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Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Benefits Appeals Process

Keywords

veterans benefits, veterans benefits claims, *Penson v. Ohio*

DID DECIDE OR SHOULD HAVE DECIDED: ISSUE EXHAUSTION AND THE VETERANS BENEFITS APPEALS PROCESS

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TABLE OF CONTENTS

Introduction.....	1279
I. Veterans Benefits	1281
II. The Veterans Benefits Claims and Appeals Process.....	1283
III. Conflicting Goals in the Veterans Benefits Appeals Process.....	1289
IV. Development of the Case Law on Issue Exhaustion.....	1292
V. Options for Resolving the Conflict	1305
A. Requiring Issue Exhaustion for All Issues.....	1305
B. Not Requiring Issue Exhaustion for Any Issue.....	1306
C. Requiring Issue Exhaustion for Some Issues, But Not Others	1309
1. Case-by-case balancing versus a general rule	1309
2. Types of arguments on appeal: suggestions for a taxonomy	1311
a. The form or structure of the argument on appeal	1312
b. The legal authority relied on.....	1313
c. The function or substance of the rule	1314
d. Changing the settled "rules of the game"—"law- creating" and "law-destroying" arguments.....	1316
Conclusion	1319

INTRODUCTION

The American judicial system is an adversarial one, and its fundamental operational rules are generally based on the assumptions that the parties are represented by competent counsel,

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the proceedings comport with the requirements of due process, and the decisionmaker is fair and knowledgeable.¹

In veterans benefits cases, however, the initial proceedings at the agency level are informal and nonadversarial.² Few claimants are represented by attorneys at that level.³ Claimants who are not represented by an attorney at the informal, nonadversarial agency level often fail to raise issues that an attorney would have. When the claimant files an appeal from an agency determination to the federal appellate court, the proceedings become adversarial.⁴ Attorneys for claimants often wish to raise issues on appeal that the claimant never raised before the agency.

At this stage, the appellate court must balance competing and often conflicting goals to determine whether it should address issues raised for the first time on appeal. On the one hand, the claimant has an interest in recognition of the informal, nonadversarial nature of initial proceedings. On the other hand, federal appellate courts usually do not consider an issue if a claimant failed to raise it before the lower tribunal, on the ground that the claimant waived or failed to exhaust administrative remedies with respect to that particular issue.⁵

1. See *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. . . . This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.' . . . The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over.") (quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975) (quoting Lord Eldon)).

2. See BARTON F. STICHMAN, RONALD B. ABRAMS & DAVID F. ADDLESTONE, *VETERANS BENEFITS MANUAL* ' 12.1.1, at 12-5 (1999) (noting that claims for veterans benefits are initially filed at one of the fifty-eight VA regional offices); see also *infra* notes 71-76 and accompanying text (explaining non-adversarial nature of veterans benefits cases).

3. See *infra* note 32 and accompanying text (discussing statistics on attorney representation).

4. See 38 U.S.C. ' 7252 (1994) (claimants can appeal agency decision to Court of Appeals for Veterans Claims); 38 U.S.C. ' 7263(a) (1994) (on appeal to Court of Appeals for Veterans Claims, the agency is represented by the General Counsel of the Department of Veterans Affairs); 38 U.S.C. ' 7263(b)-(d) (1994) (provisions for representation of claimants before the Court of Appeals for Veterans Claims).

5. See *Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 767 (Fed. Cir. 1988) (citing the general rule that arguments not presented to the "initial adjudicatory forum" are deemed waived on appeal); see also 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 15.8, at 341-44 (3d ed. 1994) (reviewing cases standing for the proposition that a petitioner cannot raise an issue not previously raised before the agency because a reviewing court would "usurp" that agency's power "to consider the matter, make [a] ruling, and state the reasons for its action").

This Article focuses on the application of the doctrine of “issue exhaustion”—that is, the requirement that a claimant raise a particular legal issue before the agency-level adjudicator in order for a reviewing court to consider the issue on appeal⁶—to veterans benefits appeals. Part I discusses the federal benefits available to veterans and their dependents. Part II outlines the claims and appeals process in veterans benefits cases. Part III discusses the conflicting goals of the veterans benefits appeals process. Part IV traces the development of case law on issue exhaustion in veterans benefits appeals. Part V explores the options available to the courts: requiring issue exhaustion for all issues, not requiring issue exhaustion for any issue, and requiring issue exhaustion for certain types of issues, but not for other types of issues. This Article concludes that requiring issue exhaustion for all issues or not requiring it for any issue fails to balance the conflicting goals of the veterans benefits appeals process. Furthermore, this Article advocates an approach which requires issue exhaustion for certain issues, but not for other issues, because it strikes a better balance between those conflicting goals than an “all or nothing” approach.

This Article contends that a rule-based approach is superior to a case-by-case balancing approach for determining which issues should require exhaustion. A case-by-case balancing approach is undesirable because it tends to produce ad hoc, unprincipled, and unpredictable decisions.⁷ Consequently, a rule-based approach predicated on the types of rules and arguments asserted on appeal is the more advantageous approach to this problem. Such an approach should be based on an inquiry into what the lower tribunal *did* decide or *should have* decided. Furthermore, the determination of what the lower tribunal *should have decided* should be based on the evidence and argument present in the record at the time the lower tribunal rendered its decision.

I. VETERANS BENEFITS

Various federal benefits are available to veterans and their dependents through the Department of Veterans Affairs (“VA”). A

6. See *Sims v. Apfel*, 120 S. Ct. 2080, 2083 (2000) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)) (“Ordinarily an appellate court does not give consideration to issues not raised below.”). See generally John C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Requirement to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997) (arguing that application of formal issue exhaustion rules to Social Security benefits appeals and other informal administrative proceedings significantly limits claimants’ judicial review rights).

7. See *infra* notes 213-18 and accompanying text.

veteran may receive monthly compensation if he or she has a service-connected disability.⁸ To receive service connection for a disability, there must be evidence that the veteran currently has a disability and that the current disability is connected to a disease or injury incurred while in service.⁹ Once the VA Regional Office grants service connection for a particular disability, the amount of compensation depends on the disability evaluation the Regional Office assigns. The criteria for the disability evaluations for various disabilities are set forth in the "Schedule for Rating Disabilities."¹⁰ There are separate criteria for distinct disabilities, and those criteria are listed under "Diagnostic Codes" in the Schedule for Rating Disabilities.¹¹ Compensable disability evaluations range, in 10% increments, from 10% to 100%. The percentage ratings represent the average impairment in earning capacity resulting from the service-connected disease or injury.¹²

A veteran can receive a 100% disability evaluation in two principal ways. First, the veteran may meet the criteria for a 100% evaluation for a particular disability.¹³ Second, even if the veteran does not meet the criteria for a 100% evaluation for a particular disability, he or she still may receive a 100% evaluation based on "individual unemployability" if the veteran "presents evidence that he or she is unable to secure or follow a substantially gainful occupation as a

8. Veterans benefits statutes are located at Title 38 of the United States Code. Veterans benefits regulations are located at Title 38 of the Code of Federal Regulations. *See generally* 38 U.S.C. § 1110 (1994) (providing for payment of compensation for disability incurred in the line of duty during wartime); *id.* § 1131 (providing for payment of compensation for disability incurred in the line of duty during peacetime).

9. Veterans benefits cases are reported in West's Veterans Appeals Reporter, abbreviated as "Vet. App." *See Caluza v. Brown*, 7 Vet. App. 498, 505 (1995) (examining cases applying the general rule that "[s]ervice connection for VA disability compensation purposes will be awarded to a veteran who served on active duty . . . for any disease or injury that was incurred in or aggravated by a veteran's active service or for certain diseases that were initially manifested to a degree of 10% or more within a specified presumption period after the date of separation from service"), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (per curiam).

10. *See generally* 38 C.F.R. § 4 (1999) (establishing criteria for evaluating the level of disability of veterans with disabilities).

11. *See id.*; *see also id.* § 4.27 (explaining the use of diagnostic code numbers to represent the listed ratable disabilities); *id.* § 4, app. B (providing a numerical index of diagnostic codes representing specific disabilities).

12. *See* 38 C.F.R. § 4.1 (1999) (explaining that the rating schedule is a guide in the evaluation of disability where the degrees of disability specified are generally adequate to compensate for considerable loss of working time from exacerbations or illness proportionate to the severity of the several grades of disability).

13. *See, e.g., id.* § 4.71a, Diagnostic Code 5285 (providing a 100% evaluation for residuals of fracture of a spinal vertebra with cord involvement, either bedridden or requiring long leg braces).

result of a service-connected disability.”¹⁴

If a veteran is disabled, but the disability is not connected to a disease or injury incurred in service, he or she may still be eligible for non-service-connected pension benefits.¹⁵ To receive non-service-connected pension benefits, a veteran must have had ninety or more days of active service during a period of war, meet certain income requirements, and be unable to work because of a permanent disability.¹⁶

VA benefits are also available to certain spouses and dependents of veterans. If a veteran dies from a service-connected disability, his or her spouse or dependents are eligible for Dependency and Indemnity Compensation (“DIC”) benefits.¹⁷ DIC benefits are also available in some cases when a veteran is totally disabled due to a service-connected disability at the time of death, even if the death was not due to the service-connected disability.¹⁸

Many other VA benefits, including health-care benefits, educational benefits, vocational rehabilitation, home loan guaranties, life insurance, and burial benefits, are available to veterans.¹⁹ The vast majority of appeals in veterans benefits cases, however, concern entitlement to compensation for service-connected disabilities, non-service-connected pensions, and DIC benefits.²⁰

II. THE VETERANS BENEFITS CLAIMS AND APPEALS PROCESS

In order to obtain veterans benefits, the person seeking the benefits must first file a claim with the VA Regional Office.²¹ After

14. *Id.* § 4.16. *See generally id.* § 4.15 (granting total disability when an impairment renders it impossible for the average person to follow a substantially gainful occupation and the impairment is certain to continue throughout the life of the disabled person); *id.* § 4.16 (granting total disability based on the unemployability of the individual).

15. *See* 38 U.S.C. § 1521 (1994) (providing for payment of a pension to a veteran who is permanently and totally disabled from non-service-connected disability not the result of willful misconduct and who meets the service requirement).

16. *See* *Vargas-Gonzalez v. West*, 12 Vet. App. 321, 328 (1999) (enumerating the factors for establishing entitlement to non-service-connected pension benefits).

17. *See* 38 U.S.C. § 1310 (1994) (stating that benefits will be paid to the surviving spouse, children, and parents when any veteran dies after December 31, 1956, from a service-connected or compensable disability).

18. *See id.* § 1318. The survivor is eligible if the veteran was rated totally disabled (i.e., a 100% evaluation) for ten years or more before death, or for at least five years following discharge from service. *See id.*

19. *See generally* DEPARTMENT OF VETERANS AFFAIRS, *FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS* (1999) (providing a detailed overview of benefits available to veterans); *see also generally* KEITH D. SNYDER & RICHARD E. O'DELL, *VETERANS BENEFITS: THE COMPLETE GUIDE* (1990) (same).

20. *See infra* notes 30-31 and accompanying text (citing statistics for veterans benefits cases).

21. *See* 38 U.S.C. § 5101(a) (1994).

the appropriate development²² of the claim, the Regional Office then makes a decision, usually referred to as a "rating decision."²³ Once the Regional Office has rendered a decision regarding a claim that is adverse to the claimant, the claimant may appeal to the Board of Veterans' Appeals ("Board").²⁴

The Board is part of the Department of Veterans Affairs.²⁵ President Roosevelt created the Board in 1933 by executive order.²⁶ In 1999, there were sixty-one Board members, all of whom were attorneys.²⁷ Decisions are made by a single Board member.²⁸ In fiscal year 1999, the Board issued 37,373 decisions.²⁹ Approximately ninety-three percent of those decisions concerned claims for compensation for service-connected disabilities by veterans or dependents.³⁰ Non-service-connected pension claims accounted for another three percent.³¹

In 1999, approximately five percent of claimants appealing to the Board were represented by attorneys.³² However, about eighty-four percent of claimants were represented by veterans service organizations, such as The American Legion³³ and Disabled American Veterans.³⁴ Veterans service organization staff members, who usually

22. In veterans benefits cases "development" or fulfillment of the "duty to assist" is roughly analogous to discovery in civil cases. That is, it is the process of gathering evidence before a decision is made. *See infra* note 95 and accompanying text.

23. The agency must give a claimant timely notice of a decision affecting the provision of benefits. *See* 38 U.S.C. § 5104 (1994). The notice must include an explanation of the procedure for obtaining review of the decision and in cases where a benefit is denied, it must also include a statement of the reasons for the decision and a summary of the evidence considered. *See id.*

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

25. *See* REPORT OF THE CHAIRMAN, BOARD OF VETERANS' APPEALS, FISCAL YEAR 1999, at 1 (1999) [hereinafter CHAIRMAN'S REPORT].

26. *See id.* at 1-2.

