

# AN INTRODUCTION TO VETERANS LAW: SERVING THOSE WHO SERVED US

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*Executive Summary: The Federal Circuit is a court of appeals with exclusive jurisdiction over several important subjects, such as veterans law. Veterans law mainly encompasses monetary disputes against the government for benefits owed to veterans and their families as a benefit of their service to the United States. These disputes invariably come up when a veteran or their family member is denied a benefit promised to eligible veterans, like a disability pension for veterans injured in connection with their military service. Three pressing veterans law issues currently are: The Court of Appeals for Veterans Claims' (CAVC) newfound ability to certify class actions, the Veterans Appeals Improvement and Modernization Act (AMA), and the newfound reviewability of eligibility determinations under the Caregiver Program by the Board of Veterans Appeals. Veterans law is grounded in our desire to repay those that served our nation while ensuring that only legitimate claims are fulfilled. The foundational elements of veterans law are rooted in administrative law and the need for judicial review over agency decisions.*

### I. THE 4-1-1 ON VETERANS LAW

Veterans law is the body of law that governs the adjudication of veterans benefits claims; it is “the creature of a robust federal statutory and regulatory scheme.”<sup>1</sup> The Department of Veterans Affairs (VA) oversees and administers veterans benefits regulated under Title 38 of the United States Code.<sup>2</sup> Once a veteran is discharged from active military service, they and their family become eligible for various benefits.<sup>3</sup> Some of these benefits include health care, compensation and pension, education and training, home loans, insurance, vocational rehabilitation and employment, burial and memorial services, and a variety of fiduciary services.

#### A. A Brief History of the Veterans Affairs System

Prior to the creation of the Veterans Administration, the U.S. Congress and the States all variously provided benefits to veterans.<sup>4</sup> For fifty-eight years, from its inception in 1930 until 1988, the VA operated virtually free of any judicial oversight.<sup>5</sup> Under this system, when the VA denied a veteran’s claim, the veteran had no right to challenge the agency’s decision.<sup>6</sup> On November 18, 1988, President Ronald Reagan signed the Veteran’s Judicial Review Act,<sup>7</sup> thereby establishing the United States Court of Veteran’s Appeals—finally providing claimants an avenue to appeal claims that the VA denied.<sup>8</sup> Congress changed the court’s name in 1999 to the United States Court of Appeals for

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<sup>1</sup> Drake et al., *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1343, 1345 (2020).

<sup>2</sup> 38 U.S.C. § 301.

<sup>3</sup> See U.S. DEP’T OF VETERANS AFFAIRS, <https://www.va.gov/opa/persona/index.asp> (last visited Sept. 22, 2021) (explaining that active service means “full-time service, other than active duty for training, as a member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or as a commissioned officer of the Public Health Service, Environmental Science Services Administration or National Oceanic and Atmospheric Administration”). Also note that those service members dishonorably discharged are not eligible for benefits. *Id.*

<sup>4</sup> *Court History*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/history.php> (last visited Sept. 20, 2021).

<sup>5</sup> See *id.* (noting that the VA was the only federal agency free from oversight).

<sup>6</sup> *Id.*

<sup>7</sup> Pub. L. No. 100-687, 102 Stat. 4107 (1988) (codified as amended at 38 U.S.C. § 7101 (2018)).

<sup>8</sup> See *Court History*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/history.php> (last visited Sept. 23, 2021) (noting that the CAVC is an Article I court).

Veterans Claims (CAVC).<sup>9</sup> This court is wholly separate from the VA, and it hears opinions on appeal from the VA-contained Board of Veterans Appeals (BVA).<sup>10</sup>

### B. The Veterans Claims Process

Veterans, or certain family members seeking benefits, must apply to receive them at their local VA office.<sup>11</sup> Upon receipt of the benefits application, the VA reviews the applicant's claim and either accepts or denies it.<sup>12</sup> When a local VA office denies an applicant's claim, they may appeal directly to the BVA, kicking off a uniquely pro-claimant appeals process.<sup>13</sup>

