³⁴

2. *Willful misconduct*

VA regulations prohibit compensation for injuries resulting from "willfull misconduct."³³⁵ In *Yeoman v. West*,³³⁶ the court considered an appeal in a case in which the agency found that consuming six to eight beers and not sleeping for forty-five hours prior to an automobile accident constituted willful misconduct.³³⁷ The court rejected arguments that the agency erred in relying on state law in considering whether the actions constituted "an act involving conscious wrongdoing or known prohibited action."³³⁸

3. *Slayer's rule*³³⁹

VA regulations also bar a veteran's survivor from obtaining benefits if the survivor intentionally and wrongfully killed the veteran.³⁴⁰ In *Lofton v. West*,³⁴¹ the court rejected a challenge to this regulation. The court reasoned that, even though the statute did not contain such an exception, the regulation at issue was "an entirely reasonable gap-filling measure."³⁴² According to the court, the regulation codified a long-standing common law principle known as the "slayer's rule" which bars wrongdoers from obtaining insurance and other benefits as a direct consequence of their wrongful acts.³⁴³

334. *Id.*

335. See 38 U.S.C. § 105(a) (1994) (providing "an injury or disease incurred during active . . . service will be deemed to have been incurred in the line of duty . . . unless the injury was a result of the person's own willful misconduct or abuse of alcohol or drugs."); 38 C.F.R. § 3.1(n) (2001) (defining willful misconduct as "an act involving conscious wrongdoing or known prohibited action."); *id.* § 3.301(b) (stating "[d]isability pension is not payable for any condition due to the veteran's own willful misconduct.").

336. 140 F.3d 1443 (Fed. Cir. 1998).

337. *Id.* at 1444-45.

338. *Id.* at 1446 (explaining that the VA regulations permit the use of Iowa state law in interpreting whether an act constitutes willful misconduct).

339. See *supra* Part VI.D and accompanying notes (discussing the court's use of the common law (namely the "slayer's rule") as a means of statutory construction to uphold veterans benefits regulations).

340. See 38 C.F.R. § 3.11 (2001) (providing "any person who has intentionally and wrongfully caused the death of another person is not entitled to pension, compensation, or dependency and indemnity compensation . . .").

341. 198 F.3d 846 (Fed. Cir. 1999).

342. *Id.* at 850.

343. *Id.*

C. Rules Applicable to Particular Types of Claims

1. Claims, general

VA statutes provide that “[a] specific claim in the form prescribed by the Secretary” must be filed in order for benefits to be paid under VA statutes.³⁴⁴ The Federal Circuit has addressed the prerequisites for a claimant making a “claim” for VA benefits.

In *Fleshman v. West*,³⁴⁵ the court held that because an application did not contain a signature, it was not a “claim.”³⁴⁶ The court noted that VA statutes required that in order to receive benefits from the Department of Veterans Affairs, an applicant must file a claim “in the form prescribed by the Secretary.”³⁴⁷ The court agreed with the agency that the statute required applicants to submit a claim in a particular format, containing specified information, and signed by the claimant, as called for by the blocks on the application form.³⁴⁸ The court reasoned that its holding did not mean that “a formal application submitted on the appropriate form will never be deemed sufficient unless it is letter perfect.”³⁴⁹ The court concluded, however, that if the Department of Veterans Affairs returns a form to an applicant requesting that he provide additional information, the applicant will not have satisfied the “in the form prescribed by the Secretary” requirement of the statute until he submits the requested information.³⁵⁰

The Federal Circuit has also addressed informal claims. In *Rodriguez v. West*,³⁵¹ the court held that an informal claim for benefits must be in writing.³⁵² The claimant, a surviving spouse, visited a Regional Office four times, only to be told that she was not entitled to a certain kind of benefit.³⁵³ The court held that these visits and inquiries about benefits did not constitute “informal claims” within

344. 38 U.S.C. § 5101(a) (1994).

345. 138 F.3d 1429 (Fed. Cir. 1998).

346. See *id.* at 1431-32 (holding a claimant's signature is a critical element of information required by the Department of Veteran Affairs and is, therefore, essential when filing a claim).

347. *Id.* at 1431 (citing 38 U.S.C. § 5101(a) and alluding to its specificity).

348. *Id.* at 1431-32.

349. *Id.* at 1432.

350. *Id.*

351. 189 F.3d 1351 (Fed. Cir. 1999).

352. See *id.* at 1353-54 (stating that 38 C.F.R. § 3.155(a), allowing for informal claims, does not authorize oral informal claims).

353. See *id.* at 1352 (concerning a claimant who was initially denied a surviving spouse's pension because her Social Security benefits exceeded the permissible maximum, and was then denied such pension on subsequent occasions after notification that her Social Security benefits would terminate).

the meaning of the regulation.³⁵⁴

2. *New and material evidence*

A veteran whose claim has been finally denied—either by failing to appeal a final Regional Office or Board decision, or by losing before the CAVC or the Federal Circuit—may seek to “reopen” the claim that was previously disallowed.³⁵⁵ In order to reopen a claim, the veteran must present “new and material evidence.”³⁵⁶ There exists no time limit for seeking to reopen a previously disallowed claim;³⁵⁷ nor is a veteran limited as to the number of times he can seek to reopen a claim.³⁵⁸ Some veterans have filed as many as a dozen reopened claims over the years.³⁵⁹

If the veteran submits new and material evidence, and the claim is reopened, the agency is required to “review the former disposition of the claim.”³⁶⁰ If this review results in a grant of benefits, the effective date for the grant of benefits is the date the veteran submitted a claim to reopen, not the date of the original claim.³⁶¹

In 1998, in *Hodge v. West*, the Federal Circuit made a major change in the standard for reopening previously denied claims.³⁶² Until that time, the CAVC’s 1991 decision in *Colvin v. Derwinski*³⁶³ set the standard test for new and material evidence, and was applied in thousands of cases.³⁶⁴ In *Colvin*, the CAVC held that in order for evidence to be material, “there must be a reasonable possibility that the new evidence, when viewed in the context of all the evidence,

354. See *id.* at 1354 (reasoning that if such visits and inquiries constituted “informal claims,” serious problems in the operation of the benefits programs would result because it would be difficult for the Department’s personnel who handle these claims to recollect the oral applications).