27. *See id.* at 20-21.

28. *See id.* at 8-9.

29. *See id.* at 31.

30. *See id.* (reporting 34,739 decisions in the "compensation" category).

31. *See id.* (reporting 1,260 decisions in the "pension" category).

32. *See id.* at 32.

33. *See id.* (representing 22.5% of claimants in 1999). The American Legion is a community service organization of war-time veterans. *See The American Legion: The American Legion Organization*, at <http://www.legion.org/backfact.htm> (last modified Jan. 4, 2000). The Veterans Affairs and Rehabilitation Commission of the American Legion oversees federally mandated programs provided by the Department of Veterans Affairs for veterans and their dependents. *See id.*

34. *See* CHAIRMAN'S REPORT, *supra* note 25, at 32 (representing 33.6% of claimants in 1999). Disabled American Veterans is a nationwide organization that provides a network of services to veterans and their families. *See DAV: Background Information on the Disabled American Veterans*, at <http://www.dav.org/about> (last visited Apr. 18, 2000).

2000]

VETERANS BENEFITS APPEALS PROCESS

1285

are not attorneys, represent claimants without charge.³⁵ About ten percent of claimants were unrepresented before the Board.³⁶

The first step in the appeals process is the filing of a timely "Notice of Disagreement" by the claimant.³⁷ 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."³⁸ The claimant must file the Notice of Disagreement within one year of the agency's mailing of notice of the decision to be appealed.³⁹ The filing of a timely Notice of Disagreement is a jurisdictional requirement for obtaining appellate review.⁴⁰

After the claimant has filed a Notice of Disagreement, responsibility shifts to the VA Regional Office to issue a "Statement of the Case."⁴¹ The Statement of the Case must contain a summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed; a citation to pertinent laws and regulations; a discussion of how those laws and regulations affect the agency's decision; a decision on each issue; and a summary of the reasons for the decision.⁴² The purpose of the Statement of the Case is to frame the issues for appeal and assist the claimant in preparing arguments to the Board.⁴³

35. See H.R. REP. NO. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 ("[T]he major veterans service organizations also furnish claims assistance by trained specialists at no charge."), *quoted in* Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

36. See CHAIRMAN'S REPORT, *supra* note 25, at 32.

37. 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. See *id.*

38. 38 C.F.R. § 20.201 (1999).

39. 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.").

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

41. See 38 U.S.C. § 7105(d)(1) (1994) (describing the procedure for filing of Notice of Disagreement and appeal); 38 C.F.R. § 19.26 (1999) (requiring the agency to reexamine the claim, take additional development or review action as it deems proper, and prepare a Statement of the Case).

42. See 38 U.S.C. § 7105(d)(1) (1994) (establishing the elements required in the Statement of the Case); 38 C.F.R. § 19.29 (1999) (same).

43. See 38 C.F.R. § 19.29 (1999) ("The Statement of the Case must be complete enough to allow the appellant to present written and/or oral arguments before the

After the Regional Office issues the Statement of the Case, the claimant must then file a Substantive Appeal.⁴⁴ In the Substantive Appeal, the claimant "should set out specific allegations of error of fact or law, [and] such allegations [should be] related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified."⁴⁵

After the claimant files the Substantive Appeal, the Board must then render a decision.⁴⁶ In rendering its decision, the Board is required to provide "a written statement of its findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record."⁴⁷

Prior to 1988, there was no judicial review of the decisions of the Board.⁴⁸ In 1988, the Veterans' Judicial Review Act⁴⁹ created the Court of Veterans Appeals, a seven-member Article I court.⁵⁰ On

Board of Veterans' Appeals.").

44. See 38 U.S.C. § 7105(d) (3) (1994) (affording the claimant sixty days from the date the Statement of the Case is mailed to file a formal appeal); 38 C.F.R. § 20.202 (1999) ("An appeal consists of a timely filed Notice of Disagreement in writing and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal."); see also *id.* ("Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal.").

45. 38 C.F.R. § 20.202 (1999).

46. See *id.* § 20.200.

47. 38 U.S.C. § 7104(d) (1) (1994).

48. See *Hamilton v. Brown*, 39 F.3d 1574, 1576 (Fed. Cir. 1994) ("Effective September 1, 1989, Congress established the Court of Veterans Appeals to provide for the first time a judicial appeals process to be utilized in veterans benefits matters."); 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* 3-11 (2d ed. 1998) (discussing judicial review of veterans benefits claims prior to 1988).

49. See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, § 301, 102 Stat. 4105 (codified as amended at 38 U.S.C. §§ 4051-4092 (1994)); see also FOX, *supra* note 48, at 13-27.

50. See *Bailey v. West*, 160 F.3d 1360, 1367 (Fed. Cir. 1998) (referring to the Court of Appeals for Veterans Claims as an Article I court).

Prior to the enactment of the Veterans' Judicial Review Act, an attorney or agent was proscribed, under threat of fine and imprisonment, from charging a claimant of veterans benefits more than \$10 for representation before the Department of Veterans Affairs or the Board of Veterans' Appeals. See *In re Wick*, 40 F.3d 367, 369 (Fed. Cir. 1994); see also *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985) (upholding the constitutionality of the then-existing fee limitation on veterans' attorneys or agents). With the passage of the Veterans' Judicial Review Act in 1988, Congress repealed the \$10 fee limitation and permitted claimants to enter into fee agreements with attorneys and agents representing them, provided the agreement met specific requirements. See *Wick*, 40 F.2d at 369 (citing 38 U.S.C. § 5904). The Federal Courts Administration Act of 1992 extended Equal Access to Justice Act coverage to the Court of Appeals for Veterans Claims. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506, 106 Stat. 4506 (codified at 28 U.S.C. § 2412(d) (2) (f) (1994)); see also *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995) (concluding that "attorney fees" do not include fees for non-attorney

March 1, 1999, the name of the United States Court of Veterans Appeals was changed to the United States Court of Appeals for Veterans Claims.⁵¹ This Article will refer to that court as the Court of Appeals for Veterans Claims (or “CAVC”).

Article I courts, or “legislative” courts, are created under Article I, section 8 of the Constitution.⁵² Article III courts, or “constitutional” courts, are created under Article III, section 1.⁵³ Article I courts include the Tax Court, the Court of Federal Claims, the Court of Military Appeals, as well as the Court of Appeals for Veterans Claims.⁵⁴ Courts have interpreted the powers of an Article I court to be “limited by what it has been given it by specific acts of Congress and by its own rules adopted pursuant to Congressional authority.”⁵⁵

If the Board renders an adverse decision, the claimant may either file a motion for reconsideration with the Chairman of the Board⁵⁶ or file a Notice of Appeal to the Court of Appeals for Veterans Claims.⁵⁷ The agency may not seek review of a Board decision.⁵⁸

The Court of Appeals for Veterans Claims’ review is “on the record of proceedings before the Secretary and the Board” and the court has the power “to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.”⁵⁹ Initial decisions are usually made by a single judge.⁶⁰ A party, however, may move for panel

practitioners who are not licensed to practice law in other courts but are allowed to practice before the Court of Appeals for Veterans Claims).

51. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (codified at 38 U.S.C. § 7251) (noting the change of the court’s name).

52. See CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 11 (5th ed. 1994) (discussing the development of legislative courts as well as the confusion and controversy created by the distinction between “constitutional” and “legislative” courts).

53. See *id.* (“Article III, § 1, of the Constitution provides: ‘The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.’”).

54. See *id.* at 56 (listing the “legislative” courts created pursuant to Article I of the Constitution and noting that the Court of Military Appeals is not part of the judiciary at all but is a military tribunal created by the Article I power to make rules for the government and regulate land and naval forces).

55. *In re United States*, 877 F.2d 1568, 1571 (Fed. Cir. 1989).

56. See 38 C.F.R. § 20.1000 (1999) (granting the ability to seek reconsideration by the Board of Veterans’ Appeals on motion by the appellant or on the Board’s own motion).

57. See 38 U.S.C. § 7252 (1994) (granting exclusive jurisdiction of the Court of Appeals for Veterans Claims to review decisions of the Board); *id.* § 7261(a)(1) (establishing the Court’s scope of review to decide all relevant questions of law, interpret constitutional, statutory and regulatory decisions, and determine the applicability or meaning of the terms of an action by the Secretary).

58. 38 U.S.C. § 7252(a) (1994).

59. *Id.*; see also *id.* § 7261 (granting power to the Court of Appeals for Veterans Claims to hold unlawful and set aside findings if clearly erroneous).

60. See FOX, *supra* note 48, at 22 (noting that approximately 80% of cases are

(three-judge)⁶¹ or full court (seven-judge)⁶² consideration. A party may also move for reconsideration.⁶³

If the Court of Appeals for Veterans Claims makes an adverse decision, review is available by the United States Court of Appeals for the Federal Circuit.⁶⁴ The Court of Appeals for the Federal Circuit is a relatively new court. The court was created in 1982 and was originally given appellate jurisdiction over the Court of Claims and the Court of Customs and Patent Appeals.⁶⁵ Congress has limited the Federal Circuit's jurisdiction over decisions of the Court of Appeals for Veterans Claims to those appeals that challenge the validity of any statute or regulation or any interpretation of a statute or regulation.⁶⁶ An issue otherwise within the Federal Circuit's jurisdiction must, in addition, be one upon which the Court of Appeals for Veterans Claims relied in making its decision.⁶⁷ Either the agency or the claimant may seek review in the Federal Circuit.⁶⁸ The Supreme Court may review the Federal Circuit's decision.⁶⁹ To date, the Supreme Court has only granted certiorari in one case.⁷⁰

This Article will focus on the arguments a claimant must make to the agency, i.e., the Board, in order to be able to properly raise those arguments before the Court of Appeals for Veterans Claims.

decided by a single judge).

61. See U.S. VET. APP. R. 35(b) ("A party in a case decided by a single judge may move for review by a panel of the Court.").

62. See U.S. VET. APP. R. 35(c) ("A party may move for initial consideration of a case, or for review of a panel decision in a case, by the full Court.").

63. See U.S. VET. APP. R. 35(a) (providing that "[s]uch a motion must be made within 14 days after the date of the decision of which reconsideration is being requested").

64. See 38 U.S.C. § 7292 (1994).

65. See WRIGHT, *supra* note 52, § 5, at 17 (describing the functions of the two separate courts before their merger in 1982).

66. See 38 U.S.C. § 7292(a) (1994) (stating that the Court of Appeals for the Federal Circuit's review of a decision will be to the extent the issue is presented and necessary to a decision); see also *id.* § 7292(d)(1) ("The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions.").

67. *Id.* § 7292(a). Review may be sought on issues considered by the United States Court of Appeals for Veterans Claims in making its decision other than a refusal to review the schedule of ratings for disabilities or a determination as to a factual matter. See *id.*

68. See *id.* The Secretary may not appeal a Board decision. See *supra* note 58 and accompanying text.

69. See 28 U.S.C. § 1254(1) (1994).

70. See *Brown v. Gardner*, 513 U.S. 115 (1994) (affirming the Federal Circuit's interpretation of 38 U.S.C. § 1151 for purposes of liability for a veteran's claim of disability after VA treatment).

III. CONFLICTING GOALS IN THE VETERANS BENEFITS APPEALS PROCESS

Congress designed the veterans benefits system to be nonadversarial and to favor veterans.⁷¹ All three courts that decide veterans benefits cases recognize this basic premise. The Supreme Court has observed that “surely Congress desired that the proceedings be as informal and nonadversarial as possible.”⁷² The Supreme Court has also noted that in construing statutes, interpretive doubt is to be resolved in favor of the veteran.⁷³

The Federal Circuit has described the veterans benefits system as “uniquely pro-claimant”⁷⁴ and as “a nonadversarial, *ex parte*, paternalistic system.”⁷⁵ The Court of Appeals for Veterans Claims has indicated that “it is well established that the VA adjudication process is a non-adversarial one.”⁷⁶

Although agency-level adjudications are non-adversarial, appellate adjudications in the Court of Appeals for Veterans Claims are adversarial.⁷⁷ And one of the general rules in federal appellate courts is that a claimant is expected to raise an issue before the lower tribunal before raising that issue on appeal. One of the leading scholars of administrative law, Professor Kenneth Davis, has stated, in discussing issues not raised before an administrative agency, that “[m]any cases support the proposition that ‘[a] reviewing court usurps the agency’s function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.’”⁷⁸ Professor Davis also

71. See H.R. REP. NO. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95.

72. *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985). This decision predates the passage of the Veterans’ Judicial Review Act in 1988, which created the Court of Appeals for Veterans Claims. See *supra* notes 48 through 51 and accompanying text.

73. See *Gardner*, 513 U.S. at 117-18 (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220-21 n.9 (1991)).

74. *Hodge*, 155 F.3d at 1363 (noting that the system of awarding compensation in the context of veterans benefits is so uniquely pro-claimant that systemic fairness and the appearance of fairness are important).

