

## AREA SUMMARIES

### REVIEW OF VETERANS LAW DECISIONS OF THE FEDERAL CIRCUIT, 2020 EDITION

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#### ABSTRACT

*This Article continues last year's in-depth review of veterans law cases decided by the Federal Circuit, published by the American University Law Review. In the year 2020, the Federal Circuit further clarified the law applicable to veterans cases, including the parameters of the class action device and the need for robust analysis in cases challenging agency delay and inaction. The court significantly expanded veterans' ability to challenge regulations and manual provisions directly in the Federal Circuit. It created new law with regard to the presumption of competency applicable to Department of Veterans Affairs (VA) examiners and explored the parameters of VA's duty to sympathetically read claims. The Federal Circuit also issued important decisions regarding "effective dates" impacting the amount of money veterans can receive where claims linger for years in the adjudicative process. Finally, the court confirmed the validity of VA's definition of willful and persistent misconduct.*

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#### I. THE CLASS ACTION DEVICE AND UNREASONABLE DELAY: FURTHER REVIEW

One of the most significant procedural changes in veterans benefits law in the past few years is the recognition that the class action procedure is available to veterans. Agency delay is a pervasive systemic problem faced by veterans. This delay served as the catalyst to a proposed class action in the long running *Monk* litigation.<sup>1</sup> In 2020, the Federal Circuit addressed both the proper use of the class action device in veterans cases, and the proper legal test to use in evaluating agency delay. In *Monk v. Wilkie*,<sup>2</sup> the court considered the proper parameters of the class action procedural device in a case alleging unreasonable delay, furthering the development of the procedural law in this area.<sup>3</sup> Unreasonable delay was further addressed in *Mote v. Wilkie*,<sup>4</sup> where the court reiterated the multi-factor analysis which must be substantively applied in cases alleging unreasonable agency delay.<sup>5</sup>

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1. See *Monk v. Shulkin (Monk II)*, 855 F.3d 1312, 1318 (Fed. Cir. 2017) (locating the Veterans Court’s ability to hear class actions in both statutory authorities and its inherent judicial power); see also *Monk v. Wilkie (Monk III)*, 30 Vet. App. 167, 184 (2018) (Davis, C.J., concurring) (calling the Federal Circuit’s decision to allow class actions in Veterans Court “a seismic shift in our precedent, departing from nearly 30 years of [the Veterans] Court’s case law” and “a watershed decision” that “will shape our jurisprudence for years to come”), *aff’d*, *Monk v. Wilkie (Monk IV)*, 978 F.3d 1273 (Fed. Cir. 2020); Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 514, 539–40 (2019) (considering the Federal Circuit’s decision in *Monk II* a “major change[] in federal court case law regarding veterans benefits”).

2. 978 F.3d 1273 (Fed. Cir. 2020).

3. *Id.* at 1274.

4. 976 F.3d 1337 (Fed. Cir. 2020).

5. *Id.* at 1343.

A. *Monk v. Wilkie: The Most Recent Federal Circuit Decision Applying Class Certification Concepts to Veterans Benefits Cases*

We addressed the saga of the *Monk* litigation in last year's review of the Federal Circuit's cases in this space.<sup>6</sup> The Article covered several reported *Monk* decisions.<sup>7</sup> The efforts of Conley Monk and the Yale Law School Veterans Clinic continue to fundamentally change the legal landscape for veterans.<sup>8</sup>

1. *Background to the recent Federal Circuit appeal*

Conley Monk suffered from several disabilities related to his service in the United States Marine Corps.<sup>9</sup> He filed a claim with the U.S. Department of Veterans Affairs (VA) in February 2012 for disability benefits. In 2013, VA notified him that it denied his claim due to the character of his Marine Corps discharge, which was "other than honorable."<sup>10</sup> Mr. Monk timely appealed, but it was not until March 2015 that VA informed him that it would need to request and receive his records from the Navy's Board for Correction of Naval Records (BCNR) concerning his discharge status before processing his appeal.<sup>11</sup>

Mr. Monk filed a petition for a writ of mandamus with the United States Court of Appeals for Veterans Claims (the Veterans Court), asserting that VA's delay in deciding his claim was unreasonable.<sup>12</sup> He asked the Veterans Court to order the Secretary of Veterans Affairs to promptly adjudicate his claim.<sup>13</sup> In his writ, Mr. Monk sought class certification for himself and other similarly situated veterans.<sup>14</sup> The class definition included those who had applied for VA benefits, had timely filed a Notice of Disagreement (NOD), had not received a

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6. Angela Drake et al., *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1343, 1376–83 (2020).

7. *Id.* (referring to *Monk v. Shulkin (Monk II)*, 855 F.3d 1312 (Fed. Cir. 2017), *Monk v. Wilkie (Monk III)*, 30 Vet. App. 167 (2018) (en banc), *aff'd*, *Monk v. Wilkie (Monk IV)*, 978 F.3d 1273 (Fed. Cir. 2020)).

8. *Monk IV*, 978 F.3d at 1273; *see also id.* at 1278 (Reyna, J., concurring) (calling class certification to address delays in veterans claims as "available and important as ever").

9. *Monk II*, 855 F.3d at 1314.

10. *Id.*

11. *Id.*

12. *Id.* at 1314–15.

13. *Id.* at 1314.

14. *Id.*

decision within twelve months, and had demonstrated medical or financial hardship as defined by 38 U.S.C. §§ 7107(a)(2)(B)–(C).<sup>15</sup>

On May 27, 2015, the Veterans Court denied the class certification request because it lacked authority to certify a class.<sup>16</sup> In July 2015, the Veterans Court also denied Mr. Monk's individual mandamus petition because it found that part of the delay in adjudication resulted from VA's need to obtain the BCNR records.<sup>17</sup> Mr. Monk appealed both decisions.<sup>18</sup>

On appeal, the Federal Circuit determined Mr. Monk's disability claim was moot because the Secretary awarded him a 100% disability rating while his appeal was pending.<sup>19</sup> With regard to the Veterans Court's authority to adjudicate class actions, the Federal Circuit reversed,<sup>20</sup> finding that that the Veterans Court does have the legal authority to certify classes under three bases: (1) the All Writs Act;<sup>21</sup> (2) the enabling statutory authority granted to the Veterans Court; and (3) the Veterans Court's inherent powers.<sup>22</sup> On remand, and using Rule 23 of Federal Rules of Civil Procedure (FRCP) as the basis for its analysis, the Veterans Court denied class certification on August 23, 2018, largely based on the lack of commonality.<sup>23</sup> Mr. Monk filed his notice of appeal to the Federal Circuit on October 3, 2018.<sup>24</sup>

## 2. Monk IV: *Continued viability of the class action device*

The most recent Federal Circuit decision in *Monk* affirmed the Veterans Court's decision denying class certification, holding that the

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15. *Id.* at 1314–15.

16. *Id.* at 1315.

17. *Id.*

18. *Id.*

19. *Id.* at 1316.

20. *Id.* at 1318.

21. 28 U.S.C. § 1651 (2018).

22. *See Monk II*, 855 F.3d at 1318 (recognizing the three bases for the Veterans Court's authority to certify classes). Refer to this article for a more comprehensive understanding of this Federal Circuit holding. *See Drake et al.*, *supra* note 6, at 1378.

23. *See Monk v. Wilkie (Monk III)*, 30 Vet. App. 167, 170, 181 (2018) (en banc) (concluding that because the class does not challenge a specific VA practice or policy but alleges systemic delay, no one common answer would resolve all of their claims), *aff'd*, *Monk v. Wilkie (Monk IV)*, 978 F.3d 1273 (Fed. Cir. 2020).

24. Court Docket, *Monk v. Wilkie (Monk IV)*, No. 19-1094 (Fed. Cir. Oct. 19, 2018).

*Monk* putative class failed to establish the commonality element required under the Rule 23 analysis.<sup>25</sup>

In affirming the denial of class certification, the Federal Circuit relied heavily on recent legislation known as the Veterans Appeals Improvement and Modernization Act of 2017<sup>26</sup> (AMA).<sup>27</sup> Congress passed this legislation while the *Monk* putative class was pending at the Veterans Court.<sup>28</sup> The goal of the AMA was to streamline VA's frequently delayed processing of appeals.<sup>29</sup>

The Secretary asserted the new appeal options for veterans under the AMA would streamline veterans' experiences by eliminating "one long queue."<sup>30</sup>

The older system governing Mr. Monk and 200,000 other veterans is now known as the "legacy system."<sup>31</sup> The legacy system operates separately from the AMA, and many claims remain within it, as the AMA did not become effective until February 19, 2019.<sup>32</sup> The legacy system requires multiple steps for each veteran's disability appeal, as experienced by Mr. Monk: the veteran must file a NOD within one year of the adverse VA decision, then wait for the VA Regional Office to issue a Statement of the Case ("SOC").<sup>33</sup> Next, the veteran must file a Form 9, VA's standard document for registering an appeal to the

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25. See *Monk IV*, 978 F.3d at 1274, 1277–78; see also FED. R. CIV. P. 23(a) (2) (allowing class actions only if the representatives share, among other characteristics, "questions of law or fact common to the class").

26. Pub. L. No. 115-55, 131 Stat. 1105 (2017) (codified as amended in scattered sections of 38 U.S.C.).

27. See *Monk IV*, 978 F.3d at 1275–77 (considering the law's impact on the pending claims and declining to intervene in light of Congress's adoption of a new structure for veterans claims).

28. *Id.* at 1275.

29. See 131 Stat. at 1105 (stating Congress's intention "to reform the rights and processes relating to appeals of decisions regarding claims for benefits"); see also 162 CONG. REC. H627 (daily ed. Feb. 9, 2016) (statement of Rep. Ryan Costello) (calling the legislation "another step in doing our best to reduce the claims backlog").

30. Supplemental Brief of Respondent-Appellee at 2, *Monk IV*, 978 F.3d 1273 (Fed. Cir. 2020) (No. 19-1094).

31. See Supplemental Brief of Petitioners-Appellants at 1, *Monk IV*, 978 F.3d 1273 (Fed. Cir. 2020) (No. 19-1094).

32. 38 C.F.R. § 19.2(a)–(b) (2019); see also Supplemental Brief of Petitioners-Appellants, *supra* note 31, at 1 (noting that there are approximately 200,000 veterans experiencing delays in the legacy appeals system).

33. *Monk IV*, 978 F.3d at 1275; 38 C.F.R. § 19.52; see also, §§ 19.28–30 (describing that the Statement of the Case (SOC) is a document that will be furnished to a claimant to explain the VA's decision about the claimant's disability benefit case).

Board of Veterans Appeals, within sixty days of the SOC, and then wait again for the file to be transferred to the Board.<sup>34</sup> After these steps, the veteran may submit additional evidence to the Board.<sup>35</sup> Finally, after an average of five years, the veteran will receive the Board's decision.<sup>36</sup>

Mr. Monk and the other petitioners argued that the AMA does not have any effect on their appeals because their claims are pending under the legacy system and they have not opted into the AMA.<sup>37</sup> The Secretary accepted that the AMA does not apply to legacy appeals but contended that it does not matter, since nearly every potential class member had the opportunity to leave the legacy system and expedite their appeal under the AMA framework.<sup>38</sup>

Notwithstanding VA's optimistic outlook for appeals under the AMA, VA estimated that the Board would receive as many as 100,000 legacy appeals in Fiscal Year 2020.<sup>39</sup> An amicus brief by the National Law School Veterans Clinic Consortium pointed out that there continues to be systemic problems with the legacy system, unaddressed by the AMA.<sup>40</sup> Additionally, legacy appeals that switched over to the AMA system would still be subject to error and delay.<sup>41</sup> For those reasons, the appellants argued that judicial action was still necessary to remedy issues concerning legacy appeals.<sup>42</sup>

Taking the implementation of the AMA into account, the Federal Circuit held the putative class members did not present a "common question that is capable of a common legal answer."<sup>43</sup> The Federal Circuit affirmed the Veterans Court's analysis with regard to the

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34. *Monk IV*, 978 F.3d at 1275; 38 C.F.R. §§ 19.22, 19.52(b).

35. *Monk IV*, 978 F.3d at 1275; *see* 38 C.F.R. §§ 19.37.

36. *Monk IV*, 978 F.3d at 1275. The government states that the average wait time is five years, whereas the petitioners state the average wait time is seven years. *Id.*

37. Supplemental Brief of Petitioners-Appellants, *supra* note 31, at 3.

38. Supplemental Brief of Respondent-Appellee, *supra* note 30, at 5–6.

39. BD. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFS., ANNUAL REPORT FISCAL YEAR (FY) 2019 27 (2020).

40. *See* Brief of Amicus Curiae National Law School Veterans Clinic Consortium in Support of Appellants at 4–5, *Monk IV*, 978 F.3d 1273 (Fed. Cir. 2020) (No. 19-1094) (noting as examples, among other things, appeals closed prematurely without giving notice to appellants despite the need for further action, as well as cases not processed in accordance with remand instructions).

41. *Id.* at 9–10 (stating that VA had not prepared for the possibility that many veterans would opt for more "resource-intensive" appeal options involving hearings and evidence, and offering anecdotal evidence of problems in the AMA process).

42. *Monk IV*, 978 F.3d at 1277–78.

43. *Id.*

commonality requirement, holding the petitioners did not provide a discrete and common class-wide issue.<sup>44</sup> The Federal Circuit reiterated that the commonality requirement mandates a question of law or fact common to the class as a whole, that all members of the class suffer the same injury and that some reasonable resolution exists curing all the alleged injuries.<sup>45</sup>

The fact that the *Monk* petitioners all faced an issue of “unreasonable delay” was too broad of an issue for the commonality requirement.<sup>46</sup> With regard to the *Monk* putative class, the Federal Circuit held that unreasonable delay not specific enough to satisfy the commonality requirement and no answer or path was provided with regard to “subclasses.” Although not specifically stated in the opinion, it is quite possible each veteran experienced delay for different reasons: some due to VA’s statutory duty to assist, some because of VA’s duty to provide hearings, and others due to the complexity of the case.<sup>47</sup>

The Federal Circuit found that there is not a common legal answer for all the veterans in the legacy appeals process.<sup>48</sup> The petitioners asked that a one-year deadline be imposed on VA to decide pending appeals.<sup>49</sup> The Government explained that Congress mandated the AMA structure because a strict one-year deadline is not reasonably workable.<sup>50</sup> The court declined to impose a rigid deadline, relying upon the AMA as a “comprehensive remedial structure,” which should be evaluated before contemplating judicial intervention.<sup>51</sup>

Judge Reyna’s additional remarks are important. He emphasized that class certification is a procedural tool which should be granted to veterans who successfully show commonality.<sup>52</sup> He also stated that legacy veterans are not required to opt into the AMA to receive “swift

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44. *Id.*

45. *See id.* at 1277 (claiming that one veteran’s case history, though “distressing,” was not sufficient “reassurance” that the other delays or consequences other veterans experienced provided the same outcome); *id.* (suggesting that the proposed one-year deadline constitutes a judicially imposed remedy untethered to the specifics of claims); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011) (recognizing that a common injury requires a shared contention beyond violation of the same statute).

46. *Id.*

47. *Monk v. Wilkie (Monk III)*, 30 Vet. App. 167, 177–78 (2018) (en banc), *aff’d*, *Monk IV*, 978 F.3d 1273.

48. *Monk IV*, 978 F.3d at 1277.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1278 (Reyna, J., concurring).



adjudication.”<sup>53</sup> He found the delay that 200,000 veterans in the legacy appeals process are facing “unacceptable,” and explained a remedy should be available to them.<sup>54</sup>

In short, the court did not find a common issue which would lead to resolution of the delay the *Monk* putative class asserted. Whether Congress’s remedial legislation will truly solve the delay problem remains to be seen. Though the *Monk* proposed class failed, the court recognized that class certification remains viable in appropriate circumstances.<sup>55</sup> This remains positive law for veterans and their advocates.

*B. Mote v. Wilkie: The Federal Circuit Reaffirms It Meant What It Said in Martin*

When the Federal Circuit decided *Martin v. O’Rourke*,<sup>56</sup> changing the standard by which the Veterans Court reviews unreasonable delay claims, it signaled needed change in unreasonable delay cases and paved the way for proper analysis.<sup>57</sup> *Mote v. Wilkie*, which was not a class action, reaffirmed the need for real change, requiring that the Veterans Court review, for the third time, the same case asserting unreasonable delay.<sup>58</sup>

*1. Background to the recent Federal Circuit appeal*

Mr. Wayne Mote served in the United States Air Force during the Vietnam War.<sup>59</sup> In 2010, he filed a claim for disability compensation benefits, asserting his ischemic heart disease was caused by exposure

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53. *Id.*

54. *Id.*

55. *See id.* at 1277–78 (noting that petitioners had not advised the Court about how to analyze any subclass remedies); *see also id.* at 1278 (Reyna, J., concurring) (emphasizing that class certification is available for veterans with commonality).