355. 38 U.S.C. § 5108 (1994).

356. *Id.*

357. BARTON F. STICHMAN ET AL., VETERANS BENEFITS MANUAL § 12.2.2.1, at 923 (2001). Indeed, section 5108 does not condition the reopening of a disallowed claim on timeliness. The presentation of “new and material evidence” is its only explicit requirement.

358. *Id.*

359. *Id.*

360. 38 U.S.C. § 5108.

361. See 38 U.S.C. § 5110(a) (1994) (providing that generally when an award is based on a claim that has been reopened, the effective date of the award is determined based on the facts found, but that the date will not be earlier than the date of receipt of application); see also 38 C.F.R. § 3.400(r) (2001) (providing that the effective date of reopened claims is generally the “[d]ate of receipt of claim or date entitlement arose, whichever is later . . .”).

362. *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).

363. 1 Vet. App. 171 (1991).

364. See *Hodge*, 155 F.3d at 1360 (observing that the Court of Veteran’s Appeals has applied this test consistently since its establishment).

both new and old, would change the outcome.”³⁶⁵ In *Hodge*, the Federal Circuit invalidated the test, holding that the requirement that the new evidence change the outcome was inconsistent with the governing statute.³⁶⁶ As a result of the *Hodge* decision, hundreds of cases were remanded to the Board for consideration of the revised test.

The Federal Circuit revisited the *Colvin* test in *Anglin v. West*.³⁶⁷ The court held that the requirement that new and material evidence is not cumulative of other evidence of record is consistent with the governing regulation.³⁶⁸ The court noted that it had overruled *Colvin*’s materiality element, which required that evidence affect the outcome of a case, “but [it] left the remainder of the *Colvin* test intact.”³⁶⁹ The court stated that “the paramount concern in evaluating any judicial test for new and material evidence is its consistency with the regulation.”³⁷⁰ Moreover, according to the plain language of the regulation, “evidence that is merely cumulative of other evidence in the record cannot be new and material even if that evidence had not been previously presented to the Board.”³⁷¹

In addition to changing the standard for determining whether evidence is new and material, the court has addressed narrower issues applicable to specific cases. For example, in *Routen v. West*,³⁷² the court held that failure to apply an evidentiary presumption did not constitute “new and material evidence.”³⁷³ The court noted that a presumption is not “any form of evidence” and thus cannot constitute new and material evidence.³⁷⁴

In *D’Amico v. West*,³⁷⁵ the Federal Circuit overruled previous CAVC holdings that the statutory new and material evidence standard is inapplicable when the original claim was denied because a veteran

365. *Colvin*, 1 Vet. App. at 174 (noting that this is a bright-line rule followed in other federal courts and is consistent with judicial precedent).

366. See *Hodge*, 155 F.3d at 1361 (noting that it appeared that the CAVC failed to examine the requirements of 38 C.F.R. § 3.156(a) and applying an inappropriate definition of materiality). But cf. 38 C.F.R. § 3.156 (2001) (providing that material evidence is evidence “so significant that it must be considered,” although the rule does not require that such evidence change the outcome of the case).

367. 203 F.3d 1343 (Fed. Cir. 2000).

368. See *id.* at 1346-47 (holding that although *Hodge* overruled a portion of the *Colvin* test, the first prong of the test requiring non-cumulative evidence is consistent with the regulation’s demands).

369. *Id.* at 1347.

370. *Id.* (citing *Hodge*, 155 F.3d at 1361).

371. *Id.*

372. 142 F.3d 1434 (Fed. Cir. 1998).

373. See *id.* at 1440.

374. *Id.* at 1439.

375. 209 F.3d 1322 (Fed. Cir. 2000).

did not establish veteran status.³⁷⁶ The rationale of the CAVC cases was that veterans benefits statutes did not apply until a claimant established veteran status.³⁷⁷ The Federal Circuit disagreed, concluding that the new and material evidence statute “applies to the reopening of claims disallowed for any reason.”³⁷⁸

In *Jackson v. Principi*,³⁷⁹ the court rejected the argument that it was improper for the Board to address the question of whether the claimant had offered new and material evidence sufficient to reopen his claim after the Regional Office had ruled in his favor.³⁸⁰ The court noted that the Board had “a jurisdictional responsibility to determine whether it was proper for a claim to be reopened.”³⁸¹

3. Clear and unmistakable error

Under VA statutes and regulations, a veteran can seek “revision” of a prior final decision on the basis of “clear and unmistakable error” (also known as “CUE”).³⁸² A claim of clear and unmistakable error is a collateral attack on a prior final decision, usually after the time to appeal that decision has lapsed.³⁸³ When a veteran establishes clear and unmistakable error in a prior final decision, it has “the same

376. See *id.* at 1326 (citing 38 U.S.C. § 5108 and observing that nothing in the statutory language suggests it does not apply to such claims).

377. See *Laruan v. West*, 11 Vet. App. 80, 84-86 (1998) (en banc) (noting that designation as a veteran bestows certain procedural advantages and evidentiary benefits, and, therefore, in fairness one must establish veteran status before he is entitled to these advantages and benefits).

378. *D’Amico*, 209 F.3d at 1327 (observing that there is “no indication in the legislative history that Congress intended to limit the new and material evidence standard of section 5108 to persons who have established their veteran status to the satisfaction of the agency.”). The court dismissed the legislative history recalled by the *Laruan* court and stated that the “relevant” legislative history indicates that the new and material evidence requirement is applicable to a claimant seeking review of “any prior decision affecting the claimant with respect to benefits under laws administered by the [agency].” See H.R. REP. NO. 100-963, at 37 (1988), *reprinted in* 1998 U.S.C.C.A.N. 5782, 5819.

379. 265 F.3d 1366 (Fed. Cir. 2001).

380. See *id.* at 1369 (concluding that sections 511(a) and 7104(a) authorize the Board to make a final decision on the issue of whether new and material evidence has been presented by a veteran); see generally 38 U.S.C. § 7104 (1994) (providing that issues that are subject to review by the Secretary under section 511(a) are also subject to a final decision by the Board and based on the entire record in the proceeding, as well as upon consideration of all evidence and applicable provisions of the law); *id.* § 511(a) (providing in part that “[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary”).