The BVA is the appellate body of the VA;<sup>14</sup> it is comprised of a Chairman, a Vice Chairman, and Veterans Law Judges (VLJs).<sup>15</sup> The BVA does not have a set number of judges; the amount of judges varies based on the volume of appeals.<sup>16</sup> Once the BVA reviews the appeal, a single VLJ issues a final decision.<sup>17</sup> If a claimant does not agree with the BVA's decision, they may begin the appeals process by timely filing a notice of appeal with the CAVC.<sup>18</sup>

The CAVC is comprised of seven permanent judges and two additional judges, all of whom serve fifteen-year terms.<sup>19</sup> A panel of three judges hears appeals from the BVA, during which the CAVC reviews the BVA's decision, the written record, and the parties' briefs.<sup>20</sup> After the CAVC issues its judgment, a party has sixty days to appeal the decision to the United States Court of Appeals for the Federal Circuit.<sup>21</sup>

The Federal Circuit reviews questions of law; thus, claimants only appeal CAVC decisions when they believe that the CAVC has made a legal error.<sup>22</sup> The Federal Circuit cannot review the CAVC's factual findings unless the case presents a constitutional

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<sup>9</sup> *See id.* (explaining that the change in name resulted largely from an influx of post-Vietnam claims in the 1970s and 1980s).

<sup>10</sup> *Id.*

<sup>11</sup> DANIEL T. SHEDD, CONG. RESEARCH SERV., OVERVIEW OF THE APPEAL PROCESS FOR VETERANS' CLAIMS 1 (2012), [http://www.veteranslawlibrary.com/files/CRS\\_R42609.pdf](http://www.veteranslawlibrary.com/files/CRS_R42609.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> *See Drake et al., supra* note 1, at 1345 n.4 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (explaining that the VA must assist veterans in developing evidence to support their claims). For example, veterans are entitled to the "benefit of the doubt" when there is a balance of positive and negative evidence. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (explaining that 38 U.S.C. § 3007(b) provides this unique standard of proof to veterans). The BVA reviews claims *de novo*. *Henderson*, 562 U.S. at 440–41.

<sup>14</sup> *Board of Veterans' Appeals*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.bva.va.gov/index.asp> (last visited Sept. 26, 2021).

<sup>15</sup> *Board of Veterans' Appeals Organizational Chart*, U.S. DEPARTMENT OF VETERANS AFFAIRS, [https://www.bva.va.gov/docs/Board\\_of\\_Veterans\\_Appeals\\_Organizational\\_Chart.pdf](https://www.bva.va.gov/docs/Board_of_Veterans_Appeals_Organizational_Chart.pdf) (last visited Sept. 21, 2021).

<sup>16</sup> *How Do I Appeal?*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet-508Compliance.pdf> (last visited Sept. 27, 2021).

<sup>17</sup> *Id.*

<sup>18</sup> *See Court Process*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, [https://www.uscourts.cavc.gov/court\\_process.php](https://www.uscourts.cavc.gov/court_process.php) (last visited Sept. 21, 2021) (explaining that veterans must file a notice of appeal to the CAVC within 120 days of the BVA's decision).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* However, the majority of the cases that reach the CAVC are non-precedential; single judges, as opposed to a panel of three judges, resolve these non-precedential cases. *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Court Role and Structure*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Sept. 22, 2021).

issue.<sup>23</sup> Given the limited jurisdiction, few veterans law cases reach the Federal Circuit.<sup>24</sup> When a party does not agree with the Federal Circuit’s decision, it can appeal to the Supreme Court.<sup>25</sup>