56. 891 F.3d 1338 (Fed. Cir. 2018).

57. *See id.* at 1345 (instructing the Veterans Court that the D.C. Circuit’s six factors in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984), “serve as a useful starting point” for it to analyze claims of unreasonable delay in appeals); *see also infra* note 80 and accompanying text (listing all of *TRAC*’s six factors).

58. *Mote v. Wilkie*, 976 F.3d 1337, 1346–47 (Fed. Cir. 2020) (“We find it necessary to repeat today what we said in *Martin* . . . Because the Veterans Court did not apply this standard as required here, we again vacate the court’s judgment and remand for it do so.”).

59. *Id.* at 1339.

to Agent Orange.<sup>60</sup> VA denied his claim, and Mr. Mote filed a NOD on January 30, 2013.<sup>61</sup> Shortly thereafter, Mr. Mote died.<sup>62</sup>

Mrs. Eugenia Mote, the veteran's widow, was substituted into his claim.<sup>63</sup> She also filed a Dependency and Indemnity Compensation claim (DIC), which allows for payments to surviving spouses where the veteran's death results from a service-connected disability.<sup>64</sup> VA denied Mrs. Mote's DIC claim in January of 2015, and Mrs. Mote filed an NOD.<sup>65</sup> Mrs. Mote filed her substantive appeal in June of 2016 and requested a hearing before the Board of Veterans' Appeals (the Board) at a local VA office, known as a Travel Board hearing.<sup>66</sup>

Mrs. Mote petitioned the Veterans Court for a writ of mandamus in September of 2016, arguing that she faced unreasonable delay in the resolution of her claim.<sup>67</sup> The Veterans Court denied the writ, applying the *Costanza v. West*<sup>68</sup> standard to conclude that Mrs. Mote did not face unreasonable delay.<sup>69</sup> The *Costanza* standard requires that the veteran demonstrate the delay to be "so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system."<sup>70</sup> The Veterans Court interestingly joined the minority of courts that apply a *Costanza*-type standard, despite the mandate that it consider cases with a "pro-veteran" approach.<sup>71</sup> The Veterans Court also held that the Board could not issue a decision until Mrs. Mote received her requested Travel Board hearing.<sup>72</sup> Following this decision by the Veterans Court, Mrs.

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; *About VA DIC for Spouses, Dependents, and Parents*, U.S. DEP'T OF VETERANS AFFS. (Feb. 18, 2021), <https://www.va.gov/disability/dependency-indemnity-compensation> (describing how veterans' surviving dependents may be eligible for VA benefits or compensation when the veteran dies in the line of duty or from service-related injuries or illnesses).

65. *Mote*, 976 F.3d at 1339.

66. *Id.*

67. *Id.*

68. 12 Vet. App. 133 (1999) (per curiam), *abrogated by* *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018).

69. *Mote*, 976 F.3d at 1339.

70. *Costanza*, 12 Vet. App. at 134, *abrogated by* *Martin*, 891 F.3d 1338.

71. *Simcox*, *supra* note 1, at 536.

72. *Mote*, 976 F.3d at 1339.

Mote appealed to the Federal Circuit.<sup>73</sup> Her claim was consolidated with eight other appellants in *Martin v. O'Rourke*.<sup>74</sup>

The appellants in *Martin* faced the same issue many other veterans experience—years and years of delay in the adjudication of appeals—as described in the *Monk* litigation.<sup>75</sup> The *Martin* court held that the Veterans Court was wrong in applying the *Costanza* standard to evaluate mandamus petitions for unreasonable delay.<sup>76</sup> The court determined that the *TRAC*<sup>77</sup> standard was a more balanced approach and provides an analytical framework for evaluating unreasonable delay cases.<sup>78</sup>

In *TRAC*, the D.C. Circuit promulgated a six-factor test to determine whether an agency's delay is "egregious enough to warrant mandamus."<sup>79</sup> The six factors are:

- (1) [T]he time agencies take to make decisions must be governed by a "rule of reason" . . . ;
- (2) [W]here Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason . . . ;
- (3) [D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . . ;
- (4) [T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority . . . ;
- (5) [T]he court should also take into account the nature and extent of the interests prejudiced by delay . . . ; and
- (6) [T]he court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."<sup>80</sup>

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73. *Id.*

74. 891 F.3d 1338, 1340 (Fed. Cir. 2018).

75. *Id.*; see also Drake et al., *supra* note 6, at 1372 (discussing *Martin* in greater detail).

76. *Martin*, 891 F.3d at 1340.

77. *Telecomms. Rsch. & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984).

78. *Martin*, 891 F.3d at 1349.

79. *TRAC*, 750 F.2d at 80.

80. *Id.* (first quoting *Potomac Elec. Power Co. v. Interstate Com. Comm'n*, 702 F.2d 1026, 1034 (D.C. Cir. 1983); and then quoting *Pub. Citizen Health Rsch. Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984)).

With the new standard of review in place, the *Martin* court remanded Mrs. Mote's case back to the Veterans Court for reconsideration under the *TRAC* standard.<sup>81</sup> On remand, the Veterans Court, in a single judge decision, dismissed Mrs. Mote's amended<sup>82</sup> mandamus petition, primarily for the reason that Mrs. Mote "[had] not yet participated in her scheduled Board hearing," which the Veterans Court thought made her petition premature.<sup>83</sup> Mrs. Mote then requested a panel decision.<sup>84</sup> The panel adopted the single judge's decision as the decision of the Veterans Court.<sup>85</sup>

On May 13, 2019, Mrs. Mote presented her case at the Travel Board hearing.<sup>86</sup> Following the Veterans Court's dismissal of Mrs. Mote's panel decision request, the Board reviewed her case and remanded it back to the Regional VA office for factual development.<sup>87</sup>

## 2. Federal Circuit decision

Mrs. Mote once again appealed to the Federal Circuit. The Federal Circuit remanded again.<sup>88</sup> In an opinion authored by Chief Judge Prost, the Federal Circuit held:

- (1) The Board's decision remanding Mrs. Mote's case for more factual development did not moot her appeal;<sup>89</sup>
- (2) Mrs. Mote's pending Board hearing did not render an immediate judicial decision inappropriate;<sup>90</sup> and
- (3) The Veterans Court erred by not applying the proper *TRAC* standard to Mrs. Mote's mandamus petition.<sup>91</sup>

The Federal Circuit recognized that Mrs. Mote was seeking a decision on her DIC claim and not just a mere remand. It found that a Board decision in this context means more than just a remand from

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81. *Martin*, 891 F.3d at 1349.

82. The petition was nearly identical to the original with an added request for a "reasoned decision" from the Board." *Mote v. Wilkie*, 976 F.3d 1337, 1339–40 (Fed. Cir. 2020).

83. *Id.* at 1340.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1347.

89. *Id.* at 1341.

90. *Id.* at 1344.

91. *Id.* at 1346.

the Board to the Regional Office of VA.<sup>92</sup> The Federal Circuit explained that a case does not become moot until a claimant receives all of her requested relief.<sup>93</sup> Because the Board's remand did not include any order that granted relief to the widow with regard to her substantive claim, her claim was not moot.<sup>94</sup> Mrs. Mote's circumstances clearly indicated that she sought more than just a remand after eight years of waiting, multiple appeals, and two mandamus petitions.<sup>95</sup>

The Secretary argued that the Veterans Court did not need to conduct the *TRAC* analysis on remand because the third prong of the *Cheney* standard was not met.<sup>96</sup> In *Cheney v. U.S. District Court for the District of Columbia*,<sup>97</sup> the Supreme Court held that three conditions must be met before a court can grant a mandamus petition:

- (1) the party seeking the writ must have "no other adequate means" to obtain the desired relief;
- (2) the party's right to the writ must be "clear and indisputable";
- and
- (3) even if these first two conditions are met, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."<sup>98</sup>

With regard to this argument, the Federal Circuit found that the Veterans Court erred in concluding that the *TRAC* factors need not be engaged since *Cheney's* third factor was not met.<sup>99</sup> The third factor is designed to be an additional check, it held rather than an independent basis for denying a writ.<sup>100</sup> The Federal Circuit concluded that the *TRAC* factors must still be considered, even if the Veterans Court thought the writ was inappropriate "under the circumstances."<sup>101</sup> In short, the analysis does not end with *Cheney*, and the *TRAC* factors are the best place to start when evaluating a mandamus petition asserting unreasonable delay.<sup>102</sup>

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92. *Id.* at 1341.

93. *Id.* at 1342.

94. *Id.*

95. *Id.*

96. *Id.* at 1343.

97. 542 U.S. 367 (2004).

98. *Id.* at 380–81 (quoting *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)).

99. *Mote*, 976 F.3d at 1343.

100. *Id.*

101. *Id.* at 1344.

102. *Id.* at 1346.

Even though the Secretary claimed the Veterans Court did not need to consider the *TRAC* factors, the Secretary nonetheless contended that the Veterans Court did, in fact, consider them.<sup>103</sup> On this point, the Federal Circuit concluded that the Veterans Court did not appropriately apply the *TRAC* factors to Mrs. Mote's petition by just conducting a "rote walk-through."<sup>104</sup> The Federal Circuit explained that the Veterans Court needs to do more than just identify the *TRAC* factors; it must analyze each factor and contemplate the facts in light of the particular claimant's circumstances.<sup>105</sup> A genuine consideration of each factor is needed: simply checking boxes is not enough. The Federal Circuit further stated that the Veterans Court is "uniquely well positioned" to engage with the *TRAC* factors in analyzing mandamus petitions filed by veterans.<sup>106</sup>

The Veterans Court's truncated analysis described in *Mote* is not an isolated incident. As one amicus brief noted in the *Monk* appeals discussed supra, between the time of the *Martin* decision adopting *TRAC* in June 2018 and February 28, 2020, the Veterans Court denied writs in over 100 cases, with many denials resulting from a rote *TRAC* analysis.<sup>107</sup> The decisions in these cases share a formulaic pattern that identifies the *TRAC* factors, but fails to conduct a thorough veteran-specific analysis. *Howard v. Wilkie*,<sup>108</sup> *Casper v. Wilkie*,<sup>109</sup> and *Carter v. Wilkie*<sup>110</sup> are examples of three cases where the petitioning veterans experienced delays over one year.<sup>111</sup> In conducting its *TRAC* analysis in these cases, the Veterans Court denied each petition, concluding that where VA takes *any* action after the veteran files a petition, a writ is not appropriate.<sup>112</sup> Furthermore, the Veterans Court often denied petitions based solely on the first *TRAC* factor, without even discussing

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103. *Id.* at 1345.

104. *Id.* at 1346.

105. *Id.*

106. *Id.*

107. Corrected Unopposed Brief & Addendum Amicus Curiae National Law School Veterans Clinic Consortium in Support of Appellants at 1, *Monk v. Wilkie*, 978 F.3d 1273 (Fed. Cir. 2020) (No. 20-1305) [hereinafter NLSVCC Corrected Unopposed Brief].

108. No. 19-4975, 2019 WL 5700582 (Vet. App. Nov. 5, 2019).

109. No. 19-5723, 2019 WL 5073585 (Vet. App. Oct. 10, 2019).

110. No. 19-1165, 2019 WL 3333108 (Vet. App. July 25, 2019).

111. *Howard*, 2019 WL 5700582, at \*2; *Casper*, 2019 WL 5073585, at \*1; *Carter*, 2019 WL 3333108, at \*1.

112. *Howard*, 2019 WL 5700582, at \*2; *Casper*, 2019 WL 5073585, at \*2; *Carter*, 2019 WL 3333108, at \*1.

the other five factors.<sup>113</sup> This is clearly the wrong approach, as the *Martin* court expressly stated that a court should consider each factor when ruling on a petition alleging unreasonable delay.<sup>114</sup>

In *Mote*, the Federal Circuit clearly held that a comprehensive and complete *TRAC* analysis must be applied in writ cases.<sup>115</sup> The Veterans Court must conduct a thorough step-by-step analysis of each factor and weigh the results. Simply identifying the factors without a genuine evaluation is not acceptable. A rote walk-through of the factors is not sufficient because each case needs to be “analyzed based on its unique circumstances.”<sup>116</sup>

In addition to her unreasonable delay claim, Mrs. Mote also claimed that her due process rights were violated.<sup>117</sup> Relying on *Martin*, the Federal Circuit held that the Veterans Court does not need to engage in a separate due process analysis after it properly applies the *TRAC* factors.<sup>118</sup> This conclusion reaffirms the importance of a robust and complete *TRAC* analysis when it comes to veterans’ due process rights.

Sadly, Mrs. Mote passed away while her case was pending on remand in the Veterans Court.<sup>119</sup> Her death rendered her appeal moot. Just as Mr. Mote died while his VA claim was pending, his wife—who tirelessly fought for VA benefits—died after the Federal Circuit issued its second decision on the same claim for unreasonable delay. As Mrs. Mote’s counsel said, “[a]ny system in which death regularly moots access to benefits cannot be labeled just.”<sup>120</sup>

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113. See NLSVCC Corrected Unopposed Brief, *supra* note 107, at 7 (stating that “many cases were denied based upon the first factor—the ‘rule of reason’—without further discussion”).

114. *Martin v. O’Rourke*, 891 F.3d 1338, 1345–48 (Fed. Cir. 2018) (indicating that courts should consider all factors with an in-depth analysis into each one).

115. *Mote v. Wilkie*, 976 F.3d 1337, 1343, 1346 (Fed. Cir. 2020).

116. *Id.* at 1346 (quoting *Martin*, 891 F.3d at 1345).

117. See Corrected Opening Brief of Appellant at 2, *Mote*, 976 F.3d 1337 (No. 2019-2367).

118. *Mote*, 976 F.3d at 1346.

119. Petitioner’s Response to the Court’s March 1, 2021 Order at 1, *Mote v. Wilkie*, No. 16-2506 (Vet. App. Mar. 15, 2021).

120. *Id.* at 7.

## II. *DISABLED AMERICAN VETERANS* IS OVERRULED; JUDICIAL REVIEW OF AGENCY MANUAL PROVISIONS IS POSSIBLE

Previous scholarship discussed *Disabled American Veterans v. Secretary of Veterans Affairs*<sup>121</sup> at length.<sup>122</sup> In brief, the Federal Circuit held that it lacked jurisdiction to review the VA Adjudication Procedures Manual M21-1, VA's internal operating manual.<sup>123</sup> The Federal Circuit explained that "because the M21 provisions are not binding on the Board, the provisions do not have the force of law" and thus cannot be reviewed by the court under 38 U.S.C. § 502.<sup>124</sup>

After four long years, the Federal Circuit has now overruled *Disabled American Veterans* in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*<sup>125</sup> (*NOVA*). In an en banc decision<sup>126</sup> authored by Judge Dyk, the Federal Circuit determined that it has jurisdiction to review provisions in the M21.<sup>127</sup> Specifically, the court found that the agency's M21 rules constitute final agency action by VA in its interpretation of the rules.<sup>128</sup> Further, the Federal Circuit found that its internal sixty-day time limit to bring § 502 petitions was invalid.<sup>129</sup> It held that it would change Federal Circuit Rule 15(f) to align with the six-year statute of limitations provided in 28 U.S.C. § 2401(a).<sup>130</sup>

*NOVA* sought review of two rules in the M21 agency manual: the Knee Joint Stability Rule and the Knee Replacement Rule.<sup>131</sup> The Knee Joint Stability Rule defines the terms "severe," "moderate," and "slight" as found in the officially promulgated regulation governing the rating of knee disabilities.<sup>132</sup> Under Diagnostic Code (DC) 5257,<sup>133</sup> the regulations require joint instability to be "severe" in order to receive a

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211. 859 F.3d 1072 (Fed. Cir. 2017), *overruled by* Nat'l Org. of Veterans' Advoc. v. Sec'y of Veterans Affs. (*NOVA*), 981 F.3d 1360 (Fed. Cir. 2020) (en banc).

122. Drake et al., *supra* note 6, at 1354.

123. *Id.* at 1358; *Disabled Am. Veterans*, 859 F.3d at 1074.

124. Drake et al., *supra* note 6, at 1358; 38 U.S.C. § 502 (2018).

125. 981 F.3d 1360 (Fed. Cir. 2020) (en banc).

126. Judge Moore did not participate in the decision. *Id.* at 1364 n.1.

127. *Id.* at 1365.

128. *Id.*

129. *Id.* at 1386.

130. *Id.*; 28 U.S.C. § 2401(a) (2018).

131. *NOVA*, 981 F.3d at 1365.

132. *Id.* at 1365–66 (citing 38 C.F.R. § 4.71(a) (2019)).

