AREA SUMMARIES

REVIEW OF VETERANS LAW DECISIONS OF THE FEDERAL CIRCUIT, 2021 EDITION

ANGELA DRAKE,* YELENA DUTERTE,** & STACEY-RAE SIMCOX***

In the past year, the United States Court of Appeals for the Federal Circuit (Federal Circuit) continued to define boundaries for the Department of Veterans Affairs (VA) and the U.S. Court of Appeals for Veterans Claims (Veterans Court). These boundaries align more closely with congressional intent, especially with regard to the jurisdiction of the Veterans Court and the internal operations of the agency.

This Area Summary discusses eight major areas in which the Federal Circuit articulated important changes in veterans law. First, the Federal Circuit revisited the important and veteran-friendly "benefit of the doubt" rule in Lynch *and modified it. In* Lynch*, the Court analyzed the term "approximate balance" and instructed VA to liberally consider evidence and apply the benefit of the doubt rule even where the evidence is not in exact equipoise. Second, the Federal Circuit limited the Veterans Court's power to fact-find and narrowed its power to find prejudicial error in* Tadlock*. Third, in* Anania*, the Court strengthened the "mailbox" rule by finding that the claimant's, or advocate's, own affidavit sufficiently proved proper mailing. Fourth, the Court broadened the constructive*

* Professor Drake directs the Veterans Clinic at the *University of Missouri School of Law*. She thanks 3L students Emily Bergmann and Joel Smith for their help in preparing portions of this Area Summary on the heels of their hard work in preparing the National Law School Veterans Clinic Consortium amicus brief in *Taylor v. McDonough*, discussed further below.

** Professor Duterte is an Assistant Professor of Law and the Director of the Veterans Legal Clinic at *University of Illinois Chicago School of Law* in Chicago, Illinois.

*** Professor Simcox directs the Veterans Law Institute and the Veterans Advocacy Clinic at *Stetson University College of Law*. She would like to thank Elanna Lochan and Morgan MacIsaac for their feedback and help researching portions of this Area Summary. And, of course, her ever-patient family.

possession rules relating to VA-contracted medical reports in Euzebio. *Fifth, the Federal Circuit looked to principles of equity in* Arellano *and* Taylor *to determine whether tolling or estoppel may be invoked when the question relates to the effective date for the grant of VA benefits. Sixth, the Court clarified effective date rules in* Kisor, George, Ortiz, *and* Buffington. *Seventh, in* Military-Veterans Advocacy, *the Federal Circuit overturned three regulations promulgated under the new Appeals Modernization Act, each related to supplemental claims—a new avenue for veterans seeking to reopen earlier decisions. Finally, in* Smith, *the Court continued to weigh in on attorney's fees, an important issue for veterans and their advocates.*

TABLE OF CONTENTS

I. REVISITING THE APPLICATION OF THE BENEFIT OF THE DOUBT RULE

In the 2021 decision *Lynch v. McDonough*,[1] the Federal Circuit considered one of the most integral aspects of the non-adversarial nature of veterans law: the "benefit of the doubt" rule.[2] This rule has always been an important part of veterans law—since the Civil War one hundred years ago to its current existence as a statutory directive in the Veterans' Judicial Review Act (VJRA) of 1988.[3] The purpose of the benefit of the doubt rule is to provide a distinct advantage to veterans when evidence regarding "service origin, the degree of disability, or any other point," material to a determination of their claims, gives rise to a "reasonable doubt" concerning the disability's connection to service.[4] As codified, the benefit of the doubt doctrine provides:

> The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to

1. 21 F.4th 776 (Fed. Cir. 2021) (en banc).

2. *See id.* at 778 (hearing arguments that prior Court decisions wrongly decided the standard to trigger the benefit of the doubt rule).

3. Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990); Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

4. 38 C.F.R. § 3.102 (2019).

> benefits under laws administered by the Secretary. When there is an *approximate balance* of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.[5]

The implementing regulation, which was partially in effect when Congress passed the VJRA, provides:

> When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant.
>
> By reasonable doubt is meant one which exists because of an *approximate balance* of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine.[6]

In 1990, the newly formed Veterans Court reviewed the history of the rule in *Gilbert v. Derwinski*.[7] Over the past thirty years, the resulting explanation is often cited when it comes to understanding "approximate balance":

> [T]he "benefit of the doubt" standard is similar to the rule deeply embedded in sandlot baseball folklore that "the tie goes to the runner." If the ball clearly beats the runner, he is out and the rule has no application; if the runner clearly beats the ball, he is safe and, again, the rule has no application; if, however, the play is close, then the runner is called safe by operation of the rule that "the tie goes to the runner." . . . Similarly, if a fair preponderance of the evidence is against a veteran's claim, it will be denied and the "benefit of the doubt" rule has no application; if the veteran establishes a claim by a fair preponderance of the evidence, the claim will be granted and, again, the rule has no application; if, however, the play is close, *i.e.*, "there is an approximate balance of positive and negative evidence," the veteran prevails . . . .[8]

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5. 38 U.S.C. § 5107(b) (2018) (emphasis added).
6. 38 C.F.R. § 3.102 (emphasis added).
7. *Gilbert*, 1 Vet. App. at 55.
8. *Id.* at 55–56.

In 2001, the Federal Circuit revisited the application of "approximate balance" in *Ortiz v. Principi*.[9] In Ortiz, the Board of Veterans' Appeals denied a veteran service connection for a back condition that the veteran believed was caused by a slip-and-fall in the shower during his active-duty service.[10] In denying Mr. Ortiz's claim, the Board found his statements concerning the slip-and-fall lacked credibility.[11] On appeal, the Veterans Court held that the benefit of the doubt rule did not apply because the Board determined that a preponderance of the evidence was against Mr. Ortiz's claim[12] Mr. Ortiz again appealed, challenging the Veterans Court's assertion that the benefit of the doubt rule is inapplicable in cases where the Board finds a preponderance of the evidence against the veteran's claim.[13]

On appeal, the Federal Circuit conducted an exercise in statutory interpretation regarding the benefit of the doubt rule using the plain language of the statute.[14] It determined that "evidence is in 'approximate balance' when the evidence in favor of and opposing the veteran's claim is found to be 'almost exact[ly or] nearly' 'equal.'"[15] The court then invoked the "tie goes to the runner" baseball analogy of *Gilbert* to emphasize that nearly equal means a decision that is "too close to call."[16] This standard is different from a finding that a preponderance of the evidence is for or against a decision, which "describe[s] a state of proof that *persuades* the factfinders that the points in question are 'more probably so than not.'"[17] The court held that once a preponderance of the evidence is found "either for or against the veteran's claim," the evidence cannot be "'nearly equal' or 'too close to call,'" thus the benefit of the doubt cannot apply in cases where the preponderance of the evidence exists.[18]

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9. 274 F.3d 1361 (Fed. Cir. 2001).

10. *Id.* at 1363.

11. *See id.* (finding the supporting medical opinions to be of "limited probative value" because the opinions were based only on the veteran's accounts of his injury).

12. *Id.*

13. *Id.* at 1364.

14. *See id.* ("Any question of statutory interpretation begins with the language of the statute itself.").

15. *Id.*

16. *Id.* at 1365.

17. *Id.* (citing to MUELLER & KIRKPATRICK, EVIDENCE § 3.3 (1995)).

18. *See id.* at 1365–66 (concluding that a finding in which the positive and negative evidence is in "approximate balance" cannot result in a finding that evidence preponderates one way or the other).

The court also noted that another characterization of the benefit of the doubt rule can be expressed as "shifting the 'risk of nonpersuasion' to VA to prove that the veteran is not entitled to benefits."[19]

> From that perspective, if the Board finds that the positive and negative evidence relating to a veteran's claim are in "approximate balance," then the placement of the risk of nonpersuasion on the VA dictates a finding in favor of the claimant. If, however, the Board determines that the preponderance of the evidence is against the veteran's claim, then it necessarily has been persuaded to find in favor of the VA, and thus the VA has overcome its risk of nonpersuasion. Under either view of the benefit of the doubt rule, the result is the same. Accordingly, we conclude that a finding that evidence preponderates in one direction precludes a finding that the positive and negative evidence is in "approximate balance," and we therefore interpret the clear and unambiguous language of § 5107(b) and its accompanying regulation to have no application where the Board determines that the preponderance of the evidence weighs against the veteran's claim.[20]

Based upon the Board's conclusion that the evidence for Mr. Ortiz's claim "preponderates in one direction," the evidence could not be in approximate balance and the benefit of the doubt rule did not apply.[21]

The holding in *Ortiz* has been cited hundreds of times by the Veterans Court when it has reviewed Board decisions finding against a veteran's claims. The Federal Circuit considered *Lynch v. McDonough* in the shadow of *Ortiz*.

A. Lynch v. McDonough

In March 2016, Mr. Lynch filed a claim for post-traumatic stress disorder (PTSD) with VA.[22] VA granted his claim, rating his impairment at thirty percent.[23] Mr. Lynch appealed this rating.[24] When the Board considered his claim, there were two private medical evaluations in the record which supported an increased rating and two VA medical examinations which did not.[25] Based upon these examinations, the Board found that a preponderance of the evidence

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19. *Id.* at 1365.
20. *Id.* at 1365–66.
21. *Id.* at 1366.
22. Lynch v. McDonough, 999 F.3d 1391, 1391–93 (Fed. Cir. 2021), *vacated*, 21 F.4th 776 (Fed. Cir. 2021).
23. *Id.*
24. *Id.* at 1393.
25. *Id.*

indicated Mr. Lynch was entitled to only a thirty percent rating.[26] Mr. Lynch appealed to the Veterans Court and argued that the Board did not appropriately apply the benefit of the doubt rule to his claim.[27] The Veterans Court relied on *Ortiz* to hold that Mr. Lynch's claim was not entitled to application of the benefit of the doubt rule because the Board found that a preponderance of the evidence was against his claim.[28]

Mr. Lynch then appealed to the Federal Circuit. He argued that the *Ortiz* decision should be overturned.[29] Mr. Lynch asserted that *Ortiz* "read the modifier 'approximate' out of the term 'approximate balance' set forth in 38 U.S.C. § 5107(b) by requiring an equal or even balance of the evidence to give the benefit of the doubt to the claimant."[30] This, he argued, is in contrast to Congress' specific use of the word "approximate" to create "a standard of proof lower than equipoise-of-the-evidence for veterans, and conversely, higher than preponderance-of-the-evidence" for VA.[31] Mr. Lynch asserted that the Federal Circuit's case law relying upon *Ortiz* since that 2001 decision similarly required that veterans meet an "equipoise of evidence" standard before applying the benefit of the doubt rule to their claims.[32]

Initially, in a panel decision written by Judge Prost and joined by Judge Clevenger, the majority flatly refuted the aforementioned concerns and asserted that *Ortiz* applied the "benefit of the doubt" rule in both situations where the evidence was in equipoise and in situations where the evidence was nearly in equipoise.[33] The opinion stated that it was bound by *Ortiz*'s language, which provides that when the Board believes that a preponderance of the evidence weighs for or against a claim, then the evidence is necessarily not "nearly equal." The court subsequently affirmed the Veterans Court's decision.[34]

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26. *Id.*

27. *Id.*

28. *Id.* (citing Ortiz v. Principi, 274 F.3d 1361, 1364 (Fed. Cir. 2001)).

29. Appellant's Corrected Opening Brief at 16–17, Lynch v. McDonough, 999 F.3d 1391 (No. 20-2067).

30. *Id.* at 12.

31. *Id.* at 13; *see also id.* at 16 n.5 (citing Skoczen v. Shinseki, 564 F.3d 1319, 1324 (Fed. Cir. 2009) (emphasis omitted) (defining the equipoise-of-the-evidence standard as an "equality of the evidence standard" that requires evidence to "rise to a state of equipoise for the claimant to win")).

32. Br. of Pet'r-Appellant Appellant's Corrected Opening Br. at 17–18.

33. *Lynch*, 999 F.3d at 1395 (emphasizing that *Ortiz* included scenarios where evidence that was is not in equipoise was still in approximate balance).

34. *Id.* at 1395.

In his dissent, Judge Dyk asserted that portions of the *Ortiz* decision were indeed inconsistent with the plain language of 38 U.S.C. § 5107(b).[35] Though the court withdrew the panel decision when they issued a later en banc decision, Judge Dyk's dissent remains instructive because the en banc decision considered and addressed his concerns, which created a major departure from *Ortiz*'s applicability to future cases.[36]

While Judge Dyk agreed that *Ortiz* defines "approximately equal" as the standard to apply with regard to the benefit of the doubt rule, he urged the court to disregard the dicta in *Ortiz* that indicated there was a requirement for an equipoise of the evidence.[37] Specifically, Judge Dyk took issue with the "confusing" language of *Ortiz* and the majority in *Lynch* concerning the preponderance of the evidence.[38] Judge Dyk pointed out that the Federal Circuit and other courts explained in previous cases that preponderance refers to "the greater weight of evidence" and "may be found when the evidence only slightly favors one party."[39] This slight tipping of evidence in favor of one side or another as a definition of "preponderance" is at odds with *Ortiz*'s definition of "approximate balance" because "'[a]pproximate' is not the same as 'slight.'"[40]

Understanding the definition of "approximate balance" by comparing it to a preponderance of the evidence puts a veteran at a disadvantage—a situation not intended by the statute:

> It is not difficult to imagine a range of cases in which the evidence is in approximate balance between the veteran and the government (and the veteran should recover), but still slightly favors the government (and under the majority's test, the veteran would not recover).
>
> *Ortiz*'s holding effectively and impermissibly restricts the benefit-of-the-doubt rule to cases in which there is close to an evidentiary tie, a proposition that the majority agrees would be contrary to the "approximate balance" language of the statute. Indeed, the

35. *Id.* at 1396.