381. *Jackson*, 265 F.3d at 1369 (noting the Board had jurisdiction under section 7104(b) because Jackson’s initial claim was never appealed to the Board).

382. See 38 U.S.C. § 5109A (Supp. IV 1998) (“Revision of [Regional Office] decisions on grounds of clear and unmistakable error”); *id.* § 7111 (“Revision of [Board] decisions on grounds of clear and unmistakable error”).

383. See *Crippen v. Brown*, 9 Vet. App. 412, 418 (1996) (defining a claim of CUE and surveying judicial precedent establishing the requirements for a valid CUE claim).

effect as if the corrected decision had been made on the date of the reversed decision.”³⁸⁴ In other words, the veteran is entitled to the effective date, which commences on the date of the decision that was collaterally attacked, including any benefits due since that date.

The Federal Circuit has issued a number of decisions clarifying CUE standards. First, the Federal Circuit has defined the term “evidence.” The CUE statute provides that “[i]f evidence establishes the [clear and unmistakable] error, the prior decision shall be reversed or revised.”³⁸⁵ In *Pierce v. Principi*,³⁸⁶ the court held that the term “evidence” meant evidence of record at the time of the challenged decision.³⁸⁷ Thus, in making a CUE determination, evidence submitted after the challenged decision is not considered.³⁸⁸ Although the statute did not limit “evidence” to evidence of record at the time the challenged decision was made, the court concluded that “the legislative history of the statute, the purpose of the statute, and the overall statutory scheme for reviewing veterans’ benefits decisions all indicate that Congress intended the evidence to be so limited.”³⁸⁹

Second, the court has addressed the nature of the error. The court has repeatedly affirmed that in order to be “clear and unmistakable,” the error must be “outcome-determinative,” i.e., it must be an error that changed the outcome of the decision being challenged.³⁹⁰ Further, the court has held that breach of the duty to assist cannot constitute CUE.³⁹¹

Third, the court addressed the validity of newly-enacted CUE regulations. Before 1997, a Board decision could not be the subject of a CUE challenge.³⁹² In 1997, Congress enacted a statute³⁹³ that

384. 38 C.F.R. § 3.105(a) (2001).

385. 38 U.S.C. § 5109A(a).

386. 240 F.3d 1348 (Fed. Cir. 2001).

387. *See id.* at 1353-54 (noting that the interpretation of “evidence” as stated in section 5109A is consistent with the purpose of providing for CUE review).

388. *See id.* at 1354 (noting that evidence submitted after the decision being challenged would not be part of the record).

389. *Id.* at 1353.

390. *See Yates v. West*, 213 F.3d 1372, 1374 (Fed. Cir. 2000) (concluding that revision of a Board decision based on clear and unmistakable error requires an error that would have manifestly changed the outcome of the decision when it was made); *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999) (holding the requirement that the claimant show an error that would manifestly change the outcome of a prior decision is consistent with 38 U.S.C. § 3.105(a)).

391. *See Hayre v. West*, 188 F.3d 1327, 1332-33 (Fed. Cir. 1999) (holding that a breach of the duty to assist is not an error that would manifestly change the outcome of the prior decision, and therefore, is not an error that should constitute CUE); *see also Roberson v. Principi*, 251 F.3d 1378, 1383 (Fed. Cir. 2001) (citing *Hayre* and holding a breach of the duty to assist cannot form the basis for the CUE claim).

392. *See Smith v. Brown*, 35 F.3d 1516, 1527 (Fed. Cir. 1994) (holding that CUE review applied to review of Regional Office decisions and not decisions of the

allows Board decisions to be challenged on the basis of CUE. In January 1999, the Department of Veterans Affairs published final regulations implementing that statute.³⁹⁴ Several veterans organizations challenged the regulations on various grounds, alleging a failure to comply with rulemaking procedures and arguing that the regulations were arbitrary and capricious.³⁹⁵ The court rejected most of the challenges, but did invalidate a rule that prevented the Board from reviewing a CUE claim on the merits if that claim had been the subject of a motion that was denied for failure to comply with the pleading requirements.³⁹⁶ The court reasoned that the rule was contrary to the statutory requirement that a CUE claim "shall be decided by the Board on the merits."³⁹⁷

Fourth, the court considered the relationship between challenges to Regional Office decisions and challenges to Board decisions. In *Donovan v. West*,³⁹⁸ the court rejected the argument that an agency regulation allowed a veteran to challenge a final decision of the VA Regional Office denying a claim for a service-connected disability, despite an intervening decision of the Board of Veterans' Appeals that rejected the same claim.³⁹⁹ The court reasoned that the Board decision barred the claimant from relitigating this issue because if the Regional Office were to attempt to decide that question de novo, it would be reviewing a decision of the appellate tribunal that customarily reviews the decisions of the Regional Offices.⁴⁰⁰ The court noted that "it would be 'odd' to 'permit an inferior [the Regional Office] to collaterally review the actions of a superior [the

Board).

393. See Pub. L. No. 105-111, § 1(b), 111 Stat. 2271-72 (1997) (codified as 38 U.S.C. § 7111) (permitting veterans benefits decisions to be reviewed by CUE and reversed when CUE establishes error).

394. See 38 C.F.R. §§ 20.1400-1411 (2001) (allowing revision of Board decision on the grounds of clear and unmistakable error).

395. See *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 686 (Fed. Cir. 2000) (challenging the validity of 38 C.F.R. §§ 20.1400-1411 in a suit filed by Disabled American Veterans, National Organization of Veterans' Advocates, Inc., Paralyzed Veterans of America, and Vietnam Veterans of America, Inc.).

396. See *id.* at 698-99, 704 (holding Rule 1404(b) invalid as it operates with Rule 1404(c), because it prevents the claim from being considered on the merits, as required by the statute, but finding all other rules challenged to be consistent with the statute).

397. *Id.* at 704 (citing 38 U.S.C. § 7111(e)) (stating that a motion not in compliance with the pleading requirements would not be reviewed, thereby preventing consideration on the merits of the claim).

398. 158 F.3d 1377 (Fed. Cir. 1998).

399. See *id.* at 1381 (affirming the finding that the Board's decision is a final decision denying the claim on the merits).