The most recent and important veterans law case to reach the Supreme Court was *Kisor v. Wilkie*.<sup>26</sup> In *Kisor*, a veteran, Mr. Kisor, sought disability benefits, but the VA denied his application.<sup>27</sup> Upon review, the BVA denied Mr. Kisor’s claim because he failed to proffer “relevant official service department records” not filed at the time of the initial claim.<sup>28</sup> The BVA’s decision turned on its interpretation of the word “relevant” as used in 38 C.F.R. § 3.156(c)(1).<sup>29</sup> Both the CAVC and the Federal Circuit affirmed the BVA’s decision.<sup>30</sup> The Court considered whether the Secretary of the VA made a valid “interpretation of an ambiguous regulation.”<sup>31</sup> Twice before *Kisor*, in *Auer v. Robbins*<sup>32</sup> and *Bowles v. Seminole Rock & Sand Co.*,<sup>33</sup> the Court considered the issue of an executive department’s interpretation of an ambiguous regulation. In *Auer* and *Bowles*, the Court determined that courts must defer to an agency’s reading of its own ambiguous regulation.<sup>34</sup> Reviewing the issue of interpretation again in *Kisor*, the Court decided not to overrule these two seminal cases—instead it articulated a new three step test for courts to apply when determining if a regulation contains ambiguous language.<sup>35</sup>

## II. THREE KEY VETERANS LAW ISSUES TO KEEP AN EYE OUT FOR

In 2017, the Federal Circuit and Congress revolutionized the veterans benefits process. First, in April 2017, the Federal Circuit decided *Monk v. Shulkin*.<sup>36</sup> After the VA denied his application for disability benefits because of his other than honorable discharge, Mr. Monk filed a petition for a writ of mandamus with the CAVC, requesting that the CAVC order the Secretary of the VA to “promptly adjudicate both his disability

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<sup>23</sup> CONG. RESEARCH SERV., U.S. COURT OF APPEALS FOR VETERANS CLAIMS: A BRIEF INTRODUCTION 1 (2019), <https://crsreports.congress.gov/product/pdf/IF/IF11365>.

<sup>24</sup> *Court Jurisdiction*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction> (last visited Sept. 25, 2021) (noting that, as of 2018, the Federal Circuit’s case load consisted of 20% administrative law cases, 67% intellectual property cases, and 13% money damages against the United States government). Veterans benefits claims, international trade disputes, and personnel claims, account for the administrative law cases that make up 20% of the Federal Circuit’s docket. *Id.*

<sup>25</sup> *Court Process*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, [http://www.uscourts.cavc.gov/court\\_process.php](http://www.uscourts.cavc.gov/court_process.php) (last visited Sept. 25, 2021).

<sup>26</sup> 139 S. Ct. 2400 (2019).

<sup>27</sup> *Id.* at 2409.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Drake, *supra* note 1, at 1350.

<sup>32</sup> 519 U.S. 452 (1997).

<sup>33</sup> 325 U.S. 410 (1945).

<sup>34</sup> *Kisor*, 139 S. Ct. at 2409.

<sup>35</sup> *Id.* at 2416–418; *see also* Drake, *supra* note 1, at 1352–353 (outlining the three steps: (1) determine if a genuine ambiguity exists; (2) if ambiguity exists, the interpretation of the ambiguity must be reasonable; (3) even if the interpretation is reasonable, determine if the interpretation deserves “controlling weight”). *Kisor* does not directly affect Chevron, however, it does change when Chevron is used because it can no longer be used to avoid *Kisor*’s limitations since *Auer* is restricted by *Kisor*. David L. Portilla & Will C. Giles, *Kisor v. Wilkie: A New Limit on Agency Deference and Its Implications for Banking Organizations*, **Am. Bar Assoc.** (Jan. 4, 2020) [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/01/kisor-v-wilkie](https://www.americanbar.org/groups/business_law/publications/blt/2020/01/kisor-v-wilkie). Now it must be clear that an agency is interpreting its enabling statute and not one of its own regulation. *Id.*

<sup>36</sup> 855 F.3d 1312 (Fed. Cir. 2017).

benefits application and the applications of similarly situated veterans.”<sup>37</sup> The CAVC denied both Mr. Monk’s request for class certification and his individual petition.<sup>38</sup> The CAVC rejected the class action request on the ground that it lacked the authority to maintain class actions.<sup>39</sup> The Federal Circuit reversed on appeal, holding that the All Writs Act<sup>40</sup> authorized the CAVC to aggregate cases, including Mr. Monk’s, which concerned a petition for a writ of mandamus.<sup>41</sup> Since *Monk*, the CAVC has certified three class actions.<sup>42</sup> Until the CAVC adopts its own class action rules and procedures, the CAVC has opted to use Rule 23 of the Federal Rules of Civil Procedure as a guide for class action proceedings.<sup>43</sup> This new class action process provides veterans and their surviving family members with more choices of how to handle disagreements with VA decisions.<sup>44</sup>