36. *See* Lynch v. McDonough, 21 F.4th 776, 781 n.3 (Fed. Cir. 2021) (en banc) ("The earlier opinion in this case, reported at 999 F.3d 1391 (Fed. Cir. 2021), is withdrawn, and this opinion substituted therefor.").

37. *See Lynch*, 999 F.3d at 1396 (finding that the dicta's suggestion "that the benefit-of-the-doubt rule applies only in the context of an evidentiary tie" was "inconsistent with the plain text of § 5107(b)").

38. *Id.*

39. *Id.*

40. *Id.* at 1397.

> government appeared to agree at oral argument that when the evidence against a veteran's claim is equal to "equipoise plus a mere peppercorn," denying the benefit-of-the-doubt rule would be contrary to statute.[41]

Mr. Lynch requested en banc reconsideration and the Federal Circuit issued a new decision authored again by Judge Prost. Eight other judges joined, including Judge Dyk.[42] Judge Reyna authored a concurrence-in-part and dissent-in-part which Judges Newman and O'Malley joined.[43]

The en banc decision aligned with the panel's decision, finding that *Ortiz*'s specific inclusion of the definition of "approximate balance" "includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance."[44] The court then rebutted the assertion that its decisions had required an equipoise of evidence before applying the benefit of the doubt rule, but it did acknowledge that some Veterans Court's decisions since *Ortiz* have required "equipoise," which is the incorrect standard.[45]

Reiterating the holding of *Ortiz*, the Federal Circuit held:

> So, let us be clear. Under § 5107(b) and *Ortiz*, a claimant is to receive the benefit of the doubt when there is an "approximate balance" of positive and negative evidence, which *Ortiz* interpreted as "nearly equal" evidence. This interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance. Put differently, if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt.[46]

The majority en banc opinion then addressed the concerns Judge Dyk expressed regarding *Ortiz*'s confusing explanation of "preponderance of the evidence."[47] The Federal Circuit acknowledged that *Ortiz* could be misunderstood and officially departed from describing "approximate

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41. *Id.* (citation omitted).
42. Lynch v. McDonough, 21 F.4th 776, 777 (Fed. Cir. 2021) (en banc).
43. *Id.* at 777, 782.
44. *Id.* at 781.
45. *See id.* at 780–81. (finding the "Veterans Court's recitation in *Chotta* of the standard is incorrect") (citing Chotta v. Peake, 22 Vet. App. 80, 86 (2008), *overruled by Lynch*, 21 F.4th at 780–81).
46. *Id.* at 781.
47. *Id.*

balance" in terms of a "preponderance of evidence" standard.[48] The majority held that the correct view is that "approximate balance" most closely approximates "nearly equal."[49] The benefit of the doubt standard does not apply when "the Board 'has been persuaded' to find" for or against a veteran's claim.[50] The court also explicitly declined to overturn *Ortiz* and insisted that the *Lynch* decision was merely a clarification.[51] The Federal Circuit then affirmed the Veterans Court's decision.[52]

In his concurring/dissenting opinion, Judge Reyna agreed that *Ortiz*'s language needed to be corrected.[53] However, he criticized the majority's inability to admit that it was overturning *Ortiz*'s "preponderance of evidence" standard in favor of a "persuasion of evidence standard."[54] Additionally, Judge Reyna noted that, much like a preponderance standard, the statute did not contemplate a persuasion standard, and the persuasion standard would make it much more difficult for veterans to appeal Board decisions when a case is a "close call."[55]

Judge Reyna's concern stems from the fact that the majority's new standard did not require the Board to disclose when it considers evidence "close" but still sufficiently persuasive for the Board to foreclose a veteran's claim.[56] Without this admission, the record is incomplete and veterans would have a difficult time arguing to the Veterans Court that the benefit of the doubt rule should have been applied in their case.[57] Judge Reyna suggests that the Board be required to indicate when the evidence is a "close call," as an aid to subsequent appellate review and proper application of the benefit of the doubt rule.[58]

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48. *See id.* (departing from *Ortiz* to "eliminate the potential for confusion going forward").

49. *Id.*

50. *Id.* at 781–82.

51. *Id.* at 782 ("To be clear, *Ortiz* (and the instant case) were not wrongly decided.").

52. *Id.*

53. *See id.* (concurring with the majority's rejection of the *Ortiz* preponderance of evidence standard).

54. *See id.* (dissenting with the majority's "refusal to overturn *Ortiz* in its entirety").

55. *Id.*

56. *Id.* at 783.

57. *See id.* (noting that a lack of admission would shield VA determinations from "meaningful appellate review").

58. *Id.*

B. Impact of Lynch *on VA and the Benefit of the Doubt Rule*

Judge Dyk's discussion highlighting the confusion over the word "preponderance" is insightful, and *Lynch*'s recharacterization of the term "persuasion" to "eliminate the potential for confusion"[59] is likely not helpful to veterans. While it appears *Ortiz* intended to give some buffer to the veterans on either side of an evenly balanced scale, determining how much evidence equates to "persuasion" is tricky. *Ortiz* mentioned that the preponderance standard "is not amenable to any mathematical formula, such as the often-recited 'fifty-one percent/forty-nine percent' rule . . . [r]ather, a preponderance of the evidence can be said to 'describe a state of proof that *persuades* the factfinders that the points in question are 'more probably so than not.'"[60] The Federal Circuit previously considered the persuasion standard when it issued *Ortiz*, even if the use of the word preponderance muddied the waters.

While the Federal Circuit may understand its persuasion standard, it is unlikely it will be easily understood by VA for three reasons. The difficulty will hinder proper application of the benefit of the doubt doctrine.

First, the decision as to whether the evidence is "nearly equal" or has passed an invisible line into "persuasion" is made by Board of Veterans' Appeals Judges who are employees of VA.[61] There is tension when VA employees making decisions must pit a veteran's private medical evidence against VA's own medical examinations. This tension can be seen in VA's regulations. VA reminds employees that "[p]roceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government."[62] One former Chief of Policy and Procedure for the Board of Veterans' Appeals described this standard as requiring VA employees to be both advocates and adjudicators.[63] Asking a VA employee to determine when evidence against a veteran's claim is "nearly equal" versus slightly in favor of

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59. *Id.*
60. Ortiz v. Principi, 274 F.3d 1361, 1365 (Fed. Cir. 2001).
61. 38 U.S.C. §§ 7101, 7101A(a)(1).
62. 38 C.F.R. § 3.103(a) (2019).
63. 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, 126–27 (2009).

VA—so a claim may be granted—seems to place VA employees into a moral quandary.

Second, the Veterans Court does not have the power to review factual determinations, such as the balancing of evidence, de novo.[64] The Veterans Court can only review these Board determinations under a clearly erroneous standard. This standard applies to an error that leaves a reviewing court with the firm conviction that a mistake has been made.[65] In determining whether a finding is clearly erroneous, the Veterans Court "is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the [Board] . . . [the court] cannot overturn them."[66]

Given the clearly erroneous standard applicable to factual findings, it is highly unlikely that the Veterans Court will reverse any finding in which the Board was "persuaded" by the evidence that a veteran's claim should not be granted.

In the twenty years between *Ortiz* and *Lynch*, the Veterans Court considered Board decisions regarding the preponderance of the evidence standard, as described in *Ortiz*, and the benefit of the doubt application several hundred times.[67] In only five of these cases did the court find the Board's determinations clearly erroneous.[68] Because the

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64. *See id.* at 141–42 (discussing how the Veterans Court cannot reach issues with which the Board did not make any factual finding, and that factor "frustrates effective judicial review").

65. *See, e.g.*, Russo v. Brown, 9 Vet. App. 46, 50 (1996) (applying the Veterans Court's "clearly erroneous" standard of review). *See generally*, United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

66. *See* Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990) (disclaiming the Veterans Court's ability to overturn Board decisions under the clearly erroneous standard "even if [the] Court might not have reached the same factual determinations").

67. Opinions citing *Ortiz* and discussing the preponderance of the evidence standard span multiple years and multiple Secretaries of Veterans Affairs. *See, e.g.*, Padgett v. Nicholson, 19 Vet. App. 133, 146 (2005), *rev'd and remanded*, 473 F.3d 1364 (Fed. Cir. 2007); Skoczen v. Peake, No. 06-0127, 2007 WL 4570718, at *1–2 (Dec. 21, 2007); Anderson v. Peake, No. 06-1724, 2009 WL 59154, at *2–3 (Jan. 12, 2009); Mendenhall v. McDonald, No. 13-2422, 2014 WL 4784319, at *2 (Sept. 25, 2014); Holland v. Wilkie, No. 18-1315, 2019 WL 347672, at *3 & nn.26 & 30 (Jan. 29, 2019).

68. *See Padgett*, 19 Vet. App. at 145–47 (finding that the Board incorrectly declared that evidence preponderated against veteran's claim despite veteran's claim being "the only plausible resolution"); Schuster v. Nicholson, 21 Vet. App. 418, at *2 (2005)

clearly erroneous standard is such a high standard, it is (and was) unlikely a veteran could prevail at the Veterans Court with the argument that marginal evidence tipping the scales one way is not a preponderance, and should instead be considered in "approximate balance." Now that the standard is "persuasion," which seems to be a lesser standard than "preponderance," Board decisions concerning the application of the benefit of the doubt rule will likely be harder to review for clear error. Courts have not yet provided decisions implementing *Lynch* to explain when evidence is persuasive versus preponderant.

Third, historically the Veterans Court has had a difficult time understanding *Ortiz*'s "approximate balance" standard in light of the dicta regarding "preponderance." There are many examples of the Veterans Court holding that the benefit of the doubt doctrine may only be applied when the evidence is in equipoise, citing to *Ortiz* and its progeny as the authority for its decisions.[69] The Federal Circuit now

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(concluding that faulty assessments and failures to address possible nexuses resulted in a clearly erroneous ruling); Bruce v. McDonald, No. 15-3237, 2017 WL 57172, at *3 (Vet. App. Jan. 5, 2017) (concluding that a failure to demonstrate one outcome was more likely than the outcome argued by the veteran in this case constituted a clearly erroneous finding of fact); Cohen v. Shinseki, No. 09-3769, 2011 WL 2636968, at *7–8 (Vet. App. Jul. 6, 2011) (finding the Board's decision to be clearly erroneous because "the preponderance of the evidence is not against a finding of nexus" between the veteran's service injury and current condition); Curle v. Shinseki, No. 08-1824, 2010 WL 326034, at *1, *7 (Vet. App. Jan. 29, 2010) (concluding that the Board's finding that the veteran's heart disease was neither caused nor aggravated by the veteran's PTSD was without sufficient basis and thus clearly erroneous).

69. *See, e.g.*, Chotta v. Peake, 22 Vet. App. 80, 86 (2008), *abrogated by* Lynch v. McDonough, 21 F.4th 776 (Fed. Cir. 2021) ("Finally, the Court recognizes that the evidence must be at least in equipoise to award a benefit, including a particular rating." (citing Ortiz v. Principi (citation omitted)); Fagan v. Peake, No. 06-1327, 2008 WL 2130166, at *3 (Vet. App. Feb. 29, 2008) ("This appeal presents a single question—the interpretation and application of the benefit of the doubt doctrine codified at 38 U.S.C. § 5107(b). This doctrine, also referred to as the 'equipoise' standard, requires that, '[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant' . . . . [B]ecause the evidence is not in equipoise [in this case], the benefit of the doubt doctrine is not applicable"); Hawkins v. Shinseki, No. 09-0842, 2010 WL 3034720, at *4 (Vet. App. Jul. 29, 2010) ("The benefit of the doubt doctrine is only for use in cases where the evidence is in equipoise . . . . Here, the Board was not required to discuss or apply the benefit of the doubt rule because it did not find that the evidence was in equipoise."); Myrkle v. Wilkie, No. 19-7039, 2020 WL 7770892, at *3 (Vet. App. Dec. 30, 2020) ("Here, the

indicates that the preponderance language of *Ortiz* was apparently an unfortunate confusion of the actual standard which was the persuasiveness of the evidence. Unfortunately, much like preponderance, the *Lynch* decision does little to help the Veterans Court, or the Board, gain a new understanding of when evidence crosses the line from "approximate balance" to "persuasion."

The bright side in *Lynch* is that the standard to apply the benefit of the doubt rule can no longer be simply referred to as the "equipoise" standard, which may open the door for VA and veterans to find a more balanced approach to apply the rule.

The concern, which Judge Reyna shared, is that there is little guidance concerning precisely how much evidence tilts the balance one way or another. A lack of a clear and workable standard makes it difficult to hold VA's feet to the fire when enforcing application of the benefit of the doubt rule. It also ensures this issue will continue to be appealed to the courts until the standard is clarified.