400. *Id.* at 1382.

Board], at least as an initial matter.”⁴⁰¹

In *Dittrich v. West*,⁴⁰² the court again considered the issue argued in *Donovan*—whether a Regional Office could consider a CUE claim that the Board had already denied.⁴⁰³ The court rejected the claimant’s argument that the enactment of a statute after the *Donovan* decision required a different result.⁴⁰⁴ The new statute authorized challenges to both Regional Office and Board decisions.⁴⁰⁵ Review of Board decisions for CUE had previously been prohibited.⁴⁰⁶ The court again held that a Regional Office may not review collaterally an earlier Board decision on the same operative facts.⁴⁰⁷ Thus, the court concluded, the Board’s decision “necessarily subsumed” the Regional Office decision.⁴⁰⁸

The Federal Circuit held that subsuming did not occur in *Brown v. West*.⁴⁰⁹ The court noted, “[t]his is not a case in which the substance of the challenge to the prior [Regional Office] determination was rejected in an intervening decision of the Board of Veterans’ Appeals” because the Board in its earlier decisions “did not decide the same claim that is now at issue”⁴¹⁰ Thus, the court concluded “there has been no Board decision that subsumes the 1947 [Regional Office] determination as to Mr. Brown’s present claim.”⁴¹¹

4. *Liberalizing law*

In *Spencer v. Brown*,⁴¹² the Federal Circuit held that VA statutes do not preclude consideration of a claim, upon a showing of a new basis of entitlement to a benefit as a result of an intervening change in law, even though based on facts in a previously (and finally) denied

401. *Id.* (quoting *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994)).

402. 163 F.3d 1349 (Fed. Cir. 1998).

403. *See id.* at 1351-52 (citing *Donovan* for the proposition that a Regional Office was prohibited from reviewing a final Board decision).

404. *See id.* at 1352 (noting that although *Donovan* was decided under a different statutory directive, the new statute essentially requires the same result and Regional Offices are not authorized to review an earlier Board decision).

405. *See id.* (stating that the new statute was enacted specifically to allow challenges to Board decisions, but it did not authorize a Regional Office to challenge a Board decision).

406. *See Spencer v. Brown*, 17 F.3d 368, 371-72 (Fed. Cir. 1994) (providing an exception where “new and material evidence is secured”) (quoting 28 U.S.C. § 5108 (1994)).

407. *See Dittrich*, 163 F.3d at 1352-53 (holding that the statute permits only the Board, and not Regional Offices, to CUE review of the Board’s decisions).

408. *Id.* at 1353.

409. 203 F.3d 1378 (Fed. Cir. 2000).

410. *Id.* at 1381.

411. *Id.* at 1381-82.

412. 17 F.3d 368 (Fed. Cir. 1998).

claim.⁴¹³ This concept is referred to as a "liberalizing law."⁴¹⁴ In *Routen v. West*,⁴¹⁵ the court held that a change in the standard for an evidentiary presumption did not constitute such a "liberalizing law."⁴¹⁶ The court reasoned that the change in the evidentiary standard was "procedural in nature" and did not "effect a substantive change in the law; that is, it does not create a new cause of action, since no new basis of entitlement is created."⁴¹⁷ Thus, "[t]he peacetime service veterans simply benefit from a stronger presumption toward the same ultimate disability benefit entitlement, based on the same factual predicates."⁴¹⁸

D. Rules Applicable to Particular Types of Benefits

1. Survivors benefits

A number of cases addressed the criteria for obtaining survivors benefits. The Federal Circuit has held that certain kinds of claims do not survive a veteran's death and thus a survivor may not receive benefits based on those claims.⁴¹⁹ For other kinds of claims, the Federal Circuit has held that certain criteria must be met for a survivor to receive benefits. In *Jones v. West*,⁴²⁰ the court held that, for a surviving spouse to be entitled to accrued benefits, the veteran must have had a claim pending at the time of his death or else be entitled to them under an existing rating decision.⁴²¹ The court reasoned that a surviving spouse's "accrued benefits claim is derivative of the veteran's claim."⁴²² As a consequence of the derivative nature of the surviving spouse's entitlement to a veteran's accrued benefits claim, the surviving spouse has no claim upon which to derive his or her

413. See *id.* at 372-73 (concluding that without presenting evidence to show a new claim of entitlement under a new statute, de novo review is not available to a veteran when the claim has been denied in a final decision).

414. See *id.* at 372 (defining "liberalizing law" as one which changed the law substantially by creating a new entitlement to a benefit).

415. 142 F.3d 1434 (Fed. Cir. 1998).

416. See *id.* at 1441-42 (stating that the new regulation does not define "liberalizing" and addresses the procedural issues of the dates of benefit awards made subject to a new law).

417. *Id.* at 1442.

418. *Id.*

419. See *Haines v. West*, 154 F.3d 1298 (Fed. Cir. 1998) (rejecting the argument that a CUE claim should survive the veteran's death); *Richard v. West*, 161 F.3d 719 (Fed. Cir. 1998) (holding a veteran's claim for service-connected disability benefits does not survive the veteran's death); *Seymour v. Principi*, 245 F.3d 1377 (Fed. Cir. 2001) (finding a claim for benefits for persons disabled by treatment, vocational treatment, or vocational rehabilitation does not survive the veteran's death).

420. 136 F.3d 1296 (Fed. Cir. 1998).

421. *Id.* at 1300.

422. *Id.* (citing *Zevalkink v. Brown*, 102 F.3d 1236 (Fed. Cir. 1996)).

own claim without the veteran having a claim pending at the time of death.⁴²³

The Federal Circuit has also addressed how survivors benefits claims are decided. In *Hix v. Gober*,⁴²⁴ the court held that where a survivor makes a claim for Dependency and Indemnity Compensation benefits, the veteran's level of disability is reviewed de novo—without regard to any adverse decisions during the veteran's lifetime.⁴²⁵

In *National Organization of Veterans' Advocates v. Secretary of Veteran's Affairs*,⁴²⁶ the Federal Circuit revisited the issue addressed in *Hix*, i.e., how an agency should decide claims for survivors benefits when there existed adverse decisions during the veteran's lifetime. Various veterans organizations challenged regulatory changes implemented in 2000.⁴²⁷ Those changes were in response to various CAVC decisions interpreting the regulation.⁴²⁸ The court noted that the challenged regulation was "inconsistent with the agency's interpretation of another virtually identical statute"⁴²⁹ and remanded for the agency to "explain the rationale for the different interpretations."⁴³⁰ The court directed the agency to conduct an expedited rulemaking in which the agency would either "provide a reasonable explanation" for its decision to interpret the statutes "in inconsistent ways," or revise the regulations to be consistent.⁴³¹

2. Total disability based on individual unemployability

VA regulations require a claimant to "identify the benefit sought."⁴³² In *Roberson v. Principi*,⁴³³ the court addressed whether the

423. See *id.* (requiring a claim to be filed by the veteran before death of the surviving spouse who is to receive benefits).