Second, in August 2017, Congress passed the Veteran Appeals Improvement and Modernization Act (AMA).<sup>45</sup> The rules that the VA promulgated to implement the AMA took effect in February 2019.<sup>46</sup> The AMA, in part, created a new decision review process before the agency consisting of three different “lanes” of review: higher-level review, supplemental claims, and appeal.<sup>47</sup> The first two lanes involve review by the agency of original jurisdiction, most often a VA regional office, that made the initial decision. Under higher-level review, claimants cannot submit additional evidence, there is only argument.<sup>48</sup> In supplemental claims, claimants may submit evidence that is new and relevant.<sup>49</sup> In the appeals lane, veterans proceed directly to the Board of Veterans Appeals for *de novo* review; once at the Board, appellants may submit evidence in the hearing and evidence dockets but not in the direct docket.<sup>50</sup>

Furthermore, in April 2021, the CAVC changed the appeals process for the Caregivers Program.<sup>51</sup> The Caregivers Program provides VA benefits to the caretakers of disabled veterans who are unable to perform at least one activity of daily living or who require constant supervision because of an impairment.<sup>52</sup> Maya Beaudette, wife of disabled veteran Jeremy Beaudette, was denied caregiver benefits upon reassessment in 2018.<sup>53</sup> The couple attempted to appeal the decision to the Board and it replied that it had no jurisdiction to review decisions under the Caregivers Program.<sup>54</sup> In 2020, the Beaudettes petitioned the CAVC for a writ of mandamus to allow them to appeal the

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<sup>37</sup> *Id.* at 1314 (emphasis added).

<sup>38</sup> *Id.* at 1315.

<sup>39</sup> *Id.* (explaining that at Mr. Monk’s decision review hearing, the VA informed Mr. Monk that he could not move forward with his appeal until the BCNR provided records concerning his discharge status).

<sup>40</sup> 28 U.S.C. § 1651(a).

<sup>41</sup> *Monk*, 855 F.3d at 1318.

<sup>42</sup> *See, e.g.*, *Godsey v. Wilkie*, 31 Vet. App. 207, 225 (2019) (per curiam); *Skaar v. Wilkie*, 32 Vet. App. 156, 201 (2019); *Wolfe v. Wilkie*, 32 Vet. App. 1, 34 (2019).

<sup>43</sup> *Monk v. Wilkie*, 30 Vet. App. 167, 170-71 (2018) (en banc).

<sup>44</sup> *Monk*, 835 F.3d at 1321.

<sup>45</sup> Pub. L. No. 115-55, 131 Stat. 1105 (2017).

<sup>46</sup> VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (proposed final rule).

<sup>47</sup> 38 U.S.C. § 5104C (2018); *Board of Veterans’ Appeals*, U.S. DEPT. OF VETERANS AFFAIRS, <https://www.bva.va.gov/index.asp> (last visited Sept. 25, 2021).

<sup>48</sup> 38 U.S.C. § 5104B(d).

<sup>49</sup> 38 U.S.C. § 5108.

<sup>50</sup> 38 U.S.C. §§ 7105, 7113.

<sup>51</sup> *Beaudette v. McDonough*, 34 Vet. App. 95 (2021).

<sup>52</sup> *Id.* at 100. For more information on the Caregivers Program, see *The Program of Comprehensive Assistance for Family Caregivers*, U.S. Department of Veterans Affairs, <https://www.va.gov/family-member-benefits/comprehensive-assistance-for-family-caregivers> (last visited Sept. 26, 2021).

<sup>53</sup> *Beaudette*, 34 Vet. App. at 100.