Board found that the evidence weighed against Ms. Myrkle's claim. Thus, the evidence was not in equipoise and the benefit of the doubt was not for application."); *see also* De Ramos v. Shinseki, No. 07-0857, 2009 WL 278832, at *5 (Vet. App. Feb. 5, 2009) (refusing to apply the benefit of the doubt doctrine because "the evidence was not in equipoise"); Lott v. Shinseki, No. 09-2059, 2010 WL 2706256, at *7 (Vet. App. Jul. 6, 2010) (finding the Board did not clearly err because they properly determined the evidence was not in equipoise); Campbell v. Shinseki, No. 08-1511, 2010 WL 2637819, at *1, *7 (Vet. App. Jun. 30, 2010) (stating that the Court can assess the Board's determination of whether evidence is in equipoise for clear error); Bloom v. Shinseki, No. 12-3415, 2013 WL 6823377, at *6 (Vet. App. Dec. 27, 2013) (stating that the Court cannot make the "determination as to whether the evidence is in equipoise and apply the benefit of the doubt doctrine," but the Court can review the Board's determination of the same matter for clear error); Kinast v. Shinseki, No. 11-2503, 2013 WL 240983, at *2 (Vet. App. Jan. 23, 2013) ("[The benefit of the doubt] doctrine applies not when there is any possible doubt, but only when the evidence is in equipoise."). Multiple cases merely cite *Ortiz* favorably for its discussion on equipoise of the evidence. *See* Webb v. Shinseki, No. 12-3078, 2013 WL 57755662, at *4 (Vet. App. Oct. 24, 2013) ("[T]he benefit of the doubt doctrine has 'no application where the Board determines that the preponderance of the evidence weighs against the veteran's claim' or when the evidence is not in 'equipoise.'" (citing Ortiz v. Principi (citation omitted))); Enos v. Gibson, No. 13-0721, 2014 WL 3475102, at *3 (Vet. App. Jul. 16, 2014) (relying on *Ortiz* for its discussion of equipoise of the evidence); Talley v. Shinseki, No. 13-2490, 2014 WL 1810823, at *4 (Vet. App. May 8, 2014) (same); Wall v. Shinseki, No. 13-0189, 2014 WL 1016219, at *5 (Vet. App. Mar. 18, 2014) (same); Wathen v. Shinseki, No. 12-1650, 2014 WL 438309, at *2 (Vet. App. Feb. 5, 2014) (same).

II. LIMITING FACT-FINDING AND PREJUDICIAL ERROR AT THE VETERANS COURT

In *Tadlock v. McDonough*,[70] the Federal Circuit limited the Veterans Court's power to fact-find and narrowed its power to find prejudicial error.[71] In 1988, President Ronald Reagan finalized the creation of the Veterans Court by signing the VJRA into law.[72] The Federal Circuit noted that "VA stood in splendid isolation as the single federal administrative agency whose major functions were explicitly insulated from judicial review" before the VJRA specifically subjected VA to judicial review.[73] While discussions about the creation of a court to review VA's decisions began in the 1950s,[74] there were several concerns about introducing judicial review to the veterans benefits process.[75]

Among these concerns were fears that introducing judicial review to the practice would bring more attorneys into the VA process who might bilk unsuspecting veterans out of their guaranteed benefit

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70. 5 F.4th 1327 (Fed. Cir. 2021).

71. *Id.* at 1337–38.

72. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113 (1988) ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals.").

73. Gardner v. Brown, 5 F.3d 1456, 1463 (Fed. Cir. 1993) (internal quotation marks omitted). The court cited provisions of a House report that examined proposed changes to Title 38 of the U.S. Code, including changes to 38 U.S.C. § 211(a) as follows:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

H.R. Rep. No. 100-963, pt. 1, at 54 (1988).

74. Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 ME. L. REV. 43–45 (1994).

75. *Id.* at 45–46 ("It is clear that there was concern that with it, judicial review would bring unnecessary formalism to the claims adjudication process.").

monies.[76] There was also a fear that judicial review would lead to a delay in adjudicating veterans' claims for benefits.[77]

Given these concerns, Congress crafted jurisdictional limits for the Veterans Court's review of Board of Veterans' Appeals decisions.[78] Specifically, Congress expressed that the Veterans Court has jurisdictional authority to do the following: (1) "decide all relevant questions of law"; (2) "interpret constitutional, statutory, and regulatory provisions"; (3) "determine the meaning or applicability of the terms of an action of the Secretary [of Veterans Affairs]"; (4) "compel action of the Secretary unlawfully withheld or unreasonably delayed"; (5) "hold unlawful and set aside decisions, findings . . . , conclusions, rules, and regulations adopted by the Secretary [or BVA]" that are "arbitrary, capricious, an abuse of discretion," "contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations," among other things; and (6) "hold unlawful and set aside or reverse [] finding[s]" of material fact made by VA that are "clearly erroneous."[79]

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76. S. 11, The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs, 100th Cong. 175 (1988) (statement of Sen. John Kerry).

77. *See, e.g.*, *id.* at 493, 500 (statement of Donald L. Ivers, General Counsel, Veterans Administration) (articulating concerns that the new adversarial system would make the processing of claims more burdensome and that caseloads could increase dramatically, both of which could cause delays); *id.* at 603 (statement of Disable American Veterans) (echoing the general concern that judicial review would cause significant delays); *id.* at 333–34 (statement of Honorable Morris S. Arnold and Honorable Stephen G. Breyer, on behalf of the Judicial Conference of the United States) (expressing concern for judicial review because "[a]ny such litigation in the courts would be expensive and fraught with delay"); *id.* at 568 (statement of Jerry L. Mashaw, Professor of Law at Yale Law School) (describing how attorney behavior in response to judicial review would delay claims).

78. 38 U.S.C. § 7252(a). *See generally* Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 167–70 (1992) (providing an overview of the final judicial structure of the VJRA and the underlying political justifications for its structure); Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 23 CLEARINGHOUSE REV. 506 (1989) (providing a broad overview of the congressional changes implemented in the VJRA).

79. 38 U.S.C. § 7261(a) (2018). The "clearly erroneous" standard differs slightly from the Administrative Procedures Act's "arbitrary and capricious" standard applied to questions of fact. 5 U.S.C. § 706 (2018); *see, e.g.*, Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 378 (1989) (requiring a reviewing court that applies the arbitrary and capricious standard to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement").

When exercising judicial review, Congress strictly prohibited de novo fact-finding by the Veterans Court.[80] This prohibition on first instance fact-finding represented one of Congress's concessions to the concerns of judicial review:

> In questions of fact, . . . the VA had particular expertise in gathering relevant information through its use of medical, legal, and occupational experts, while courts were comparatively less equipped to decide such matters. Perhaps more significantly, factual review would cause the [Board] and VA to rely on substantially more complex rationales to justify their decisions. With greater complexity and a more formalized decision-making structure would also come increased reliance on attorneys . . . .[81]

In addition to requiring that the Veterans Court's decisions must "be [up]on the record of proceedings before the Secretary and the Board,"[82] Congress required the Veterans Court to "take due account of the rule of prejudicial error" in each case.[83] The Supreme Court found this prejudicial error analysis to be the same review undertaken pursuant to the Administrative Procedure Act (APA),[84] which the Court previously determined requires a review of the "administrative record already in existence, not some new record made initially in the reviewing court."[85] Indeed, if the agency record does not support an agency finding, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."[86]

Over the past thirty years of judicial review of VA's decision-making, the Federal Circuit often reminded the Veterans Court of its inability to engage in fact-finding in the first instance.[87] For example, in *Hensley v. West*,[88] the Federal Circuit examined a claim involving a veteran's lung problems and noted that for the Veterans Court to determine that

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80. *See* 38 U.S.C. § 7261(c) (noting that "in no event shall findings of fact made by the Secretary or [the Board] be subject to trial de novo by the Court").

81. Helfer, *supra* note 78, at 164.

82. 38 U.S.C. § 7252(b).

83. *Id.* § 7261(b).

84. Shinseki v. Sanders, 556 U.S. 396, 406 (2009) (citing 5 U.S.C. § 706).

85. Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam).

86. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

87. *See, e.g.*, Hensley v. West, 212 F.3d 1255, 1264 (Fed. Cir. 2000); Elkins v. Gober, 229 F.3d 1369, 1377 (Fed. Cir. 2000).

88. 212 F.3d 1255 (Fed. Cir. 2000).

the veteran's lung condition occurred before exposure to toxic gas, it must have engaged in fact-finding of a condition that the Board did not previously address.[89] The Federal Circuit found that this fact-finding in the first instance by the Veterans Court was inappropriate.[90] Similarly, in *Elkins v. Gober*,[91] the Veterans Court determined that the Board's conclusion that a veteran had not presented sufficient evidence of headaches was incorrect.[92] The Veterans Court went further to find that VA still would not have granted the claim because the veteran failed to provide evidence of a nexus between the disability and military service; therefore, the Board's error could not have been prejudicial.[93] On appeal to the Federal Circuit, even the Secretary of Veterans Affairs (Secretary) agreed that this conclusion by the Veterans Court was a result of improper fact-finding.[94] The appropriate action the Veterans Court should have taken in *Elkins* was to remand the claim to the Board for continued development of the evidence and to make a new determination regarding the nexus of the veteran's condition to his service.[95] The Federal Circuit reminded the Veterans Court that "[f]act-finding in veterans cases is to be done by the expert [Board], not by the Veterans Court."[96]

While the Veterans Court's inability to engage in fact-finding in the first instance may seem well-defined, nuances to the prohibition continue to develop. One of these nuances is that Congress authorized the Veterans Court to engage in factfinding to determine whether an error committed by the Board resulted in prejudicial error to the veteran.[97] For over a decade, the Federal Circuit's 2007 decision in *Newhouse v. Nicholson*[98] (*Newhouse II*) served as the foundation upon which the Veterans Court interpreted its fact-finding authority in cases involving prejudicial error.[99]

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89. *Id.* at 1264.
90. *Id.*
91. 229 F.3d 1369 (Fed. Cir. 2000).
92. *Id.* at 1371.
93. *Id.* at 1377.
94. *Id.*
95. *Id.*
96. *Id.*
97. 38 U.S.C. § 7261(b).
98. 497 F.3d 1298 (Fed. Cir. 2007).
99. *See id.* at 1302–03 (concluding that the Veterans Court did not err because it has "the statutory duty to 'take due account of the rule of prejudicial error' by considering 'the record of the proceedings before the Secretary and the Board'").

In *Newhouse II*, the Federal Circuit reviewed a Veterans Court decision which found harmless error, even though the Board itself found that VA failed to provide adequate notice to the veteran.[100] The Federal Circuit considered the veteran's argument that the Veterans Court erred when it affirmed the Board's decision using a different legal ground than the one relied upon by the Board.[101] The veteran premised the assertion of error on the Supreme Court's decision in *SEC v. Chenery*,[102] a seminal administrative law case. The Court held that a court reviewing an agency's decision may not affirm on a different reasoning than the agency used in reaching its decision.[103] The Federal Circuit ultimately concluded that this prohibition in *Chenery* does not apply to the prejudicial error analysis for veterans claims because Congress specifically authorized the Veterans Court to determine prejudicial error in 38 U.S.C. § 7621(b)(2).[104] Congress also authorized the Veterans Court to review the entire record and did not explicitly limit review to the facts found by the Board.[105]

Newhouse II launched a trend of cases which broadly interpreted the Veterans Court's jurisdictional power to include fact-finding in a prejudicial error analysis. The recent Veterans Court decision in *Simmons v. Wilkie*,[106] affirmed by the Federal Circuit on other grounds, demonstrates how the Veterans Court interpreted *Newhouse II* to bypass statutory prohibitions on de novo review and "engage in plenary review of the underlying facts of the [VA] decision."[107]

In *Simmons*, the veteran argued that a VA error in his case prevented an award of benefits.[108] The Veterans Court agreed with the veteran that the Board had made an error, but then considered whether this

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100. *Id.* at 1300.

101. *See id.* (describing how the Veterans Court instead found harmless error because the Veterans Court found that the veteran had "actual knowledge that he needed to submit medical evidence").

102. SEC v. Chenery Corp., 332 U.S. 194 (1947).

103. *Id.* at 196.

104. *Newhouse*, 497 F.3d at 1301–02 (holding that the *Chenery* doctrine does not apply to the case at bar because the Veterans Court appropriately acted within the scope of its mandate); *see also* 38 U.S.C. § 7261(b)(2) (Supp. V 2000) ("[T]he Court shall . . . take due account of the rule of prejudicial error.").

105. 38 U.S.C. § 7261(b)(2) (Supp. V 2000).

106. 30 Vet. App. 267 (2018), *aff'd* 964 F.3d 1381 (Fed. Cir. 2020).

107. *Id.* at 283; *see also* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary of the Board of Veterans' Appeals be subject to trial de novo by the Court.").