75. *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998) (crediting the veterans benefits’ nonadversarial, paternalistic system as the reason for its conclusion that veteran’s Notice of Disagreement was adequate).

76. *Robinette v. Brown*, 8 Vet. App. 69, 75 (1995) (quoting 38 C.F.R. § 20.700(c) (1994)) (further noting that VA proceedings are not “limited by legal rules of evidence”).

77. See 38 U.S.C. § 7263 (1994) (designating the representation of the Secretary and appellants).

78. 2 DAVIS & PIERCE, *supra* note 5, § 15.8, at 341 (quoting *Unemployment Comp. Comm’n v. Aragon*, 329 U.S. 143, 155 (1946)). See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879, 902 (1988) (referring to Professor Davis as “a widely respected

indicated that it is “[v]ery common” to find statements in appellate decisions such as, “in the absence of extraordinary circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding . . . at the appropriate time.”⁷⁹ This proposition is similar to the general rule that appellate courts will not entertain arguments that could have been, but were not, raised in the trial court.⁸⁰

According to Professor Davis, this “exhaustion” doctrine serves several important functions. First, and most important, the legislature creates an agency for the purpose of applying a statutory scheme to particular factual situations.⁸¹ The exhaustion doctrine permits the agency to perform this function, including, in particular, the opportunity for the agency to find facts, apply its expertise, and exercise the discretion granted it by the legislature.⁸² Second, it is more efficient to permit the administrative process to proceed uninterrupted and to subject the results of the process to judicial review only at the conclusion of the process than to permit judicial intervention at each phase of the process.⁸³ Third, agencies are not part of the judicial branch; they are autonomous entities created by the legislature to perform a particular function.⁸⁴ The exhaustion doctrine protects that agency autonomy. Fourth, judicial review of agency action can be hindered by failure to exhaust administrative remedies because the agency may not have had an adequate opportunity to assemble and to analyze relevant facts and to explain the basis for its action.⁸⁵ Fifth, the exhaustion requirement reduces court appeals by providing the agency additional opportunities to correct its prior errors.⁸⁶ Sixth, allowing some parties to obtain court review without first exhausting administrative remedies may reduce the agency’s effectiveness, both by encouraging others to circumvent its procedures and by rendering the agency’s enforcement efforts

administrative law scholar”); *United States v. Deitz*, 991 F.2d 443, 449 (8th Cir. 1993) (referring to Professor Davis as the “dean of administrative law scholars”).

79. 2 DAVIS & PIERCE, *supra* note 5, ' 15.8, at 342 (quoting *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 832 (9th Cir. 1981)).

80. *See Department of Pub. Welfare v. Secretary of Agric.*, 984 F.2d 514, 523 (1st Cir. 1993) (“In the usual administrative law case, a court ought not to consider points which were not seasonably raised before the agency.”).

81. *See* 2 DAVIS & PIERCE, *supra* note 5, ' 15.2, at 309 (citing *McKart v. United States*, 395 U.S. 185, 193-95 (1969)).

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

more complicated and more expensive.⁸⁷

An additional function of the issue exhaustion doctrine may be added to Professor Davis' list, based on the nature or function of an appellate court. Appeals are needed, as the great Roman jurist Ulpian wrote in the third century, because they "correct the unfairness or unskillfulness of those who adjudicate."⁸⁸ The principal function of an appellate court is to correct errors of "those who adjudicate"—that is, errors of the lower tribunal.⁸⁹ "Error" can only be understood in light of what an appellate court may expect from a lower tribunal, or what a lower tribunal *should have* done in deciding the case. In other words, "error" consists of the lower tribunal failing to do something it should have. As Judge Farley stated in a decision in the first year of the Court of Appeals for Veterans Claims' operation, "[t]his Court is a court of review and our jurisdiction is derivative; we can review only what was—or should have been—decided below."⁹⁰

What should an appellate court be able to expect from a lower tribunal? What "skillfulness" should "those who adjudicate" be

87. *See id.*

88. ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941) (citing DIG. 49.1.1.pr. (Ulpian, De Appellationibus 1)). *See* 4 THE DIGEST OF JUSTINIAN 864 (Theodor Mommsen et al. eds., 1985) (translating "cum iniquitatem iudicantium uel imperitiam recorgit" as "it corrects the partiality or inexperience of judges").

Ulpian, or Domitius Ulpianus, was a jurist of the early third century A.D. Bruce W. Frier, *Law on the Installment Plan*, 82 MICH. L. REV. 856, 856 (1984) (reviewing TONY HONORÉ, ULPIAN (1982)). Approximately two-fifths of Justinian's *Digest* is attributed to him. *Id.* A Roman-law scholar writes that "the *Digest* is by far the most influential work in Western legal history; then through the *Digest*, Ulpian has a fair claim to being the most influential of all jurists in that long and distinguished tradition." *Id.*

89. *See* Stuckey v. West, 13 Vet. App. 163, 168-69 (1999) ("The role of this Court is to correct errors of the Board."); *cf.* Barclay v. Florida, 463 U.S. 939, 988-89 (1983) (Marshall, J., dissenting) ("If appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in the trial court proceedings. A review for correctness reinforces the authority and acceptability of the trial court's decision and controls the adverse effects of any personal shortcomings in the initial decisionmaker."); POUND, *supra* note 88, at 3 (noting that appellate proceedings have a "double function of correction and prevention"); Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 649 (1988) (noting that "the federal courts of appeals serve two functions: the correction of error in individual cases and the development of the law in ways that will guide future conduct and future litigation"); The Honorable Joseph R. Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 AM. U. L. REV. 237, 239 (1982) ("Appellate courts generally have two functions: first, they correct errors committed during trial proceedings, thereby guaranteeing fair and just results to the litigants; second, appellate courts further institutional goals of the judicial system by . . . enunciating the law, clarifying the law, and, on occasion, promulgating new rules of law.").

90. Smith v. Derwinski, 1 Vet. App. 267, 275 (1991) (further noting that the court's first determination is whether the Board "adequately addressed and resolved the issue raised by appellant or whether a remand is required").

expected to have? This Article contends that the lower tribunal should be expected to apply the basic settled case law and statutory and regulatory provisions governing the agency, to the extent that they are raised by the record and a claimant's argument and testimony. In other words, the lower tribunal's decision should be judged in light of the evidence and argument presented before the tribunal, as well as the settled agency-administered law in existence at the time of the decision.⁹¹

The agency should not be expected to anticipate all possible challenges a claimant's counsel could make based on authority other than the agency-specific statutes and regulations. Nor should it be expected to, *sua sponte*, challenge the settled rules applicable to the agency.

IV. DEVELOPMENT OF THE CASE LAW ON ISSUE EXHAUSTION

The Court of Appeals for Veterans Claims and the Federal Circuit have issued conflicting decisions in addressing the matter of issue exhaustion. The Court of Appeals for Veterans Claims has repeatedly stated that it does not consider issues raised for the first time on appeal.⁹² The court has noted that it has powers of review over Board decisions before it, not powers of first impression.⁹³ The court has also stated that, "[a]s a court of review, our task is to review [Board] decisions based upon the record before the [Board], not to consider for the first time defenses, contentions, or arguments which were not

91. See 38 U.S.C. § 7104(d)(1) (1994) (explaining that in rendering its decision, the Board is required to provide "a written statement of its findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record"). This requirement is part of VA regulations. See, e.g., 38 C.F.R. § 3.103(a) (1999) (VA has an "obligation . . . to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government"); 38 C.F.R. § 3.303(a) (1999) (noting the policy of the Department of Veterans Affairs to "administer the law under a broad and liberal interpretation consistent with the facts of each individual case").

92. See, e.g., *Richards v. Brown*, 9 Vet. App. 255, 257 (1996) ("Even more conclusive, however, is the fact that this issue was not raised before the [Board], and is therefore not properly before the Court."); *Horowitz v. Brown*, 5 Vet. App. 217, 225 (1993) ("However, appellant raises the 'due process' argument for the first time here in this Court. A claimant seeking to appeal an issue to the Court must first obtain a *final* [Board] decision on that issue."); *Talon v. Derwinski*, 3 Vet. App. 74, 74 (1992) ("This issue, raised for the first time in this appeal, cannot be considered by the Court . . .").

93. See *Talbert v. Brown*, 7 Vet. App. 352, 356-57 (1995) (explaining that "the 'liberal reading' requirement does not require the Board to conduct an exercise in prognostication, but only requires that it consider all issues reasonably raised by the appellant's substantive appeal"); *Smith v. Derwinski*, 1 Vet. App. 267, 275 (1991) ("This Court is a court of review and our jurisdiction is derivative; we can review only what was—or should have been—decided below."); see also *supra* note 92 and accompanying text.

raised before the Board.”⁹⁴

In other cases, however, the court has stated that the Board is required to consider a well-grounded claim⁹⁵ for VA benefits under all applicable provisions of law and regulation, even if the claimant did not specifically raise the applicable provision.⁹⁶ The court has reasoned that to require veterans to specify which sections are applicable to their request for benefits would mean that veterans would have to be well versed in veterans benefits laws and regulations before receiving compensation.⁹⁷ The court further noted that such a “fundamental change” could only be made by the legislative

94. *Manio v. Derwinski*, 1 Vet. App. 140, 144 (1991) (stating that the court’s jurisdiction is only over decisions issued by the Board).

95. Before November 2000, the concept of a “well-grounded” claim was important in veterans benefits law because courts had held that the agency’s “duty to assist” was not triggered unless the claimant had submitted a well-grounded claim. *See* 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[.]”); *Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997) (concluding that under section 5107(a), the VA has a duty to assist only those claimants who have established well-grounded claims), *cert. denied sub nom. Epps v. West*, 524 U.S. 940 (1998). The “duty to assist” includes, in appropriate circumstances, conducting a medical examination, the reading of an appellant’s claim documents in a liberal manner, and the gathering of evidence from VA, Social Security Administration, and private records. *See Robinette v. Brown*, 8 Vet. App. 69, 76 (1995). Recent legislation has broadened the agency’s duty to assist and eliminated the requirement of submitting a well-grounded claim before the agency has a duty to assist. *See Veterans Claims Assistance Act of 2000*, Pub. L. No. 106-475, 114 Stat. 2096.

Well-groundedness was a legal question whether, assuming the credibility of the evidence in favor of the claimant, there was sufficient competent evidence on the key elements of that particular claim. *See Robinette*, 8 Vet. App. at 75 (noting that for the purpose of determining whether a claim is well-grounded, the credibility of the evidence in support of the claim is presumed, and the determination is subject to *de novo* review).

A well-grounded service-connection claim generally required a medical diagnosis of a current disability; medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between an in-service disease or injury and the current disability. *See Epps*, 126 F.3d at 1468.

96. *See Beaty v. Brown*, 6 Vet. App. 532, 536 (1994) (noting that the court has held that the Board must consider a well-grounded claim regardless of whether the claimant specifically raised the applicable provision of law or regulation). *See, e.g., Mays v. Brown*, 5 Vet. App. 302, 305-06 (1993) (“[T]he Board is required to consider a veteran’s claims under all applicable provisions of law and regulation whether or not the claimant specifically raises the applicable provision.”); *Hohol v. Derwinski*, 2 Vet. App. 169, 173 (1992) (“We have invariably held that the BVA is not free to ignore its own regulations, even if the appellant fails to raise the issue on appeal.”); *Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991) (“Even if not raised by appellant, the Court has consistently ruled that the BVA is not free to ignore its own regulations.”).

97. *See Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991) (noting that “the essence of the VA system” is tied to the Secretary’s duty to ensure that each veteran is informed of all benefits to which he is entitled; this “essence” is the non-adversarial setting of the claims process).

branch; it would be beyond the scope of the charter of the court itself to make such a change.⁹⁸

The Federal Circuit first considered issue exhaustion in *Ledford v. West*.⁹⁹ The Federal Circuit considered whether the Court of Appeals for Veterans Claims erred in dismissing the part of the veteran's appeal that sought to challenge termination of his individual unemployability benefits.¹⁰⁰ In that case, the veteran's benefits were terminated based on an agency circular.¹⁰¹ The veteran argued that the circular was invalid because it was not published in the Federal Register or subject to notice and comment under the Administrative Procedure Act ("APA"), and the operation of the circular violated his due process rights because it was inconsistent with a VA regulation requiring clear and convincing evidence to reduce that benefit.¹⁰² The Federal Circuit concluded that the Court of Appeals for Veterans Claims did not err in dismissing that part of the appeal.¹⁰³ There were two bases for the court's holding, one jurisdictional and one non-jurisdictional.

First, the Federal Circuit held that, because the veteran did not file a Notice of Disagreement with respect to the decision that terminated his individual unemployability benefits, the court did not have jurisdiction over that claim.¹⁰⁴ Second, the court held that the veteran had to exhaust his administrative remedies by presenting his constitutional and APA challenges to the agency before presenting them to a reviewing court.¹⁰⁵ The Federal Circuit indicated that this

98. See *id.*

99. See 136 F.3d 776, 780 (Fed. Cir. 1998); see also Dubin, *supra* note 6, at 1297 n.38 (noting in 1997 that the Federal Circuit had not yet addressed "issue exhaustion" in veterans benefits cases).