424. 260 F.3d 1377 (Fed. Cir. 2000).

425. See *id.* at 1379 (applying the statute to suggest that a claim for DIC for a veteran's spouse should be decided without regard to any prior unfavorable decisions before the veteran's death).

426. 260 F.3d 1365 (Fed. Cir. 2001).

427. See *id.* at 1367, 1371 (noting the National Organization of Veterans' Advocates, Disabled American Veterans, and Paralyzed Veterans of America challenged a revised 2000 regulation that would pay survivor benefits as if the veteran's death had been service-related when the veteran was already receiving compensation for a total disability or was entitled to receive compensation).

428. See *id.* at 1371 (concluding in cases before the CAVC that benefits could be awarded to survivors when the deceased veteran had never applied for compensation for a service-related disability).

429. *Id.* at 1379 (noting that one regulation allows granting of survivor benefits without regard to any prior claim or decision, whereas the other regulation precludes re-litigation without clear and mistakable evidence).

430. *Id.* at 1379-80 (stating the differing interpretations in the two regulations centered on the explanation of the phrase "entitled to receive").

431. *Id.* at 1380-81.

432. 38 C.F.R. § 3.155(a) (2001).

claimant specifically had to request benefits for total disability based on individual unemployability (TDIU). The court held that claimants are not required to make a specific request, noting “[o]nce a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the ‘identify the benefit sought’ requirement of 38 C.F.R. § 3.155(a) is met and the VA must consider TDIU.”⁴³⁴ The court noted that the agency “must determine all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled as a claim for TDIU.”⁴³⁵

Further, VA regulations define “total disability” as an impairment of mind or body “which is sufficient to render it impossible for the average person to follow a substantially gainful occupation.”⁴³⁶ The court held that this does not require a veteran to “show 100 percent unemployability.”⁴³⁷

The court reasoned that “the use of the word ‘substantially’ suggest[ed] an intent to impart flexibility into a determination of the veterans overall employability, whereas a requirement that the veteran prove 100 percent unemployability leaves no flexibility.”⁴³⁸ The court noted that “[w]hile the term ‘substantially gainful occupation’ may not set a clear numerical standard for determining TDIU, it does indicate an amount less than 100 percent.”⁴³⁹

E. Rules Applicable to Particular Disabilities

Under veterans benefits statutes and regulations, special rules are applicable to a number of disabilities, such as post-traumatic stress disorder, hearing loss, and disease resulting from exposure to radiation. In *Boyer v. West*,⁴⁴⁰ the court held that the agency was not required to consider a veteran’s partial non-service-connected hearing loss in one ear when evaluating the service connected hearing loss in another ear.⁴⁴¹

433. 251 F.3d 1378 (Fed. Cir. 2001).

434. *Id.* at 1384.

435. *Id.*

436. 38 C.F.R. § 3.340(a) (2001).

437. *Roberson*, 251 F.3d at 1385.

438. *Id.*

439. *Id.*

440. 210 F.3d 1351 (Fed. Cir. 2000).

441. *See id.* at 1356 (reasoning that Congress “intended that hearing loss be treated different than other loss of paired organ function.”).

F. Presumptions Established By VA Statutes and Regulations

As noted above,⁴⁴² the Federal Circuit has applied the nonstatutory presumption of administrative regularity in a number of cases. VA statutes and regulations establish a number of presumptions that reduce evidentiary burdens for veterans. In *Routen v. West*,⁴⁴³ the court discussed the nature of presumptions generally.⁴⁴⁴ The court noted, “[a] presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption.”⁴⁴⁵ Additionally, “[w]hen the opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears.”⁴⁴⁶ Furthermore, “[t]he party originally favored by the presumption is now put to his factually-supported proof [because] the presumption does not shift the burden of persuasion, and the party on whom that burden falls must ultimately prove the point at issue by the requisite standard of proof.”⁴⁴⁷

The court also has addressed the standards applicable to particular presumptions. Under VA statutes and regulations, if a specific condition is not noted upon a veteran’s entrance to service, the veteran is entitled to a presumption that he or she was sound upon entry to service.⁴⁴⁸ This “presumption of soundness” may be rebutted if “clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by [the veteran’s military] service.”⁴⁴⁹

In *Harris v. West*,⁴⁵⁰ the Federal Circuit considered what kinds of evidence may be used to rebut the presumption of soundness.⁴⁵¹ The court rejected the argument that the statutory presumption of

442. See *supra* Part IV.C (addressing the application of the presumption of administrative regularity by the Federal Circuit).

443. 142 F.3d 1434 (Fed. Cir. 1998).

444. See *id.* at 1440 (stating that a presumption is never considered evidence and any change in the evidentiary standard for a presumption is also not considered evidence).

445. *Id.*

446. *Id.*

447. *Id.*

448. See 38 U.S.C. § 1111 (1994) (codifying this principle); 38 C.F.R. § 3.304(b) (2001) (discussing wartime disability compensation and determining direct service connections as related to a particular disability).

449. 38 U.S.C. § 1111.

450. 203 F.3d 1347 (Fed. Cir. 2000).