108. 30 Vet. App. at 275.

error was prejudicial.[109] The Veterans Court decided that, despite the Board's error, the veteran's claim would not have been granted because the veteran failed to provide proof of one of the elements of service connection for his disability.[110] Relying on *Newhouse II*, the Veterans Court made this finding de novo; the Board had not addressed the missing element of service connection at all.[111] The Veterans Court explained that it was permitted to engage in first instance fact-finding because "[the harmless error] inquiry must go beyond the Board's analysis because '[t]he Board cannot predict every instance in which it might be found to have committed error,' and, therefore, 'cannot be expected to make specific factual findings that might facilitate a prejudicial error analysis.'"[112]

On appeal to the Federal Circuit, the Federal Circuit affirmed the decision but did not address any issues of fact-finding during the determination of prejudicial error by the Veterans Court.[113] In the shadow of *Newhouse II* and cases like *Simmons*, the Federal Circuit in Tadlock v. McDonough[114] considered the Veterans Court's fact-finding powers during prejudicial error review.

A. Tadlock v. McDonough

In *Tadlock*, the veteran claimed that VA should consider the pulmonary embolism and resulting heart attack he suffered to be conditions presumptively caused by his service in the Persian Gulf.[115] The Board of Veterans' Appeals denied his claim because pulmonary embolism was not an undiagnosed illness—one of the permitted categories of conditions for service connection to service in the Persian Gulf.[116] However, in doing so, the Board failed to consider an alternate theory that allowed for a presumptive service connection for

109. *Id.* at 279 ("[T]he Court has a duty to consider whether the Board's errors prejudiced Mr. Simmons . . . .").

110. *See id.* at 285 (finding that the veteran failed to establish the linkage prong of service connection).

111. *Id.* at 284; *see also* Bd. Vet. App. 1619575, No. 12-10 110, 2016 WL 3651237 (May 13, 2016) (making no reference to the veteran's failure to prove linkage).

112. *Simmons*, 30 Vet. App. at 284 (citing Vogan v. Shinseki, 24 Vet. App. 159, 163–64 (2010)).

113. Simmons v. Wilkie, 964 F.3d 1381, 1386 (Fed. Cir. 2020).

114. 5 F.4th 1327 (Fed. Cir. 2021).

115. *Id.* at 1331.

116. *Id.* ("[P]ulmonary embolism, and therefore service connection based on the law and regulations pertaining to undiagnosed illness incurred due to Persian Gulf service is not warranted.").

"medically unexplained chronic multisymptom illness [(MUCMI)] . . . defined by a cluster of signs or symptoms."[117] The Board made no factual determinations regarding the MUCMI category of conditions.[118] Mr. Tadlock appealed to the Veterans Court arguing, inter alia, that the Board failed to consider his pulmonary embolism under the MUCMI provision of the statute.[119]

On appeal, the Veterans Court—in a single-judge opinion—acknowledged that the Board's determination regarding whether the pulmonary embolism disability could be presumptively linked to the veteran's Gulf War service was a factual determination.[120] The Veterans Court reviews these determinations under the clearly erroneous standard.

The Veterans Court agreed with Mr. Tadlock that the Board's failure to consider whether the pulmonary embolism condition was a MUCMI was clearly erroneous.[121] The Veterans Court then considered whether the Board's error was prejudicial to Mr. Tadlock, thus requiring a remand.[122] The Veterans Court held that Mr. Tadlock had not presented any evidence to the Board that his pulmonary embolism was defined by a cluster of signs or symptoms, a requisite to qualify as a MUCMI.[123] Therefore, the Veterans Court concluded the Board's error was not prejudicial because the claim would not have been granted under the unconsidered provisions of the statute.[124] In support of this finding, the Court pointed to facts in the record concerning Mr. Tadlock's lack of embolisms for several years and the fact that his "mild exertional intolerance and lifetime aspirin regimen are residuals of his [embolism and heart attack] and are not shown to be indicative of a

117. *Id.*; 38 U.S.C. §§ 1117(a)(1)(A), (a)(2)(B) (2012).

118. *Tadlock*, 5 F.4th at 1331.

119. *Id.*

120. Tadlock v. Wilkie, No. 18-1160, 2019 WL 2707830, at *2 (Vet. App. June 28, 2019), *denying motion for full-court review*, No. 18-1160, 2020 WL 738550 (Vet. App. Feb. 14, 2020) (per curiam), *vacated sub nom.* Tadlock v. McDonough, 5 F.4th 1327 (Fed. Cir. 2021) (outlining Mr. Tadlock's argument that "MUCMI is defined . . . as a *diagnosed* illness" in the statute).

121. *Id.*

122. *Id.*

123. *See id.* ("Mr. Tadlock has not pointed to anything in the record suggesting that his PE meets these criteria.").

124. *Id.*

[qualifying condition]."[125] In making these findings, the Veterans Court did not point to any Board findings to support its holding.[126]

Mr. Tadlock filed a motion with the Veterans Court for a review by a panel of judges.[127] Two of the three judges determined that the single-judge opinion should stand.[128] In her dissent, Veterans Court Judge Pietsch noted that the Veterans Court's decision in *Tadlock* represents "the latest in a recent string of aggressive prejudicial error analyses" by the court.[129] Specifically, Judge Pietsch highlighted the Veterans Court's decision in *Simmons*, which she characterized as an instance in which the court "granted itself factfinding authority otherwise denied to it by Congress by couching its initial factfinding in the language of prejudicial error."[130]

While Judge Pietsch's concerns appear to be a combination of issues addressed in *Chenery* and *Newhouse II* and the prohibition on first instance fact-finding by the Veterans Court found in *Hensley* and *Elkins*, her concern is clear: "the [c]ourt's initial factfinding, unlike the Board's, is essentially unreviewable."[131]

Mr. Tadlock then filed a motion for full-court review.[132] The Veterans Court denied this motion, noting that motions for full-court review are not "granted unless such action is necessary to secure or maintain uniformity of the [c]ourt's decisions or to resolve a question of exceptional importance."[133]

On appeal to the Federal Circuit, Mr. Tadlock challenged the authority of the Veterans Court to make the fact-finding determination that his condition was not a "medically unexplained chronic multisymptom illness . . . defined by a cluster of signs of symptoms."[134]

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125. *Id.* at *3.

126. *Id.* (finding the Board's basis "erroneous" and instead finding the veteran's disability "doesn't exhibit the characteristics and features of a MUCMI").

127. Order, Tadlock v. Wilkie, No. 18-1160, slip. op. at *1 (Vet. App. Sept. 17, 2019) (per curiam).

128. *Id.* at *1–2 (showing that three judges considered the motion and one dissented).

129. *Id.* at *2 (Pietsch, J., dissenting).

130. *Id.*

131. *Id.*

132. Tadlock v. Wilkie, No. 18-1160, 2020 WL 738550, at *1 (citing U.S. VET. APP. R. 35(c)).

133. *Id.* (quoting U.S. VET. APP. R. 35(c)).

134. 38 U.S.C. § 1117(a)(2)(B) (2012); *see Tadlock*, 5 F.4th at 1333 ("Tadlock's challenge here is not to the factual determination of the Veterans Court that his illness

The Secretary of Veterans Affairs argued that *Newhouse II*, among other cases, authorizes the Veterans Court to "go outside of the facts as found by the Board" to determine if there was prejudicial error—the Secretary thus contended that the Veterans Court's decision was valid.[135] Mr. Tadlock argued that his case was like *Hensley* and that the Veterans Court had violated *Chenery* when it affirmed the Board's decision on a different rationale than the Board had used.[136]

Considering Mr. Tadlock's *Chenery* concerns, the Federal Circuit, in an opinion written by Judge Linn and joined by Judges Chen and Newman, reiterated that the Veterans Court can affirm a Board decision based on a different legal rationale than the Board used in its findings when "it is clear that the factual basis for such conclusion is not open to debate and the Board on remand could not have reached any other determination on that issue."[137]

Regarding the argument that the Veterans Court is prohibited from de novo fact-finding during its prejudicial error analysis, the Federal Circuit began by acknowledging *Newhouse II*'s holding that "[i]n reviewing the Board's decision for prejudicial error, the Veterans Court is not limited to considering only the facts relied on by the Board and VA but can—and indeed must—consult the full agency record, including facts and determinations that could support an alternative ground for affirmance."[138] However, the Federal Circuit declined to find that *Newhouse II* and its progeny stand for the premise that the Veterans Court may engage in the prejudicial error review "unfettered by the particular fact-findings made by VA or the Board."[139] Rather, the Federal Circuit held that these cases merely recognize that a prejudicial error review must be performed in every instance based upon the record before VA.[140] Specifically, the Federal Circuit explained that a prejudicial error analysis does *not* allow the Veterans Court to conduct de novo fact-finding:

> While "the record of the proceedings before the Secretary and the Board" is broader than "the facts as found by the Board," nothing in either case, however, requires or even suggests that considering the

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was not a MUCMI, but instead to the Veterans Court's authority to make that fact-determination in the first instance in its consideration of prejudicial error.").

135. *Tadlock*, 5 F.4th at 1334.
136. *Id.* at 1333.
137. *Id.* at 1336.
138. *Id.* at 1334.
139. *Id.* at 1335.
140. *Id.*

> "record of the proceedings" authorizes the Veterans Court to make findings of fact in the first instance.[141]

Allowing the Veterans Court to engage in first instance fact-finding "[w]hen questions of fact are open to debate" would prevent a veteran from presenting evidence or argument to the expert agency for an initial decision—an outcome that Congress did not authorize.[142]

In light of this, the Federal Circuit held that the Veterans Court's prejudicial error review is limited to (1) factual findings that are already made by VA or the Board, or (2) facts that are obvious and undebatable in the record, even if the Board did not specifically make these findings.[143] In instances where a fact may be open to disagreement, a remand to the Board is necessary to allow the Board to make the finding of fact based upon the evidence in the record.[144]

Turning to the Veterans Court's decision in Mr. Tadlock's case, the Federal Circuit found that the Veterans Court's determination that Mr. Tadlock's pulmonary embolism did not qualify as a MUCMI did not rely upon any fact-finding by VA.[145] The Federal Circuit explicitly agreed with Judge Pietsch that the Veterans Court decision "made factual findings that the Board did not make,"[146] thus, "[t]he determination that [Mr.] Tadlock's symptoms did not constitute [a qualifying condition] . . . was . . . the Veterans Court's alone"—an example of fact-finding in the first instance prohibited by *Hensley* and *Elkins*.[147] The Federal Circuit found support for this determination not only in the Veterans Court's failure to point to anything in the record to support its determination, but also its failure to assert that its factual finding was the only possible finding that could have been made by VA.[148] Based upon the Veterans Court's impermissible reach into fact-finding, the Federal Circuit vacated the decision and remanded it for further proceedings.[149]

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141. *Id.* at 1335–36.
142. *Id.* at 1337.
143. *Id.*
144. *Id.* at 1337–38.
145. *Id.* at 1338.
146. *Id.* at 1338, 1340; *see also* Order, Tadlock v. Wilkie, No. 18-1160, slip. op. at *2 (Vet. App. Sept. 17, 2019) (per curiam) (Pietsch, J., dissenting).
147. *Tadlock*, 5 F.4th at 1338–39.
148. *See id.* at 1340.
149. *Id.*

B. Impact of Tadlock *on Future Veterans Court Decisions*

While the Federal Circuit did not explicitly refer to the *Simmons* case in its *Tadlock* decision, the *Simmons* decision and its progeny are nonetheless implicated.

A review of the case law at the Veterans Court indicates that the court had been relying on the "exceedingly broad" language in *Simmons* and, according to the Federal Circuit, an erroneous interpretation of *Newhouse II* to make factual determinations that are now barred by *Tadlock*.[150] This type of fact-finding by the Veterans Court typifies the Federal Circuit's concern in *Tadlock* that the Veterans Court had expanded its own ability to engage in de novo fact-finding to include "factual findings that the Board did not make."[151]

The *Tadlock* decision is a positive development for veterans. When the Board makes an erroneous determination that veterans' claims are without merit, the Board stops making factual findings regarding other aspects of the claims. This is quite understandable because, in the Board's eyes, it did not commit an error; thus, any continued fact-finding would be a waste of time and resources once it determines a claim is meritless. In these types of cases, the Veterans Court then had the challenge of reviewing, in the first instance, many different aspects of a veteran's claim that were untouched by the Board's decision. This is exactly what occurred in *Simmons*.[152] In such circumstances, veterans not only had to argue legal error in the Board's decision, but also had to argue for a new interpretation of the facts without being able to submit new supporting evidence to the Veterans Court. The *Tadlock* decision will significantly curtail this practice.

Tadlock's curtailing of the Veterans Court's fact-finding capabilities may also be a benefit to veterans by requiring more frequent remands to the Board. On remand, veterans will have the opportunity to present arguments, and potentially evidence, on aspects of their claims which may have been overlooked in their first opportunity to visit the Board. Additionally, the Board's factual findings that impact a veteran's claims can be reviewed for clear error by the Veterans Court. There was no recourse for these same findings made by the Veterans Court in a prejudicial error review. When appealing a Board decision to the

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150. *See, e.g.*, Wait v. Wilkie, 33 Vet. App. 8, 18 (2020) (relying on *Simmons* to justify the court's authority to engage in factfinding beyond the scope of the Board's analysis).

151. *Tadlock*, 5 F.4th at 1340.

152. *See supra* notes 111–12 and accompanying text.