100. See *Ledford*, 136 F.3d at 778. Specifically, the Court of Appeals for Veterans Claims found *Ledford's* challenge to the 1981 rating decision to be a clear and unmistakable error claim under 38 C.F.R. § 3.105(a) (1997). Because of this, the court concluded that since this claim had not been raised before the Board, the court lacked jurisdiction over the claim. See *id.*

101. See *Ledford*, 136 F.3d at 777 ("In January 1981, the Seattle RO changed [*Ledford's*] rating to a 100% schedular rating pursuant to VA Circular 21-80-7, which provided that '[a] 100% schedular evaluation will be assigned if unemployability is directly attributable to a service-connected neuropsychiatric condition.'").

102. See *id.* at 778; see also 38 C.F.R. § 3.343(c) (1999) (cautioning that while reducing a rating of 100% service-connected disability based on individual unemployability is allowed, such a determination of employability must be established by clear and convincing evidence).

103. See *Ledford*, 136 F.3d at 782.

104. See *id.* at 779-80 (concluding that although legal reasoning supporting a challenge need not be present in the Notice of Disagreement, it must mention a disagreement with a specific determination; in this case, this requirement was not satisfied with respect to the veteran's claim).

105. See *id.* at 780 ("We agree with the government that, while the doctrine of exhaustion of administrative remedies is not jurisdictional, *Ledford* had to first

2000]

VETERANS BENEFITS APPEALS PROCESS

1295

requirement was “not jurisdictional” but nevertheless required it in that case.¹⁰⁶ The court rejected the veteran’s argument that exhaustion was not required because the Board did not have the power to invalidate the circular he challenged.¹⁰⁷ 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.”¹⁰⁸

The court reasoned that the veteran’s situation was similar to that of the plaintiff in *Aircraft & Diesel Corp. v. Hirsch*.¹⁰⁹ The Federal Circuit quoted the Supreme Court’s reasoning in that case:

[I]n this case the very fact that constitutional issues are put forward constitutes a strong reason for not allowing [a district court suit] to anticipate or take the place of the Tax Court’s final performance of its function. When that has been done, it is possible that nothing will be left of appellant’s claim

The Tax Court may [likely] decide entirely in appellant’s favor For, apart from the questions of constitutionality and of the Tax Court’s power to decide them finally or otherwise, appellant has put forward . . . claims of exemption and noncoverage And if those claims are well founded . . . the Tax Court’s determination of these matters of coverage . . . well might render consideration of the constitutional questions by it unnecessary and this cause moot.¹¹⁰

The Federal Circuit reasoned that the veteran argued that his individual unemployability benefits were improperly terminated under the circular in spite of a certain VA regulation; that the Board is clearly empowered to determine which law applied to the facts presented by the veteran and to apply that law; and that, had the Board found the VA regulation to be applicable, the veteran might have been provided with the remedy he sought, and the need for the Board (and ultimately the Court of Appeals for Veterans Claims and the Federal Circuit) to rule on the merits of his APA and

present his constitutional and APA challenges to the agency before presenting them to the Court of Veteran Appeals.”).

106. *See id.*

107. *See id.* at 780-81 (“Ledford’s assertion that the agency cannot invalidate the circular does not relieve him of the obligation of presenting his constitutional and APA challenge to the agency.”).

108. *Id.* at 780.

109. 331 U.S. 752 (1947) (addressing the appeal of a dismissed suit by a subcontractor for a declaratory judgment that the Renegotiations Acts were unconstitutional).

110. *Ledford*, 136 F.3d at 781 (quoting *Aircraft & Diesel*, 331 U.S. at 772-73) (footnotes and citations omitted).

constitutional challenges might have been obviated.¹¹¹ The court also rejected his argument based on the legislative history of the Veterans' Judicial Review Act, stating that "[t]he legislative history provides no basis for us to conclude that the doctrine of exhaustion of administrative remedies does not apply here."¹¹²

In a case that did not discuss exhaustion, *Carbino v. West*,¹¹³ the Federal Circuit held that the Court of Appeals for Veterans Claims did not err in refusing to consider an argument raised for the first time in a reply brief.¹¹⁴ The claimant had argued in his reply brief before the Court of Appeals for Veterans Claims that certain provisions of an internal agency adjudication procedure manual were "substantive rules" within the meaning of the Administrative Procedure Act, and thus had the "force and effect of law."¹¹⁵ The Federal Circuit reasoned that the Court of Appeals for Veterans Claims' procedural rule was similar to the corresponding rule of the Federal Rules of Appellate Procedure, Rule 28(c).¹¹⁶ The court noted that it had previously stated that under Rule 28(c), a reply brief should "reply to the brief of the appellee" and "is not the appropriate place to raise, for the first time, an issue for appellate review."¹¹⁷

The court reasoned that "[t]here is substantial and well-established precedent in other courts, as well, holding that issues initially raised in a reply brief should not be entertained."¹¹⁸ The court cited the nature of the adversarial process as a reason for this rule:

111. See *id.* at 781-82 (addressing the Board's "empowerment," the court cited 38 C.F.R. § 19.5 (1997): "In the consideration of appeals, the Board is bound by applicable statutes [and] regulations. . . . The Board is not bound by Department manuals, circulars, or similar administrative issues[.]").

112. *Id.* at 782 (conceding that the legislative history does support Ledford's argument that Congress intended the Court of Veterans Appeals to have the power to invalidate challenged regulations, but qualifying this concession with the fact that the legislative history "does not speak to the question whether such a challenge needs to be raised at the agency level in order to preserve it at the Court of Veterans Appeals").

113. 168 F.3d 32 (Fed. Cir. 1999).

114. See *id.* at 34 ("[T]he failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument.").

115. See *infra* note 236 and accompanying text (discussing how claimants sometimes argue that the circular or agency manual in question, by virtue of the Administrative Procedure Act, has the effect of a "substantive rule" with the "force and effect of law," which is what the claimant argued in *Carbino*).

116. See *Carbino*, 168 F.3d at 34; see also FED. R. APP. P. 28(c) (permitting an appellant to file a brief in reply to the appellee's brief).

117. *Carbino*, 168 F.3d at 34 (citing *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565-66 (Fed. Cir. 1997); *Amhil Enters. Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1563 (Fed. Cir. 1996)).

118. *Carbino*, 168 F.3d at 34 (citing *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994); *Frazier v. Bailey*, 957 F.2d 920, 932 n.14 (1st Cir. 1992); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 n.2 (7th Cir. 1989)).

As the Tenth Circuit put it, permitting an appellant to raise new arguments in a reply brief “would be unfair to the court itself, which without the benefit of a response from appellee to an appellant’s late-blooming argument, would run the risk ‘of an improvident or ill-advised opinion, given [the court’s] dependence . . . on the adversarial process for sharpening the issues for decision.’”¹¹⁹

In *Stuckey v. West*,¹²⁰ the Court of Appeals for Veterans Claims considered whether a claimant could raise constitutional and APA challenges for the first time on appeal. The APA argument was the same as the one raised in *Carbino*, that is, that certain provisions of an internal agency adjudication procedure manual were “substantive rules” within the meaning of the Administrative Procedure Act, and thus had the “force and effect of law.”¹²¹ The constitutional argument, like the constitutional arguments in *Ledford* and *Maggitt*,¹²² was that the agency’s actions violated the Due Process Clause.¹²³ The court invited participation of amici, and most of the major veterans service organizations submitted amicus briefs.¹²⁴ The Court of Appeals for Veterans Claims considered the Federal Circuit’s *Ledford* opinion, and held that it had jurisdiction “to review all challenges and arguments relating to a particular claim, assuming all other jurisdictional requirements were met.”¹²⁵ The court indicated, however, that it “generally will decline to exercise jurisdiction based upon the doctrine of administrative exhaustion when the appellant has failed to present those challenges and arguments, either expressly

119. *Carbino*, 168 F.3d at 35 (quoting *Headrick v. Rockwell Int’l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994)). The court therefore concluded 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.” *Id.*

120. 13 Vet. App. 163 (1999).

121. *See id.* at 175; *see also Carbino*, 168 F.3d at 33 (noting *Carbino*’s claim that the internal agency manual provisions did constitute binding substantive rules).

122. *See infra* notes 133-67 and accompanying text (discussing the cases of *Maggitt* and *Ledford*).

123. *See Stuckey*, 13 Vet. App. at 176. The claimant argued, *inter alia*, that the VA failed to notify him that it needed doctors’ statements directly addressing the issues in his case, and that it would not accept hearsay. *See id.*

124. *See id.* at 165 (noting that the Paralyzed Veterans of America, the National Organization of Veterans’ Advocates, the National Gulf War Resources Center, the Disabled American Veterans, the Veterans of Foreign Wars, The American Legion, and the National Veterans Legal Services Program participated as *amici curiae*). Four of the *amici curiae*, The American Legion, Disabled American Veterans, Paralyzed Veterans of America, and Veterans of Foreign Wars represented about two-thirds of claimants before the Board in 1999. *See CHAIRMAN’S REPORT, supra* note 25, at 32 (noting that the American Legion represented 22.5%, Disabled American Veterans represented 33.6%, Paralyzed Veterans of America represented 2.2%, and Veterans of Foreign Wars represented 8.6% of claimants).

125. *Stuckey*, 13 Vet. App. at 174.

or implicitly, to the Board.”¹²⁶ The court noted that there were exceptions to this “general rule,” such as where the Board committed a procedural error after the appellant filed his Notice of Disagreement and Substantive Appeal, and “where the record on appeal clearly and unmistakably present[ed] an issue to the Board.”¹²⁷

The court recognized that “the adjudicative system established by Congress and administered by the Secretary is meant to be strongly pro-claimant” but noted that “this pro-claimant environment does not leave us free to ignore statutes and implementing regulations imposing duties on [the] claimant in defining their claims.”¹²⁸ The court stated that those provisions must be interpreted in a generous manner to determine whether an issue was implied but, “we cannot pretend that they do not exist nor can we, in the guise of ‘interpretation,’ repeal them.”¹²⁹ The court observed that Congress and the Secretary have provided for accredited representatives “to assist claimants to navigate the claims process.”¹³⁰ These representatives are usually not lawyers “but they may be far more attuned to the procedural esoterica of the VA claims system than most lawyers.”¹³¹ The court noted that “the appellant was represented, quite actively, by such an accredited representative.”¹³²

In *Maggitt v. West*,¹³³ the Federal Circuit considered whether the Court of Appeals for Veterans Claims erred in holding that it lacked the authority to hear the claimant’s constitutional and Administrative Procedure Act challenges because he had not presented those issues earlier in the claims process.¹³⁴ Those arguments were similar to the arguments made in *Ledford*, i.e., that the agency did not follow APA notice and comment procedures with respect to two regulations that were repealed, and that the Regional Office’s failure to cite applicable case law violated his due process rights because it was inconsistent with a VA statute.¹³⁵

The court stated that “to the extent the Veterans Court decision in this case implies that the exhaustion doctrine is jurisdictional in

126. *Id.*

127. *Id.* (citing *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991)).

128. *Id.*

129. *Id.* at 174-75.

130. *Id.* at 175.

131. *Id.*

132. *Id.*

133. 202 F.3d 1370, 1377 (Fed. Cir. 2000).

134. See *Maggitt*, 202 F.3d at 1377 (turning to the question of exhaustion of remedies and noting that the “Veterans Court” held that it lacked the authority to hear the claimant’s APA challenge because he had not presented it earlier).

135. Compare *id.* at 1373, with *Ledford*, 136 F.3d at 778.

nature, it is incorrect.”¹³⁶ 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.”¹³⁷

The court reasoned, relying on *McCarthy v. Madigan*,¹³⁸ that when Congress has not clearly mandated the exhaustion of particular administrative remedies, the exhaustion doctrine is not jurisdictional, but is a matter for the exercise of “sound judicial discretion.”¹³⁹ “The exercise of that discretion, requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.”¹⁴⁰ The Federal Circuit further noted that the Court of Appeals for Veterans Claims is

uniquely positioned to balance and decide the considerations regarding exhaustion in a particular case, and that, over time, it will develop a body of law in its unique setting that will permit comparable certainty in outcome that has occurred in other fields of law . . . 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.¹⁴¹

The Federal Circuit’s opinion in *Maggitt* appears inconsistent with its *Ledford* opinion in several areas. 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* said that the claimant was required to exhaust.¹⁴² In *Maggitt*, where the claimant made arguments for the first time on appeal that were similar to the ones made in *Ledford*,¹⁴³ 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”¹⁴⁴

Second, there are inconsistencies in the case law authority cited, even though the arguments raised for the first time on appeal were similar. In *Ledford*, the court primarily relied on *Aircraft & Diesel Corp. v. Hirsh*,¹⁴⁵ a 1947 Supreme Court case.¹⁴⁶ In *Maggitt*, the court

136. *Maggitt*, 202 F.3d at 1377.