<sup>54</sup> *Id.*

decision to the Board.<sup>55</sup> The court ruled that VA decisions to deny benefits under the Caregivers Program can be reviewed by the Board and, if need be, judicially reviewed.<sup>56</sup>

### III. THE NATIONAL DEFENSE AUTHORIZATION ACT (NDAA)

The National Defense Authorization Act (NDAA) authorizes appropriations and establishes policy for the Department of Defense, nuclear weapons at the Department of Energy, defense intelligence programs, and the federal government's other defense activities. The Act determines the agencies responsible for defense, establishes recommended funding levels, and sets the policies under which money will be spent. It does not provide budget authority, which is provided in subsequent legislation.<sup>57</sup> The passage of the Act follows a predictable yearly schedule. First, in early February, the executive branch releases its Presidential Budget Request, which details a proposed budget for the upcoming fiscal year. Then, the House and Senate Armed Services Committees hold hearings on the budget programs for the upcoming fiscal year. Next, the Committees release their proposed bills for review and passage through subcommittees and full committees. After the bills are passed in committees, the full House and Senate consider the bill on the floor. Then, the two versions go to "conference" in which leadership of both committees work to reconcile differences. Finally, once the bill is passed in the House and Senate, the final bill is sent to the President for signature before it becomes law.<sup>58</sup>

### IV. FEDERAL TORT CLAIMS ACT

Civil litigation against the United States government is permitted under the Federal Tort Claims Act (FTCA).<sup>59</sup> Individuals are allowed to bring suit for money damages only for damage to or loss of property, or personal injury/death, caused by the negligence, wrongful act, or omission of a government employee while acting within the scope of his or her employment.<sup>60</sup> The FTCA includes an intentional tort exception that does not allow an individual to sue the federal government for an intentional tort by a federal government employee.<sup>61</sup>

### V. FERES DOCTRINE

An exception to the remedies provided by the FTCA is the Feres Doctrine that prevents servicemembers from suing for injuries caused by negligence on the part of the federal government if the injury is active-duty service related.<sup>62</sup> Discharged veterans injured at VA hospitals are excluded from the Feres Doctrine, whereas military reservists killed or

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<sup>55</sup> *Id.* at 101.

<sup>56</sup> *Id.* at 105, 108.

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283.

<sup>58</sup> Center for Arms Control and Non-Proliferation, The NDAA process, explained, <https://armscontrolcenter.org/the-ndaa-process-explained/> (last visited Oct. 8, 2021).

<sup>59</sup> *Federal Tort Claims Against Federal Judiciary Personnel*, <https://www.uscourts.gov/rules-policies/judiciary-policies/federal-tort-claims-against-federal-judiciary-personnel> (last visited Oct. 7, 2021).

<sup>60</sup> *Id.*

<sup>61</sup> 28 U.S.C. § 2680(h).

<sup>62</sup> Callum D. Dewar et al., *The Changing Landscape of Military Medical Malpractice: From the Feres Doctrine to Present*, 49 J. NEUROSURGERY 1, 1 (2020).

injured in training exercises are included under the Feres Doctrine.<sup>63</sup> Critics of the Feres Doctrine level three main criticisms at it: (1) the loss of autonomy and rights of servicemembers because they are unable to sue for medical malpractice, (2) the majority of medical care provided to servicemembers is outside of combat zones, and (3) the change in rationale for upholding the doctrine over the years from protecting military unity to preventing the second-guessing of orders.<sup>64</sup> Proponents counter by arguing litigation will not solve the problem of military hospital negligence because the Feres Doctrine only prevents the government from being sued and not individual hospitals.<sup>65</sup> Additionally, seventy percent of people treated in military hospitals are dependents of servicemembers, who are not subject to the Feres Doctrine.<sup>66</sup> In the NDAA 2020, Congress granted servicemembers an exception to the Feres Doctrine, allowing those injured by medical malpractice to file an administrative claim with the Secretary of Defense for compensation.<sup>67</sup>