Veterans Court, the veteran, or veteran's advocate, would be wise to refrain from a pro forma statement that any Board error was prejudicial. Instead, advocates should argue that once the error is identified, a remand to the Board is required to determine the veteran's claim because the facts regarding certain elements or issues remain open and debatable. Specifically, discussing—even briefly—why the facts are debatable may be advisable in order to ensure remand or create an appealable issue in the event of an overreach by the Veterans Court into fact-finding.

III. SELF SERVING AFFIDAVITS MAY BE SUFFICIENT EVIDENCE TO ESTABLISH THE MAILBOX RULE PRESUMPTION

This past year, in *Anania v. McDonough*,[153] the Federal Circuit addressed the impact of a party's affidavit regarding proper mailing when applying the mailbox rule.[154] The Federal Circuit determined that a party's affidavit may provide credible evidence to create a rebuttable presumption that the mailbox rule applies, especially when the Secretary has not challenged the credibility of the affiant.[155] To give *Anania* full context, it is important to understand VA's adoption of the mailbox rule, as well as the Board's implicit credibility findings.

In *Rios v. Nicholson*,[156] the Federal Circuit determined that the common law mailbox rule applied to correspondence between VA and a veteran.[157] The mailbox rule does not create a conclusive presumption that correspondence arrived; rather, it creates a rebuttable presumption of that fact.[158] In other words, if a veteran mailed an appeal of a VA decision with a proper address and postage, then VA must presume that it received the correspondence unless it can affirmatively rebut the presumption with evidence that it did not receive the correspondence.[159] The operation of the mailbox rule is

153. 1 F.4th 1019 (Fed. Cir. 2021).

154. *Anania*, 1 F.4th at 1022 ("Under the common law mailbox rule, 'if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.'" (quoting Rios v. Nicholson, 490 F.3d 928, 930–31 (Fed. Cir. 2007))).

155. *Anania*, 1 F.4th at 1027.

156. 490 F.3d 928 (Fed. Cir. 2007).

157. *Id.* at 931–33.

158. *Id.* at 933.

159. *Id.*

important because veterans have several deadlines in the adjudicatory process.[160] If VA failed to record receipt of a correspondence, a veteran's appeal may be time barred, impacting most significantly the veteran's effective date for his retroactive benefits.[161]

When assessing credibility of evidence, the Veterans Court looks to the Board's express and implicit fact-finding.[162] A presumption exists, provided that the Board considered all of the evidence of record in its decisions.[163] Where evidence is not specifically mentioned in a Board decision, the presumption remains notwithstanding the omission(s).[164] Following the logic applied to the presumption regarding evidence in the record, when the Board does not find something to be incredible, the Veterans Court may conclude that the Board made an implicit credibility determination.[165]

These two concepts, the mailbox rule and implicit credibility determinations, are intertwined in *Anania*.[166] In February 2009, VA issued a Rating Decision, awarding Roy Anania "a total disability rating based on individual unemployability" with an effective date of June 2008 and an increased rating for his major depressive disorder.[167] Later, in March 2009, VA issued a "statement of the case" regarding the major depressive disorder.[168] Mr. Anania appealed the Rating Decision in September 2009 to obtain an earlier effective date.[169] In December 2009, VA denied his request for an earlier date.[170] In its denial letter, VA told Mr. Anania that he could appeal within sixty days of the decision or within a year of the Rating Decision, whichever was later.[171]

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160. *See generally* R. PRAC. & P. U.S. CT. VET. APP. (providing procedural rules for timely filings and motions in the Veterans Court).

161. *See infra* Sections V.A.–V.B (discussing the *Arellano* and *Taylor* cases).

162. *See* Miller v. Wilkie, 32 Vet. App. 249, 252 (2020) (describing the court's approach of reviewing the Board's express factual determinations, then reviewing the Board's implicit factual determinations).

163. *Id.* at 260.

164. *Id.*

165. *Id.*

166. Anania v. McDonough, 1 F.4th 1019, 1020 (Fed. Cir. 2021).

167. *See id.* at 1020–21 (explaining that VA raised Anania's rating to fifty percent based on his condition).

168. *Id.* at 1021.

169. *Id.*

170. *See id.* ("As such, Mr. Anania had until March 3, 2010—one year after the date of mailing of the notification of the VA's decision—to file a substantive appeal . . . .").

171. *Id.*

In June 2012, Mr. Anania's attorney submitted a letter to the Board requesting confirmation that it had docketed Mr. Anania's appeal.[172] The attorney included a copy of the substantive appeal as an exhibit.[173] In March 2013, the Board issued a decision, concluding that Mr. Anania failed to timely file an appeal.[174] Mr. Anania appealed to the Veterans Court, and it remanded for further adjudication.[175] On remand, VA found that the presumption of regularity[176] was applicable, and that since there was no file in the computer system, the appeal was not timely received.[177] Mr. Anania again appealed to the Board requesting that it consider and apply the mailbox rule.[178] Included in the evidence was a signed affidavit from Mr. Anania's counsel stating that he mailed a substantive appeal to the proper office on December 4, 2009, which would have been timely.[179]

The Board again determined that Mr. Anania's appeal was not timely filed.[180] Mr. Anania appealed the case to the Veterans Court, and the court ordered yet another remand because the Board failed to explain why the affidavit was insufficient to trigger the mailbox rule.[181] On this second remand from the Veterans Court, the Board found that the mailbox rule presumption did not attach because counsel's affidavit was "no more than self-serving testimony."[182]

The Veterans Court affirmed.[183] In a memorandum decision, the Veterans Court looked to *Fithian v. Shinseki*,[184] in which the court found that a sworn affidavit was not sufficient to establish the presumption of receipt under the common law mailbox rule.[185] The Veterans Court further looked to *Rios* and determined that the appellant must provide

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *See id.* at 1021 & n.1 (stating the presumption of regularity assumes that government officials have properly discharged their official duties).
177. *Id.*
178. *Id.*
179. *Id.* at 1021–22.
180. *Id.* at 1022.
181. *Id.*
182. *Id.*
183. *Id.*
184. 24 Vet. App. 146 (2010).
185. Anania v. Wilkie, No. 18-0180, 2019 WL 3436604, at *2 (Vet. App. July 31, 2019) (citing *Fithian*, 24 Vet. App. at 151), *rev'd sub nom.* Anania v. McDonough, 1 F.4th 1019 (Fed. Cir. 2021).

evidence demonstrating that his filing was properly addressed, stamped, and mailed with adequate time to reach the recipient.[186] Here, the Veterans Court agreed with the Board in its finding that counsel's affidavit was merely self-serving and was not sufficient evidence for the presumption of receipt to attach.[187]

On appeal, the Federal Circuit looked to the common law mailbox rule and analyzed whether self-serving affidavits are sufficient.[188] The Federal Circuit looked to other circuits for guidance as well.[189] The court found that the Second, Third, Fifth, Sixth, and Ninth Circuits acknowledge that self-serving affidavits suffice to establish the presumption of receipt.[190] The Federal Circuit rejected the Veterans Court's rule that self-serving affidavits are per se insufficient to establish the presumption under the mailbox rule.[191] In the opinion, Judge Stoll found that it was "inappropriate to apply an artificially rigid approach to the assessment of evidence on the factual question of mailing in the area of veterans benefits law given the absence of a statute commanding such a rule and the pro-claimant, nonadversarial nature of the statutory scheme created by Congress."[192]

The Federal Circuit also looked to the Secretary's position on the credibility of the attorney's statement.[193] VA never challenged the attorney's credibility and never asserted that the attorney did not properly address or mail the appeal.[194] Instead, VA argued that the attorney's affidavit was inconclusive as to whether the document was actually sent, since it was "insufficient to establish proof of mailing by circumstantial evidence of mailings and practices."[195] The court found that his affidavit was not conclusory and demonstrated that he mailed the appeal in adequate time to reach VA.[196]

Anania has two important takeaways: first, representatives, such as VSOs, attorneys, and agents, can play a substantive role to ensure that

186. *Anania*, 2019 WL 3436604, at *2.
187. *Id.* at *3.
188. *Anania*, 1 F.4th at 1022.
189. *Id.* at 1024–26 (examining cases from the Second, Third, Fifth, Sixth, and Ninth Circuits).
190. *Id.*
191. *Id.* at 1027.
192. *Id.* at 1026.
193. *Id.* at 1027–28.
194. *Id.* at 1027.
195. *Id.* at 1028.
196. *Id.*

veterans' due process rights are protected, and second, the Board must explicitly find that an affidavit lacks credibility to rebut the mailbox rule presumption.

As a matter of best practice, when a representative assists her client with an appeal, the representative should keep a clear record of when the appeal was submitted and by what means it was done. Although many representatives now rely on the "direct upload" tool available through VA's electronic system, representatives should keep their own record of submission. By keeping a record, the representative can satisfy the mailbox rule.

When reviewing a Board decision, it is important to determine what explicit and implicit findings of fact were made by the Board. Specifically, if the Board does not explicitly find that a piece of evidence lacks credibility, the representative should assume the Board found the evidence credible.[197] These findings can be quite important to ensure that a veteran is fairly treated throughout the process, including at the Veterans Court and on remand.

IV. THE FEDERAL CIRCUIT CLARIFIES THE EXTENT OF THE CONSTRUCTIVE POSSESSION DOCTRINE

In *Euzebio v. McDonough*,[198] the Federal Circuit expanded the constructive possession doctrine to VA-contracted medical reports.[199] The doctrine of constructive possession in veterans benefits law is based on *Bell v. Derwinski*.[200] The doctrine is important because the Veterans Court is statutorily restricted from reviewing any document that is not part of the record before the agency.[201] Under *Bell*, courts

197. It is important to note that *Anania* is a legacy case and new rules bind the Board under the Appeals Modernization Act. Specifically, 38 C.F.R. § 20.801(a) binds the Board to any favorable findings identified by Regional Office or a previous Board decision unless rebutted by clear and unmistakable evidence. The regulation specifically defines findings as conclusions on questions of fact and application of law to facts made by an adjudicator concerning the issue under review. It is unclear whether implicit findings by the Board will be treated as favorable findings, including credibility findings.

198. 989 F.3d 1305 (Fed. Cir. 2021).

199. *Id.* at 1309.

200. 2 Vet. App. 611 (1992) (per curiam).

201. *See* 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.").

will find constructive possession when the evidence is "within the Secretary's control and could reasonably be expected to be a part of the record 'before the Secretary and the Board,'" and is constructively part of the administrative record.[202] This means that if the record before the agency does not actually include a document within the file, the document is nonetheless considered in the analysis and on appeal.

In *Bell*, the VA claim file did not include three documents created by VA itself relating to the veteran and one document submitted by the veteran to VA during the adjudication of his claim.[203] Fortunately, the veteran's widow had copies of the documents, which her advocate argued should be considered part of the record.[204] Because these documents should have been in the file, and the Secretary did not contest their genuineness, the Veterans Court held that the record should include the submitted material. The Veterans Court remanded the case back to the Board.[205]

Following *Bell*, veterans argued that medical reports prepared by the National Academies of Sciences, Engineering, and Medicine (NAS) should be considered part of the record and urged the Veterans Court to apply the doctrine of constructive possession to these reports.[206] For example, in *Monzingo v. Shinseki*,[207] the veteran argued that a noise study prepared by NAS, which supported his hearing loss claim, should be considered part of the record.[208] In *Monzingo*, the Veterans Court declined to find that the constructive possession doctrine applied, stating it did not believe the NAS reports had a "direct relationship" to the veteran's claim.[209] The Federal Circuit dismissed the appeal,

202. *Bell*, 2 Vet. App. at 613.

203. *See id.* at 612 ("(1) a VA Form 119 Report of Contact, dated March 8, 1988, and completed by Dr. Robert A. Kreisberg, a VA physician and Chief of Medical Services; (2) a letter, dated October 3, 1988, from Dr. Joel D. Silverberg, Chief Medical Resident and Instructor in Medicine, 1988–89, at the VA Medical Center in Birmingham, Alabama . . .; (3) a letter from the VA to appellant informing her that the VA had received her application and that she did not have to take any additional action at that time . . . .").

204. *Id.*

205. *Id.* at 612–13.

206. *See, e.g.*, Monzingo v. Shinseki, 26 Vet. App. 97, 100 (2012) (per curiam) (explaining a veteran's argument to the Veterans Court that two NAS reports were "constructively in the Board's possession").

207. 26 Vet. App. 97 (2012) (per curiam), *appeal dismissed sub nom.*, Monzingo v. Gibson, 566 F. App'x 972 (Fed. Cir. 2014).

208. *Id.* at 101 (noting that the veteran relied on "select findings from *Noise and Military Service* and *Tinnitus*").

209. *Id.* at 102.

finding it did not have jurisdiction because the appeal involved applying facts to the law, which is precluded by the Federal Circuit's scope of review.[210]

In *Euzebio*, the Federal Circuit determined it had jurisdiction to hear the case because it was reviewing a question of law, to wit: the scope of the constructive possession doctrine. This legal question was presented in the context of NAS Agent Orange health reports.[211]

A. History of Agent Orange Claims

During the Vietnam War, the United States widely used Agent Orange as a defoliant.[212] Following a National Institutes of Health Report in 1969, the government restricted the use of Agent Orange.[213] Thereafter, Vietnam veterans and their families filed a class action suit in 1979, seeking damages for injuries and deaths relating to Agent Orange exposure.[214]

Due to "concern . . . about the decision making process within the [VA] with respect to Agent Orange compensation," Congress enacted the Dioxin Act,[215] which sought to ensure that VA disability compensation was provided to veterans with service-connected disabilities from Agent Orange exposure "based on sound scientific and medical evidence[.]"[216] In 1985, VA promulgated a regulation for the Dioxin Act that concluded: "'[s]ound scientific and medical evidence d[id] not establish a cause and effect relationship between dioxin exposure' and any disease except chloracne."[217]

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210. Monzingo v. Gibson, 566 F. App'x at 976; *see also* 38 U.S.C. § 7292(a) (2018) (expressly limiting the Federal Circuit's ability to review "determination[s] as to a factual matter").