133. The schedule of ratings for the musculoskeletal system is found in 38 C.F.R. § 4.71(a).



thirty percent rating for that knee symptom.<sup>134</sup> The M21 further defines “severe” to mean ten to fifteen millimeters of joint translation.<sup>135</sup> The M21 also defined “moderate” as five to ten millimeters and “slight” as zero to five millimeters of joint translation.<sup>136</sup> The Knee Replacement Rule further defines DC 5055 to only provide benefits under the diagnostic code when it is a total knee replacement and not a partial,<sup>137</sup> which is contrary to the Veterans Court’s finding in *Hudgens v. McDonald*.<sup>138</sup> The regulation gives “a minimum 100 percent disability rating ‘[f]or 1 year following implantation of [a] prosthesis,” with no mention of total or partial implantation.<sup>139</sup> The merits decision on these issues will be decided by a future panel.<sup>140</sup>

The Federal Circuit grappled with (1) whether NOVA had associational standing, (2) whether it should overrule *Disabled American Veterans*, and (3) whether § 502 is governed by the sixty-day deadline set out in Federal Circuit Rule 47.12(a) or by the six-year statute of limitations in 28 U.S.C. § 2401(a).<sup>141</sup>

#### A. NOVA Had Associational Standing

In terms of standing, the Federal Circuit went through the *Hunt v. Washington State Apple Advertising Commission*<sup>142</sup> test to determine

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134. 38 C.F.R. § 4.71(a). VA’s rating schedule guides the evaluation of disability resulting from injuries “incident to military service.” See § 4.1 (“The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries.”); see also *M21-1, Part III, Subpart iv, Chapter 4, Section A-Musculoskeletal Conditions*, U.S. DEP’T OF VETERANS AFFS. (Jan. 21, 2021), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014194/M21-1-Part-III-Subpart-iv-Chapter-4-Section-A-Musculoskeletal-Conditions#6](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/55440000014194/M21-1-Part-III-Subpart-iv-Chapter-4-Section-A-Musculoskeletal-Conditions#6) [<https://perma.cc/8Q4N-MMJP>] (describing evaluations for knee injuries under the subsection 6. *Evaluating Musculoskeletal Disabilities of the Legs*).

135. *NOVA*, 981 F.3d at 1366. Joint translation refers to the linear movement or sliding of a joint. See THOMAS F. BERGMANN & DAVID H. PETERSON, *CHIROPRACTIC TECHNIQUE: PRINCIPLES AND PROCEDURES* 13, 21 (3d ed. 2011).

136. *NOVA*, 981 F.3d at 1366.

137. *Id.*

138. 823 F.3d 630, 637–40 (Fed. Cir. 2016) (holding DC 5055 does not unambiguously exclude partial knee replacements).

139. *NOVA*, 981 F.3d at 1366 (alteration in original) (quoting 38 C.F.R. § 4.71(a)).

140. *Id.* at 1383.

141. *Id.* at 1367.

142. 432 U.S. 333 (1977).

whether NOVA had associational standing.<sup>143</sup> There are three requirements incumbent upon associations in the *Hunt* standing test: (1) “its members would otherwise have standing to sue in their own right”; (2) “the interests it seeks to protect are germane to the organization’s purpose”; and (3) “neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit.”<sup>144</sup>

Under the first prong of the *Hunt* test, the court found that NOVA’s members had “an actual or potential claim” to challenge the rule, since some of their members have been individually impacted by the rule.<sup>145</sup> As to the second prong in *Hunt*, the court determined that NOVA’s mission is “focused on helping veterans obtain fair compensation for their claims.”<sup>146</sup> The court found that “[t]his interest in fair adjudication of veteran disability benefits is precisely the interest NOVA [sought] to protect in challenging these two interpretive rules.”<sup>147</sup> As to the final prong in *Hunt*, NOVA’s challenge did not require “individualized proof” because the case presented a purely legal question asking whether the rules are unlawful under the Administrative Procedure Act (APA).<sup>148</sup>

*B. The Federal Circuit Has Jurisdiction to Review Manual Provisions*

The court then considered whether it had jurisdiction under § 502 to review the M21.<sup>149</sup> Under § 502, the Federal Circuit can review any “action of the Secretary” that falls under 5 U.S.C. § 552(a)(1) and § 553.<sup>150</sup> The court reviewed the rules separately to determine whether it had jurisdiction to review each.<sup>151</sup>

Focusing on the Knee Joint Stability Rule, the Federal Circuit looked to § 552(a)(1) for guidance.<sup>152</sup> Section 552 governs agency action that must be published in the Federal Register, such as “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated

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143. *NOVA*, 981 F.3d at 1368–72.

144. *Id.* at 1368 (quoting *Hunt*, 432 U.S. at 343).

145. *Id.* at 1369–70. NOVA submitted declarations from its members who suffered injuries traceable to “the alleged shortcomings” of the provisions it challenged. *Id.*

146. *Id.* at 1371.

147. *Id.*

148. *Id.* (quoting *Hunt*, 432 U.S. at 344).

149. *Id.* at 1372.

150. 38 U.S.C. § 502 (2018).

151. *NOVA*, 981 F.3d at 1372–73, 1382–83.

152. *Id.* at 1373–74.

and adopted by the agency.”<sup>153</sup> The court found that even though the rule was not published in the Federal Register, the Federal Circuit was not precluded from reviewing the rule.<sup>154</sup> Further, the court determined that the rule was within the general applicability language of § 552(a)(1), following the Supreme Court’s decision in *Azar v. Allina Health Services*.<sup>155</sup> In *Azar*, the Supreme Court determined that agency manual instructions “qualify as guidelines of general applicability.”<sup>156</sup>

The court overruled its prior holding in *Disabled American Veterans* by determining that since the Knee Joint Stability Rule “governs all regional office adjudications of knee instability claims,” it is an “interpretation of general applicability.”<sup>157</sup> The court found that even though the M21 is not binding on the Board of Veterans Appeals, the term “general applicability” refers to impact on a segment of the general public.<sup>158</sup> The court further held that because this rule has general applicability, it must be published in the Federal Register.<sup>159</sup>

The court also addressed whether the Knee Joint Stability Rule was a “[f]inal [a]gency [a]ction.”<sup>160</sup> To qualify as such, the court looked to determine whether the rule was “the consummation of the agency’s decisionmaking process . . . by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>161</sup> The court found that this rule was made with approval of a team at VA headquarters, and at the direction of the Under Secretary.<sup>162</sup> While the rule may be changed in the future, the court indicated the prospect of

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153. 5 U.S.C. § 552 (2018).

154. *NOVA*, 981 F.3d at 1374.

155. 139 S. Ct. 1804 (2019); *see NOVA*, 981 F.3d at 1374–75.

156. *NOVA*, 981 F.3d at 1374 (quoting *Azar*, 139 S. Ct. at 1814 n.1).

157. *Id.* at 1374 (quoting 5 U.S.C. § 552(a)(1)).

158. *Id.* at 1374–77.

159. *Id.* at 1377–78.

160. *Id.* at 1378.

161. *Id.* (quoting En Banc Brief for Respondent at 42, *NOVA*, 981 F.3d 1360 (No. 2020-1321)). The Supreme Court laid out this standard in *Bennett v. Spear*, holding that for an agency action be final, it must satisfy two conditions. *Bennett v. Spear*, 520 U.S. 154, 177 (1997). First, “the action must mark the consummation of the agency’s decisionmaking process.” *Id.* at 177–78 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Second, “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* at 178 (quoting *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

162. *NOVA*, 981 F.3d at 1379.

future changes did not negate its finding that the rule was final.<sup>163</sup> Further, veterans who apply for benefits for knee instability will all be bound by this rule, unless they appeal.<sup>164</sup> The court pointed to the *Auer v. Robbins*<sup>165</sup> deference standard, which courts had previously applied to M21 provisions, as further evidence of the final legal consequences of these provisions.<sup>166</sup> Because the Knee Joint Stability Rule is both an interpretative rule of general applicability and final, the Federal Circuit determined that it had the jurisdiction to review this rule.<sup>167</sup>

The Federal Circuit briefly looked at the Knee Replacement Rule.<sup>168</sup> The Knee Replacement Rule was published in the Federal Register in 2015.<sup>169</sup> The rule was republished in 2016 in a different form as a provision of the M21.<sup>170</sup> The court held, regardless of whether a rule is published in the M21 or the Federal Register, it has jurisdiction to review the rule under § 502.<sup>171</sup> The court ordered a full panel review of this Rule.<sup>172</sup>

*C. The Federal Circuit Overturns Court Rule, Expanding Statute of Limitations on Regulation and Manual Challenges to Six Years*

Finally, the Federal Circuit looked at the timeliness of the challenge.<sup>173</sup> Section 502 itself does not have a statute of limitations.<sup>174</sup> Under 28 U.S.C. § 2401, every civil action commenced against the United States must be filed within six years.<sup>175</sup> The Federal Circuit created its own rule that shortened the timeline under which litigants may file a § 502 action to just sixty days.<sup>176</sup> The court found that it is not allowed to create rules that are inconsistent with acts of Congress and no other courts have either expanded or limited the time to file a

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163. *Id.*

164. *Id.* at 1374.

165. 519 U.S. 452 (1997).

166. *NOVA*, 981 F.3d at 1381–82.

167. *Id.* at 1382.

168. *Id.*

169. *Id.* at 1365.

170. *Id.*; Agency Interpretation of Prosthetic Replacement of a Joint, 80 Fed. Reg. 42,040 (July 16, 2015) (to be codified at 38 C.F.R. pt. 4).

171. *NOVA*, 981 F.3d at 1382–83.

172. *Id.* at 1383.

173. *Id.*

174. 38 U.S.C. § 502 (2018).

175. 28 U.S.C. § 2401(a) (2018).

176. *NOVA*, 981 F.3d at 1383 (citing FED. CIR. R. 15(f)).

claim where a statutory time limit applies.<sup>177</sup> Thus, the court overturned its own local rules and found that the veterans are allowed to request a review of a regulation or a manual provision within six years of its promulgation.<sup>178</sup>

#### D. *Impact of NOVA*

*NOVA* is a major victory for veterans. For years, the M21 was insulated from judicial review, and veterans were required to appeal and wait for justice. Federal Circuit jurisdiction over agency manual provisions gives rise to systemic change for veterans, much needed in a bureaucracy known for delay. The decision impacts not just veterans with a knee injury, but any veteran who is impacted by a rule interpretation in the agency manual that has not gone through the rigorous process of notice and comment. Further, this decision will likely require VA to publish many of its rules in the Federal Register for public review and criticism, since many of the M21 rules are similar in terms of general applicability, like the Knee Joint Stability Rule.<sup>179</sup> And now, with the lengthened statute of limitations of six years, veterans and their advocates will have the necessary time to understand the implications of the M21 provisions and seek judicial relief where needed.

### III. THE PRESUMPTION OF COMPETENCE FOR VA MEDICAL EXAMINERS

The Federal Circuit's decision in *Francway v. Wilkie*<sup>180</sup> is part of the "[continuing] dialogue" between VA and the Federal Circuit over the past eleven years on the subject of whether or not a VA medical examiner can

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177. *Id.* at 1384.

178. *Id.* at 1386.

179. *Compare id.* at 1374 (explaining that the Knee Joint Stability Rule is of general applicability because in part "governs all regional office adjudications of knee instability claims, affecting an open-ended category of veterans"), with *M21-1, Part V, Subpart ii, Chapter I, Section A—Requirements for Live Pension Ratings*, U.S. DEP'T OF VETERANS AFFS. (Oct. 21, 2020), [https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014383/M21-1-Part-V-Subpart-ii-Chapter-I-Section-A-Requirements-for-Live-Pension-Ratings](https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014383/M21-1-Part-V-Subpart-ii-Chapter-I-Section-A-Requirements-for-Live-Pension-Ratings) (explaining how veterans generally can establish their eligibility for a Veterans Pension); *see also NOVA*, 981 F.3d at 1374 (recognizing that "many [agency] manual instructions surely qualify as guidelines of generally applicability" (alteration in original) (quoting *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 n.1 (2019))).

180. 940 F.3d 1304 (Fed. Cir. 2019) (en banc).

be presumed competent to provide a medical opinion.<sup>181</sup> A review of the long and winding history of the “presumption of competence”<sup>182</sup> is instrumental to understanding the future of this presumption.

A. *Historical Context*

The presumption of competence regarding medical examiners begins with *Rizzo v. Shinseki*.<sup>183</sup> Mr. Rizzo claimed that he suffered eye conditions that were caused by his exposure to ionizing radiation during service.<sup>184</sup> He submitted to VA the medical opinion of Dr. U. Hans Behling, a Ph.D. in Radiation Physics, who testified that a high dose of radiation exposure could have caused the veteran’s eye problems.<sup>185</sup> VA then asked the Defense Threat Reduction Agency (DTRA) for an estimate of the radiation Mr. Rizzo was likely exposed to during service.<sup>186</sup> The DTRA used a worst-case estimate of the amount of radiation exposure.<sup>187</sup> Based upon that estimate, a VA physician who served as the Chief Officer of Public Health and Environmental Hazards, Dr. Lawrence R. Deyton, gave the opinion that Mr. Rizzo’s eye conditions were not caused by his exposure to ionizing radiation on active duty.<sup>188</sup> VA found Dr. Deyton’s opinion to be more probative and denied Mr. Rizzo benefits for his eye condition.<sup>189</sup> Mr. Rizzo argued that VA’s decision to rely upon Dr. Deyton’s opinion was in error because VA did not “affirmatively establish Dr. Deyton’s competency as an expert,” nor did VA consider “evidence that would show that Dr. Deyton possessed the knowledge and expertise to qualify as an expert” regarding the veteran’s claims.<sup>190</sup>

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181. See, e.g., *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (noting “[t]he medical examiner whose opinion the [VA] relied on to deny a veteran’s claim is presumed competent, absent a specific objection by the veteran”), *denying cert. to* *Mathis v. McDonald*, 643 F. App’x 968 (Fed. Cir. 2016).

182. *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (quoting *Cox v. Nicholson*, 20 Vet. App. 563, 569 (2007), *dismissed by* *Cox v. Peake*, 263 F. App’x 864 (Fed. Cir. 2008)), *overruled by* *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019) (en banc).

183. *Id.*, *overruled by* *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019) (en banc).

184. *Id.* at 1289.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 1289–90.

190. *Id.* at 1290.

When considering the presumption that a VA medical examiner providing an opinion is competent to do so, the Federal Circuit considered<sup>191</sup> the Veterans Court's decision in *Cox v. Nicholson*,<sup>192</sup> which found that the "Board [was] entitled to assume the competenc[y] of a VA examiner" if no doubt had been raised regarding that examiner's competency.<sup>193</sup> Explicitly adopting the Veterans Court's reasoning in *Cox*, the Federal Circuit held that "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion."<sup>194</sup> The court noted that while the veteran challenged Dr. Deyton's *opinion* before the Board, he did not specifically challenge Dr. Deyton's *credentials*.<sup>195</sup> A challenge to Dr. Deyton's credentials would have been necessary to challenge the Board's reliance on his medical opinion.<sup>196</sup> The court also relied upon the presumption of regularity—that "in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties"—to determine that Dr. Deyton was competent to provide a medical opinion on Rizzo's claims.<sup>197</sup>

In the year following *Rizzo*, the Federal Circuit determined in *Bastien v. Shinseki*<sup>198</sup> that a veteran challenging the competency of a VA medical expert "must set forth the specific reasons why . . . the expert is not qualified to give an opinion" in order for the Board to "determine the validity" of the veteran's dispute.<sup>199</sup> Unfortunately for the widow in *Bastien*, the court determined that her request for VA medical expert's qualifications and her protest that this same examiner was not an independent medical expert were not enough to raise a challenge to the examiner's competency.<sup>200</sup>

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191. *Id.* at 1290–91.

192. 20 Vet. App. 563 (2007), *dismissed by Cox v. Peake*, 263 F. App'x. 864 (Fed. Cir. 2008).

193. *Id.* at 569.

194. *Rizzo*, 580 F.3d at 1291.

195. *Id.*

196. *Id.*

197. *Id.* at 1292 (quoting *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004)).

198. 599 F.3d 1301 (Fed. Cir. 2010), *overruled by Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019) (en banc).

199. *Id.* at 1307.

200. *Id.* at 1306–07.

In 2011, following *Bastien*, the court considered the extent of the Board's discussion of the competency of a medical examiner. In *Sickels v. Shinseki*,<sup>201</sup> the court found that when the veteran failed to specifically challenge the examiner's credentials, the Board was not required to provide an explanation as to why the examiner should be deemed competent.<sup>202</sup>

In the 2013 decision *Parks v. Shinseki*,<sup>203</sup> the court reviewed the case of Mr. Parks, a veteran, who sought benefits for heart- and diabetes-related conditions he believed were caused by his exposure to chemical warfare agents during his participation in a classified experimental project.<sup>204</sup> To determine if these chemical agents could have led to the claimed conditions, VA engaged an advanced registered nurse practitioner to provide a medical opinion on the subject.<sup>205</sup> Throughout this process at the agency, Mr. Parks represented himself *pro se*.<sup>206</sup> On appeal and with counsel, Mr. Parks argued that the nurse practitioner was unable to provide "competent medical evidence" regarding these issues.<sup>207</sup> The court ultimately held that Mr. Parks had waived the issue of competency when he failed to raise the issue at the agency level.<sup>208</sup> The fact that Mr. Parks was *pro se* was no excuse.<sup>209</sup> The court suggested that if Mr. Parks had raised *any* objection, such as suggesting "that no nurse practitioner was competent to provide the opinion, or that [the examiner] herself was in some way incompetent," he would have preserved the issue.<sup>210</sup> However, in this case, Mr. Parks had not raised any concern about the examiner's competency at the agency level.