451. See *id.* at 1350 (emphasizing the breadth of inquiry into considering whether the veteran’s disease or injury existed prior to service).

soundness could be rebutted only by contemporaneous preservice clinical evidence or recorded history showing that the veteran was suffering from the disease or condition in question before entering military service.⁴⁵² The court also held that the presumption could be rebutted by a medical professional's after-the-fact opinion regarding the probable onset of the disease or condition.⁴⁵³ The court noted that "[w]hile contemporaneous clinical evidence or recorded history may often be necessary to satisfy the heavy burden of rebutting the statutory presumption of soundness, we conclude that there is no absolute rule in the statute, the regulation, or the case law requiring such evidence before the presumption can be rebutted."⁴⁵⁴ In a case "in which a later medical opinion is based on statements made by the veteran about the preservice history of his condition,"⁴⁵⁵ the court stated "contemporaneous clinical evidence and recorded history may not be necessary."⁴⁵⁶

VA statutes and regulations also establish evidentiary presumptions for combat veterans. In *Maxson v. Gober*,⁴⁵⁷ the Federal Circuit specifically considered the presumption of aggravation associated with combat veterans. In this case, the Court of Appeals for Veterans Claims found that the absence of post-service medical records relating to the claimed condition for a period of more than four decades was "decisive" in its determination that the condition had not been aggravated in service.⁴⁵⁸ In response, the veteran argued that the absence of medical records could not constitute "clear and convincing evidence" that the aggravation did not occur and that the presumption could only be overcome "by positive medical evidence of non-aggravation."⁴⁵⁹ The court rejected this argument, however, and concluded that "evidence of a prolonged period without medical complaint can be considered, along with other factors . . . as evidence of whether a pre-existing condition was aggravated by military

452. See *id.* at 1351 (suggesting the court is interested in the overall quality of evidence rather than what type of evidence is presented).

453. See *id.* at 1350-51 (commenting that the court in *Miller v. West*, 11 Vet. App. 345 (1998), did not find pre-service evidence essential to rebutting a presumption of soundness in the case of a schizophrenic veteran who challenged the use of psychiatric evaluations done after service).

454. *Id.* at 1351.

455. *Id.*

456. *Id.*

457. 230 F.3d 1330 (Fed. Cir. 2000).

458. See *id.* at 1332 (observing that the absence of complaint for four decades following service establishes a rebuttable presumption of the lack of "symptomatic manifestations" related to such service).

459. *Id.* (arguing that the several "good health" records following service were not dispositive).

service.”⁴⁶⁰

In *Dambach v. Gober*,⁴⁶¹ the court addressed the combat presumption again, and held that the presumption of aggravation applies to in-service injuries even where there is no record of the particular injury. In contrast to *Maxson*, the court stated that the absence of an official record cannot constitute “clear and convincing evidence” to rebut a presumption.⁴⁶² Moreover, the court suggested that combat conditions do not always allow for proper medical treatment and records, and as a result, a veteran should receive the evidentiary benefit in cases where no record exists.⁴⁶³

In *Splane v. West*,⁴⁶⁴ the Federal Circuit invalidated a general counsel opinion in part, reasoning that the opinion incorrectly interpreted a statute as not creating a presumption of aggravation for chronic diseases existing prior to service.⁴⁶⁵ Because congressional intent supported a presumption of aggravation in such cases, the *Splane* court held that the agency’s interpretation exceeded the powers delegated to the DVA by Congress.⁴⁶⁶ Consequently, the veteran could argue that the presumption applies to his post-service case of multiple sclerosis.

The Federal Circuit also addressed a statute that does not specify the type of evidence required to rebut the statutory presumption. In *Forshey v. Gober*,⁴⁶⁷ the court held that, even though the statute was silent on the issue, clear and unmistakable evidence was required to rebut the presumption.⁴⁶⁸

460. *Id.* at 1333.

461. 223 F.3d 1376 (Fed. Cir. 2000).

462. *See id.* at 1380-81 (concluding that, even in the absence of an official record, the combat veteran will receive the benefit of a three-step analysis under Section 1154(b), which is intended to provide a lighter evidentiary burden to demonstrate a service connection to an injury or disease).

463. *See id.* at 1380 (stating that section 1154(b) was enacted to protect veterans, and as such, should be applied even in those cases where veterans did not have access to proper medical care).

464. 216 F.3d 1058 (Fed. Cir. 2000).

465. *See id.* at 1067-69 (determining that the general counsel failed to interpret section 1112(a) in a way that was consistent with the plain meaning of the statute, and consequently, interpreted the section in a manner inconsistent with congressional intent).

466. *Id.* at 1670.

467. 226 F.3d 1299 (Fed. Cir. 2000). This opinion was later withdrawn. *See supra* note 156.

468. *See Forshey*, 226 F.3d at 1305 (noting that the clear and convincing standard exists in various other statutes that deal with presumptions related to veterans).

G. *Agency Duty to Assist*

A number of VA statutes and regulations provide that the agency is to assist claimants for veterans benefits. In *Glover v. West*,⁴⁶⁹ the court rejected an argument that a 1979 VA regulation⁴⁷⁰ mandated a reexamination of the disability for all cases in which the veteran wishes to reopen a claim for a service-connected disability.⁴⁷¹ Furthermore, the court found the agency had discretion under this regulation to determine whether a reexamination is necessary.⁴⁷² The court reasoned that "[t]he plain language at issue" could "only be construed to mean that the DVA is not required to request that the veteran be reexamined in all cases, but rather only when there is evidence suggesting a material change in the veteran's disability."⁴⁷³

In *Rodriguez v. West*,⁴⁷⁴ the Federal Circuit cast doubt on whether provisions of a VA statute, which indicated that the agency "shall" provide certain kinds of assistance to applicants in filing claims,⁴⁷⁵ created enforceable rights. The court reasoned: "It is doubtful whether these two provisions create any enforceable rights for an applicant for benefits who did not receive assistance in presenting a claim. Neither provision prescribes any remedy for breach. The provisions appear to be hortatory rather than to impose enforceable legal obligations upon the Secretary."⁴⁷⁶

In *Schroeder v. West*,⁴⁷⁷ the Federal Circuit held that the duty to assist "attaches to the investigation of all possible in-service causes of that current disability, including those unknown to the veteran."⁴⁷⁸ In that case, the veteran alleged that his eye condition was due to exposure to Agent Orange or some other unnamed toxic substance, making

469. 185 F.3d 1328 (Fed. Cir. 1999) (concluding that, in cases where the veteran wishes to reopen a claim, the veteran must come forward with evidence that supports his claim of material change related to the disability).