137. *Id.* at 1378.

138. 503 U.S. 140, 144 (1992).

139. *Maggitt*, 202 F.3d at 1377 (quoting *McCarthy*, 503 U.S. at 144).

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

141. *Id.* at 1378.

142. *See Ledford*, 136 F.3d at 780-82 (concluding that there is no legal basis for suspending application of the doctrine of exhaustion of remedies in veterans benefits cases).

143. *See supra* note 135 and accompanying text.

144. *Maggitt*, 202 F.3d at 1377.

145. 331 U.S. 752 (1947).

146. *See Ledford*, 136 F.3d at 780-81 (relying on *Aircraft & Diesel* to find that a lack

primarily relied on *McCarthy v. Madigan*,¹⁴⁷ a 1992 Supreme Court case.¹⁴⁸ This is not an instance of a Supreme Court opinion being issued after the Federal Circuit's first opinion, thus, changing the way the court viewed the issue; every Supreme Court case that the *Maggitt* opinion cited in 2000 had been decided at least five years prior to the *Ledford* opinion in 1998.¹⁴⁹

Furthermore, neither case cited *Darby v. Cisneros*,¹⁵⁰ a 1993 Supreme Court case that did much to change the law of exhaustion under the APA.¹⁵¹ Professor Davis characterized *Darby* as holding that "a petitioner for review of an otherwise final agency action is not required to exhaust an available remedy that consists of a 'reconsideration' or 'an appeal to superior agency authority' unless it is explicitly required by statute or rule."¹⁵² Some federal appellate courts have stated the holding similarly.¹⁵³ Because the administrative appeals process in veterans benefits cases is required by statute,¹⁵⁴ the *Darby* holding appears at first glance to be inapplicable to veterans benefits cases. Some courts, however, read the holding of *Darby* more broadly.¹⁵⁵ Both the Court of Appeals for the Federal Circuit and the

of agency power to provide a remedy does not eliminate the exhaustion requirement).

147. 503 U.S. 140 (1992).

148. See *Maggitt*, 202 F.3d at 1377 (citing *McCarthy* for the proposition that when Congress has not specifically required exhaustion, the doctrine is left for judicial discretion).

149. See *id.* at 1378 (citing *Reiter v. Cooper*, 502 U.S. 258, 261 (1993); *McCarthy v. Madigan*, 503 U.S. 140 (1992); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496 (1982); *McGee v. United States*, 402 U.S. 479 (1971); *McKart v. United States*, 395 U.S. 185 (1969)).

150. 509 U.S. 137 (1993).

151. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 152 (1998) (discussing "*Darby v. Cisneros* and the Death of Exhaustion Doctrine in APA Cases"); Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 560 (1997) (referring to the "*Darby* gutting" of the exhaustion requirement).

152. See 2 DAVIS & PIERCE (2000 Supp.), *supra* note 5, § 15.3, at 472.

153. See *DSE, Inc. v. United States*, 169 F.3d 21, 26 (D.C. Cir. 1999) (citing *Darby* and noting that, under the APA, "a party can seek judicial review from a final agency action without pursuing an intra-agency appeal unless required to do so by statute or by regulation"); *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996) ("*Darby* held that a person aggrieved by an agency decision is not required to exhaust nonmandatory administrative remedies, such as filing an optional appeal to a superior agency authority, before seeking judicial review.>").

154. See 38 U.S.C. §§ 7105, 7106 (1994) (outlining the process for filing and reviewing appeals from Regional Office decisions).

155. See *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 36 n.15 (1st Cir. 1998) ("[I]f a claim arises under the APA, courts may not exercise their judicial discretion to require exhaustion of administrative remedies if the statute and agency rules do not otherwise require exhaustion."); *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998) ("[T]he Supreme Court has instructed that if Congress has not enacted an explicit exhaustion requirement, courts may not exercise their judicial discretion to impose one."); *Ciba-Geigy Corp. v. EPA*, 46 F.3d 1208, 1210 n.2

Court of Appeals for Veterans Claims have cited *Darby* several times, but neither court has cited it in discussing an exhaustion issue in a veterans benefits case.¹⁵⁶

Third, the two decisions are inconsistent in their reading of the legislative intent and purpose underlying the Veterans' Judicial Review Act.¹⁵⁷ In *Ledford*, 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."¹⁵⁸ In *Maggitt*, the court questioned whether "an exhaustion requirement is consistent with the statutory purposes underlying the veterans benefits laws"¹⁵⁹

Fourth, the decisions are inconsistent in their statement of the exceptions to the exhaustion doctrine. In *Ledford*, the court rejected the claimant's argument that exhaustion was not required because the Board did not have the power to invalidate the circular he challenged, noting 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."¹⁶⁰ In *Maggitt*, however, the court indicated that if there is "some doubt as to whether the agency was empowered to grant effective relief,"¹⁶¹ the doctrine "should not be invoked."¹⁶²

Furthermore, in *Maggitt*, the Federal Circuit did not mention its *Carbino* decision,¹⁶³ decided after *Ledford*. In *Carbino*, the Federal Circuit cited the adversarial process as a reason for the Court of Appeals for Veterans Claims not to reach an issue that was not timely presented.¹⁶⁴ In *Maggitt*, the court cited the "nonadversarial, *ex parte*

(D.C. Cir. 1995) (citing *Darby* for the proposition that "courts cannot require exhaustion of administrative remedies where, as here, it is not expressly required by statute or agency rule").

156. See, e.g., *Smith v. Brown*, 35 F.3d 1516, 1524 (Fed. Cir. 1994) (citing *Darby* for the proposition that "extrinsic evidence of intent (i.e. legislative history materials) is properly considered only if the intrinsic evidence yields no clear answer"); *Brooks v. Brown*, 5 Vet. App. 484, 486 (1993) (quoting *Darby* as stating that "[r]ecourse to the legislative history . . . is unnecessary in light of the plain meaning of the statutory text").

157. Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended throughout scattered sections of 38 U.S.C.).

158. *Ledford*, 136 F.3d at 778.

159. *Maggitt*, 202 F.3d at 1378.

160. *Ledford*, 136 F.3d at 780.

161. *Maggitt*, 202 F.3d at 1377 (quoting *McCarthy v. Madigan*, 508 U.S. 137, 147 (1992), which quotes *Gibson v. Berryhill*, 419 U.S. 564, 575 n.14 (1973)).

162. *Maggitt*, 202 F.3d at 1377.

163. See *supra* notes 133-41 and accompanying text (discussing the analysis of the Federal Circuit in *Maggitt*).

164. See *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999); cf. 2 DAVIS & PIERCE, *supra* note 5, § 15.1, at 305 (describing exhaustion of administrative remedies as an

system that supplies veterans benefits” as a basis for its decision.¹⁶⁵ Additionally, in *Carbino*, the court relied on cases from other federal appellate courts as a basis for deciding the issue in a veterans benefits case, implying that the veterans benefits appeals process is similar to other federal appeals.¹⁶⁶ In *Maggitt*, however, the court urged the Court of Appeals for Veterans Claims to “develop a body of law in its unique setting.”¹⁶⁷

The Supreme Court recently held that social security benefits claimants who had otherwise exhausted their administrative remedies did not have to exhaust issues in a “request for review” in order to preserve judicial review of those issues.¹⁶⁸ In social security benefits cases, a “request for review” enables a claimant to obtain judicial review.¹⁶⁹ The author of the Columbia Law Review article on issue exhaustion in social security cases discussed later in this Article¹⁷⁰ was on the briefs for the claimant,¹⁷¹ and the Court cited the article in its opinion.¹⁷²

It is unclear how, or even if, *Sims* applies to veterans benefits appeals. Much of the Court’s reasoning was specific to the social security benefits appeals system,¹⁷³ but there was some language that was broader. Veterans benefits appeals were mentioned at oral argument,¹⁷⁴ but not in the opinion. Because of the differences between the social security benefits appeals process and the veterans benefits appeals process, that holding may not be applicable to veterans benefits appeals.

issue of timing).

165. *Maggitt*, 202 F.3d at 1377.

166. See *Carbino*, 168 F.3d at 34 (noting that other courts have established that issues initially raised in a reply briefs should not be considered) (citing *Headrick v. Rockwell Int’l Corp.*, 24 F.3d 1272, 1227-78 (10th Cir. 1994), *Frazier v. Bailey*, 957 F.2d 920, 932 (1st Cir. 1992) and *Reynolds v. Eastdyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989)).

167. *Maggitt*, 202 F.3d at 1378.

168. *Sims v. Apfel*, 120 S. Ct. 2080 (2000).

169. See *id.* at 2082 (“Petitioner then requested that the Social Security Appeals Council review her claims. A claimant may request such review by completing a one-page form provided by the Social Security Administration (SSA)—Form HA 520—or ‘by any other writing specifically requesting review.’ 20 C.F.R. § 422.205(a) (1999).”).

170. See *infra* notes 195-99.

171. See 2000 WL 115893 (Brief for Petitioner), 2000 WL 297722 (Reply Brief for Petitioner).

174. See *Sims*, 120 S. Ct. at 2085, 2086.

173. See William Funk, *Supreme Court News: Issue Exhaustion Splits Court*, 26 ADMIN. & REG. L. NEWS 7 (Fall 2000) (noting that “Outside the Social Security context it is unlikely that *Apfel* has any force. Not only do the four dissenters indicate the view that issue exhaustion is the general rule, subject to only the rarest of exceptions, but Justice O’Connor clearly viewed the situation in *Apfel* unique”).

174. The author attended the argument.

First, the Court conceded that an agency may promulgate regulations in order to require issue exhaustion, but the Social Security Administration had not done so.¹⁷⁵ VA statutes and regulations, however, indicate that in a Substantive Appeal, the claimants “should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case.”¹⁷⁶

Second, the Court emphasized how short the social security appeal form was—it provided only three lines for the request for review and the notice accompanying the form indicated that it would take only ten minutes to complete the form.¹⁷⁷ The Court noted that the form “strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review.”¹⁷⁸ The VA appeal form, VA Form 9, the “Appeal to the Board of Veterans’ Appeals” is not as limited as the social security appeal form. The Form 9 provides about a third of a page for the box marked “I HEREBY PETITION THE BOARD OF VETERANS’ APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed is erroneous. Read carefully paragraphs 1 through 5 of the ‘Instructions’.)”¹⁷⁹ It also indicates “Continue on the back, or attach sheets of paper, if you need more space.”¹⁸⁰ The instructions indicate that

The benefit sought on appeal must be clearly identified. In preparing your appellate argument in the space provided . . . care should be taken to set out errors of fact or law believed to have been made in the determination—that is, the reasons for disagreeing with the determination being appealed. Appeals which fail to allege specific error of fact or law in the determination may be dismissed by the [Board].¹⁸¹

Further, the form indicates that it would take one hour to fill it out.¹⁸²

Third, the Court noted that a large portion of social security claimants “either have no representation at all or are represented by non-attorneys . . .”¹⁸³ Before the Board of Veterans’ Appeals, however,

175. *See Sims*, 120 S. Ct. at 2084.

176. 38 U.S.C. § 7105(d)(3) (1994); *see Stuckey*, 13 Vet. App. at 174 (citing section 7105(d)(3) in support of requiring issue exhaustion); *see also* 38 C.F.R. § 20.202 (1999) (implementing regulation).

177. *Sims*, 120 S. Ct. at 2086.

178. *Id.*

179. VA Form 9, OMB No. 2900-0085; *see* <http://www.va.gov/forms/data/9.pdf>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Sims*, 120 S. Ct. at 2086.

most claimants are represented by attorneys or representatives from veterans service organizations.¹⁸⁴ The Court of Appeals for Veterans Claims has noted that these representatives “are not generally lawyers but they may be far more attuned to the procedural esoterica of the VA claims system than most lawyers.”¹⁸⁵

Fourth, the issue that the Supreme Court considered in *Sims* was narrow—whether a claimant was required to exhaust an issue “by presenting it to the Appeals Council in his request for review.”¹⁸⁶ The Court explicitly stated that “whether a claimant must exhaust issues before the ALJ is not before us.”¹⁸⁷ In other words, the question before the Court was whether the claimant was required to address a particular issue explicitly in the agency’s official appeal form in order to preserve judicial review of the issue. An affirmative answer would give a claimant a narrowly limited opportunity to raise an issue (which was further limited by the short form provided for an appeal).

In veterans benefits cases, imposing an issue exhaustion requirement would not require that a claimant raise the issue in the agency’s official appeal form, the VA Form 9. Rather, the question would be whether the claimant raised the issue in any manner prior to the Board’s decision.¹⁸⁸ A claimant could raise the issue in the Notice of Disagreement, Substantive Appeal, in a letter to the Board or Regional Office, or in a hearing before the Board or the Regional Office. Thus, a VA claimant’s opportunity to raise an issue would not be as narrowly limited—either in terms of the time for raising the issue or the space provided on the official appeal form.