The court reasoned that a presumption is a presumption for a reason—to avoid unnecessary evidentiary burdens.<sup>211</sup> The presumption of competency, however, is rebuttable. Nevertheless, in order to rebut the presumption, "it may be necessary for the veteran to provide

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201. 643 F.3d 1362 (Fed. Cir. 2011).

202. *Id.* at 1366.

203. 716 F.3d 581 (Fed. Cir. 2013).

204. *Id.* at 582.

205. *Id.* at 583.

206. *See id.*

207. *Id.* (quoting 38 C.F.R. § 3.159(a)(1) (2019)).

208. *Id.* at 586.

209. *Id.*

210. *Id.*

211. *Id.* at 585.



information to overcome the presumption.”<sup>212</sup> While VA is presumed to have chosen the appropriate examiner qualified by “training, education, or experience in the particular field” to provide a medical opinion, the court noted that demonstrating an examiner lacks these presumed qualifications would overcome the presumption.<sup>213</sup>

In 2016, the Federal Circuit issued a non-precedential decision in *Mathis v. McDonald*<sup>214</sup> where the court considered rejecting “the presumption of competency as it applies to VA medical examiners.”<sup>215</sup> While determining that the court was bound by *Rizzo*, the court noted:

[T]hough there may be a fair basis to criticize the *Rizzo* line of cases, there exists a practical need for an administrable rule, given the volume of claims the VA is charged with processing. Replacing the presumption established by *Rizzo* would require a concrete, clear standard for determining the sufficiency of an examiner’s qualifications to conduct an examination or provide a medical opinion.<sup>216</sup>

Mr. Mathis petitioned for a rehearing en banc, which was denied by the court.<sup>217</sup> Judge Hughes, joined by five other judges, wrote a concurrence to this denial in order to emphasize “the limited nature of the rebuttable presumption” and underscore VA’s obligations to develop the record and assist the veteran.<sup>218</sup>

In contrast, the dissent, authored by Judge Reyna and joined by two others, maintained that the presumption of competence is a “judicially created evidentiary presumption that in application denies due process to veterans seeking disability benefits.”<sup>219</sup> The dissent reasoned that because the court had not determined in *Rizzo* if VA’s process of choosing medical examiners actually provided for competent examiners, the presumption of competence was wrongly created, “void of any evidentiary basis.”<sup>220</sup> Noting the disparity between the level of scrutiny placed upon private physician medical opinions provided by veterans and VA’s own medical examinations, the dissent reasoned:

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212. *Id.*

213. *Id.*

214. 643 F. App’x 968 (Fed. Cir. 2016).

215. *Id.* at 971.

216. *Id.* at 975.

217. *Mathis v. McDonald*, 834 F.3d 1347, 1348 (Fed. Cir. 2016) (per curiam), *denying reh’g en banc* 643 F. App’x 968 (Fed. Cir. 2016) (en banc).

218. *Id.* at 1349 (Hughes, J., concurring).

219. *Id.* at 1353 (Reyna, J., dissenting).

220. *Id.* at 1353, 1355.

As it does in cases involving medical opinions provided by professionals hired by the veteran, the Board should be able to examine a VA examiner's qualifications and weigh them in determining the persuasive value of an examiner's reports rather than being instructed by this court to presume that the examiner is competent. The VA's incentive to not provide evidence about the examiner's qualifications will be strongest when an examiner is not qualified or is barely qualified, the very circumstances where the veteran, the Board, and the Veterans Court ought to know an examiner's qualifications.<sup>221</sup>

Comparing VA's use of experts to those relied upon under Federal Rule of Evidence 702, the dissent concluded that the Board must affirmatively determine if the examiner is competent before relying upon the medical opinion provided.<sup>222</sup>

Thereafter, Mr. Mathis petitioned the Supreme Court for a writ of certiorari.<sup>223</sup> The Supreme Court denied certiorari, but not without comment.<sup>224</sup> Justice Gorsuch dissented from the denial, noting that the Board often refuses to provide veterans with information concerning the qualifications of an examiner even after request and that this denial thwarts the duty to assist.<sup>225</sup> Justice Gorsuch framed the issue as follows: "how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?"<sup>226</sup>

Justice Sotomayor, understanding the issue similarly, noted that unfortunately, the *Mathis* case did not provide the appropriate vehicle to review the presumption of competency that may "work to the veteran's disadvantage," because Mr. Mathis did not request the examiner's credentials from VA at the agency level.<sup>227</sup> She further explained that the appropriate case to allow the Court to review the presumption of competency would arise when VA declined to provide an examiner's qualifications after a veteran's request and subsequently

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221. *Id.* at 1357.

222. *Id.* at 1358.

223. *See Mathis v. Shulkin*, 137 S. Ct. 1994, 1994 (2017), *denying cert. to Mathis v. McDonald*, 643 F. App'x 968 (Fed. Cir. 2016).

224. *See id.* at 1994 (Sotomayor, J., concurring); *id.* at 1995 (Gorsuch, J., dissenting).

225. *See id.* at 1995 (Gorsuch, J., dissenting).

226. *Id.*

227. *Id.* (Sotomayor, J., concurring).

denied the veteran's claims.<sup>228</sup> Until that case arises, "staying our hand allows the Federal Circuit and VA to continue their dialogue over whether the current system for adjudicating veterans' disability claims can be squared with VA's statutory obligations to assist veterans in the development of their disability claims."<sup>229</sup>

### B. *Francway v. Wilkie*

This tapestry of cases provides the backdrop for the *Francway* decision and the continuing dialogue between the Federal Circuit and VA regarding these issues. In July of 2019, the Federal Circuit issued a panel decision in *Francway*.<sup>230</sup> Mr. Francway, a veteran, filed a claim for a back condition he believed was caused by an accident he suffered while on active duty.<sup>231</sup> After appealing the decision to the Board, the Board remanded Mr. Francway's case back to the regional office in order to obtain an opinion from an "appropriate medical specialist" concerning the claim.<sup>232</sup> Mr. Francway's medical records were reviewed by an internist, who found that his current disability was not caused by his claimed in-service event.<sup>233</sup> The Board found no service connection.<sup>234</sup>

On appeal to the Veterans Court, Mr. Francway argued for the first time that the internist providing the medical opinion was not an "appropriate medical specialist."<sup>235</sup> Mr. Francway also argued that VA's duty to assist prohibited VA from relying upon a presumption of competency of its own medical experts.<sup>236</sup> This argument's foundation is found in language from *Rizzo*, which indicates that the veteran bears some burden to demonstrate that VA's reliance on the examiner's opinion was in error.<sup>237</sup> In the July 2019 opinion, written by Judge Dyk and joined by Chief Judge Prost and Judge Lourie, the court explained that it construed Mr. Francway's "continued argument as to the

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228. *See id.*

229. *Id.*

230. *Francway v. Wilkie*, 930 F.3d 1377 (Fed. Cir. 2019), *amended and superseded on reh'g en banc* by 940 F.3d 1304 (Fed. Cir. 2019).

231. *See id.* at 1378.

232. *Id.*

233. *See id.* at 1378–79.

234. *See id.* at 1379.

235. *Id.*

236. *See id.*

237. *Id.* at 1379–80 (citing *Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009), *overruled by Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019) (en banc)).

illegitimacy of the presumption as a request for . . . an en banc hearing . . . to overturn *Rizzo*.<sup>238</sup> The court declined to do so, stating that the presumption of competency rule was “far narrower” than Mr. Francway presented it and that it “[was] not inconsistent with the statutory scheme.”<sup>239</sup>

The court explained that the *Rizzo* presumption of competency was unlike traditional presumptions in that the veteran was *not* required to provide evidence of incompetency to rebut the presumption—the veteran must merely raise a challenge to the competency of the examiner.<sup>240</sup>

[O]nce the veteran raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner’s qualifications.<sup>241</sup>

The court also noted that the veteran has a right to request materials that would allow them to challenge the examiner’s competence and to include the examiner qualifications, and that VA’s duty to assist mandates that VA provide this information to the veteran.<sup>242</sup>

Three months later, in October 2019, the court withdrew the July 2019 precedential opinion and reissued it en banc, deleting a footnote regarding the Federal Circuit’s rules on requesting en banc review.<sup>243</sup> The impetus for this en banc review appears to be an attempt to reconcile the view that a veteran need only raise some question of the examiner’s competence with the court’s previous and inconsistent precedent in *Rizzo* and *Bastien* that requires the veteran to “set forth the specific reasons why the litigant concludes that the expert is not qualified to give an opinion.”<sup>244</sup> In order to perfect this reconciliation, the court added this text: “We see no inconsistency since the ‘presumption of competency’ is far narrower than Francway asserts

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238. *Id.* at 1379.

239. *Id.*

240. *See id.* at 1380.

241. *Id.* at 1381.

242. *See id.*

243. *Id.*

244. *Mathis v. McDonald*, 643 F. App’x 968, 971 (Fed. Cir. 2016) (quoting *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010), *overruled by* *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019) (en banc)). *Compare Francway*, 930 F.3d at 1380 (“The presumption of competency requires nothing more than . . . that the veteran raise the issue.”), *with Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (“Absent some challenge to [the medical examiner’s] credentials, this court sees no reason to preclude the Board’s reliance on [his] competence.”), *overruled by* *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019) (en banc), *and Bastien*, 599 F.3d at 1307.

and is not inconsistent with the statutory scheme.”<sup>245</sup> Additionally, in place of the deleted footnote, the court added this footnote specifically overruling inconsistent portions of *Rizzo* and *Bastien*:

The en banc court formed of Prost, Chief Judge, Newman, Lourie, Dyk, Moore, O’Malley, Reyna, Wallach, Taranto, Chen, Hughes, and Stoll, Circuit Judges, has determined that to the extent that the decision here is inconsistent with *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), and *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), those cases are overruled. We note that in the future, the requirement that the veteran raise the issue of the competency of the medical examiner is best referred to simply as a “requirement” and not a “presumption of competency.”<sup>246</sup>

How, precisely, the court believed that changing “presumption of competency” to a “requirement” and overruling portions of *Rizzo* and *Bastien* would affect VA’s reliance on medical examiners who are not required to provide qualifications is unclear.

The veterans’ advocacy community has argued that the court’s ruling does not substantively change the situation for veterans in any meaningful way. For example, in November 2019, Mr. Francway filed a petition for certiorari to the Supreme Court to review the Federal Circuit’s decision.<sup>247</sup> While the Supreme Court denied the petition in March of 2020, the petition and accompanying amici briefs are illustrative of veterans advocates’ concerns regarding the *Francway* decision.

In the petition, Mr. Francway argued that:

In a one-paragraph footnote, the full court “overruled” certain (undefined) aspects of the doctrine and rebranded it as “simply . . . a ‘requirement.’” But the core of the presumption (or, to use the Federal Circuit’s euphemism, “requirement”)—the veteran’s obligation to articulate a *specific reason* to believe the examiner is incompetent before the VA will address the issue—apparently remains intact.<sup>248</sup>

In a reply brief, Mr. Francway went on to note that:

The presumption of competency stands as a glaring anomaly in this uniformly pro-claimant regime. The presumption tasks veterans with the affirmative obligation to request the examiner’s credentials and raise challenges to the examiner’s competence. If the veteran fails to

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245. *Francway*, 940 F.3d at 1307.

246. *Id.* at 1307 n.1 (emphasis omitted).

247. See Petition for Writ of Certiorari, *Francway v. Wilkie*, No. 19-604 (Nov. 7, 2019).

248. *Id.* at 3 (citation omitted).

discharge these burdens, the presumption permits the VA and the courts to assume, without any evidence, that the examiner is qualified.<sup>249</sup>

In its amicus brief, the National Law School Veterans Clinic Consortium noted that this continuing “requirement” for veterans to raise concerns regarding the competence of the examiner is unjust because most veterans have no idea that such a requirement exists and are either pro se or represented by non-attorneys during this crucial period.<sup>250</sup> This burden on the veteran undermines the unique pro-claimant system in which VA has a duty to assist the veteran that is the hallmark of VA.<sup>251</sup>

In its rebuttal to the cert petition, VA argued *Francway* clarified any confusion *Rizzo* and its subsequent cases created regarding a veteran’s burden to persuade the VA of a medical examiner’s incompetence.<sup>252</sup> VA claimed that under *Francway*, the Federal Circuit answered concerns by affirmatively stating that the only burden on a veteran is to merely to raise the question of competency.<sup>253</sup> VA also reasoned that the *Francway* decision addressed the concerns of Justices Sotomayor and Gorsuch in the *Mathis* denial of certiorari—“that the VA might refuse to provide veterans with information concerning an examiner’s qualifications, leaving veterans unable to challenge examiner competency”—by requiring VA to respond to any request by the veteran for this information.<sup>254</sup> In short, VA’s position was that *Francway* cuts in favor of the veteran. VA reasoned that by not requiring the agency to qualify every expert it was helping veterans, as doing so permitted the VA to consider veteran-submitted medical opinions from private practitioners without engaging in a lengthy qualification procedure as a prerequisite to consideration.<sup>255</sup> VA proposed that if

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249. Reply Brief for the Petitioner at 3, *Francway*, No. 19-604 (Feb. 21, 2020).

250. Brief of Amicus Curiae National Law School Veterans Clinic Consortium in Support of Petitioner at 17, *Francway*, No. 19-604 (Dec. 4, 2019).

251. *Id.* at 19. An amicus brief filed by Military-Veterans Advocacy Inc. also raised this concern. See Brief of Military-Veterans Advocacy Inc. as Amicus Curiae in Support of Petitioner at 2, *Francway*, No. 19-604 (Dec. 9, 2019) (“The presumption of competence is an anti-claimant concept in an otherwise uniquely pro-claimant system of veterans’ benefits adjudication.”).

252. See Brief for the Respondent in Opposition at 14–15, *Francway*, No. 19-604 (Feb. 7, 2020).

253. See *id.* at 15.

254. *Id.* at 16 (citing *Mathis v. Shulkin*, 137 S. Ct. 1994, 1994–95 (2017), *denying cert. to Mathis v. McDonald*, 643 F. App’x 968 (Fed. Cir. 2016)).

255. See *id.* at 13.

veterans were unsatisfied with the current procedures for medical examinations, the appropriate vehicle for change was not a legal challenge, but a petition for rulemaking under the APA.<sup>256</sup> The Supreme Court denied certiorari without comment.<sup>257</sup>

### C. *Application of Francway*

While the Federal Circuit may believe it has made clear the only burden on a veteran is the “requirement” that a veteran merely raise the issue of competency, this clarification in the law has not reliably been applied by the agency. As illustrated in a sample of cases decided by the Board of Veterans’ Appeals since the October 2019 *Francway* decision, the Board has, at best, a spotty record in complying with the Federal Circuit’s guidance—to the detriment of veterans.

More specifically, in cases where the veteran’s representative specifically asked for the curriculum vitae of the examiner, the Board found that this request did not meet the requirements of *Rizzo*—which the Federal Circuit explicitly overruled in this regard. Here is one example:

Further the Veteran’s representative requested the qualifications and curriculum vitae of the VA examiner, citing *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019). *The Veteran’s representative provided no specific challenge to the VA examiner’s qualifications, but rather contends that he does not have the necessary information to form a challenge so as to begin to identify inadequacies in the examiner’s qualifications. The Board disagrees with an obligation to provide [any] additional information not already of record. . . . All VA examiners are presumed to be competent - and their medical opinions, in turn, are assumed to be adequate - absent specific evidence to the contrary . . . .*

The Board finds that the Veteran’s representative’s general assertions and request for documentation including the examiner’s curriculum vitae and other documents is insufficient to rebut the presumption of regularity and serves only to delay adjudication. . . . The Veteran has simply demanded that VA provide him publicly available information in or[der] to form a challenge. The Veteran has in fact not yet raised any specific challenge. . . .

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256. *See id.* at 14.

257. *See Francway v. Wilkie*, 140 S. Ct. 2507 (2020) (mem.), *denying cert. to* 940 F.3d 1304 (Fed. Cir. 2019) (en banc).