470. 38 C.F.R. § 3.327(a) (1979) (requiring reexaminations only where it is likely that the condition of the disability has changed significantly or where there is evidence that the current rating may be incorrect).

471. See *Glover*, 185 F.3d at 1333 (refusing to address the issue of whether the failure to reexamine constituted a breach of duty on the part of the agency).

472. See *id.* at 1328 (affirming the agency's decision, reasoning that requiring a judicial determination of the necessity of a reexamination would go to the facts of the case, which is outside the scope of the court's review).

473. *Id.*

474. 189 F.3d 1351 (Fed. Cir. 1999).

475. See, e.g., 38 U.S.C. § 7722(d) (1994) (requiring specifically that the Secretary provide "to the maximum extent possible, aid and assistance" to veterans and their dependants).

476. *Rodriguez*, 189 F.3d at 1355.

477. 212 F.3d 1265 (Fed. Cir. 2000).

478. *Id.* at 1271 (reasoning that the CAVC erred in its interpretation of what is a "claim" and finding that a veteran need only establish a single well-grounded claim to prompt the agency's duty to assist).

out a well-grounded claim for a disability resulting from service.⁴⁷⁹ Consequently, the agency was obligated to assist him in the investigation of all his claims concerning his eye condition.⁴⁸⁰

The Federal Circuit held in *Gonzales v. West*⁴⁸¹ that a regulation requiring service connection determinations to be “based on review of the entire evidence of record”⁴⁸² did not require the Regional Office to analyze and discuss each piece of evidence.⁴⁸³ Instead, the court suggested that the regulation only requires the Regional Office to weigh all the evidence before it, not “analyze and discuss” each piece.⁴⁸⁴

The court also addressed a VA regulation that requires the agency to send an application to “any dependent who has apparent entitlement” to obtain death benefits.⁴⁸⁵ In *Westberry v. Principi*,⁴⁸⁶ the Federal Circuit held that “apparent entitlement” meant a situation “where entitlement is evident and not merely a ‘possibility.’”⁴⁸⁷ Thus, the agency did not have a duty to inform a spouse, who was separated from the veteran at the time of the veteran’s death, about potential survivor benefits.⁴⁸⁸

H. Agency Authority to Request General Counsel Opinions

The Federal Circuit has also rejected a challenge to the authority of the Agency Board to request opinions from the agency’s general counsel.⁴⁸⁹ In *Splane v. West*,⁴⁹⁰ the court recognized the importance of the general counsel’s interpretation, but ultimately invalidated the general counsel opinion in part. The court reasoned that the opinion incorrectly interpreted a statute as not creating a

479. *Id.* at 1270.

480. *Id.* (holding that once the veteran had made a well-grounded claim regarding the Agent Orange occurrence and based his claims on the same disability, he was entitled to agency assistance in the investigation of all claims concerning his eye disorder).

481. 218 F.3d 1378 (Fed. Cir. 2000).

482. 38 C.F.R. § 3.303(a) (2001).

483. *See Gonzales*, 218 F.3d at 1380-81 (holding statutory requirement of “review” of evidence requires only a re-examination and not an analysis or discussion).

484. *See id.* at 1381 (finding no conflict between the agency’s duty to assist the veteran and the failure to analyze each piece of evidence of record).

485. 38 C.F.R. § 3.150(b) (2001) (supplementing the authority requiring provision of such forms on request by the veteran or dependent).

486. 255 F.3d 1377 (Fed. Cir. 2001).

487. *Id.* at 1379.

488. *Id.*

489. *See Splane v. West*, 216 F.3d 1058, 1066 (Fed. Cir. 2000) (inferring, from the Supreme Court’s finding that agency heads have the implicit authority to delegate powers, that the Secretary clearly can delegate to the Board the authority to request legal opinions).

490. 216 F.3d 1058 (Fed. Cir. 2000).

presumption of aggravation for chronic diseases existing prior to service.⁴⁹¹ In doing so, the Federal Circuit emphasized that legal opinions, and agency interpretations, were binding only when consistent with the intent of Congress.⁴⁹²

VIII. REMEDIES

The Federal Circuit also has clarified certain aspects of the remedies available to veterans benefits claimants.

A. *Remands*

In *Adams v. Principi*,⁴⁹³ the court rejected the argument that the CAVC should have ruled, without a remand, that the agency offered insufficient evidence to rebut the presumption of sound condition. The Federal Circuit held that “the remand in this case was statutorily authorized because the remand was ordered for a reason that is consistent with the statutory scheme the court is charged with enforcing.”⁴⁹⁴

The court reasoned that “[t]his is not a case in which the court was faced with evidence that was clearly insufficient to overcome the presumption of sound condition.”⁴⁹⁵ In fact, the court noted that the CAVC had not remanded the matter to the Board to allow for the introduction of new evidence, in an effort to make up for the recognized shortfall in the evidence supplied to the court.⁴⁹⁶ Moreover, the CAVC had concluded “that the evidence before the Board was subject to differing interpretations.”⁴⁹⁷ And, as a result, the proper analysis “turned not on a weighing of the evidence”⁴⁹⁸ but on an understanding of what a particular physician meant in a report—“a matter best resolved by a further factual inquiry, ideally including further inquiry”⁴⁹⁹ to the physician himself.

491. See *id.* at 1070 (reiterating that congressional intent always supersedes agency interpretation of a regulation).

492. See *id.* at 1068-69 (citing *Chevron*, which held that agency interpretations were to be given effect only when consistent with Congress, and determining congressional intent in this case to oppose that of the agency).

493. 256 F.3d 1318 (Fed. Cir. 2001).

494. *Id.* at 1321 (confirming that the CAVC is authorized by statute to “affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.”).

495. *Id.* at 1321-22.

496. See *id.* at 1322 (reasoning that the evidence was not lacking in sufficiency, but noting that it was open to different, reasonable interpretations).

497. *Id.* (explaining that viewing the evidence one way overcame the presumption of sound condition, while viewing the evidence another way led to the conclusion that the veteran’s condition existed prior to service).