The Federal Circuit has addressed whether the *Sims* holding applies to issues raised for the first time in an appeal from a decision of the Court of Appeals for Veterans Claims, reaching conflicting conclusions.¹⁸⁹ As of February 2001, the Court of Appeals for

184. See *supra* notes 32-34 and accompanying text.

185. *Stuckey*, 13 Vet. App. at 175.

186. *Sims*, 120 S. Ct. at 2083.

187. *Id.* at 2083-84.

188. See *Douglas v. Derwinski*, 2 Vet. App. 435, 439 (1992) (“Nowhere does the regulation [38 C.F.R. § 20.202] state that only the issues raised in the Form 1-9 appeal must be considered . . .”).

189. Compare *Forshey v. West*, 226 F.3d 1299, 1303 (Fed. Cir. 2000) (applying *Sims*, and reaching issue not raised before CAVC), with *Belcher v. West*, 214 F.3d 1335, 1337 (Fed. Cir. 2000) (distinguishing *Sims* on the ground that a statute required issue exhaustion, and *Sims* involved review of an agency decision by a court rather than review of another court’s judgment, and holding that it would not consider an issue on appeal unless the CAVC addressed it or the issue was raised by a party before the CAVC), and *Forshey*, 226 F.3d at 1306 (Schall, J., dissenting) (“*Belcher* determined that these conditions [for raising an issue in a Federal Circuit appeal] were not in consistent with *Sims v. Apfel* . . . because that decision addressed a situation where there was no statute or regulation on point, whereas our jurisdiction over appeals

Veterans Claims had not addressed whether the *Sims* holding applies to issues raised for the first time in an appeal from a decision of the Board.

There appears to be a conflict in the Federal Circuit's case law between treating veterans benefits cases like other federal appellate cases (*Ledford* and *Carbino*) and treating them as a unique area of law (*Maggitt*). Given the conflicting goals of the veterans benefits appeals process, it is not surprising to see the conflict reflected in case law. The question is whether there is an approach that can better accommodate and reconcile these competing and sometimes conflicting goals—an approach that can bring concordance to these discordant cases.

The approach advocated in this Article, that the Court of Appeals for Veterans Claims should consider only those issues that the Board did decide or should have decided, is consistent with the Federal Circuit's holding that it would only consider issues that the CAVC did decide or that the parties raised.¹⁹⁰

V. OPTIONS FOR RESOLVING THE CONFLICT

There are three basic ways to resolve this conflict: requiring issue exhaustion for all issues; not requiring issue exhaustion for any issue; and requiring issue exhaustion for some issues, but not others.

A. *Requiring Issue Exhaustion for All Issues*

A court could require that a claimant exhaust with respect to all issues. In the context of veterans benefits appeals, this approach seems overly demanding. In fact, the Federal Circuit rejected this approach in *Maggitt*, noting that,

[n]othing in the statutory scheme providing benefits for veterans mandates a jurisdictional requirement of exhaustion of remedies which would require the Veterans Court to disregard every legal argument not previously made before the Board of Veterans' Appeals. In fact, such an absolute

from the CAVC is governed by 38 U.S.C. § 7292(a)."). See generally *Howard v. Gober*, 220 F.3d 1341, 1345 (Fed. Cir. 2000) (relying on *Belcher* in declining to address an issue where the claimant "did not raise that interpretation to the Court of Appeals for Veterans Claims, and that court did not otherwise raise it sua sponte in its decision"); *Nolen v. Gober*, 222 F.3d 1356, 1359 (Fed. Cir. 2000) (distinguishing *Belcher* on the ground that the CAVC raised the issue *sua sponte*).

190. See *Belcher*, 214 F.3d at 1337 (court would not consider a legal issue or argument on appeal "absent at least one of two conditions: (1) the Court of Appeals for Veterans Claims addressed the issue or argument, or (2) the issue or argument was raised by a party to the Court of Appeals for Veterans Claims").

rule would be inconsistent with the nonadversarial *ex parte* system that supplies veterans benefits.¹⁹¹

B. Not Requiring Issue Exhaustion for Any Issue

A court could also agree to hear any argument that was not raised below. This approach would have definite advantages for claimants. They would not be penalized for not having legal counsel before the Board of Veterans' Appeals.¹⁹²

However, this approach does not take seriously the fact that the Court of Appeals for Veterans Claims is an appellate court. As an appellate court, its primary function is to correct the errors of the lower tribunal, i.e., the Board.¹⁹³ An approach which would allow claimants to raise any issue for the first time on appeal would make the "of Appeals" part of the court's name almost meaningless.¹⁹⁴

This is the approach advocated by the leading article that addresses the issue in the context of Social Security Administration benefits appeals.¹⁹⁵ The author argues for "a blanket exemption from issue exhaustion" in all social security benefits cases.¹⁹⁶ When applied to

191. *Maggitt*, 202 F.3d at 1377.

192. See CHAIRMAN'S REPORT, *supra* note 25, at 32 (approximately five percent of claimants before the Board were represented by attorneys).

193. See *supra* notes 88-90 and accompanying text (noting that correction of error is the primary function of an appellate court and that "error" must be understood in light of what the appellate court may legitimately expect from the lower tribunal).

194. In *Maggitt*, the Federal Circuit referred to the Court of Appeals for Veterans Claims as the "Veterans Court." See *Maggitt*, 202 F.3d at 1372 ("Adway Maggitt, Jr., appeals from the decision of the United States Court of Appeals for Veterans Claims (Veterans Court) . . ."). Referring to that court as the "Veterans Court" seems curious for a couple of reasons. First, it reverses the order of the words that appear in the court's official title—placing the word "Court" after "Veterans" instead of before. Second, it omits any reference to the fact that that court is an appellate court.

The *Maggitt* opinion marked the second time in several years that the Federal Circuit used the term "Veterans Court" in a published opinion. In the six years prior to the *Maggitt* decision, the Federal Circuit had used the term "Veterans Court" only once in a published opinion, and that was quoting the case that had last used the term (three years earlier). See *Degmetich v. Brown*, 104 F.3d 1328, 1331 (Fed. Cir. 1997) ("[O]ur review of Veterans' Court judgments entails the review of underlying agency action.") (quoting *Smith v. Brown*, 35 F.3d 1516, 1517 (Fed. Cir. 1994)). During those six years, the Federal Circuit used "Court of Veterans Appeals" or "Court of Appeals for Veterans Claims" or the acronym CAVC much more frequently—terms that did not omit a reference to it being an appellate court.

It is interesting to note that in the two cases in which the Federal Circuit treated that court as an appellate court, *Ledford* and *Carbino*, the Federal Circuit referred to it as the "Court of Veterans Appeals." See *Carbino*, 168 F.3d at 33; *Ledford*, 136 F.3d at 778. But in *Maggitt*, which seems to imply that the usual rules governing appellate courts do not apply to that court, the Federal Circuit merely referred to it as the "Veterans Court." See *Maggitt*, 202 F.3d at 1372.

195. See *Dubin*, *supra* note 6, at 1296 (exploring the creation of a "issue exhaustion" rule in agencies, like the VA, that provide benefits).

196. See *id.* at 1340 (arguing that within the context of the Social Security

veterans benefits appeals, this approach and the supporting arguments are problematic for a number of reasons.

The article offers two main arguments supporting its claim that issue exhaustion is not appropriate for social security cases. First, the article argues that the purposes of the doctrine of exhaustion are not served by applying it to social security cases.¹⁹⁷ In the context of veterans benefits appeals, however, this argument does not take into account the error-correcting function of an appellate court,¹⁹⁸ and does not treat the reviewing court like a court “of appeals.”

Second, the article argues that applying issue exhaustion violates procedural due process and discusses the Supreme Court’s *Mathews v. Eldridge*¹⁹⁹ opinion. In *Eldridge*, the Court considered whether the Due Process Clause required that, prior to the termination of social security disability benefit payments, the recipient should be afforded an opportunity for an evidentiary hearing.²⁰⁰ The Court reasoned that “resolution of the issue whether the administrative procedures provided here are constitutionally sufficient require[d] analysis of the governmental and private interests that [were] affected.”²⁰¹

The Court held that a procedural due process analysis required consideration of three factors: the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional or substitute procedural safeguards; and the government’s interest, including the fiscal or administrative burdens that additional procedural requirements would impose.²⁰²

Applying the *Eldridge* analysis to veterans benefits appeals, however, is problematic for a number of reasons. In order for a due process analysis to apply, there would have to be a property interest.²⁰³ The Supreme Court has held that a person receiving federal disability

Administration proceedings, the administration’s deceptive conduct and absence of justification supporting issue exhaustion support a “blanket exemption from issue exhaustion”).

197. See *id.* at 1323-31 (arguing that the purposes underlying regulatory agency issue exhaustion are not served and in some cases are substantially undermined in an inquisitorial benefactor agency setting).

198. See *supra* notes 88-90 and accompanying text (noting that correction of error is the primary function of an appellate court and that “error” must be understood in light of what the appellate court may legitimately expect from the lower tribunal).

199. 424 U.S. 319, 349 (1976) (determining that an evidentiary hearing is not required by due process prior to termination of disability benefits).

200. *Id.* at 323.

201. *Id.* at 334.

202. *Id.* at 335.

203. See *id.* at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”).

benefits has a property interest in continuing to receive the benefits.²⁰⁴ It is unclear, however, whether applicants for veterans benefits have a property interest protected by the Due Process Clause. The Supreme Court has stated that “[w]e have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.”²⁰⁵ Further, the Court recently held that applicants for disability benefits who did not meet the criteria for those benefits did not have a “property interest” for Due Process Clause purposes.²⁰⁶ The Court, however, did not address the issue of whether there was a property interest in the claims for payment.²⁰⁷ Even if there is a property interest for veterans benefits applicants, applying the *Mathews* analysis in this context is problematic.

There is also the issue of the timing of a due process challenge. A claimant may not generally bring a constitutional challenge until after there has been a constitutional violation.²⁰⁸ The alleged constitutional violation—application of the issue exhaustion doctrine—would occur, at the earliest, when the Court of Appeals for Veterans Claims made its decision.²⁰⁹ Thus, the earliest a claimant could bring such a challenge would be after the court made its decision—by moving for reconsideration of the decision, for a panel decision, for full court review, or by appealing to the Federal Circuit. If the claimant appealed to the Federal Circuit, then the Federal Circuit would have no decision from the Court of Appeals for

204. See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that an individual receiving federal welfare assistance has a statutorily-created property interest in the continued receipt of those benefits that affords him a right to an evidentiary hearing before those property rights are terminated).

205. *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (citing *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305 n.8 (1985)), *quoted in* *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998); see *Owings v. Brown*, 8 Vet. App. 17, 23 (1995) (noting that the Supreme Court has not yet ruled on the extent to which applicants for, rather than recipients of, government benefits have property rights in their expectations and observing that the lower federal courts are split).

206. See *American Mfgs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999) (holding that under Pennsylvania law an employee is not entitled to payment of medical benefits that are not “reasonable and necessary” under an employer’s health care plan).

207. See *id.* at 61 n.13 (noting that the Court did not address the issue of whether there is a property interest in claims for payment).

208. See 2 DAVIS & PIERCE, *supra* note 5, § 15.12 (indicating that the “case or controversy” limitation on federal jurisdiction in Article III of the Constitution requires that an issue be ripe for consideration).

209. It would not be until the Court of Appeals for Veterans Claims issued a decision that a claimant would know that the court required exhaustion in that particular case. See 38 U.S.C. § 7267 (1994).

Veterans Claims on the issue of whether the application of the issue exhaustion doctrine violated the Due Process Clause.

C. Requiring Issue Exhaustion for Some Issues, But Not Others

Finally, a court could choose to hear some arguments that were not raised below, but not others. There are several methods to determine which arguments a court should hear.

1. Case-by-case balancing versus a general rule

In choosing to consider some arguments, but not others, there are two basic approaches a court could take: case-by-case balancing and adopting a general rule. This choice is not new, or unique to this area of the law. Twenty-four centuries ago, Aristotle recognized the choice between equity, that is, “special enactments for particular cases,” and law, which is a “universal or general statement.”²¹⁰

A case-by-case “balancing” test approach has the advantage of being able to take into account the facts of the individual case. After all, “a general statement cannot apply rightly to all cases.”²¹¹ In such cases, “[w]hen the law has spoken in general terms, and there arises a case of exception to the general rule,” which the general law omitted, a court may wish “to set right the omission by ruling it as the lawgiver himself would rule were he there present, and would have provided by law had he foreseen the case would arise.”²¹²

This approach, however, has significant disadvantages. The balancing approach has the disadvantage of producing inconsistent results.²¹³ This inconsistency results in case law that leads even the most knowledgeable commentators to make such unhelpful generalizations as “[e]xhaustion of administrative remedies is sometimes required and sometimes not.”²¹⁴ Because the case law is inconsistent, it is also unpredictable, providing little guidance to the

210. ARISTOTLE, NICOMACHEAN ETHICS 95 (William Kaufman ed. & D.P. Chase trans., Dover Publ'ns 1998); see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (arguing that there are “two opposed modes” for dealing with substantive legal problems, the first favors the use of “clearly defined, highly administrable, general rules” and the second “supports the use of equitable standards producing ad hoc decisions with relatively little precedential value”).