The Veteran's representative's request for a curriculum vitae and other documents, standing alone, is insufficient to rebut the presumption of regularity.<sup>258</sup>

In many other instances, the Board confused the response VA must provide a veteran when she raises the question of competency. For instance, in one case, the veteran specifically raised a challenge to the qualifications of each examiner who conducted his examinations, noting that the examiners had not been shown to have particular expertise in the conditions being reviewed. Considering this argument, the Board found:

Here, the Veteran has not requested the curriculum vitae or any other information concerning the individual qualifications of the physician assistant and the nurse practitioner who performed his June 2018 VA examinations. He has not asserted any unusual facts of his claimed disabilities that would require the heightened education and experience of a physician or specialist. Rather, the assertion made is that physician assistants and nurse practitioners as groups of medical professionals are not competent to perform these examinations. As this is a general challenge, the Board finds that the presumption of competence as to the physician assistant and nurse practitioner here has not been rebutted, and consequently, the Board finds the physician assistant and nurse practitioner who performed the Veteran's June 2018 VA examinations to have been competent to perform those examinations.<sup>259</sup>

But in another agency case, the Board recognized that an attorney's challenge that a doctor with the specialty of "obstetrics and gynecology" did not have the expertise to evaluate coronary artery disease and did require the VA to establish the examiner's qualifications.<sup>260</sup>

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258. Bd. Vet. App. 20057088, No. 14-27 666, 2020 WL 7086946, at \*4-5 (Aug. 28, 2020) (emphasis added); *see also* Bd. Vet. App. 20046042, No. 16-63 409, 2020 WL 6108857, at \*12-13 (July 9, 2020) (after acknowledging that the veteran's representative requested the CV of the examiner the Board refused, noting that "[t]he Veteran's request for a curriculum vitae, standing alone, is insufficient to rebut the presumption of regularity").

259. Bd. Vet. App. 20021261, No. 14-06 201, 2020 WL 2826359, at \*3 (Mar. 25, 2020); *see also* Bd. Vet. App. 20004390, No. 18-03 138, 2020 WL 1551812, at \*4 (Jan. 17, 2020) (stating that where the veteran raises concerns that a nurse practitioner is not qualified to perform certain examinations, the Board requires the veteran to raise a "specific challenge to the professional medical competence or qualifications of the VA examiner who provided his VA examination" or provide a "showing that the examiner is not competent or did not report accurately what she found in her review of the claims file").

260. *See* Bd. Vet. App. 20034751, No. 19-08 411, 2020 WL 5199085, at \*24 (May 19, 2020).



The Board finds that the attorney’s challenge meets the *Francway* criteria, as it is more than just general assertions of inadequacy. Hence, the challenge is sufficient to shift the burden of persuasion to the VA to establish the examiner’s qualifications by providing information about those qualifications to the Veteran and his representative . . . . Hence, the Board finds that, at most, *Francway* requires that VA obtain the VA examiner’s curriculum vitae and provide it to the Veteran and his attorney to provide them the opportunity to make a more informed argument as to why the examiner would not be qualified to evaluate the Veteran’s heart disability . . . .<sup>261</sup>

Despite a lack of discernable differences between these cases’ facts, the Board made directly contradictory holdings—not just to one another, but to *Francway* as well. In one case, the veteran need not raise a “specific” challenge to the examiner’s competence; yet, in the other case, the veteran must.

In several other cases, the Board appears to wrestle with reconciling the difference between a “requirement” on the part of the veteran to raise the issue of competency in order to begin VA’s duty to review the qualifications of the examiner and the “presumption of competence” that has been explicitly overruled by *Francway*. The agency commonly confuses the issue of what it means for a veteran to “challenge a VA examiner’s competence in the first instance” in order to invoke *Francway*.<sup>262</sup> For instance, in one case where the veteran raised a general challenge to the professional competence of the examiner, the Board found the following:

Neither the Veteran nor his representative has raised a specific challenge to the professional medical competence or qualifications of the VA examiners who provided the medical evidence obtained by the AOJ during the pendency of this appeal. In other words, the appellant has not satisfied the requirement of raising a specific challenge to a VA examiner’s competence in the first instance. As a result, VA is not required to support its decision in this appeal by presenting information about the examiner’s qualifications . . . . [A]s the Federal Circuit held in *Francway*, although there is no longer a presumption of competence for VA examiners (as *Rizzo* previously was interpreted), a Veteran nevertheless is required to challenge a VA examiner’s competence in the first instance before VA is required to present evidence of the examiner’s professional

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261. *Id.* at \*25.

262. Bd. Vet. App. 19196178, No. 17-44 767, 2019 WL 8053245, at \*4 (Dec. 26, 2019).

qualifications in order to rebut this challenge . . . There has been no showing or even an allegation that the VA examiners who provided the medical evidence obtained by the AOJ were not competent or did not report accurately what they found in their review of the claims file.<sup>263</sup>

While these cases from the Board wind their way through the appeals courts, if in fact they are appealed at all, it will be important to keep an eye on how VA is applying *Francway* to ensure consistency across the system. This is true particularly when most veterans are pro se<sup>264</sup> and are not expected to have an “encyclopedic knowledge of veterans law.”<sup>265</sup>

#### IV. SCULPTING VA’S DUTY TO SYMPATHETICALLY READ A VETERAN’S CLAIM FOR BENEFITS

The VA claims process was designed by Congress to be a non-adversarial system where veterans receive help from VA to develop their claims.<sup>266</sup> Since 1988, with the creation of the Veterans Court and the establishment of judicial review of VA’s decision making process,<sup>267</sup> the courts have been defining the duties VA owes to veterans in the adjudication process. Recently, the Federal Circuit has issued two landmark decisions that continue to sculpt one of the core tenants of VA’s non-adversarial system—the duty to assist veterans in prosecuting

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263. *Id.* at \*3–4. This problem, almost entirely word for word in its analysis at the Board, can be found in a number of Board decisions. *See, e.g.*, Bd. Vet. App. 19192345, No. 14-29 909, 2019 WL 8048944, at \*2–3 (Dec. 10, 2019); Bd. Vet. App. 19184428, No. 16-33 531, 2019 WL 7824469, at \*2–4 (Nov. 7, 2019); Bd. Vet. App. 20049405, No. 15-38 307, 2020 WL 6192573, at \*3 (July 3, 2020); Bd. Vet. App. 20049877, No. 20-14 646, 2020 WL 6220352, at \*3–4 (July 27, 2020) (finding that the veteran’s representative failed to raise specific concerns about the examiner’s competence); Bd. Vet. App. A20013470, No. 200302-66204, 2020 WL 7089063, at \*5 (Aug. 24, 2020) (requiring the veteran to raise specific competency concerns to rebut the presumption of competence and failing to cite to *Francway* at all); Bd. Vet. App. 20057474, No. 14-36 098, 2020 WL 7087876, at \*7 (Aug. 31, 2020) (same); Bd. Vet. App. 20055851, No. 14-27 817A, 2020 WL 7085193, at \*18 (Aug. 24, 2020) (same).

264. *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

265. *See Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007) (per curiam).

266. *See Drake et al.*, *supra* note 6, at 1345 (describing how the process is “uniquely pro-claimant”); *see also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 323–24 (1985) (noting that “Congress desired that the proceedings be as informal and nonadversarial as possible”).

267. *See Veterans’ Judicial Review Act*, Pub. L. No. 100-687, 102 Stat. 4105, 4113–22 (1988).

their claims.<sup>268</sup> In order to understand the Federal Circuit's most recent forays into the defining the scope of this duty, it is important to understand the landscape within which VA offers this assistance to veterans.

#### A. *The Duty to Assist*

While the character of a non-adversarial system has many nuances, the prohibition preventing veterans from hiring an attorney to help them through the process of filing a claim and receiving an initial decision from VA has great impact on the discussion here.<sup>269</sup> This prohibition is permissible, the Supreme Court rationalized, because VA was created to assist veterans.<sup>270</sup> Allowing attorneys to intervene in VA's methods of assisting veterans during the initial processing of a claim will unnecessarily burden the system with adversarial interactions that would hinder VA's assistance to a veteran.<sup>271</sup> The prohibition on hiring professionals to begin the claims process is significant because it often means that a veteran is filing a claim on his or her own, or with the help of a non-expert agent.<sup>272</sup> The veteran and the agents are not likely to be trained in either reading medical records to determine the correct names for disabilities or the statutes and case law defining the specificity with which the veteran must explain a disability in order to claim it. Additionally, the veteran and volunteer are quite likely to assume that because a disability is listed in a veteran's medical records, VA must see and act upon that condition.<sup>273</sup>

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268. See *Sellers v. Wilkie*, 965 F.3d 1328, 1330 (Fed. Cir. 2020) (concerning whether a service member's past claim for disability should be read to include a current disability that was not mentioned in the past application); *Shea v. Wilkie*, 926 F.3d 1362, 1364 (Fed. Cir. 2019) (concerning whether an informal application for physical disability benefits could be read to include a claim for psychiatric benefits).

269. 38 U.S.C. § 5904(c)(1) (2018) (forbidding the payment of any legal fee to an attorney prior to the rendering of the respective agency's initial decision); see also Stacey-Rae Simcox, *Thirty Years After Walters the Mission Is Clear, the Execution Is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 695–97 (2016) (discussing the expansion of attorneys' involvement in the claims process and the debate on further expansion).

270. See *Walters*, 473 U.S. at 333–34.

271. See *id.* at 323–24.

272. See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

273. See, e.g., *Shea*, 926 F.3d at 1367 (noting that the veteran argued that evidence of psychiatric issues in her medical record submitted in support of an explicit claim for physical disability benefits should have been sufficient informal notice of her claim for psychiatric benefits); *Sellers*, 965 F.3d at 1332.

Understanding that a veteran is often navigating a complex bureaucracy without expert help is integral to understanding VA's duty to assist the veteran in the claims process.<sup>274</sup> While the duty to assist veterans has been recognized as an important aspect of the VA for decades, it was not actually codified until 2000 in the Veterans Claims Assistance Act.<sup>275</sup> The term "duty to assist" comprises a number of specific duties, some created by statute and others imposed by the judiciary, that ensure VA is able to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary."<sup>276</sup> For example, in order to help the veteran gather evidence to support the claim, VA is required to (1) obtain all federal records that may help to prove a veteran's claim,<sup>277</sup> (2) help the veteran to procure private records,<sup>278</sup> and (3) provide the veteran a medical examination if that examination may help to further a favorable decision on the veteran's claim for disability benefits.<sup>279</sup>

In addition, there are many other duties encompassed under the "duty to assist" umbrella that have been acknowledged as necessary to assist veterans who are filing claims without the help of an expert advocate. One situation that arises quite often when a veteran is filing a claim is ambiguity in describing the claimed disability. Generally, the courts recognize that the essential requirements of any claim, whether formal or informal, include "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing."<sup>280</sup> Determining when a veteran has "identified the benefits sought" is a tug of war between VA and the veteran.

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274. For more information on the history and creation of the non-adversarial system, see Simcox, *supra* note 269, at 674–76 (detailing VA's history back to the U.S. Civil War).

275. See Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified as amended at 38 U.S.C. §§ 5100–5107 (2018)); see also *Hodge*, 155 F.3d at 1362 ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant.").

276. § 5103A(a)(1).

277. See § 5103A(c)(1)(C).

278. See § 5103A(b).

279. See § 5103A(d).

280. See *Brokowski v. Shinseki*, 23 Vet. App. 79, 84–85 (2009) (citing 38 C.F.R. § 3.159(a)(3) (2008) (noting that these regulations define a "[s]ubstantially complete application" for benefits as one that, inter alia, identifies "the benefit claimed and any medical condition(s) on which it is based" (alteration in original) (quoting § 3.159(a)(3))).

On one hand, the courts defer to the Congressional grant of authority to the Secretary, which allows him to create the rules governing the form(s) a claimant must use in order to pursue a benefit.<sup>281</sup> Within this authority, the Secretary has required that claims “contain[] specified information . . . as called for by the blocks on the application form” that all veterans must complete in order to file a claim.<sup>282</sup> On the other hand, the courts recognize that veterans filling out these claims forms are often doing so without expert help and often use imprecise language in describing the benefit they seek. The courts have sought to address this issue by requiring the VA to provide a “sympathetic reading” of the veteran’s claim.<sup>283</sup>

For example, a veteran suffering from knee pain need not tell VA the precise nature of his “patella femoral syndrome.” Writing “knee pain” on the claim form is sufficient to alert VA that the veteran seeks benefits for a knee condition and sufficient to trigger the duty to assist the veteran in the prosecution of the claim.<sup>284</sup> While there is no specific statutory or regulatory directive to VA requiring a sympathetic reading of a veteran’s claim for benefits, “it is clear . . . that it includes a duty to apply some level of expertise in reading documents to recognize the existence of possible claims that an unsophisticated pro se claimant would not be expected to be able to articulate clearly.”<sup>285</sup>

In other words, it is precisely because unsophisticated claimants cannot be presumed to know the law and plead claims based on legal elements that the Secretary must look at the conditions stated and the causes averred in a pro se pleading to determine whether they reasonably suggest the possibility of a claim for a benefit under title 38, regardless of whether the appellant demonstrates an

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281. See 38 U.S.C. § 5101(a)(1)(A) (requiring veterans submit a “specific claim [for benefits] in the form prescribed by the Secretary”); 38 C.F.R. § 3.151(a) (“A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid.”); *Mansfield v. Peake*, 525 F.3d 1312, 1317 (Fed. Cir. 2008).

282. See *Fleshman v. West*, 138 F.3d 1429, 1431–32 (Fed. Cir. 1988); see also *Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed. Cir. 1999) (discussing the statutory and regulatory requirements for seeking veterans’ benefits).

283. See *Ingram v. Nicholson*, 21 Vet. App. 232, 255 (2007) (per curiam) (citing *Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed. Cir. 1998)).

284. See *id.* at 256–57 (“It is the pro se claimant who knows what symptoms he is experiencing that are causing him disability, . . . [however] it is the Secretary who knows the provisions of title 38 and can evaluate whether there is potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission.” (citations omitted)).

285. *Id.* at 255.

understanding that such a benefit exists or of the technical elements of such a claim . . . . The duty to sympathetically read exists because a pro se claimant is not presumed to know the contents of title 38 or to be able to identify the specific legal provisions that would entitle him to compensation. Again, there would be no need for the duty to sympathetically read pleadings if pro se claimants had encyclopedic knowledge of veterans law.<sup>286</sup>

Determining how far VA must go in reading the veteran's imprecise claim language is an important aspect defining the parameters of VA's duty to assist. The courts have acknowledged that requiring VA to search for all possible claims in an imprecise claim for benefits would be encouraging "an unguided safari through the record to identify all conditions for which the veteran may possibly be able to assert entitlement to a claim for disability compensation."<sup>287</sup> However, because the veteran is a lay person, VA is required to look beyond the words on the paper submitted by the veteran to decipher the applicable benefit.<sup>288</sup> Helping VA determine the parameters of the duty "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits"<sup>289</sup> is an issue the Federal Circuit has taken up twice in the past year. The issue was first addressed in *Shea v. Wilkie*<sup>290</sup> in 2019 and then again in *Sellers v. Wilkie*<sup>291</sup> in 2020.

### B. *Shea v. Wilkie*

*Shea* involved an informal claim for benefits and *Sellers* involved a formal claim for benefits. The difference between the two generally involved the manner in which the veteran submits a claim to VA.<sup>292</sup>

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286. *Id.* at 256.

287. *Brokowski v. Shinseki*, 23 Vet. App. 79, 89 (2009).

288. *See Ingram*, 21 Vet. App. at 256 ("[S]ympathetic reading . . . cannot be based on a standard that requires legal sophistication beyond that which can be expected of a lay claimant."); *see also Brokowski*, 23 Vet. App. at 89 ("It is the Secretary's duty to . . . 'evaluate whether there is a potential [claim for benefits] under the law'" in a veteran's pro se submission (quoting *Ingram*, 21 Vet. App. at 256–57)).

289. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (quoting H.R. REP. NO. 100-963, pt. 1, at 13 (1988)).

290. 926 F.3d 1362 (Fed. Cir. 2019).

291. 965 F.3d 1328 (Fed. Cir. 2020).

292. For several years, the VA allowed veterans to provide "[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs" as long as the claim identified "the benefit sought." 38 C.F.R. § 3.155(a) (2014) (amended 2019). These claims were referred to as "informal claims." *Id.* The phrase "any communication" allowed veterans

However, as previously mentioned, both formal and informal claims require “identification of the benefits sought” in order to establish a claim for benefits.<sup>293</sup> This is the issue considered by the Federal Circuit in these two cases.