211. Euzebio v. McDonough, 989 F.3d 1305, 1309 (Fed. Cir. 2021).

212. *Id.* at 1309–10 (quoting S. Rep. No. 100-439, at 64 (1988)).

213. *Id.* at 1310. The government restricted the use of Agent Orange in Vietnam to "'areas remote from population,' and from '1970 to 1971, the use of herbicides was phased out.'" *Id.*

214. *Id. See generally In re* "Agent Orange" Prod. Liab. Litig. (*Agent Orange I*), 597 F. Supp. 740, 746 (E.D.N.Y. 1984), *aff'd*, *In re* "Agent Orange" Prod. Liab. Litig. (*Agent Orange II*), 818 F.2d 145 (2d Cir. 1987) (discussing the class action litigation for Vietnam veterans who came into contact with Agent Orange).

215. *Euzebio*, 989 F.3d at 1311 (citing Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984)).

216. *Id.* at 1311 (citing Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542 § 3, 98 Stat. 2725, 2727 (1984)).

217. *Id.* at 1311 (citing Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34458, 34458 (Aug. 26, 1985) (codified at 38 C.F.R. pts. 1, 3)).

Subsequently, in 1987, Vietnam veterans brought a class action suit against VA, alleging the regulation improperly implemented the Dioxin Act.[218] This action served as a catalyst culminating in VA's amendment of the Dioxin Regulation. The regulation was amended to provide for presumptive service connection "when the relative weights of valid positive and negative studies permit the conclusion that it is at least as likely as not that the purported relationship between a particular type of exposure and a specific adverse health effect exists."[219]

Following these events, Congress passed the Agent Orange Act of 1991,[220] which required the Secretary "to obtain independent scientific review of the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides."[221] Congress directed VA to contract with the NAS to review, summarize, and assess the scientific evidence of an association between Agent Orange and certain diseases.[222] The statute required NAS to transmit reports to VA at least every two years with their findings.[223]

Until 2015, the Secretary of Veterans Affairs had sixty days after receiving a NAS report to determine whether each disease contained in the report warranted a presumption of service connection.[224] If a disease warranted the presumption, the Secretary had to issue proposed regulations; however, if a disease did not warrant a presumption, the Secretary only had the obligation to publish the notice of its conclusion in the Federal Register.[225] Although the Agent Orange Act does not require VA to consider NAS reports in individual claim adjudications, "VA is on notice as to the information contained" within the reports.[226]

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218. *Id.* at 1312.

219. *Id.* (citing Evaluation of Studies Relating to Health Effects of Dioxin and Radiation Exposure, 54 Fed. Reg. 40388, 40391 (Oct. 2, 1989) (codified at 38 C.F.R. pt. 1)).

220. Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991).

221. *Euzebio*, 989 F.3d at 1312.

222. *Id.* at 1313.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 1314.

B. Euzebio v. McDonough

Robert M. Euzebio served in the U.S. Navy from February 1966 to October 1969.[227] He was exposed to Agent Orange while stationed in Da Nang and then Hoi An.[228] In 2011, Mr. Euzebio began to experience problems swallowing, and a medical examination revealed nodules on his thyroid.[229] He sought disability compensation for his thyroid condition based upon his exposure to Agent Orange in Vietnam.[230] VA denied his claim, finding that "[t]he available scientific and medical evidence d[id] not support the conclusion that [his] condition [was] associated with herbicide exposure."[231] In 2015, Mr. Euzebio appealed VA's decision to the Board.[232]

While this decision was pending, a NAS Committee published its 2014 Update which found that thyroid conditions are related to herbicide exposure.[233] In 2017, the Board denied Mr. Euzebio's claim despite the 2014 report.[234]

Mr. Euzebio appealed to the Veterans Court, arguing that the NAS report "was constructively before the Board because the Secretary knew of the report's content," and had the Board considered the report, it would have been required to obtain a medical opinion on his behalf before adjudicating the claim.[235] The Veterans Court affirmed the Board's decision, concluding that "the [NAS] 2014 Update was not constructively before the Board."[236] The Veterans Court reasoned that, "even if VA is aware of a [NAS] report . . . that [knowledge alone] is insufficient to trigger the constructive possession doctrine; there must also be a *direct relationship* to the claim on appeal."[237] Veterans Court

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227. *Id.*

228. *Id.*; *see also* 38 U.S.C. § 1116 (a)(1)(B) (establishing a presumption of Agent Orange exposure based on service in the Republic of Vietnam from 1962 to 1975).

229. *Euzebio*, 989 F.3d at 1315.

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.* (explaining that the findings of the updated report published by "the NAS Committee to Review the Health Effects in Vietnam Veterans Exposure to Herbicides").

234. *See id.* at 1316 (finding that the veteran's thyroid disability was not "related to his in-service environmental exposure").

235. *Id.*; *see also* Euzebio v. Wilkie, 31 Vet. App. 394, 397 (2019) (providing details of the veteran's argument in front of the Veterans Court).

236. *Euzebio*, 31 Vet. App. at 397.

237. *Id.* at 402 (determining that knowledge alone is insufficient even if the report "contains general information about the type of disability on appeal").

Judge Allen dissented, interpreting the majority's rationale to be "constructive ignorance rather than a constructive possession doctrine."[238]

Mr. Euzebio then appealed to the Federal Circuit where a panel reviewed the Veterans Court decision.[239] Mr. Euzebio argued the Veterans Court "relied on an erroneous legal standard when it refused to consider the [NAS Update 2014] because it lacked a 'direct relationship' to [his] claim."[240]

In an opinion by Judge Wallach, the Federal Circuit detailed the legal history of constructive possession, starting with the Veterans Court's decision in *Bell*.[241] The Federal Circuit believed the narrow interpretation of the constructive possession doctrine applied by the Veterans Court in *Euzebio* (and an earlier decision, *Monzingo)* was erroneous.[242]

The Federal Circuit found that "[r]equiring that evidence bear a 'direct relationship' or be 'specific to' the veteran for constructive possession is without basis in relevant statute or regulation . . . untethered from statutory and regulatory standard."[243] The Court instead found that the correct standard for constructive possession is "relevance and reasonableness."[244] The Federal Circuit stated that it was "undisputed" that the NAS issued its report prior to Mr. Euzebio's Board decision, that VA (and therefore the Board) knew of the NAS Report at the time of the appeal, and that the NAS Report was important and relevant to Agent Orange claims.[245] Accordingly, the Court held:

> [If the Board] has constructive or actual knowledge of evidence that is "relevant and reasonably connected" to the veteran's claim, but

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238. *See Euzebio*, 989 F.3d at 1317 (citing Euzebio v. Wilkie, at 409 (Allen, J., dissenting)) (characterizing the lower court's dissent, in which the dissenting judge stated that the majority's opinion could not "possibly be the outcome of a rational system of adjudication, especially one designed to be pro-veteran and nonadversarial").

239. *Euzebio*, 989 F.3d at 1317.

240. *Id.* at 1319.

241. *Id.* (citing Bell v. Derwinski, 2 Vet. App. 611 (1992) (per curiam)).

242. *Euzebio*, 989 F.3d at 1319.

243. *Id.* at 1320.

244. *See id.* at 1321 ("The relevancy limitation allows VA to focus its efforts on obtaining documents that have a reasonable possibility of assisting claimants in substantiating their claims for benefits." (citing Golz v. Shinseki, 590 F.3d 1317, 1323 (Fed. Cir. 2010))).

245. *Euzebio*, 989 F.3d at 1320.

> nonetheless fails to consider that evidence . . . the Veterans Court must ensure that Board and VA decisions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" . . . and remand for further consideration or explanation where appropriate.[246]

The Federal Circuit proceeded to analyze the Secretary's remaining arguments and the Veterans Court's concerns, finding each of them misguided.[247] The Court examined the "record rule" and acknowledged that judicial review should be based on the record, as required by statute.[248] Because the intent of the rule is to ensure that new evidence is not used to convert the Veterans Court's judicial review into de novo factual considerations on subsequent appeal,[249] the court allowed that where the record before the agency is "insufficient to permit meaningful judicial review, . . . extra-record evidence" may be considered by the court.[250]

Further, the Federal Circuit explained that the Veterans Court misapplied the rule from *Kyhn v. Shinseki*[251] when it failed to consider "extra-record" evidence in its review of Board decisions.[252] While *Kyhn* held that the Veterans Court could not rely upon "extra-record" evidence to make a factual finding in the first instance, the court was not precluded from taking judicial notice of "extra-record" evidence in its review of agency decisions.[253]

The Federal Circuit also disagreed with the Secretary's argument that "direct relationship" and "relevance" were essentially the same standard.[254] "Direct relationship" required the evidence to be specific

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246. *Id.* at 1321 (citing 38 U.S.C. § 7261(a)(3)(A)).

247. *See Euzebio*, 989 F.3d at 1321–23 (analyzing the statutes and cases VA relied on and disagreeing with VA's and lower court's interpretations).

248. *See id.* at 1322 (recognizing that the record rule limits the scope of judicial review, but also noting that the rule "is not without exceptions"); *see also* 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261.").

249. *See Euzebio*, 989 F.3d at 1322 ("The record rule's 'purpose . . . is to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review' . . . ." (quoting Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1380 (Fed. Cir. 2009))).

250. *Euzebio*, 989 F.3d at 1322 (citing *Axiom Res. Mgmt., Inc.*, 564 F.3d at 1381).

251. 716 F.3d 572 (Fed. Cir. 2013).

252. *Euzebio*, 989 F.3d at 1323.

253. *Id.* (citing *Kyhn*, 716 F.3d at 576, 578).

254. *See Euzebio*, 989 F.3d at 1324 (finding the Secretary's argument "facially incorrect").

to the veteran, while "relevance" required evidence to tend to prove, or disprove, a material fact.[255]

The Federal Circuit then responded to the Secretary's argument that the NAS report was not "relevant," and clarified that the Veterans Court was the proper forum to address questions of whether the Board had constructive possession of the report. It found that the Veterans Court should determine, using the correct legal standard, whether the report was relevant such that the constructive possession doctrine would apply.[256] The court further clarified that the Board was responsible for determining whether a NAS report triggers the need to administer a medical examination under VA's duty to assist.[257]

Finally, in addressing the Secretary's contention that the Secretary would face an "unworkable standard" and "impossible burden," if VA adjudicators' jobs included reviewing reports like the one at issue, the court remarked: "[a]s an initial matter, it is unclear what the Government believes VA adjudicators are meant to do if not evaluate and draw conclusions from record evidence to discern its impact on individual cases."[258] Additionally, the Federal Circuit noted that VA already requires adjudicators to consider NAS reports in some cases and, further, that "relevance and reasonableness" are already well-established standards for VA review.[259] As a final reminder, the court reiterated the "pro-claimant" nature of the system, that "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them."[260]

C. Impact of Euzebio

The implications arising from *Euzebio* are far-reaching in terms of Board policy, procedure, and advocacy.

First, with regard to Board policy, it is important to note the Federal Circuit cited to the "Purplebook" in its opinion, explaining that the Purplebook required review of NAS reports in certain cases.[261] The

255. *Id.*
256. *Id.*
257. *Euzebio*, 989 F.3d at 1324; *see also* McLendon v. Nicholson, 20 Vet. App. 79, 86 (2006) (explaining the standard to determine whether a claim requires a medical examination).
258. *Euzebio*, 989 F.3d at 1324.
259. *Id.* at 1321.
260. *Id.* (citing Comer v. Peake, 552 F.3d 1362 (Fed. Cir. 2009)).
261. *See Euzebio*, 989 F.3d at 1316–17, 1320.

Board created the Purplebook to consolidate various internal procedures, effective March 23, 2018.[262] Sixteen days after the *Euzebio* opinion was issued, the Chairman of the Board suspended use of the Purplebook "ex post facto."[263]

It will be interesting to see whether the Board's abandonment of the Purplebook "ex post facto" alters the applicability of the constructive possession doctrine when it comes to NAS reports. Setting aside the question of whether the Chairman of the Board has the authority to abandon its own operating document "ex post facto," the gist of the constructive possession doctrine is whether it is reasonable to conclude that VA was aware of the document at the time it adjudicated the claim. Whether mentioned in the Purplebook or otherwise, VA receives NAS reports through its contract with NAS, and it should not matter whether internal operating manuals refer to their existence. As explained in *Euzebio*, citing Veterans Court Judge Allen's dissent:

> The importance and relevance of the NAS Reports to Agent Orange claims are well-known and well-established—they are the result of decades of veteran engagement, . . . and of congressional investigation and legislation . . . [t]he NAS Reports exist, by congressional mandate, to give VA necessary "independent scientific review of the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides[.]" . . . A constructive possession doctrine that allows an administrative judge to "'ignore [an NAS Report] she knows exists' and knows 'contains important . . . information,'" cannot "possibly be the outcome of a rational system of adjudication, especially one designed to be pro-veteran and non-adversarial."[264]

The impact of *Euzebio* is not limited to the precise facts at issue in the case. Mr. Euzebio's disability related to his thyroid. But for as many as 160,000 Vietnam veterans, like many other Americans, hypertension is a diagnosed disability.[265] VA estimates that adopting a presumptive service connection for hypertension will cost up to fifteen billion

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262. OFFICE OF THE CHAIRMAN OF VETERANS' APPEALS, NO. 01-21-06, FORMAL RECISSION OF THE PURPLEBOOK (2021), https://www.va.gov/FOIA/docs/updated_Documents/BVA/Memo_No_01_21_06.pdf [https://perma.cc/C7SP-Y36V].