498. *Id.*

499. *Id.*

The court concluded that “under these circumstances, it is permissible for the court to remand the case so that the Board can obtain clarification as to the import of the evidence.”⁵⁰⁰ Clarification, for the purposes of the Board, can take several forms, including an explanation from the physician, or even supplemental medical evidence.⁵⁰¹

The court noted that its decision to remand the case was consistent with its authority to review certain agency decisions.⁵⁰² That is, “[i]f the reviewing court simply cannot evaluate the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”⁵⁰³

Significantly, although the decision was affirmed, the Federal Circuit disagreed with the CAVC regarding the source of the authority to remand. The CAVC indicated that the proper source of authority for that action was the agency’s statutory duty to assist the veteran. The Federal Circuit disagreed, noting that, although a remand might assist the veteran in obtaining benefits, the principal purpose of the remand was “not to assist Mr. Adams to support his claim, but to clarify whether the presumption of sound condition has been overcome.”⁵⁰⁴

The court further noted that this is a matter that falls under the court’s statutory authority to remand cases when deemed “appropriate.”⁵⁰⁵ Lastly, the Federal Circuit concluded that “[b]ecause we are persuaded that the court was authorized to remand the case,”⁵⁰⁶ the CAVC’s “characterization of the ground for ordering the remand does not affect the validity of the court’s order.”⁵⁰⁷

Yet, in *Cook v. Principi*,⁵⁰⁸ the court rejected the opposite argument—i.e., it refused to accept the argument that the CAVC should have remanded a certain issue instead of deciding it.⁵⁰⁹ At issue in the *Cook* case was the application of *Hayre v. West*. Initially,

500. *Id.* (observing that the Board’s instruction for clarification reflects the Board’s need to establish the probability that the condition resulted from service).

501. *See id.* (implying that much of the controversy surrounding this case results from ambiguities in the medical reports provided by a particular physician).

502. *See id.* (justifying remand in cases where the reviewing court cannot evaluate the record before it without additional investigation).

503. *Id.* (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

504. *Id.*

505. *See id.* (basing its authority to remand on 38 U.S.C. § 7252(a)).

506. *Id.*

507. *Id.* (permitting the Federal Circuit to justify its remand of the case, even though the court disagreed with a significant portion of the CAVC’s reasoning).

508. 258 F.3d 1311 (Fed. Cir. 2001). In January 2002, the court granted a petition to rehear the appeal en banc and withdrew its earlier opinion. *See supra* note 73.

509. *See id.* at 1327, 1332 (finding that the proper remedy for a breach of the duty to assist was to remand the case).

the Board had not even addressed the *Hayre* issue, since the Federal Circuit decided *Hayre* after the Board had heard Cook's case.⁵¹⁰

The court further noted that the authority of the CAVC to decide this issue initially was "supported by an important jurisprudential consideration."⁵¹¹ Because the *Hayre* rule was "a judicially-created doctrine,"⁵¹² the Federal Circuit concluded that it was acceptable for the courts to limit its application.⁵¹³

B. Deadlines

In *Dambach v. Gober*,⁵¹⁴ the Federal Circuit stated "[w]e believe it would be appropriate for the Veterans Court to set a deadline by which this veteran's case will be concluded."⁵¹⁵ On remand, the CAVC declined to set a deadline, reasoning, "[t]his court is not part of the Department of Veterans Affairs and its administrative machinery. We are not privy to the case loads, the number of remands taking precedence over this case, and the relative priorities established at the BVA or the Regional Offices."⁵¹⁶ Moreover, the CAVC noted that it was not in a position to order the immediate hearing of the veteran's claim by the BVA, especially as the agency then faced numerous claims demanding its attention.⁵¹⁷ By imposing a random date on the agency, the court would be unable to determine whether the date was even reasonable as related to the BVA's other claims.⁵¹⁸ Furthermore, as the court noted, the conclusion of this case "is going to require further development of the facts," and it is not possible to speculate how long such an investigation will take.⁵¹⁹

Lastly, the CAVC pointed out that much of the delay associated with the determination of the case had been at the request of the

510. See *id.* at 1315-16 (arguing that the case should be remanded following the *Hayre* decision). See generally *Hayre v. West*, 188 F.3d 1327 (Fed. Cir. 1999).

511. *Id.*

512. *Id.*

513. See *id.* (commenting that the courts should define the application of the *Hayre* doctrine, as opposed to the Secretary defining its application).

514. 223 F.3d 1376 (Fed. Cir. 2000).

515. *Id.* at 1381 (noting the veteran's poor health).

516. *Dambach v. Principi*, 14 Vet. App. 307, 309 (2001) (denying the immediate award of disability benefits to veteran because such an award would require a finding of facts by the appellate court).

517. See *id.* at 309 (remarking on the increased number of claims before the BDV stemming in part from the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000), which requires "expeditious treatment" of claims).

518. See *id.* (comparing the assignment of an arbitrary date to "slicing meat with a cleaver.").

519. See *id.* (requiring a reexamination of the facts as well as the section 1154 issue on remand).

veteran—not the BVA or the Secretary.⁵²⁰ The CAVC “urge[d] the Secretary to move this case with all the energy and dispatch he can, consistent, of course, with a full and fair development of the facts.”⁵²¹

C. *Mandamus*

In *Cox v. West*,⁵²² an attorney fee case, the court held that the CAVC has the power, under the All Writs Act, to issue writs of mandamus.⁵²³ The court noted that the All Writs Act applies to “all courts established by Act of Congress” and that the CAVC was such a court even though it is an Article I court, not an Article III court.⁵²⁴ Consequently, in determining remedies, the CAVC has the authority to issue writs of mandamus.

CONCLUSION

The last few years have seen a dramatic change in the veterans benefits cases decided by the Federal Circuit. There has been a large increase in the number of appeals filed. Furthermore, the Federal Circuit has made major changes in the case law applicable to veterans benefits. Moreover, it is likely that the 2000 legislation will give rise to additional issues for the Federal Circuit to address in the near future.

520. *See id.*

521. *Id.*

522. 149 F.3d 1360 (Fed. Cir. 1998).

523. *See id.* at 1362-63 (adding that the All Writs Act does not expand a court's jurisdiction).

524. *See id.* at 1363 (noting that there is no language limiting the application of the All Writs Act to Article III courts, and if so intended, Congress would have qualified this Act to reflect such intent).