In *Shea*, the veteran, Kerry Shea, filed a claim in October 2007.<sup>294</sup> She submitted a statement in support of the claims in which she stated, “Veteran is App[li]ying For se[r]vice connected disabilit[i]es,” and directed VA to “Please see Attached VA Form 21-526.”<sup>295</sup> On the VA Form 21-526 EZ claim form, in the box that read “What disability are you claiming?,” Ms. Shea listed four disabilities: a pelvic fracture, breathing issues, lung problems, and chest pain.<sup>296</sup> Ms. Shea indicated these conditions began on January 23, 2007—the date of a motor vehicle accident—and identified three different medical facilities in which her medical records could be found.<sup>297</sup> VA granted Ms. Shea benefits in February 2008.<sup>298</sup> Ms. Shea appealed that decision by sending a letter to VA, dated July 7, 2008, asking VA to:

“[P]lease reconsider my disability rating” and explaining that, among other symptoms, “I also don’t remember a lot of things I do, even the same day,” “[m]y job had to print out special instructions for me to close out the computer step by step because I am unable to remember day to day,” and “I live the accident daily now.”<sup>299</sup>

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to send any written correspondence in any format that would require the VA to begin the claims process, as long as it was clear the veteran wanted some benefit. *Id.* When the VA received an informal claim, it was required to send the claimant a formal application form to execute. *Id.* If the VA received the form back from the veteran within a year of sending it to the veteran, the veteran’s effective date for benefits would be the date of the filing of the informal claim. *Id.* Informal claims were sometimes particularly difficult for the VA to recognize as actual claims for benefits. Additionally, it was possible that the veteran could make an informal claim for benefits within a formal application form. *See, e.g.,* *Lacoste v. Wilkie*, 775 F. App’x 1007, 1010 (Fed. Cir. 2019); *Long v. Wilkie*, No. 19-7301, 2020 WL 4379140, at \*3 (Vet. App. July 31, 2020). Please note that several of the regulations cited changed following the Veterans Appeals Improvement and Modernization Act of 2017, which was implemented by VA in 2019. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017).

293. *Brokowski*, 23 Vet. App. at 84.

294. *Shea*, 926 F.3d at 1365.

295. *Id.* (alterations in original).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* (alteration in original).

After many appeals on Ms. Shea's part, the VA eventually recognized this July 2008 appeal letter as an informal claim for benefits for a psychiatric disorder under 38 C.F.R. § 3.155 and granted a claim for post-traumatic stress disorder (PTSD) with an effective date of July 7, 2008.<sup>300</sup> Ms. Shea appealed this decision and argued that she deserved an earlier effective date for the PTSD condition (back to her initial claim in October 2007) because her diagnosis for PTSD was apparent in the medical records submitted for her specifically claimed conditions of pelvic fracture, breathing issues, lung problems, and chest pain.<sup>301</sup>

The Board disagreed, finding:

[T]hose diagnoses [of PTSD] in the record before the VA were insufficient to constitute an informal claim. There is no indication that [Ms. Shea] intended to file a claim for service connection for PTSD through the mere submission of medical records in support of her formal claims for service connection for non-psychiatric disabilities . . . The mere existence of a diagnosis in the record does not indicate that [Ms. Shea] wishes to file a claim for service connection for that disability. The October 2007 claim did not refer to any psychiatric disability or symptom that can be attributed to a psychiatric disability. Therefore, the Board finds that the October 2007 communication does not constitute a claim for service connection [] for a psychiatric disability[,] as it does not identify that benefits are being sought for a psychiatric disability.<sup>302</sup>

On appeal to the Veterans Court, Ms. Shea argued that the law did not require her to specifically tell the VA she was filing a claim for PTSD because an informal claim for this condition could be raised by "evidence alone."<sup>303</sup> The evidence Ms. Shea believed the VA should have viewed as an informal claim for PTSD was the PTSD diagnosis recorded in the same medical records she told the VA to request because they pertained to her specified claims for physical disabilities.<sup>304</sup> To support this position, she cited to the Federal Circuit's decision in

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300. *Id.* at 1366.

301. *See* *Shea v. Shulkin*, No. 16-3479, 2017 WL 6616735, at \*5 (Vet. App. Dec. 29, 2017) (summarizing Ms. Shea's argument that her medical records raised an informal claim for benefits), *vacated and remanded sub nom.*, *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019).

302. *Id.* (first, fourth, and fifth alterations in original) (citations omitted).

303. *Id.*

304. *Shea*, 926 F.3d at 1369.



*Harris v. Shinseki*,<sup>305</sup> which held “the VA has a duty to fully develop any filing made by a pro se veteran by determining all potential claims raised by the evidence.”<sup>306</sup> The Veterans Court agreed with the Board’s decision, stating that Ms. Shea was “rel[ying] on *the mere existence* of medical evidence of a psychiatric condition, in existence at the time of the formal claim for benefits for physical disabilities,” which “alone does not raise an initial claim for benefits.”<sup>307</sup> The Veterans Court distinguished Ms. Shea’s case from *Harris* by pointing out that *Harris* discussed VA’s duties to provide the claimant with the benefit of the doubt and to sympathetically develop a claim, but did not discuss the scope of required language which would be sufficient to constitute a claim for benefits.<sup>308</sup>

In an opinion written by Judge Taranto, the Federal Circuit vacated the Veterans Court decision.<sup>309</sup> The opinion focused quite precisely on the specificity required of the veteran when identifying the benefits sought.<sup>310</sup> The Federal Circuit found the Veterans Court applied too strict a standard when it required that Ms. Shea must use words indicating she was claiming a mental health condition.<sup>311</sup> In discussing the line of cases that culminated in *Harris*, Judge Taranto concluded, “[t]he lesson of our cases is that, while a pro se claimant’s ‘claim must identify the benefit sought,’ the identification need not be explicit in the claim-stating documents, but can also be found indirectly through examination of evidence to which those documents themselves point when sympathetically read.”<sup>312</sup> The decision describes VA’s duty to sympathetically read a veteran’s claim as follows:

“[T]he Board is not obligated to consider ‘all possible’ substantive theories of recovery.” . . . But in deciding what disabilities, conditions, symptoms, or the like the claim-stating documents are sympathetically understood to be identifying, VA must look beyond the four corners of those documents when the documents themselves point elsewhere—here, to medical records . . . . “*Roberson*, *Robinson*, and *Comer* thus require the Veterans Court to

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305. 704 F.3d 946 (Fed. Cir. 2013).

306. *Id.* at 948 (citing *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)).

307. *Shea*, 2017 WL 6616735, at \*7.

308. *Id.* at \*7.

309. *Shea*, 926 F.3d at 1364.

310. *Id.* at 1367–69.

311. *Id.* at 1364 (concluding that “the Veterans Court applied too restrictive a legal standard in reading [Ms. Shea’s initial] 2007 application [for disability benefits]”).

312. *Id.* at 1367–68.

look at all of the evidence in the record to determine whether it supports related claims for service-connected disability even though the specific claim was not raised by the veteran.”<sup>313</sup>

The Federal Circuit explained that the Veterans Court was correct in asserting that a mere diagnosis in medical records is not enough to raise a claim.<sup>314</sup> However, Ms. Shea’s case is distinguishable in that Ms. Shea directed the VA to specific medical records when telling the VA that she was “applying for service connected disabilities” and that these medical records contained the diagnosis of PTSD.<sup>315</sup> The Federal Circuit held that “where a claimant’s filings refer to specific medical records, and those records contain a reasonably ascertainable diagnosis of a disability, the claimant has raised an informal claim for that disability under [38 C.F.R.] § 3.155(a).”<sup>316</sup>

### C. *Sellers v. Wilkie*

Approximately one year after *Shea*, the Federal Circuit issued its decision in *Sellers v. Wilkie*, taking a less expansive view on the issue. Mr. Sellers filed a formal claim in March 1996 for physical disabilities and told VA that he was treated while in service for these conditions.<sup>317</sup> He also wrote to VA: “Request [service connection] for disabilities occurring during active duty service.”<sup>318</sup> VA did not view this general request “for disabilities occurring during active duty service” as a claim for a mental health condition.<sup>319</sup> When Mr. Sellers filed an informal claim for disability benefits specifically mentioning a psychiatric condition in September 2009, VA granted the claim but refused to assign an effective date for this claim prior to September 2009.<sup>320</sup>

At the Veterans Court, Mr. Sellers argued that VA had medical records in its possession in 1996 that specifically diagnosed his psychiatric condition and his general statement that he sought connection for “disabilities occurring during active duty service,” which—when read

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313. *Id.* at 1368–69 (alteration in original) (first quoting *Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009); and then quoting *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015)).

314. *Id.* at 1370.

315. *Id.* at 1369.

316. *Id.* at 1370.

317. *See Sellers v. Wilkie*, 30 Vet. App. 157, 161 (2018) (discussing Mr. Sellers’ initial claim for service-connected benefits), *rev’d and remanded*, 965 F.3d 1328 (Fed. Cir. 2020).

318. *Id.* (alteration in original).

319. *Id.*

320. *Id.* at 161–62.

sympathetically—should have led VA to recognize a claim for psychiatric conditions in 1996.<sup>321</sup> In an opinion issued prior to the Federal Circuit’s 2019 decision in *Shea*, the Veterans Court agreed and discussed the level of precision required in a veteran’s claim in order to “identify the benefits sought”<sup>322</sup>:

As a general principle, VA may not ignore in-service diagnoses of specific disabilities, even those coupled with a general statement of intent to seek benefits, provided those diagnoses are *reasonably identifiable* from a review of the record . . . The fact finder must determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator . . . Only records containing diagnoses that are reasonably identifiable from a review of the record may otherwise cure an insufficient general statement of intent to seek benefits. To continue *Brokowski’s* metaphor, we caution that VA at most must participate in a fully guided safari.<sup>323</sup>

The Federal Circuit reversed the Veterans Court in a decision written by Judge Clevenger.<sup>324</sup> The court began its analysis by reviewing its previous decision in *Veterans Justice Group, LLC v. Secretary of Veterans Affairs*,<sup>325</sup> which considered 38 C.F.R. § 3.160’s implementation of 38 U.S.C. § 5107(a)’s requirement that a veteran “present and support a claim for benefits.”<sup>326</sup> Section 3.160 specifically requires that the veteran “identify the benefit sought” and include “[a] description of any symptom(s) or medical condition(s) on which the benefit is based.”<sup>327</sup> The veteran challenged this regulation arguing that § 3.160 obviates VA’s duty to “adjudicate benefits for any medical condition that is not specifically identified and . . . VA deems ‘unrelated to those particular claims’—no matter how apparent the condition is on the face of the record.”<sup>328</sup> Such a result, the veteran argued, conflicts with VA’s duty to “consider all information and lay and medical evidence of record in a case.”<sup>329</sup>

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321. *Id.* at 162–63.

322. *Id.* at 163–64.

323. *Id.* at 163–64 (emphasis added).

324. *See Sellers v. Wilkie*, 965 F.3d 1328, 1338 (Fed. Cir. 2020).

325. 818 F.3d 1336 (Fed. Cir. 2016).

326. *Sellers*, 965 F.3d at 1336 (quoting 38 U.S.C. § 5107(a) (2018)) (detailing a claimant’s responsibility to present evidence in support of his claim for benefits).

327. 38 C.F.R. § 3.160(a)(3)–(4) (2019).

328. *See Sellers*, 965 F.3d at 1336 (quoting *Veterans Just. Grp. v. Sec’y of Veterans Affs.*, 818 F.3d 1336, 1355 (Fed. Cir. 2016)).

329. *Veterans Just. Grp.*, 818 F.3d at 1356 (quoting 38 U.S.C. § 5107(b)).

The Federal Circuit held that the regulation was permissible under the *Chevron*<sup>330</sup> deference standard because it did not prevent the VA from “identifying and adjudicating issues and claims that logically relate to the claim pending before the VA.”<sup>331</sup> While § 3.160 was not in effect when Mr. Sellers filed his 1996 claim, the court found that the statute requiring the veteran to “present and support his claim” was in effect, even if only at a “high level of generality” in describing the disability.<sup>332</sup> The court explained:

The Secretary’s duty to assist is not untethered. At the time Mr. Sellers filed his formal claim, the Secretary’s duty to assist was triggered by receipt of a legally sufficient claim . . . The same is true today; the Secretary’s duty to assist begins upon receipt of a formal claim that identifies the medical condition for which benefits are sought . . . This triggers the Secretary’s duty to obtain the veteran’s medical records . . . and then to develop fully the stated claim. Until the Secretary comprehends the current condition on which the claim is based, the Secretary does not know where to begin to develop the claim to its optimum.<sup>333</sup>

In vacating the Veterans Court’s decision, the *Sellers* court determined that:

[T]he Veterans Court did not decide that Mr. Sellers filed a sufficient formal claim for a psychiatric disability in March 1996. Instead, [it] created a new legal test for determination of whether a general statement of intent to seek benefits for unspecified disabilities will suffice as a sufficient formal claim.<sup>334</sup>

The Federal Circuit explained that the correct test for determining the sufficiency of a formal claim to identify the benefits sought is the same as the test applied in *Shea*: “a veteran’s formal claim is required to identify the sickness, disease, or injuries for which compensation is sought, at least at a high level of generality.”<sup>335</sup>

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

331. *Veterans Just. Grp.*, 818 F.3d at 1356.

332. *See Sellers*, 965 F.3d at 1337 (quoting *Veterans Just. Grp.*, 818 F.3d at 1356) (specifying that while § 3.160 does “not apply to this case,” it does “not substantially differ from those regulations that do apply to this case”).

333. *Id.* at 1338 (citations omitted).

334. *Id.* at 1334.

335. *Id.* at 1338.

*D. The Effect of Shea and Sellers*

The difference between the facts of *Shea* and *Sellers* is difficult to appreciate. Ms. Shea claimed several physical injuries and pointed VA to medical records containing treatment for those injuries and a diagnosis of a mental health condition. Mr. Sellers claimed several physical injuries and pointed VA to medical records containing treatment for those injuries and a diagnosis of a mental health condition. Perhaps the difference lies in the volume of the medical records referred to by the veteran. Or the difference may be that Ms. Shea's mental health condition is listed as being aggravated by accident that led to her physical issues while Mr. Sellers mental health condition appears to be unconnected to his physical issues. However, the court does not rely on either of these two potential differentiations to explain the disparate holding in *Sellers*. This leaves the difference between *Shea* and *Sellers* and VA's duty to search for diagnoses in a veteran's claims file extremely nuanced.

How VA and the Veterans Court will interpret *Shea* and *Sellers* in tandem is yet to be seen. The tension between the two is evident in a Veterans Court memorandum opinion decision issued shortly after *Sellers* was decided. In directing the Board to reconsider whether letters sent by a veteran could have constituted an informal claim for benefits, the Veterans Court reminded the Board to consider in its analysis *Sellers* which stands for the proposition that "a general statement of intent to seek benefits, coupled with reasonably identifiable medical diagnosis in service treatment records, fails to constitute a claim for benefits."<sup>336</sup> The Court then cited *Shea* noting that the veteran's identification of a disability "need not be explicit but can be found indirectly by examining evidence an informal claim references."<sup>337</sup> The Veterans Court does not offer guidance to the Board on how exactly *Shea* and *Sellers* interact.

In the wake of these decisions, the Board has been left to interpret the difference between these holdings on its own. More than one Board decision attempting to explain the interaction between *Shea* and *Sellers* cited *Shea* as requiring VA to consider an unspecified disability as being claimed by the veteran when the medical records the veteran

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336. *Bonda v. Wilkie*, No. 19-4197, 2020 Vet. App. Claims LEXIS 1516, at \*8 n.53 (Aug. 11, 2020).

337. *Id.* at \*8.

points to specifically list that diagnosis.<sup>338</sup> In one of these cases, a veteran claimed the condition of diabetes and pointed VA to hospital records which also indicated the veteran suffered from erectile dysfunction. The Board agreed that the veteran raised an informal claim for erectile dysfunction when his claim “for service connection for diabetes mellitus referred to specific medical records, and those records contained a reasonably ascertainable diagnosis of erectile dysfunction.”<sup>339</sup> Similarly, another Board decision decided that a veteran had not raised a claim for a mental health condition because “the formal claim in this case points to the Veteran’s service treatment records . . . which do not show complaints of or treatment for a psychiatric disability.”<sup>340</sup> These cases appear to rely heavily on *Shea* and merely cite to *Sellers* as requiring a high level of generality in the claim, but do not actually tie *Sellers* to the holding at all.

As we march into the future, expecting VA—particularly at the lowest level of adjudication, where decisions are generally made by those without specialized legal training—to understand and apply these nuances is a concerning prospect that bears further consideration. Such distinctions, which to non-legal professionals may appear to be splitting hairs, are likely to make the work of VA more laborious and the wait times longer for a veteran to get to a legal professional at the Board of Veterans’ Appeals who may understand these nuances and apply them appropriately.

## V. EFFECTIVE DATES

When it comes to effective dates, the Federal Circuit took the issue head on. To give some background, an effective date is the date upon which VA will begin to pay a benefit to a veteran once they are awarded.<sup>341</sup> The effective date is typically the date that VA receives the claim.<sup>342</sup> For veterans who wait five years for a decision, they may receive thousands of dollars in “retro” benefits because it took VA so long to reach the correct result.<sup>343</sup>

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338. Bd. Vet. App. A20014743, No. 191104-41927, 2020 WL 7766554, at \*12 (Sept. 22, 2020); Bd. Vet. App. 20075962, No. 17-05 590, 2020 WL 8766188, at \*2 (Nov. 30, 2020); Bd. Vet. App. 20067260, No. 19-25 784, 2020 WL 8362556, at \*2 (Oct. 16, 2020).