211. ARISTOTLE, *supra* note 210, at 95.

212. *Id.*

213. See Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons From Environmental Cases*, 53 GEO. WASH. L. REV. 1, 26 (1984/1985) (arguing that the exceptions to the exhaustion requirement are vague and that the trend to balance various considerations leads to inconsistency among the holdings and treatment of issues in similar cases).

214. KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES § 26:1, at 434 (1989).

agency, claimants, or counsel as to which arguments will be considered for the first time on appeal and which will not.²¹⁵ Further, the inconsistent case law makes it more difficult for courts to decide those cases.²¹⁶ Finally, this inconsistency results in more litigation over whether exhaustion is required, wasting the agency's,²¹⁷ claimants', and the courts' resources in the process.²¹⁸

This inconsistency and unpredictability is due to the fact that a balancing approach provides no principled basis for distinguishing arguments that a court will hear from ones that it will not. Professor Davis has suggested that perhaps all judicial generalization about exhaustion should be qualified by words such as "except when the reviewing court in its discretion otherwise decides."²¹⁹ Because courts "exercise discretion in many cases, the courts have not developed a useful overall principle."²²⁰ Professor Davis has also noted that the doctrine of exhaustion was "about as unprincipled as any subject on which judicial opinions are written can be."²²¹

A second option is for a court to adopt a general rule regarding issue exhaustion. That is, it could consider certain types of arguments, even if raised for the first time on appeal, but not other types of arguments. This would have the advantages of predictability and providing a principled basis for distinguishing cases.

This approach would be an attempt for a court to do what Professor Davis suggested in an earlier version of his treatise—that is, "construct a rational body of precedents which could be logically applied to any problem not yet decided."²²² Professor Davis recognized that:

215. See Gelpe, *supra* note 213, at 27 (arguing that because the exhaustion theory is so vague, parties cannot predict with any accuracy whether or not a court will require exhaustion before going to court); Richard Orman, Comment, *Rafeedie v. INS: Exhaustion of Administrative Remedies and the Exclusion of Permanent Resident Aliens*, 4 GEO. IMMIGR. L.J. 301, 302 (1990) (noting that the law of exhaustion is neither a reliable nor predictable indicator for attorneys because of its inconsistent application by judges).

216. See Gelpe, *supra* note 213, at 27 (noting that a court's decision-making process is hampered by the exhaustion exceptions that are "difficult to apply, or that must be weighed and balanced").

217. See *id.* at 28 (noting that a bright line rule on exhaustion would obviate the need for costly litigation).

218. See *id.* at 27 (noting that the uncertainty about the laws of exhaustion that pervades the judicial system increases litigation).

219. See DAVIS, *supra* note 214, § 26:1, at 434.

220. *Id.*

221. KENNETH C. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 20:07, at 466 (1976).

222. 4 Kenneth C. Davis, *Administrative Law Treatise* § 26:1, at 415 (2d ed. 1983).

[t]he overwhelming fact about the law of exhaustion is that it is not of that character; instead, it is generally near the opposite end of the scale Each decision tends to be ad hoc No judge at any level has undertaken to work out a rational overall system. No judicial opinion has attempted a comprehensive treatment of the exhaustion problem.²²³

2. *Types of arguments on appeal: suggestions for a taxonomy*

If a court is to adopt an issue exhaustion rule based on types of arguments, what types of arguments should be included and what types should be excluded from the issue exhaustion requirement? The number of specific legal arguments that may be made on appeal is probably infinite.²²⁴ Montaigne wrote over four centuries ago that law is “the mother of altercation and division.”²²⁵ Legislators may pass many laws but “[w]hat have our legislators gained by culling out a hundred thousand particular cases, and applying to these a hundred thousand laws? This number holds no manner of proportion with the infinite diversity of human actions.”²²⁶ The number of laws do not curb the authority of judges, because “there is as much liberty and latitude in the interpretation of law[s], as in their form.”²²⁷ Lawyers do not simplify matters, but instead “they put us into a way of extending and diversifying difficulties, and lengthen and disperse them. In sowing and retailing questions, they make the world fructify and increase in uncertainties and disputes”²²⁸ In addition, legal commentators, instead of bringing clarity to a subject, “open the matter, and spill it in pouring out: of one subject [they] make a thousand, and in multiplying and subdividing them, fall again into the infinity of atoms of Epicurus.”²²⁹

The universe of possible appellate arguments, however, may be broken down into manageable categories.²³⁰ Arguments on appeal can be distinguished based on the form or structure of the argument, the legal authority relied on, the substance of the rule (what does it require whom to do?), and whether the argument relies on the

223. *Id.*

224. *See* Hillery v. Rushen, 720 F.2d 1132, 1137 (9th Cir. 1983).

225. MICHEL EYQUEM DE MONTAIGNE, *Of Experience*, in THE ESSAYS (1580), reprinted in 25 GREAT BOOKS OF THE WESTERN WORLD 517 (W. Carew Hazlitt ed. & Charles Cotton trans., 1952).

226. *Id.* at 516.

227. *Id.*

228. *Id.* at 517.

229. *Id.*

230. *Cf.* Kennedy, *supra* note 210, at 1713 (asserting that “the arguments lawyers use are relatively few in number and highly stereotyped, although they are applied in an infinite diversity of factual situations”).

settled “rules of the game” or seeks to change those rules.

a. The form or structure of the argument on appeal

Legal rules, whether contained in a constitution, statute, or regulation, generally take one of three forms or structures. First, legal rules define terms.²³¹ These rules take the form of a tautology or a definition. Second, legal rules create conditional statements. In other words, such rules take the form of “If *X*, then *Y*.” That is, if certain criteria are met, or if a certain action is taken, then there are certain consequences.²³² Third, legal rules create a relationship between a certain actor (or actors) and a certain action (or actions). In other words, such rules take the form of “*A (an actor)* may or may not/shall or shall not do *X (an action)*.”²³³

A particular statute or regulation may involve a combination of two or more of these forms. But almost all statutes or regulations, to the extent that they constitute rules, can be reduced to these three constituent parts.

Arguments *about* legal rules, especially in an appeal, are a bit more complex, but not much more so (at least in form). Arguments raised on appeal will involve reliance (express or implied) on some sort of legal authority. In other words, arguments on appeal (other than purely factual issues or appellate-court-specific ones such as appellate jurisdiction and scope and standard of review) will take either the form of “The lower tribunal failed to apply *X*” or “The lower tribunal erred in applying *X*” where “*X*” is some sort of legal authority—a constitutional provision, a statute, a regulation, or case law. That is, the argument about the legal rule will take the form of either an error of omission or error of commission by the lower tribunal, and the legal rule or rules contained in the legal authority that the appellate argument relies on will take one of the three forms described above.

231. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *54 (noting that “every law may be said to consist of several parts” and that one of those parts is “declaratory; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down”).

232. Cf. *id.* (stating that one of the parts of every law is “usually termed sanction, or vindicatory branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.”).

233. Cf. *id.* at *53 (defining “law” as a rule of civil conduct prescribed by the state, “commanding what is right, and prohibiting what is wrong.”), *id.* at *54 (noting that one of the parts of every law is “directory: whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs”), *id.* at *55 (stating that “the very essence of right and wrong depends on the direction of the laws to do or to omit them”).

These distinctions may be useful in describing appellate arguments, but they do not provide a good basis for distinguishing arguments for issue exhaustion purposes. An appellate court should expect the lower tribunal to apply all three forms. As noted below, when stated in a more specific way, they may provide a useful basis for distinguishing types of arguments.

b. The legal authority relied on

These distinctions are more clear cut. As noted above, arguments on appeal will be based on some appeal to legal authority, whether express or implied. In the veterans benefits appeals area, that legal authority will generally consist of one or more of the following: the United States Constitution; federal statutes and regulations that the agency is charged with administering;²³⁴ other federal statutes and regulations that the agency is not charged with administering; and case law interpreting the Constitution, statutes, and regulations.

To the extent that a claimant relies on some unpublished rule, such as an agency manual or circular, the real authority for the argument will be the Administrative Procedure Act²³⁵—i.e., an argument that the unpublished rule constitutes a binding “substantive rule” and thus should have the “force and effect of law” even though it is neither a statute nor a regulation.²³⁶

Because the agency is charged with administering its agency-specific statutes,²³⁷ it should have expertise in that area. Thus, allowing arguments that rely on agency-specific statutes or regulations to be raised for the first time on appeal seems reasonable because an

234. See 38 U.S.C. §§ 101-8528 (1994) (providing laws related to veterans' benefits); see also 38 C.F.R. §§ 0.735-47.2 (1999).

235. See 5 U.S.C. §§ 500-596 (1994) (outlining administrative practice and procedure for federal agencies).

236. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) (citing the Administrative Procedure Act, 5 U.S.C. § 553(b),(d) (1994) and stating that “[t]he central distinction among agency regulations found in the APA is that between ‘substantive rules’ on the one hand and ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice’ on the other.”); see also *Buzinski v. Brown*, 6 Vet. App. 360, 369 (1994) (“[I]n order for VA handbooks, circulars, and manuals to have the ‘force and effect of law’ they must ‘prescribe substantive rules—not interpretive rules.’”) (quoting *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982)).

237. See 2 DAVIS & PIERCE, *supra* note 5, § 15.8, at 341 (describing how courts are hesitant to reverse the determinations of agencies due to the agencies' expertise regarding agency-specific statutes); cf. *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981) (holding that an interpretation of a statute by the administrative agency charged with administering it is entitled to deference to the extent that the administrative construction, whether reached by adjudication or by rulemaking, is not inconsistent with the statutory mandate and does not frustrate the policy that Congress sought to implement).

appellate court should be able to expect that the agency would be familiar with the statutes and regulations it is charged with administering. That is, a thorough knowledge of veterans benefits law is the sort of "skillfulness" that "those who adjudicate" veterans benefits claims should be expected to have.²³⁸

The agency, however, is not charged with administering the Constitution or other federal statutes and regulations.²³⁹ A thorough knowledge of such provisions would not necessarily be within the agency decisionmaker's area of expertise or "skillfulness." Further, the agency decisionmaker should not be expected to anticipate all possible arguments, based on authority other than veterans benefits statutes and regulations, that counsel may make at some later time. The appellate court should expect the agency adjudicator to have skill in adjudication, not prognostication. Thus, allowing a claimant to raise arguments based on authority other than the record and veterans benefits statutes and regulations for the first time on appeal would not be appropriate because those arguments would not involve an agency's area of expertise or a statute or regulation it is charged with administering.

c. The function or substance of the rule

If the agency is to be expected to apply agency-specific statutes and regulations, should that apply to all agency-specific statutes and regulations? Statutes and regulations may be distinguished according to their function. In other words, there are several answers to the question "What does this rule do?" Legal rules applicable to administrative agencies generally perform five functions. These functions are related to the legal-rule distinctions based on form or structure, but are more specific in identifying actors.²⁴⁰

First, rules require a claimant to take certain kinds of actions or proscribe certain actions by a claimant.²⁴¹ Because the Secretary may

238. See *supra* note 88 and accompanying text (noting that appeals are needed to correct "the unfairness or unskillfulness of those who adjudicate").

239. See 2 DAVIS & PIERCE, *supra* note 5, § 15.8, at 341-43 (outlining agencies' expertise in administration of agency-specific statutes).

240. That is, the first, fourth, and fifth types of rules take the third form/structure, i.e., legal rules that create a relationship between a certain actor and a certain action. See *supra* note 233 and accompanying text. The second type takes the first form, i.e., definitions and criteria. See *supra* note 231 and accompanying text. The third type can be viewed as either criteria or as a conditional statement. See *supra* note 232 and accompanying text.

241. Cf. 1 BLACKSTONE, *supra* note 231, at *53 (defining "law" as a rule of civil conduct, "commanding what is right, and prohibiting what is wrong"), *id.* at *123 (noting that the first of the two types of "rights of persons" consists of "such as are due from every citizen, which are usually called civil duties"). See, e.g., 38 U.S.C. §

not appeal from an agency decision,²⁴² and a claimant is unlikely to argue that he or she failed to take certain required actions, it is unlikely that the claimant's failure to take a certain action would be a basis for an argument made by the claimant for the first time on appeal in a veterans benefits case. Second, rules set forth definitions or criteria.²⁴³ Examples include regulations defining who is a veteran,²⁴⁴ and criteria for disability ratings, which range from 10% to 100%.²⁴⁵ Third, and closely related to the second, rules establish entitlement to a certain kind of benefit. These include statutes and regulations establishing entitlement to compensation for service-connected disabilities,²⁴⁶ compensation for the surviving spouse and children of a veteran who dies from a service-connected disability,²⁴⁷ and entitlement to a pension for a veteran who is permanently and totally disabled from a disability that is not service-connected.²⁴⁸ Fourth, rules require an agency to make certain decisions²⁴⁹ or to make certain presumptions in making decisions.²⁵⁰ Fifth, rules require an agency to take certain kinds of actions²⁵¹ or proscribe certain actions by the agency.²⁵²

7105(b) (1) (1994) (explaining that claimant must file Notice of Disagreement within one year of mailing of notice of decision in order to appeal); 38 C.F.R. § 20.302(a) (1999) (same).