## VI. KEYNOTE SPEAKER REPRESENTATIVE JACKIE SPEIER

*American University Law Review's* Volume 71 Federal Circuit Symposium Keynote Speaker, Representative Jackie Speier of California's 14th congressional district, serves on the House Armed Services Committee (HASC), where she is the Chair of the Military Personnel Subcommittee, on the House Permanent Select Committee on Intelligence, where she is the Chair of the Strategic Technologies and Advanced Research (STAR) Subcommittee, and on the Counterterrorism, Counterintelligence, and Counterproliferation (C3) Subcommittee.<sup>68</sup> She received her B.A. in political science from the University of California at Davis and her J.D. from the University of California Hastings College of Law. During the 116th Congress, Representative Speier worked to pass landmark legislation as part of the National Defense Authorization Act (NDAA), including establishment of a claims process to compensate servicemembers for medical errors at military medical treatment facilities outside of conflict zones.<sup>69</sup> Representative Speier continues to work on issues such as strengthening the military's response to sexual assault, sexual harassment, and intimate partner violence; promoting racial and gender equity within the Armed Services; and advocating for the needs of military families, such as greater support for child care.<sup>70</sup>

## VII. VETERANS LAW IN THE NEWS

*Larson v. McDonough*, 10 F.4th 1325 (Fed. Cir. 2021): Larson appealed The Board's decision denying him a total disability rating because his obesity and dysmetabolic syndrome were not disabilities because they were not part of the rating schedule to determine one's

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<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.*

<sup>68</sup> *About Jackie, Congresswoman Jackie Speier*, <https://speier.house.gov/about-jackie> (last visited Sept. 22, 2021).

<sup>69</sup> *Issues I'm Working On, Military Servicemembers and Veterans, Congresswoman Jackie Speier*, <https://speier.house.gov/military-servicemembers-and-veterans> (last visited Sept. 22, 2021); Pub.L 116-92 § 731 NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, PL 116-92, December 20, 2019, 133 Stat 1198.

<sup>70</sup> *Chair Speier Statement on NDAA Conference Agreement, Congresswoman Jackie Speier*, <https://speier.house.gov/2020/12/chair-speier-statement-on-ndaa-conference-agreement> (last visited Oct. 06, 2021).

percentage of disability. He argued that CAVC has the power to decide what is a disability even if it cannot change its rating. The issue is whether CAVC is prohibited from deciding what is a disability after The Board has made its decision. The Federal Circuit ruled that CAVC has the power to decide what is a disability but not change the rating the disability receives to determine what percentage one is disabled.

*Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021) (ordering *en banc* rehearing 7/22/21): Taylor’s disability claim was denied by CAVC because he was part of a classified chemical test, which prevented him from raising it as a cause of disability. When it was declassified, he renewed his disability claim using the chemical test as a cause and claiming benefits back to 1971. The issue was whether the CAVC had the power to apply equitable tolling to a disability claim. CAVC ruled it did not but the Federal Circuit overturned CAVC and ruled that it did have this power. On July 22, 2021, the Federal Circuit ordered that a rehearing be granted *en banc* to reconsider this equitable tolling issue.

*Military-Veterans Advocacy v. Secretary of Veterans Affairs*, 7 F.4th 1110 (Fed. Cir. 2021): Military-Veterans Advocacy moved for review of multiple VA regulations issued under the AMA. The issue is whether the regulations are valid under *Chevron* deference. The Federal Circuit held that the regulation restricting attorney’s fees for VA benefits claims was invalid because it was contrary to the clear meaning of the AMA. Additionally, the court found that regulations prohibiting concurrent claims while one is pending review and the exclusion of supplemental claims were inconsistent interpretations considering the constructions of previous statutes.