339. 2020 WL 8766188, at \*1 (emphasis omitted).

340. 2020 WL 8362556, at \*2.

341. See generally 38 U.S.C. § 5110 (2018).

342. See § 5110(a)(1).

343. *Id.*

The basics of the effective date rules are straightforward; however, the nuances in application—combined with the court’s interpretation of these regulations—have made for complex developments that veterans and their advocates need to understand. In this Section, a discussion of *Lang v. Wilkie*,<sup>344</sup> *Jones v. Wilkie*,<sup>345</sup> *Kisor v. Wilkie*,<sup>346</sup> and *Arellano v. Wilkie*<sup>347</sup> will demonstrate how the law regarding effective dates has expanded over the past year.

A. *The Interpretation of “Received” Under § 3.156(b)*

Under the legacy system,<sup>348</sup> VA had an obligation to reconsider a claim when new evidence was received during an appeals period.<sup>349</sup> For example, a veteran could submit new evidence within one year of a VA Rating Decision or within sixty days of a Statement of the Case and VA was obligated to reconsider the claim.<sup>350</sup> If a veteran or his or her advocate failed to appeal or submit that new evidence to VA within a year, the claim would become final.<sup>351</sup> The effective date therefore may be lost if a veteran allowed a decision to become final, which would then impact the veteran’s retro award.<sup>352</sup> In *Lang*, the Federal Circuit clarified the process for determining when VA received medical records from the VHA.<sup>353</sup> Before *Lang* was decided by the Federal Circuit, the Veterans Court issued a landmark decision in *Turner v. Shulkin*,<sup>354</sup> which laid the groundwork for *Lang*.<sup>355</sup>

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344. 971 F.3d 1348 (Fed. Cir. 2020).

345. 918 F.3d 922 (Fed. Cir. 2019).

346. 969 F.3d 1333 (Fed. Cir. 2020).

347. 970 F.3d 1362 (Fed. Cir. 2020) (en banc) (per curiam).

348. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 6, 131 Stat. 1105, 1127 (2017) (codified as amended in scattered sections of 38 U.S.C.). Before February 2019, claims decided by the VA were part of the old appeals and adjudication system known as legacy. See *supra* notes 31–32 and accompanying text. The AMA changed the adjudication and appeals process for decisions post-February 19, 2019 and allowed for veterans to opt into the new appeals system from the legacy process. See *supra* notes 29–30 and accompanying text. Although 38 C.F.R. § 3.156(b) does not apply to the AMA system, veterans can submit new and relevant evidence within one year of a decision with a supplemental claim and the claim will remain open. See *infra* note 357 and accompanying text.

349. See 38 C.F.R. § 3.156(b) (2019).

350. See *id.*; 38 C.F.R. § 19.52(b)(2) (2019).

351. See § 3.156(b).

352. See *id.*

353. See generally *Lang v. Wilkie*, 971 F.3d 1348 (2020).

354. 29 Vet. App. 207 (2018), *abrogated by* *Lang v. Wilkie*, 971 F.3d 1348 (2020).

355. See *id.*

*I. Pre-Lang litigation regarding constructive receipt of VA medical records*

In *Turner*, the Veterans Court grappled with the term “received.”<sup>356</sup> Under § 3.156(b), if a decision was rendered in a legacy case and new and material evidence was received by VA during the appeal window, VA was required to re-adjudicate the claim and issue a new decision.<sup>357</sup> The question presented in *Turner* was this: if a VA facility created medical records during the pendency of the appeals period, do those records constitute evidence “received” by VA, triggering reconsideration of the claim?<sup>358</sup>

In reviewing § 3.156(b), the Veterans Court determined that the term “received” was ambiguous.<sup>359</sup> The Veterans Court explained that the term “received” does not always mean received in a literal sense.<sup>360</sup> And although the Veterans Court found that the term was ambiguous, it did not give the agency any deference.<sup>361</sup> At the time, under an *Auer* deference analysis, agency interpretation should be given deference when a term or phrase in a regulation is ambiguous.<sup>362</sup> However, courts only give an agency deference when the Secretary’s definitive position on the given issue is clear.<sup>363</sup> Here, the court found that the agency’s interpretation of § 3.156(b) during litigation was contradictory to the position VA supported in a 1995 General Counsel Opinion and thus there was no single position to defer to under *Auer*.<sup>364</sup> Because the Veterans Court found that deference should not be afforded to VA, it found that the term “received” includes “constructive receipt.”<sup>365</sup>

For nearly thirty years, the Veterans Court has recognized constructive possession.<sup>366</sup> As a matter of law, records generated by VA were considered constructively before the Secretary and the Board when it made its decision.<sup>367</sup> The Veterans Court determined that the

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356. *See id.* at 209.

357. *See* § 3.156(b).

358. *Turner*, 29 Vet. App. at 209.

359. *Id.* at 213.

360. *See id.* at 217.

361. *Id.* at 215.

362. *See id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997)).

363. *See id.*

364. *See id.* at 216.

365. *Id.* (holding that the term “received” in § 3.156(b) was indeed ambiguous).

366. *See Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992) (per curiam).

367. *See Turner*, 29 Vet. App. at 216.



Board “is on notice as to the possible existence and relevance” of these records.<sup>368</sup>

The Veterans Court created a triggering test in *Turner* to help determine when VA has constructive possession of medical records.<sup>369</sup> The court determined that the mere creation of a record was insufficient to put VA on notice.<sup>370</sup> The standard set forth by the Veterans Court was whether Veterans Benefits Administration (VBA) adjudicators had sufficient knowledge that such records existed.<sup>371</sup>

Although the Veterans Court did not create a bright line rule as to what constitutes sufficient knowledge, the court looked to the Federal Circuit’s decision in *Sullivan v. McDonald*<sup>372</sup> for guidance.<sup>373</sup> In *Sullivan*, the Federal Circuit held that an important limitation on VA’s duty to assist in obtaining evidence exists when “there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim.”<sup>374</sup> In *Turner*, the Veterans Court found that it may not impose any relevance requirements on the issue of constructive receipt.<sup>375</sup> In order to determine whether there was sufficient knowledge, VA and the Board would be required to make factual findings on whether the adjudicator had sufficient notice of the existence of these records, which would require the Board to look at the time, place, and nature of the medical treatment.<sup>376</sup>

The Veterans Court understood the gravity of this decision.<sup>377</sup> Specifically, the court’s opinion states that in cases in which VA has sufficient knowledge of these VA medical records, the decision will remain pending until another decision is rendered.<sup>378</sup> In order to finalize a decision, a new decision must be rendered which accounts for the new evidence.<sup>379</sup>

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368. *See id.* (quoting *Bell*, 2 Vet. App at 612).

369. *See id.* at 217.

370. *Id.*

371. *See id.* at 218.

372. 815 F.3d 786 (Fed. Cir. 2016).

373. *See Turner*, 29 Vet. App. at 218.

374. *Sullivan*, 815 F.3d at 792 (quoting 38 C.F.R. § 3.159(d) (2019)).

375. *Turner*, 29 Vet. App. at 218.

376. *Id.* at 218–19.

377. *See id.* at 209 (noting that determining when evidence was “received” had “important practical consequences”).

378. *See id.* at 219.

379. *Id.*

2. *VA medical records created during an appeals process will keep a claim pending*

The Lang court generally agreed with the Turner court's logic but disagreed with the requirement of sufficient knowledge to show constructive receipt.<sup>380</sup> The Federal Circuit found that any medical note created by a VA facility was constructively received by VA and could keep a claim open after a decision is rendered if the note was created in the appeals period.<sup>381</sup>

In *Lang*, Mr. Lang filed a disability claim for PTSD on April 13, 1995 and was granted a 10% rating on June 18, 1996.<sup>382</sup> Mr. Lang never filed an appeal; however, he continued to receive treatment for PTSD at the Pittsburgh Veterans Affairs Medical Center (VAMC) from July 1996 to June 1997, within the one-year appeals period.<sup>383</sup> In 2014, Mr. Lang filed a motion to revise the 1996 rating decision based on clear and unmistakable error (CUE).<sup>384</sup> After several appeals and a remand, Mr. Lang appealed to the Veterans Court.<sup>385</sup> He raised, for the first time, an argument that his 1996 decision was not final due to the VAMC records regarding treatment for PTSD created within the appeals period.<sup>386</sup> The Veterans Court found that it had discretion to review the argument for the first time, even though it was not raised below.<sup>387</sup> The Federal Circuit agreed that it was within the Veterans Court's jurisdiction to consider this argument.<sup>388</sup> Thus, the Federal Circuit determined it also had jurisdiction to review the issue.<sup>389</sup>

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380. *See* *Lang v. Wilkie*, 971 F.3d 1348, 1354 (Fed. Cir. 2020).

381. *See id.* at 1354–55.

382. *Id.* at 1351.

383. *Id.*

384. *Id.* 38 C.F.R. § 3.105 explains that a “clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.” 38 C.F.R. § 3.105(a)(1)(i) (2019).

385. *Lang*, 971 F.3d at 1351.

386. *Id.*

387. *Id.* at 1352 (citing *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) (finding that the court had jurisdiction over issues that were raised for the first time, even if they were not raised at the Board of Veterans Appeals)).

388. *Id.*

389. *Id.*

The Federal Circuit agreed with the Veterans Court’s analysis in *Turner* as to the initial question focusing on the constructive receipt of VA medical records created within the appeals period.<sup>390</sup> The Federal Circuit however disagreed with the Veterans Court’s additional requirement of a triggering event—the requirement of sufficient knowledge of the newly created records.<sup>391</sup> The Federal Circuit held simply that “[e]vidence is constructively received by the VA adjudicator post-decision if it (1) was generated by the VA . . . and (2) can reasonably be expected to be connected to the veteran’s claim.”<sup>392</sup> The Federal Circuit determined that “[a] veteran’s own medical records, generated by the VA itself, are *always* reasonably related to a veterans claim.”<sup>393</sup> Further, the court explicitly found that claims must remain open until “VA determines whether post-decision evidence received within the one-year appeal period is ‘new and material.’”<sup>394</sup>

The *Lang* decision will impact VA and effective dates for veterans for years to come. To understand the enormity of the decision, consider that a veteran who received treatment from VA within one year of a rating decision will not have a final decision until VA determines that these new treatment records are not material to the claim.<sup>395</sup> The claim will therefore remain open until either the veteran files a subsequent claim that considers all of the evidence in the file, including VA medical records that existed during that appeals period, or until VA renders a new decision regarding the materiality of the records.<sup>396</sup> Due to this “pending” status, a veteran may be able to establish an effective date relating back to the original filing date, rather than the new filing date, if he receives care from a VA facility. In essence, a veteran may be able to obtain a significant amount of back pay on these types of claims because of his continuously pending claim.

Fortunately for VA, this rule only applies to legacy cases.<sup>397</sup> This regulation does not apply to cases that are decided under the new AMA.<sup>398</sup>

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390. *See id.* at 1354.

391. *See id.*

392. *Id.*

393. *Id.* at 1355 (emphasis added).

394. *See id.* (quoting *Beraud v. McDonald*, 766 F.3d 1402, 1407 (Fed. Cir. 2014)).

395. *See id.*

396. *See id.*

397. *See* 38 C.F.R. § 3.156(b) (2019).

398. *See id.*; *see also* Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017) (codified as amended in scattered sections of 38 U.S.C.).

It is, nonetheless, an important decision for the many veterans whose claims remain in the legacy system.

*B. Newly Found Service Records Must be Relevant to Establish an Earlier Effective Date*

In *Jones*, in addition to reviewing § 3.156(b), the Federal Circuit also reviewed § 3.156(c) to determine whether service records added to the file required VA to both reconsider a claim and award an effective date of an earlier-decided claim.<sup>399</sup> The Federal Circuit affirmed the Veterans Court and determined that VA was only required to adopt an earlier effective date if the newly received records were the basis of the award.<sup>400</sup>

In *Jones*, Mr. Thomas Jones filed a claim for a nervous disorder in 1994.<sup>401</sup> Initially, VA denied Mr. Jones's claim because the evidence did not show he experienced an in-service stressor.<sup>402</sup> At the time, his service medical records were incomplete.<sup>403</sup> He did not appeal, and the decision became final.<sup>404</sup>

In 2002, Mr. Jones requested to reopen his claim, now claiming he suffered from PTSD.<sup>405</sup> He identified his stressor as being assaulted by muggers while stationed in Germany.<sup>406</sup> VA denied the claim because he failed to submit new material information that would allow VA to reopen the claim after it became final.<sup>407</sup> In 2006, Mr. Jones once again filed for PTSD.<sup>408</sup> This time, an adjudicator determined that VA did not have Mr. Jones' entire service record in the file.<sup>409</sup> VA requested and received his entire service record.<sup>410</sup> After an appeal and remand, VA granted Mr. Jones compensation for PTSD and schizoaffective disorder at 100%, with an effective date in 2002.<sup>411</sup> VA granted Mr. Jones compensation based upon post-service records from 2003 and

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399. See *Jones v. Wilkie*, 964 F.3d 1374, 1379 (Fed. Cir. 2020).

400. See *id.* at 1376, 1379.

401. *Id.* at 1376.

402. *Id.* (defining an "in-service stressor" as "a traumatic event that caused [the veteran's] nervous disorder").

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

2008 and not the service records received from the 2006 request.<sup>412</sup> The Veterans Court emphasized the fact that although the service records reopened the claim and allowed for reconsideration under § 3.156(c), those records were not the foundation upon which the compensation was awarded.<sup>413</sup> Thus, VA could not award an effective date back to the original filing of 1994.<sup>414</sup>

In affirming, the Federal Circuit explained that the purpose of the regulation is “to place a veteran in the position he would have been had VA considered the relevant service department record before the disposition of his earlier claim.”<sup>415</sup> The language in the regulation simply states that the award must be attributable in whole or in part to the newly obtained service records in order to obtain that earlier effective date.<sup>416</sup>

When considering § 3.156(c), adjudicators and advocates must consider how the newly obtained service records impact a claim for compensation.<sup>417</sup> In order to obtain the earliest possible effective date, an advocate should set forth arguments as to how integral the newly obtained service records are to the claim, which may include establishing continuity of symptomology, corroborating an in-service occurrence, or determining a nexus between an in-service event and the current disability. Unfortunately, the receipt of new service records does not automatically give a veteran an earlier effective date.

### C. The Term “Relevant” Is Unambiguous

*Jones* was not the only case in which the Federal Circuit reviewed § 3.156(c). The Federal Circuit re-examined this regulation in *Kisor* after a remand from the Supreme Court.<sup>418</sup> As discussed in preceding literature, the Supreme Court considered the Secretary’s interpretation of an ambiguous regulation, 38 C.F.R. § 3.156(c)(1), and the meaning of the word “relevant” in the context of the case.<sup>419</sup>

To be clear, the regulation provides, “at any time after VA issues a decision on a claim, if VA receives or associates with the claims file

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412. *Id.*

413. *See id.* at 1377.

414. *Id.*

415. *Id.* at 1379 (quoting *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014)).

416. *See* 38 C.F.R. § 3.156(c)(3) (2019).

417. § 3.156(c).

418. *See* *Drake et al.*, *supra* note 6, at 1348–54.

419. *See* *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017), *vacated sub nom.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423–24 (2019); *see also* *Drake et al.*, *supra* note 6, at 1350.

relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . . .”<sup>420</sup> Previously, the Federal Circuit determined that *Auer* deference applied to VA’s interpretation.<sup>421</sup> Specifically, the Federal Circuit found that the term “relevant” was ambiguous, and determined that the Board’s interpretation was not plainly erroneous or inconsistent.<sup>422</sup>

On remand from the Supreme Court, the Federal Circuit was directed to first determine whether ambiguity actually exists as to the term “relevant.”<sup>423</sup> If no ambiguity existed, the analysis would stop and the plain meaning of the word would apply.<sup>424</sup> If the term “relevant” was ambiguous, the Federal Circuit would have to determine whether the VA Secretary’s interpretation was reasonable.<sup>425</sup> If unreasonable, the analysis would stop and no deference would be afforded to the VA Secretary.<sup>426</sup> However, if the Federal Circuit found the interpretation reasonable, it would have to analyze whether Congress would want the interpretation by the Board of Veterans Appeals to be given deference as the agency’s decision on the proper interpretation.<sup>427</sup>

In reviewing the term “relevant,” the Federal Circuit determined that it was not genuinely ambiguous.<sup>428</sup> The Federal Circuit found that in order for a record to be “relevant,” it “must address a dispositive issue and therefore affect the outcome of the case.”<sup>429</sup> Here, Mr. Kisor was originally denied in 1983 due to having “no diagnosis of PTSD.”<sup>430</sup> Although new service records were received by VA, the records were not determinative as to whether the veteran had a diagnosis of PTSD.<sup>431</sup> Rather, the service records only further elaborated on his combat service.<sup>432</sup> Thus, the Federal Circuit affirmed the Board’s finding that

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420. § 3.156(c).