263. *Id.*

264. *Euzebio*, 989 F.3d at 1320–21 (citing Euzebio v. Wilke, 31 Vet. App. 394, 409 (2019) (Allen, J., dissenting)).

265. Abbie Bennett, *Lawmakers Introduce Bill to Extend VA Care to 490,000 More Veterans Ill from Agent Orange*, CONNECTING VETS (Mar. 18, 2021, 3:00 AM), https://www.audacy.com/connectingvets/news/politics/bill-expands-va-benefits-for-hypertension-from-agent-orange [https://perma.cc/DW3A-BJ25].

dollars, and VA has opposed efforts to legislate such a presumption, asserting the need for more scientific analysis.[266]

Indeed, NAS has been studying hypertension, "sponsored" by VA.[267] In 2018, NAS found "sufficient" evidence of a link between hypertension and Agent Orange, moving hypertension up from its earlier classification of "limited or suggestive" association.[268] These classifications provide the scientific basis upon which to place a disease on the presumptive list; the "sufficient" classification means there is a "positive association" between the disease and Agent Orange.[269]

As noted above, prior to 2015, VA was required to engage in timely rulemaking when these positive associations were found.[270] This obligation no longer exists by statute.[271] At the time of this writing, hypertension is not on the Agent Orange presumptive list, despite NAS's conclusion. Veterans advocates should cite the NAS report early and often in claims involving hypertension, to properly make the record.

When it comes to VA procedure, constructive possession of NAS reports has ripple effects. *Euzebio* reminds the Secretary of Veterans Affairs that even when VA has not conceded a presumptive connection, the statutory "duty to assist" requires VA to send a veteran for a medical examinations when the evidence "may" suggest the disability is related to service.[272] Given NAS's 2018 findings that concluded there is "sufficient" evidence of a link between hypertension and Agent Orange, it appears, under *Euzebio*, that the Veterans Court must find error if VA does not provide an adequate medical exam in the face of a Vietnam veteran's hypertension claim.[273] More to the point, VA medical exams must be reviewed carefully to ensure that the medical

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266. *See id.*

267. *See, e.g.*, *Vietnam Veterans and Agent Orange Exposure-New Report*, NASAS (Nov. 15, 2018), www.nationalacademies.org/news/2018/11/vietnam-veterans-and-agent-orange-exposure-new-report [https://perma.cc/VBR5-U58B] (explaining the studies positive association cannot be determinately proven because there are "chance, bias, and confounding factors [that] could not be ruled out with confidence").

268. *Id.*

269. *See id.*

270. 38 U.S.C. § 1116(a)(1)(B).

271. § 1116(e).

272. *Euzebio*, 989 F.3d at 1325 (citing 38 USC § 5103A(d)).

273. *See supra* notes 224–26 and accompanying text (referencing that VA will review NAS Updates but is not mandated to consider them); *see also Vietnam Veterans and Agent Orange Exposure-New Report*, *supra* note 267 (noting hypertension rates were significantly higher for veterans who were likely exposed to herbicides).

rationale is adequate and complete.[274] Further, since the Veterans Court addresses the adequacy of VA medical exams, veterans advocates can make a strong argument to the Court that any medical exam is inadequate if it does not mention the "positive association" between hypertension and Agent Orange in the 2018 NAS report. The adequacy of VA medical exams is often addressed by the Veterans Court.

Finally, in terms of future advocacy, *Euzebio*, as well as *Bell* and its progeny, did not limit the applicability of the constructive possession doctrine to NAS reports. Indeed, the parameters of what is "reasonably" in VA's possession is a ripe area to explore. At one end of the spectrum, at least one Board of Veterans Appeals Judge has explained: "[t]he Board strives for consistency in issuing its decisions, while noting that previously issued Board decisions are considered binding only with regard to the specific case decided. . . . Nevertheless, prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case."[275]

Does the openness to considering other related Board decisions, expressed by at least one Board of Veterans Appeals judge, mean the Board must analyze and research all similar decisions when adjudicating every individual claim because of the constructive possession doctrine? Whether this is reasonable will be tested in the future in light of *Euzebio*. In this regard, the volume of the Board's work may come into play: the 2020 Chairman's Report states that approximately 100 Veterans Law Judges issued 102,663 decisions in 2020 alone.[276] However, somewhere between "all related Board decisions" and NAS reports, other documents exist which are highly probative when it comes to a veteran's claim. Is it unreasonable to expect VA, which adjudicates in a nonadversarial and paternalistic system, to adjudicate claims based on its own institutional knowledge, as expressed and found in earlier Board decisions?

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274. Barr v. Nicholson, 21 Vet. App. 303,311 (2007), *abrogated on sep. grounds by* Walker v. Shinseki, 708 F.3d 1331, 1338 n.4 (Fed. Cir. 2013); *see also* Stefl v. Nicholson, 21 Vet. App. 120, 124 (2007) ("[T]he medical opinion . . . must support its conclusion with an analysis that the Board can consider and weigh.").

275. *See, e.g.*, No. 12-24 264A, 2015 WL 1601595, at *2 (Vet. App. Feb. 5, 2015) (explaining the presence of previously released information regarding herbicide exposure creates an inference that may be considered in a veteran's claims).

276. BD. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFS., ANN. REP. FISCAL YEAR (FY) 2020 6, 14.

Consider an example: a veteran, "J.D.", served in Okinawa, Japan during the Vietnam War as a military police officer. The veteran suffers from a panoply of disabilities found on the Agent Orange presumptive list. However, neither VA nor the Department of Defense (DoD) concede Agent Orange was used in Okinawa during the Vietnam War.

The VA Regional Office denies J.D.'s claim for Agent Orange related disabilities because it determines Agent Orange was not used in Okinawa. On appeal to the Board, J.D. cites the Board to its earlier decision in Case Number 21053446 ("No. 446").[277] In No. 446, the Board made an express "finding of fact" that the evidence "is in relative equipoise as to whether herbicide agents were used in Okinawa."[278] As a result of this finding, the Board service-connected J.D.'s Agent Orange disabilities. In reaching the finding of fact that Agent Orange was used in Okinawa, the Board of Veterans Appeals judge in No. 446 cited articles from the South China Morning and the Asia-Pacific Journal.[279] The judge also cited several DoD documents supporting the fact Agent Orange was used in Okinawa.[280]

Given this situation, it seems reasonable that J.D.'s claim must be granted if J.D.'s advocate cites No. 446 to VA. If the factual evidence supporting the finding of Agent Orange supported granting the claim in No. 446, why would the factual evidence relating to the use of Agent Orange be any different for J.D?

The question of whether J.D. should prevail in the absence of an able advocate is yet another *Euzebio*-related question. Must VA employees search the Board Decision database (which exists on the Board of Veterans Appeals website and is easily accessible by a Boolean search)? In the non-adversarial, paternalistic system, where the doctrine of constructive possession applies, is it really a stretch to ask VA to do a word search in its own database of decisions before it decides a veteran's claim?

A robust use of the constructive possession doctrine should lead to fewer appeals to the Veterans Court and quicker resolutions for veterans who have legitimate claims documented in analogous decisions or the subject of updated scientific studies. *Euzebio* will have a long-lasting impact in the development of veterans' benefits law.

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277. No. 15-14 318, 2021 WL 4723800, at *1 (Vet. App. Aug. 30, 2021).
278. *Id.*
279. *Id.*
280. *Id.* at 2.

Advocates should stay abreast of NAS updates, as well as analogous Board decisions.

V. EQUITABLE TOLLING & EQUITABLE ESTOPPEL

In 2021, the Federal Circuit dealt with the extent to which general fairness considerations impact statutory interpretation. Two cases squarely addressed the equitable powers of the Veterans Court. In *Arellano v. McDonough*,[281] the Federal Circuit reviewed whether a statute limiting the effective date of claims for disability compensation benefits was subject to equitable tolling.[282] In *Taylor v. McDonough*,[283] the court considered whether the Veterans Court has the power to apply equitable estoppel.[284] The final resolution of the issues raised in both of these cases will turn on an upcoming Supreme Court decision; on February 22, 2022, the United States Supreme Court granted certiorari to Mr. Arellano.[285] That same day, the Federal Circuit issued an order staying the outcome of *Taylor v. McDonough* pending the Supreme Court's disposition in *Arellano v. McDonough*.[286] We offer a brief background to these cases below.

In each of these cases, the veteran suffered from a disability resulting from his time in service and sought payment of retroactive benefits to a time earlier than the date VA found as the "effective date" of his claim.[287] Pursuant to 38 U.S.C. § 5110, the effective date for VA benefits is typically the date a veteran submits an application for benefits, although there are several statutory exceptions.[288] The effective date can affect the beginning of payments for a veteran's disability and his or her entitlement to specific benefits, such as educational assistance.[289] Often these "retroactive payments" can constitute tens of thousands of dollars.

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281. 1 F.4th 1059 (Fed. Cir. 2021) (per curiam).

282. *Id.* at 1060.

283. 3 F.4th 1351 (Fed. Cir. 2021), *vacated and reh'g granted*, 4 F.4th 1381 (Fed. Cir. 2021) (per curiam).

284. *Taylor*, 3 F.4th at 1355–56.

285. Arellano v. McDonough, No. 21-432, 2022 WL 515866, at *1 (U.S. Feb. 22, 2022).

286. Taylor v. McDonough, Fed. Cir. R. (Order, 19-2211 (2021)).

287. *See Taylor*, 3 F.4th at 1359; *see also Arellano*, 1 F.4th at 1063.

288. *See* 38 U.S.C. § 5110 (detailing the various exceptions that impact the date of an applicant's benefits, including special situations for child dependency, supplemental claims, and disability compensation).

289. *See id.* §§ 5110, 5113.

The underlying facts impacting the effective date for the benefits in the cases discussed below vary. In *Arellano*, the veteran's disability caused the delay in his application for benefits.[290] In *Taylor*, the government directly prevented the veteran from seeking benefits through a nondisclosure agreement.[291] Each of these situations gave rise to equitable arguments supporting an earlier effective date.

A. Arellano v. McDonough—*Equitable Tolling*

In an en banc opinion, the Federal Circuit declined to find that principles of equitable tolling could be applied to the effective date considerations found in 38 U.S.C. § 5110(b)(1), providing that if a veteran files a claim for compensation within one year of discharge, his effective date shall be the date of discharge.[292] Mr. Arellano sought equitable tolling based on his long period of mental illness.[293]

An equally divided court analyzed the question, with two groups of six judges each issuing separate opinions concurring with the ultimate decision that Mr. Arellano was not entitled to tolling.[294] One opinion held that equitable tolling principles do not apply to § 5110(b)(1).[295] The other opinion held the doctrine was available but not applicable under the facts presented.[296] As a result of the split decision, the court's previous decision in *Andrews v. Principi*,[297] which held that principles of equitable tolling are not applicable to the time period set forth in § 5110(b)(1), remained intact.[298]

The facts of the case are as follows. Mr. Arellano filed for disability compensation benefits in 2011, almost thirty years after discharge from

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290. *See Arellano*, 1 F.4th at 1063.

291. *Taylor*, 3 F.4th at 1358.

292. *See Arellano*, 1 F.4th at 1093 (Dyk, J., concurring).

293. *Id.* at 1063 (noting Mr. Arellano argued he was one hundred percent disabled since suffering injuries in 1980).

294. *Compare id.* at 1061 (Chen, J., concurring) (refusing to apply a presumption of equitable tolling because doing so would overturn precedent, which the judges thought would be improper since panel was equally divided), *with id.* at 1086 (Dyk, J., concurring) (determining that presumption of equitable tolling applies, but not for the circumstances of this case).

295. *Id.* at 1061 (Chen, J., concurring). The judges who joined this opinion were Judges Chen, Moore, Lourie, Prost, Taranto and Hughes. *Id.* at 1060.

296. *Id.* at 1086 (Dyk, J., concurring). The judges who joined this opinion were Judges Dyk, Newman, O'Malley, Reyna, Wallach and Stoll. *Id.*

297. 351 F.3d 1120 (Fed. Cir. 2003).