242. See 38 U.S.C. § 7252(a) (1994).

243. Cf. 1 BLACKSTONE, *supra* note 231, at *54 (noting that "every law may be said to consist of several parts" and that one of those parts is "declaratory; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down").

244. See 38 C.F.R. § 3.1(d) (1999) ("Veteran" means "a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.") (emphasis in original).

245. See 38 C.F.R. pt. 4 (1999) (providing method to determine impairment in earning capacity due to disability in order to calculate benefits to be paid).

246. See 38 U.S.C. § 1110 (1994) (setting forth basic entitlement rights for wartime disability compensation); *id.* § 1131 (1994) (setting forth basic entitlement rights for peacetime disability compensation).

247. See 38 U.S.C. § 1310 (1994) (stating that spouses and children of veterans who die from service-connected disabilities shall be paid dependency and indemnity compensation, so long as death occurred after December 31, 1956).

248. See 38 U.S.C. § 1521 (1994) (outlining pension entitlement of veterans who served during wartime but are completely disabled from a non-service-connected disability).

249. See, e.g., 38 U.S.C. § 7104(a) (1994) (stating that the Board is to make final decisions in appeals from Regional Office).

250. See, e.g., 38 U.S.C. § 1112(c) (1994) (establishing presumptions to be made regarding diseases that are likely due to radiation exposure during wartime service).

251. Cf. 1 BLACKSTONE, *supra* note 231, at *53 (defining "law" as a rule of civil conduct, "commanding what is right, and prohibiting what is wrong"), *id.* at *123 (noting that the second of the two types of "rights of persons" consists of "rights that belong to him").

252. See, e.g., 38 U.S.C. § 1159 (1994) (explaining that service connection for a disability which has been in effect for more than ten years may not be severed unless certain conditions are met); 38 C.F.R. § 3.343(c) (1999) (total rating may not be reduced unless certain conditions met).

In *Akles v. Derwinski*,²⁵³ the Court of Appeals for Veterans Claims held that the Board's failure to consider statutes and regulations conferring a particular benefit, special monthly compensation,²⁵⁴ was error even though the claimant never mentioned them.²⁵⁵ In the opinion, the court repeatedly indicated that it was referring to provisions that grant benefits.²⁵⁶ Some later cases could be read as limiting *Akles* to the failure to apply benefit-granting provisions (i.e. the third type of rule).²⁵⁷

It might be argued that rules that require agency action (the fifth type of rule), such as scheduling a medical examination, are more intrusive and are more costly in terms of agency resources than rules that simply require an agency decision (the second through fourth types of rules). Thus, it might be argued that not requiring issue exhaustion for benefit-granting agency rules (which would only require an agency decision), might be appropriate, but that issue exhaustion should be required for rules that require agency action that goes beyond the making of a decision.

However, because the agency is charged with administering both benefit-granting rules and action-requiring rules, this may be too fine a distinction. Both types of rules are within the agency's area of expertise or "skillfulness" and an appellate court should be able to expect the agency to be familiar with them and apply them to the extent they are implicated by the evidence of record and the claimant's testimony and argument.

d. Changing the settled "rules of the game"—"law-creating" and "law-destroying" arguments

Appellate arguments can also be distinguished by whether they rely on the settled "rules of the game"²⁵⁸ or whether they seek to change

253. 1 Vet. App. 118 (1991).

254. See 38 U.S.C. § 1114(k) (1994); 38 C.F.R. § 3.350 (1999) (describing special monthly compensation for veterans who have suffered the anatomical loss or loss of use of one or more body parts due to service-connected disability).

255. See *Akles*, 1 Vet. App. at 118 (holding that Secretary did not fulfill duty to assist when special monthly compensation benefits may have been available).

256. See *id.* at 121 ("There is no requirement in the law that a veteran must specify with precision the statutory provisions or the corresponding regulations under which he is seeking benefits.").

257. See, e.g., *McGrath v. Brown*, 5 Vet. App. 57, 60 (1993) ("The BVA cannot ignore or reject a claim merely because the veteran did not expressly raise the appropriate legal provision for the benefit sought."); *Magusin v. Derwinski*, 2 Vet. App. 547, 549 (1992) ("Instead, the VA has an affirmative duty to assist the veteran in developing his claim by informing him that he may be eligible for benefits under a particular provision.").

258. Cf. *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 32 n.6 (1997). The Court stated that:

the rules.²⁵⁹ This Article will refer to arguments that seek to change the settled rules as “law-creating” arguments and “law-destroying” arguments.

By “law-creating,” this Article means an argument that a document that otherwise would not be binding should be binding. This will usually be an argument that an unpublished rule is a “substantive rule” within the meaning of the Administrative Procedure Act and thus has the force and effect of law.²⁶⁰ In veterans benefits appeals, these arguments arise frequently in the context of the VA Adjudication Procedure Manual, also known as Manual M21-1.²⁶¹

By “law-destroying,” this Article means an argument that a statute, regulation, or case that otherwise would be binding should not be binding. This will usually be an argument that a statute or regulation is unconstitutional on its face or as applied²⁶² or that a regulation is invalid because the agency failed to follow proper rulemaking procedures. This term would also include an argument that a binding precedent decision should be overruled.

This distinction—between “settled rules of the game” on the one hand, and “law-creating” and “law-destroying” arguments on the other—is related to the earlier distinction based on the type of legal authority relied on. Most “law-creating” arguments will be based on a claim that an unpublished rule is a “substantive rule” within the meaning of the APA. Most “law-destroying” arguments will be based either on the APA (failure to following APA rulemaking requirements) or the Constitution (violation of some constitutional provision, such as the Due Process Clause).²⁶³

To change so substantially the rules of the game [by adopting a bright-line rule rather than a flexible rule regarding estoppel] now could very well subvert the various balances the [Patent and Trademark Office] sought to strike when issuing the numerous patents which have not yet expired and which would be affected by our decision.

Id.

259. This Article does not include arguments for a broader or narrower construction of a particular statute or regulation or case within this category.

260. See *supra* note 236 and accompanying text (discussing how those who wish to rely on agency manuals or circulars as authority point to the Administrative Procedure Act as authority for the argument).

261. See, e.g., *Cohen v. Brown*, 10 Vet. App. 128 (1997) (adjudicating claim concerning Manual M21-1 provisions regarding service connection for post-traumatic stress disorder); *Montalvo v. Brown*, 7 Vet. App. 312, 314 (1995) (concluding that agency circular providing that all beneficiaries would be “furnished” improved pension election card required that election cards have been actually received, not just mailed, was “substantive” and thus had “force and effect of law”).

262. See *Richard ex rel. v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998) (arguing that construing VA statute to compel the conclusion that a veteran’s claim to disability compensation terminates at death violated procedural due process).

263. The terms “law-creating” and “law-destroying” are the author’s. Other

Because these law-creating and law-destroying arguments seek a more drastic remedy from the court—changing the law rather than simply applying the settled law—issue exhaustion should be required for those arguments. Requiring issue exhaustion for those arguments would allow the agency to have input on the issue, and would result in a better record for appeal. A decision as to whether to change the law should be more carefully considered than one simply applying settled law. Requiring issue exhaustion may avoid an “improvident or ill-advised” opinion by giving the court the benefit of the agency’s decision.²⁶⁴ Although the agency should be expected to apply the settled rules applicable to its area of administration, it should not be expected to, *sua sponte*, seek to change those rules.

In other areas of law, there are many procedural hoops to jump through when a change in the law is proposed—whether that change is an amendment to a statute, a change in a regulation, or overturning a precedential decision.²⁶⁵ Requiring issue exhaustion when a change in the law is proposed in the context of a veterans benefits appeal would be consistent with these procedural requirements.

In veterans benefits cases, law-creating and law-destroying arguments would likely relate to provisions that would potentially

authors have used similar terms, but in a different sense. *Cf.* John W. Poulos, *The Judicial Process and Substantive Criminal Law: The Legacy of Roger Traynor*, 29 LOY. L.A. L. REV. 429, 515 (1996) (noting that Justice Traynor apparently relied on an excerpt from one case as part of the rationale for “summarily rejecting the law-creating argument” in another case); Note, *The Faith to Change: Reconciling the Oath to Uphold with the Power to Amend*, 109 HARV. L. REV. 1747, 1757 (1996) (“Oath-takers must be committed to the ideal of the publicly regulated and validated text. They need to have a constitutional faith that reflects both the benign (law creating/constitutive) and fearful (law destroying/revolutionary) aspects of the popular sovereign, ‘We, the People.’”); Andrew L. Shapiro, *Constitutional Issues Involving Use of the Internet: The Disappearance of Cyberspace and the Rise of the Code*, 8 SETON HALL CONST. L.J. 703, 720 & n.49 (1998) (referring to “Robert Cover’s concept of certain activities being ‘jurisgenerative’ (law making) or ‘jurispathic’ (law destroying)” (citing Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983))).

264. *Cf.* *Carbino v. West*, 168 F.3d 32, 35 (Fed. Cir. 1999). The court noted that as the Tenth Circuit put it, permitting an appellant to raise new arguments in a reply brief “would be unfair to the court itself, which without the benefit of a response from appellee to an appellant’s late-blooming argument, would run the risk ‘of an improvident or ill-advised opinion, given [the court’s] dependence . . . on the adversarial process for sharpening the issues for decision.’”

Id.

265. See U.S. CONST., art. I, § 7 (procedures for enacting federal statutes); 5 U.S.C. § 553 (1994) (procedures for promulgating federal regulations); see also *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991) (“[D]ecisions of a three-judge panel of this court cannot overturn prior precedential decisions.”); *Bethea v. Derwininski*, 2 Vet. App. 252, 254 (1992) (“Only the en banc Court may overturn a panel decision.”).

2000]

VETERANS BENEFITS APPEALS PROCESS

1319

affect a large number of claimants. Thus, even if one claimant were barred from making such an argument on the grounds of failure to raise the issue before the agency, it is likely that another claimant would raise the issue. So it is doubtful that such an issue would evade review by the Court of Appeals for Veterans Claims for very long.

CONCLUSION

Agency-level proceedings in veterans benefits cases are nonadversarial, but appellate review of those decisions is adversarial. There is tension and conflict between the goals and assumptions of the nonadversarial and adversarial systems. The case law from the Court of Appeals for Veterans Claims and the Federal Circuit reflects this conflict. Some cases emphasize the nonadversarial nature of agency proceedings and do not require issue exhaustion. Others emphasize the adversarial nature of appellate review of the agency's decisions and do require issue exhaustion.

In approaching this problem, courts have a number of options. One option is to ignore the nonadversarial nature of the agency proceedings and require issue exhaustion for all issues. A second option is to ignore the adversarial nature of appellate review, as well as the error-correcting function of appellate courts, and not require issue exhaustion for any issue. A third option is to try to balance the competing and often conflicting goals of the veterans benefits appeals process, and require issue exhaustion for some issues but not others. This approach would recognize that the United States Court of Appeals for Veterans Claims is both a court "of appeals" and a court "for veterans claims."

In striking a balance, a rule-based approach is more principled and predictable than a case-by-case balancing approach. The starting point in finding a rule to apply should be to consider the nature of an appellate court and what an appellate court may reasonably expect from the agency decisionmaker. In other words, what sort of "skillfulness" should the reviewing court expect from "those who adjudicate" veterans benefits claims? In answering that question, the reviewing court should consider what the agency should have decided, given the evidence and argument before it at the time of the decision, and the agency-specific statutory, regulatory, and case law in existence at that time. In other words, the agency's decision should be judged in light of the record, the settled law the agency is charged with administering, and the claimant's argument and testimony up to the time of the decision. This approach is consistent with the Federal Circuit's holding that it would only consider issues that the Court of

Appeals for Veterans Claims did decide or that the parties raised.²⁶⁶

If the argument made for the first time on appeal is based on the record before the agency decisionmaker and the settled agency-specific laws and regulations, issue exhaustion should not be required. Any arguments that go beyond this, however, would require the agency to predict whatever the imagination of counsel could dream up. Thus, if the argument is based on statutes or regulations the agency is not charged with administering, or seeks to change the settled rules applicable to the agency, then issue exhaustion should be required.

266. See *Belcher*, 214 F.3d at 1337.