421. *Kisor*, 869 F.3d at 1367, 1369; *see also supra* notes 358–63 and accompanying text (explaining the *Auer* deference standard).

422. *Kisor*, 869 F.3d at 1367–68.

423. *Kisor v. Wilkie*, 969 F.3d 1333, 1336 (Fed. Cir. 2020).

424. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (“If uncertainty does not exist, there is no plausible reason for deference.”).

425. *Id.*

426. *See id.* at 2416.

427. *See id.*

428. *Kisor*, 969 F.3d at 1336.

429. *Id.* at 1339.

430. *Id.* at 1338.

431. *Id.*

432. *Id.*

service records were not dispositive to Mr. Kisor's claim and therefore were not relevant under § 3.156(c).<sup>433</sup> And therefore, the veteran was unable to receive an earlier effective date.

#### D. Equitable Tolling

The Federal Circuit has a significant history of analyzing equitable tolling cases. Historically, equitable tolling is invoked when a claimant misses an appeal deadline.<sup>434</sup> The Federal Circuit has recognized at least four situations where equitable tolling may be appropriate: (1) the appellant has been misled or induced by VA into missing the deadline for filing the notice of appeal;<sup>435</sup> (2) the appellant has actively pursued his judicial remedies but misfiled by sending it to the wrong location within the deadline for filing the notice of appeal;<sup>436</sup> (3) the appellant's failure to file timely was the direct result of a mental illness that prevented the appellant from engaging in rational thought or deliberate decision-making or rendered the claimant incapable of handling his or her own affairs or unable to function in society;<sup>437</sup> or (4) where appellant's failure to file timely was due directly to extraordinary circumstances beyond the appellant's control, as long as appellant exercised due diligence in preserving his or her right to appeal.<sup>438</sup>

This year, the Federal Circuit considered whether it should overturn *Andrews v. Principi*<sup>439</sup> and find that equitable tolling could be applied to an initial filing to preserve an earlier effective date.<sup>440</sup> After oral

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433. *Id.* at 1343.

434. *See Bove v. Shinseki*, 25 Vet. App. 136, 145 (2011) (per curiam) (finding that the 120-day period during which petitioners could file their appeals was subject to equitable tolling), *overruled by* *Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016).

435. *See Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) (holding that although the VA did not intentionally trick the veteran, the VA misled the veteran, who could therefore use equitable tolling), *overruled by* *Henderson v. Shinseki*, 589 F.3d 1201, 1220 (Fed. Cir. 2009) (en banc).

436. *See Ratliff v. Shinseki*, 26 Vet. App. 356, 360 (2013) (per curiam) (finding that equitable tolling applied where the veteran sent the notice of appeal to the regional VA office, rather than the Court of Appeals for Veterans Claims).

437. *See Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004).

438. *See McCreary v. Nicholson*, 19 Vet. App. 324, 332 (2005) (rejecting the veteran's plea for equitable tolling because the veteran did not demonstrate that he "exercised due diligence in pursuing his appeal").

439. 351 F.3d 1134 (Fed. Cir. 2003).

440. *See Arellano v. Wilkie*, 970 F.3d 1362, 1363 (Fed. Cir. 2020) (en banc) (per curiam).

argument, the panel moved to hear the case en banc.<sup>441</sup> Although the case has not yet been decided, we provide a preview of the case here because of its importance.

In *Andrews*, the veteran appealed a decision from the Board of Veterans Appeals that “den[ied] her an earlier effective date for disability compensation.”<sup>442</sup> In April 1990, the veteran was discharged from active service due to psychiatric disorders.<sup>443</sup> The veteran did not file for benefits until June 1991.<sup>444</sup> In October 1992, the Regional Office granted service connection at 50% with an effective date back to June 1991—the date the veteran filed for benefits.<sup>445</sup> The veteran appealed for a higher rating and an earlier effective date. VA granted her a 100% rating but denied her the earlier effective date.<sup>446</sup> The Veterans Court affirmed the Board’s decision denying the veteran an earlier effective date.<sup>447</sup> The veteran appealed to the Federal Circuit.

The Federal Circuit determined that equitable tolling was not applicable to 38 U.S.C. § 5110, governing effective dates, because equitable tolling is typically applied to toll a statute of limitations.<sup>448</sup> Rather, the court found § 5110 merely indicates the date in which benefits would begin provided that an application was filed within one year of discharge.<sup>449</sup> The Federal Circuit held that equitable tolling would not be applicable to filing dates.<sup>450</sup>

In *Arellano v. Wilkie*, the court will consider whether to overturn *Andrews*. The Federal Circuit will address whether the one-year filing period of 38 U.S.C. § 5110(b)(1) can be equitably tolled.<sup>451</sup> Under § 5110(b)(1), if a veteran files a claim within a year of being discharged, the effective date will be the day after the veteran’s discharge.<sup>452</sup>

Although there are several ways to prove equitable tolling, an amicus brief in *Arellano v. Wilkie* underscores the Veterans Court’s reticence to

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441. *Id.*

442. *Andrews*, 351 F.3d at 1135.

443. *Id.*

444. *Id.*

445. *Id.* at 1135–36.

446. *Id.* at 1136.

447. *Id.*

448. *See id.* at 1138; *see also* 38 U.S.C. § 5110 (2018).

449. *Andrews*, 351 F.3d at 1138.

450. *Id.* at 1137.

451. 970 F.3d 1362, 1363 (Fed. Cir. 2020) (en banc) (per curiam).

452. 38 U.S.C. § 5110(b)(1).



grant equitable tolling for appeals.<sup>453</sup> Such recalcitrance illustrates that the flood gates will likely not open if the Federal Circuit grants relief in *Arellano*. For example, in one instance, the Veterans Court denied equitable tolling to an “[e]lderly veteran suffering from poor eyesight and poor hearing, rendering him dependent on others for communication, living in a foreign country with delayed mail service, and confused by VA forms concerning timing requirements missed notice of appeal deadline.”<sup>454</sup> Separately, the Veterans Court denied equitable tolling to:

[A] veteran suffering from Alzheimer’s disease or dementia, the diagnosis of which was acknowledged by several doctors’ written opinions (which were submitted as evidence, and in which doctors stated the veteran’s condition severely impaired his ability to remember dates and times, function in society, and handle his own affairs), where veteran was under stress because he was assisting two severely ill daughters and a severely injured wife who injured herself after the date of the Board decision, but before the date the veteran filed his Notice of Appeal outside of the 120-day timeframe.<sup>455</sup>

In the Federal Circuit’s en banc order in *Arellano*, it requested that the litigants answer several questions, including the following:

- (1) “Does the rebuttable presumption of the availability of equitable tolling articulated in *Irwin v. Department of Veterans Affairs*<sup>456</sup> . . . apply to 38 U.S.C. § 5110(b)(1), and . . . is it necessary for the court to overrule *Andrews* . . . ?”
- (2) If the “rebuttable presumption applies to § 5110(b)(1), has that presumption been rebutted?”
- (3) If the rebuttable presumption “applies to § 5110(b)(1), would such a holding extend to any additional provisions of § 5110, including . . . § 5110(a)(1)?”<sup>457</sup>

Mr. Arellano served in the Navy from 1977 to 1981.<sup>458</sup> He first filed for his benefits related to his mental health conditions in 2011, thirty

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453. Corrected Brief of Amicus Curiae National Law School Veterans Clinic Consortium Supporting Claimant-Appellant at 14, *Arellano v. Wilkie*, 970 F.3d 1362 (Fed. Cir. 2020) (No. 2020-1073) (en banc) (per curiam).

454. *See id.* at 16 (citing *Palomer v. McDonald*, 27 Vet. App. 245, 254–55 (2015)).

455. *See id.* (citing *Claiborne v. Nicholson*, 19 Vet. App. 181, 182–84, 188 (2005)).

456. 498 U.S. 89 (1990).

457. *Arellano v. Wilkie*, 970 F.3d 1362, 1363 (Fed. Cir. 2020) (en banc) (per curiam).

458. Supplemental Brief for Appellant Adolfo R. Arellano on Sua Sponte Rehearing En Banc at 6, *Arellano v. Wilkie*, 970 F.3d 1362 (Fed. Cir. 2020) (No. 2020-1073) (en banc) (per curiam).

years after leaving the service.<sup>459</sup> He suffered from schizoaffective disorder and bipolar disorder, and he claimed that his mental illness prevented him from filing earlier than 2011.<sup>460</sup> In his appeal, Mr. Arellano argues that equitable tolling should be utilized here because he was prevented from filing due to his mental health condition.<sup>461</sup> Although the thirty-year gap may be hard for any adjudicator to overlook, the question remains whether equitable tolling would be allowed for any veteran who was delayed a day, a month, a year, or even thirty years to file a claim for benefits.

Depending on the outcome, this case, like *Lang*, has the potential to have vast implications for veterans seeking earlier effective dates. The Veterans Court's narrow interpretation of equitable tolling will likely limit the number of veterans who will actually benefit from equitable tolling if the Veterans Court continues to treat cases as it has in the past.

#### VI. WILLFUL AND PERSISTENT MISCONDUCT IS A VALID BAR TO BENEFITS

A veteran, for VA purposes, is defined as a former servicemember discharged “under conditions other than dishonorable.”<sup>462</sup> The relevant statutes contemplate several scenarios in which a veteran's discharge is considered dishonorable, thus barring the veteran from benefits. Examples of disqualifying discharges include discharges due to a general court martial or being absent without leave (“AWOL”) for over 180 days.<sup>463</sup> These prohibitions are referred to as statutory “bars” and are enumerated in 38 U.S.C. § 5303(a).<sup>464</sup> VA has further elaborated on conduct that it considers dishonorable, serving as a bar, in its regulations.<sup>465</sup> The regulations include a catch-all disqualification for discharges based upon “willful and persistent misconduct.”<sup>466</sup>

In *Garvey v. Wilkie*,<sup>467</sup> the surviving spouse of the veteran claimed that the “willful and persistent” bar to benefits was contrary to the statutory

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459. *See id.* at 6–7.

460. *Id.*

461. *Id.* at 3.

462. *See* 38 U.S.C. § 101(2) (2018).

463. § 5303(a).

464. *See id.*

465. *See* 38 C.F.R. § 3.12 (2019).

466. § 3.12(d)(4).

467. 972 F.3d 1333 (Fed. Cir. 2020).

scheme of 38 U.S.C. § 5303.<sup>468</sup> The veteran served in the Army from 1966 to 1970.<sup>469</sup> The surviving wife sought DIC, a widowed spousal benefit, but was denied due to the veteran's discharge arising from the veteran's willful and persistent misconduct under 38 C.F.R. § 3.12(d)(4).<sup>470</sup> Specifically, during the veteran's time in service, he received four special court martial convictions, including one for possession of cannabis and three for being AWOL.<sup>471</sup> Each of the AWOL periods lasted between twenty and forty-eight days long.<sup>472</sup> Due to these AWOL periods, the veteran was eventually discharged with an undesirable discharge.<sup>473</sup>

In 1977, President Carter initiated a Special Discharge Review Program.<sup>474</sup> This program would allow Vietnam veterans to upgrade their undesirable discharge.<sup>475</sup> Generally speaking, if a veteran had their discharge upgraded from an undesirable to a general discharge, VA would automatically find their service honorable for VA purposes, thus entitling them to receive VA benefits.<sup>476</sup> Congress did not approve of this program, so a law was passed in 1977,<sup>477</sup> which prohibited veterans upgraded through the Special Discharge Review Program from obtaining VA eligibility.<sup>478</sup> However, a veteran could receive VA benefits if, "after a case-by-case review by a Discharge Review Board, the VA determined that the veteran would have received the upgraded discharge status even under generally applicable standards."<sup>479</sup>

Mr. Garvey's discharge was automatically upgraded to a general discharge under the Special Discharge Review Program; however, the Discharge Review Board found that he would not have been entitled

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468. *Id.* at 1334.

469. *Id.*

470. *Id.*

471. *Id.*

472. *See id.* at 1334–35.

473. *Id.* at 1335.

474. *See id.* at 1340 (citing Discharge Review Boards, 42 Fed. Reg. 21,308, 21,310 (Apr. 26, 1977)).

475. *Id.*

476. *See id.*

477. Pub. L. No. 95-126, 91 Stat. 1106 (1977) (codified as amended at 38 U.S.C. § 5303(e)(2)).

478. *See Garvey*, 972 F.3d at 1340 ("Congress concluded that . . . the Program was unfair because it upgraded Vietnam-era servicemembers but not other servicemembers, and because it unfairly allowed those with problematic service records to obtain veterans benefits.").

479. *Id.* at 1340–41 (citing 91 Stat. 1106).

to an upgrade under generally applicable standards used by the Discharge Review Board.<sup>480</sup> Thus, the Board did not upgrade Mr. Garvey's discharge for the purposes of VA benefits under the 1977 law.<sup>481</sup> Because Mr. Garvey's discharge was not upgraded for purposes of VA benefits, VA was required to perform a character of discharge review to determine if Mr. Garvey was entitled to receive benefits from VA. In doing this, VA determined that Mr. Garvey's misconduct during service could be considered "willful and persistent" misconduct and therefore he was barred from receiving benefits—as was his spouse.<sup>482</sup>

In *Garvey*, the Federal Circuit reviewed the question as to whether the willful and persistent bar to benefits was contrary to the statutory language set out in § 5303.<sup>483</sup> The court determined that the language in § 5303 is not an exclusive or exhaustive list of conduct that could constitute a bar to benefits.<sup>484</sup> Further, the court acknowledged that Congress chose not to use the term "[d]ishonorable discharge" as the bar to benefits.<sup>485</sup> Instead, Congress used the phrase "conditions other than dishonorable" to refer to the character of service of those eligible for benefits.<sup>486</sup> The Congressional Record speaks to the intention of Congress to exclude veterans from receiving benefits whose discharges may not be dishonorable, but whose conduct rose to the level of dishonorable without a formal conviction.<sup>487</sup> Further, the Federal Circuit found that the 1977 Act supported VA's willful and persistent misconduct bar, since in its passing Congress acknowledged that VA can bar veterans from receipt of VA benefits due to willful and persistent misconduct.<sup>488</sup> The court affirmed the Veterans Court's decision in finding that willful and persistent misconduct was not contrary to statute.<sup>489</sup>

A month prior to the *Garvey* decision, VA proposed new regulations clarifying the regulatory bars to benefits based on character of discharge.<sup>490</sup> In addition to other discharge-related character of service

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480. *Id.* at 1335.

481. *See id.*

482. *Id.* (quoting 38 C.F.R. § 3.12(d)(4) (2019)).

483. *See id.* at 1337.

484. *Id.*

485. *Id.*

486. *Id.* (quoting 38 U.S.C. § 101(2) (2018)).

487. *Id.* at 1339 (citing S. REP. NO. 78-755, at 15 (1944)).

488. *Id.* at 1341.

489. *Id.*

490. Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 85 Fed. Reg. 41,471, 41,471 (July 10, 2020) ("VA proposes to modify the

determinations, the proposed regulations further define willful and persistent misconduct.<sup>491</sup> VA's proposal specifically defines persistent misconduct as follows:

VA would consider instances of minor misconduct occurring within two years of each other, an instance of minor misconduct occurring within two years of more serious misconduct, and instances of more serious misconduct occurring within five years of each other as "persistent." The misconduct would not have to be of a similar nature, type, or offense to be considered "persistent."<sup>492</sup>

In the proposed regulations, VA also proposes to use the Manual for Courts-Martial as a determining factor as to whether misconduct is minor or serious.<sup>493</sup> Although the regulations are only proposed at this time, if they are finalized, these new definitions will give veterans and VA clearer rules relating to character of discharge determinations.<sup>494</sup> It is unlikely, however, that these regulations would have any impact on Ms. Garvey's claim for DIC benefits.

#### CONCLUSION

With the implementation of judicial review in 1988, veterans law is one of the newest practice areas of administrative law. Each year, the Federal Circuit issues more decisions helping to shape and forward this important expanse of law. Reviewing important constitutional issues of standing and due process due to delay in the administrative system, defining VA's obligations to veterans in a non-adversarial system like no other in the federal government, and interpreting the application of the APA are peaks among a landscape of Federal Circuit decisions. These cases create a tapestry of law against which the claims and entitlements of our nation's veterans are decided.

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regulatory framework for discharges considered 'dishonorable' for VA benefit eligibility purposes, such as discharges due to 'willful and persistent misconduct.'").

491. *See id.*

492. *Id.* at 41,473.

493. *Id.*

494. *See id.*