## VIII. REFERENCE MATERIALS

### A. Definitions/Abbreviations/Standards

- **“At least as likely as not standard:”** the evidentiary standard for veterans (*Gilbert v. Derwinski*).
- **The Benefit of the Doubt Doctrine:** the burden of proof for veterans (*Gilbert v. Derwinski*).
- **The Board/BVA:** The Board of Veterans’ Appeals (where veterans first bring their claims).
- **The CAVC:** The Court of Appeals for Veterans Claims (the U.S. Court of Appeals that hears appeals from the BVA).
- **The National Defense Authorization Act (NDAA):** a series of laws specifying the annual budget and expenditure for the U.S. Department of Defense. The Act determines the agencies responsible for defense, establishes recommended funding levels, and sets the policies under which money will be spent.
- **Pro-claimant:** the veterans law system is non-adversarial. The VA has a statutory “duty to assist” the claimant in developing supportive evidence, and the BVA must give the veteran the benefit of the doubt.
- **The VA:** Department of Veterans Affairs (a federal cabinet-level agency).
- **Veteran:** Title 38 of the Code of Federal Regulations defines a veteran as “a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.”

### B. Noteworthy Cases

#### Supreme Court

- *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019). The Court did not overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the two cases which require courts to defer to an agency’s reading of its own “ambiguous” regulation.

### **The U.S. Court of Appeals for the Federal Circuit**

- *Lang v. Wilkie*, 971 F.3d 1348, 1355 (Fed. Cir. 2020). The Federal Circuit determined that VA adjudicators do not need “actual knowledge of VAMC medical records to establish constructive receipt.”
- *Sellers v. Wilkie*, 965 F.3d 1328, 1338 (Fed. Cir. 2020). The Federal Circuit held that for a veteran to be entitled to an earlier effective date for a medical condition, the veteran must present a legally sufficient claim that identifies “the sickness, disease, or injuries for which compensation is sought, at least at a high level of generality.”
- *Monk v. Shulkin*, 855 F.3d 1312, 1322 (Fed. Cir. 2017): The Federal Circuit changed the long-standing rule that veterans could only file appeals for themselves, and it held that veterans could bring class actions.

### **The U.S. Court of Appeals for Veterans Claims**

- *Beaudette v. McDonough*, 34 Vet. App. 95 (2021): A CAVC decision that certified a class and ordered additional review of the denial of caregiver benefits. The court held that the Beaudette Class is certified as “[a]ll claimants who received an adverse benefits decision under the Caregiver program, exhausted the administrative review process within the VHA, and have not been afforded the right to appeal to the Board of Veterans' Appeals.” Additionally, the court ruled that the VA must allow for Board review of future benefits decisions under the Caregiver Program.
- *Martinez-Bodon v. Wilkie*, No. 18-3721, 2020 WL 4590176, at \*8 (Vet. App. 2020): Holding that the term “disability,” which the CAVC previously defined as “a functional impairment of earning capacity,” applies broadly and includes “more than just pain.” However, the CAVC noted that the VA retained authority “to adopt and apply its rating schedule,” which might limit the definition of “disability.” Therefore, the CAVC found that the BVA “did not err in denying service connection for an anxiety disorder,” because the VA had properly exercised its authority “to limit compensation to disabilities that conform to a DSM-5 diagnosis.”
- *Godsey v. Wilkie*, 31 Vet. App. 207 (2019): The CAVC’s first certified class action. Under *TRAC*, the CAVC found that the BVA unreasonably delayed this class, which included veterans who had been waiting more than 18 months for the VA to advance their appeals.

### *C. Further Reading Materials*

- Drake et al., *Review of Recent Veterans Law Decisions of the Federal Circuit, 2020 Edition*, 70 AM. U. L. REV. 1381 (2021).
- John Heaney, *Enlisting Support: Ensuring that Veterans Disabled by Service-Related Mental Illness Receive the Help They Deserve*, 30 FED. CIR. BAR. J. 193 (2021).
- Cassandra A. Atkin-Plunk et al., *Veteran Treatment Court Clients’ Perceptions of Procedural Justice and Recidivism*, 32 CRIM. JUST. POL’Y REV. 501 (2020).
- Cheryl L. Mason and Elizabeth Murphy, *Veterans Appeals Modernization: Choice, Control, and Clarity for Veterans*, 5 NEB. LAW. 5 (2020).
- Chase Cobb, Note, *For Him Who Shall Have Borne the Battle: How the Presumption of Competence Undermines Veterans’ Disability Law*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 577 (2019).
- Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513 (2019).
- James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009).