298. *Arellano*, 1 F.4th at 1061 (citing *Andrews*, 351 F.3d at 1137).

the Navy in 1981.[299] He sought compensation for "schizoaffective disorder bipolar type with PTSD."[300] A medical opinion from a psychiatrist confirmed his disability existed since 1980 when he was almost crushed and swept overboard on an aircraft carrier.[301] VA awarded a one hundred percent disability rating with an effective date of 2011.[302] Mr. Arellano argued the effective date of his claim should be decades earlier—1981—because his mental disorder prevented him from filing for benefits from the time of his discharge until he filed his claim in 2011.[303]

VA's effective date determination was based on § 5110(a)(1), which provides: "[u]nless specifically provided otherwise in this chapter, the effective date . . . shall not be earlier than the date of receipt of application."[304] One way the chapter specifically "provide[s] otherwise" is found in § 5110(b)(1), which states that "[t]he effective date of an award . . . shall be the day following the date of the veteran's discharge or release if application thereof is received within one year from such date of discharge."[305] Mr. Arellano focused his appeal on § 5110(b)(1), claiming it was appropriate that the time be tolled from his date of discharge until the date he filed his claim.[306]

The Supreme Court precedent central to the *Arellano* decision was *Irwin v. Department of Veterans Affairs*.[307] In *Irwin*, the Supreme Court assessed whether the wrongful discharge claim of an employee who filed outside the required time period could proceed despite a missed

299. *Arellano*, 1 F.4th at 1063.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at 1062 (citing 38 U.S.C. § 5110(a)(1)).
305. *Id.* at 1062 (citing 38 U.S.C. § 5110(b)(1)).
306. *Id.* at 1061.
307. 498 U.S. 89 (1990); *see also Arellano*, 1 F.4th at 1061 (Chen, J., concurring) ("Specifically, we consider whether the rebuttable presumption of equitable tolling for statutes of limitations established in *Irwin* . . . applies to the one-year period in § 5110(b)(1)." (citations omitted)); *id.* at 1086 (Dyk, J., concurring) ("An equal number of judges (Judges Newman, O'Malley, Reyna, Wallach, Stoll, and myself) join this opinion and would hold that § 5110(b)(1) is a statute of limitations subject to equitable tolling, that the *Irwin* presumption of equitable tolling applies, but that § 5110(b)(1) cannot be equitably tolled for mental disability in the circumstances of this case.").

deadline.[308] By statute, the employee had thirty days from receipt of the EEOC's notice of final action letter to file his claim.[309] He filed the claim forty-four days after his attorney's office received the EEOC notice because his attorney was out of the office when the notice arrived.[310] The employee argued that since the notice was sent only to the attorney's office and he had no knowledge of its date of receipt, the statute should be equitably tolled.[311] The Court found that statutes of limitations in actions against the government are subject to the same rebuttable presumption of equitable tolling that applies to suits against private litigants.[312] Ultimately, the Supreme Court declined to find that equitable tolling should apply in favor of Mr. Irwin, as his situation was only one of excusable neglect.[313]

Therefore, to follow the *Irwin* analysis, the Federal Circuit in *Arellano* had to first determine whether § 5110(b)(1) was a statute of limitations. Six of the judges held that it was, while the other six judges held it was not.[314]

The judges that determined equitable tolling did not apply to § 5110(b)(1) (the "anti-tolling judges") believed the statute did not have the functional characteristics of a statute of limitations.[315] The "anti-tolling judges" characterized § 5110(b)(1) as only setting an element of a benefits claim and not as an actual bar to such a claim.[316] In Judge Chen's opinion, those judges stated that the statute "lacks features standard to the laws recognized as statutes of limitations with presumptive equitable tolling" because it does not start the clock on seeking a remedy for breach of a duty by an opposing party.[317]

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308. *See Irwin*, 498 U.S. at 92 (noting any deadline to respond begins once notification is given to either the claimant or the attorney, but there is no requirement the claimant must receive the notice).

309. *Id.* at 91.

310. *Id.*

311. *Id.* at 91, 93 (explaining that the employee argued for equitable tolling "even if he failed to timely file").

312. *Id.* at 95–96.

313. *Id.* at 96.

314. Judges Chen, Moore, Lourie, Prost, Taranto, and Hughes determined section 5110(b)(1) was not a statute of limitation. Arellano v. McDonough, 1 F.4th 1059, 1060–61 (Fed. Cir. 2021). Judges Dyk, Newman, O'Malley, Reyna, Wallach, and Stoll held that it was a statute of limitation. *Id.* at 1086 (Dyk, J., concurring in the judgment).

315. *Id.* at 1067.

316. *Id.*

317. *Id.*

Although the "anti-tolling judges" determined that § 5110(b)(1) was not a statute of limitations as in *Irwin*, they went further to find that even if it was such a statute, the *Irwin* presumption was rebutted.[318] Specifically, the judges found that Congress did not intend the equitable tolling doctrine to apply to the statute because it is unlike a statute of limitations in two regards. First, it does not act as a bar to benefits. Second, and relatedly, § 5110(b)(1) lacks features standard to the laws recognized as statutes of limitations with presumptive equitable tolling: its one-year period is not triggered by harm from the breach of a legal duty owed by the opposing party, and it does not start the clock on seeking a remedy for that breach from a separate remedial entity.[319]

The six judges who decided that § 5110(b)(1) could be equitably tolled (the "pro-tolling judges"), led by Judge Dyk, characterized the statute as a "time requirement" and relied on precedent in other courts that applied tolling to statutory time requirements.[320] The "pro-tolling judges" stated that the "anti-tolling judges'" characterization of statutes of limitations as applying only to breach-of-duty circumstances was "bereft of support."[321] The judges pointed specifically to the Federal Circuit's previous application of tolling to the National Childhood Vaccine Injury Act of 1986,[322] where the trigger for a time limit aspect of the statute was when a vaccine was taken regardless of any fault on part of the vaccine manufacturer; thus, it lacked a breach of a duty.[323]

The "pro-tolling judges" also took issue with the "anti-tolling judges'" claim that § 5110(b)(1) was not a statute of limitations since it did not foreclose the ability of a veteran to collect benefits.[324] The "pro-tolling judges" characterized a veteran's claim for benefits as actually consisting of multiple claims—one for future monthly benefits and

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318. *See id.* at 1079 (describing that the presumption was overcome because Congress detailed specific choices where a veteran's effective date may differ from when VA received the application).

319. *Id.* at 1067.

320. *Id.* at 1087 (Dyk, J., concurring in the judgment).

321. *Id.* at 1088.

322. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified at 42 U.S.C. § 300aa).

323. *Arellano*, 1 F.4th at 1089 (Dyk, J., concurring in the judgment).

324. *Id.* at 1086.

another for retroactive benefits—and § 5110(b)(1) prevented the veteran from collecting retroactive benefits.[325]

Unlike the "anti-tolling judges," the "pro-tolling judges" determined the appellant met the *Irwin* presumption.[326] The "pro-tolling judges" applied several factors identified by the Supreme Court and determined "almost all of the factors signal that there is no general prohibition against equitable tolling."[327] The factors are the following: (1) the language of the statute; (2) the detailed nature of the statute; (3) the explicit exceptions in the statute; (4) the subject matter of the statute; and (5) whether laypersons initiate the claim.[328]

The fourth and fifth factors discussed by the judges were particularly instructive. The judges interpreted Supreme Court precedent to indicate that Congress more likely intended that equitable tolling of a statute of limitations was more appropriate in cases where laypersons, not lawyers, initiate the process and the statute was unusually protective of claimants.[329] In fact, these are the hallmarks of the veterans benefits system: as Judge Dyk explained, veterans often are unrepresented, and "the uniquely pro-claimant nature of the veterans compensation system" suggests that Congress intended at least some form of equitable tolling to be available.[330] In sum, the judges decided that the language of the statute was not jurisdictional, and the nature of the statute's language was simple enough *not* to "weigh against equitable tolling."[331] Further, although the judges acknowledged there were exceptions in § 5110 to § 5110(a)(1)'s general rule, none of them

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325. *See, e.g.*, *id.* at 1089 ("The claim for benefits here has two components: (1) a retrospective claim for benefits for past disability, and (2) a prospective claim for future benefits. The statute imposes no statute of limitations for prospective benefits, and a veteran may be entitled to forward-looking benefits after the one-year period prescribed by § 5110(b)(1) runs.").

326. *See id.* at 1092 ("Congress has not clearly indicated a general prohibition against equitable tolling as to § 5110(b)(1).").

327. *Id.*

328. *Id.* at 1092–95.

329. *Id.* at 1094 (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397 (1982)).

330. *Id.* at 1095 (citing Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000)); *see also* Bowen v. City of New York, 476 U.S. 467, 480 (1986) (addressing another statute that protective of claimants); Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 431 (2011) ("The VA's adjudicatory 'process is designed to function throughout with a high degree of informality and solicitude for the claimant.'" (quoting Walters v. Nat'l Assn. of Radiation Survivors, 473 U.S. 305, 311 (1985))).

331. *See Arellano*, 1 F.4th at 1093.

were explicit to § 5110(b)(1), and thus the statute did not already provide for equitable tolling.[332]

That the court was equally split indicates there is potential for the Federal Circuit to apply equitable tolling in future § 5110(b)(1) cases. A change in the makeup of the bench could tip the scales in favor of the possibility of equitable tolling. In this regard, it is important to note that Judge Newman was one of the three judges who declined to apply equitable tolling in *Andrews v. Principi* in 2003.[333] However, by 2010, in *Butler v. Shinseki*, Judge Newman joined the opinion, cautioning that *Andrews* had been read too broadly, stating, "[t]he time period of § 5110(b)(1) is not a jurisdictional restriction, and its blanket immunization from equitable extension, whatever the circumstances, appears to be directly contrary to the legislative purpose."[334]

Notably, even the six judges who determined that tolling is a generally available remedy did not find it was appropriate under Mr. Arellano's sympathetic circumstances.[335] Accordingly, it appears equitable tolling faces not only a legal hurdle in the interpretation of § 5110(b)(1) in light of the "anti-tolling judges'" view of *Irwin*, but also a factual hurdle, requiring more persuasive circumstances than those found in *Arellano*. Fortunately, the Supreme Court will add needed guidance very soon. As the next case, *Taylor v. McDonough*, exemplifies, the Federal Circuit did not express interest in quickly revisiting the issue of equitable tolling.

B. Taylor v. McDonough—*Equitable Estoppel*

As in *Arellano*, the *Taylor* claim for an earlier effective date rests on an assertion by a veteran that he was unable to file his benefits claim within a year of discharge and was thus prevented from receiving the earlier date permitted by § 5110(b)(1).[336] *Taylor* was pending before the en banc Federal Circuit before the Supreme Court's grant of certiorari in *Arellano*.[337] A three-judge panel decision favoring Mr.

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332. *See id.* at 1062.

333. Andrews v. Principi, 351 F.3d 1134, 1135 (Fed. Cir. 2003).

334. Butler v. Shinseki, 603 F.3d 922, 928 (Fed. Cir. 2010) (per curiam).

335. *Arellano*, 1 F.4th at 1060, 1063.

336. Taylor v. McDonough, 3 F.4th 1351, 1359 (Fed. Cir. 2021), *vacated and reh'g granted en banc per curium*, 4 F.4th 1381 (Fed. Cir. 2021).

337. Taylor v. McDonough, 4 F.4th 1381, 1381 (Fed. Cir. 2021) (en banc) (per curiam); *see supra* note 295 and accompanying text (holding that a veteran's effective date of discharge will be the day he files a claim for compensation if filing occurs within one year of discharge).

Taylor's position was issued in June 2021, but rehearing en banc was ordered sua sponte, and the panel decision was vacated.[338] Notably, the three-judge panel included Judges Newman, O'Malley and Wallach, who were "pro-tolling judges" in *Arellano*.[339] Because of the equitable tolling analysis in *Arellano*, the en banc order specifically stated that equitable tolling would *not* be considered in the en banc review of *Taylor*.[340] As in *Arellano*, the case involved VA's reliance on § 5110(a)(1) as a limit on the effective date of Mr. Taylor's claim to the year he filed the claim for benefits.[341]

The facts of *Taylor* are compelling. Before serving two tours in Vietnam, Mr. Taylor volunteered to serve his country in a unique capacity.[342] In 1969, the DoD sought soldiers who would serve as test subjects for toxic chemical exposure, including nerve gas.[343] The Army sought to learn how U.S. soldiers would function when exposed to chemical agents that combatants may encounter during their military service.[344] The military gave soldiers doses filled with an array of toxic substances and subjected them to training exercises to measure their performance.[345] Based on the tests' effects on Mr. Taylor's health, VA awarded him monthly compensation for Total Disability based upon Individual Unemployability after Mr. Taylor filed his claim in 2007.[346]

Mr. Taylor claims the government's conduct interfered with his statutory right to an effective date of the day after his discharge.[347] Prior to participating in the tests, Mr. Taylor was required to sign an oath of secrecy that, if broken, would have subjected him to criminal prosecution and a dishonorable discharge—a characterization that

338. *See Taylor*, 4 F.4th at 1381 (noting the parties must also submit new briefing on the case's issues before the rehearing).

339. *Taylor*, 3 F.4th at 1355; *see supra* note 322 and accompanying text.

340. *See Taylor*, 4 F.4th at 1382 ("While the issue of equitable tolling is preserved, the court does not wish to secure further briefing on equitable tolling and will not revisit the issue of equitable tolling in this case, (A) the court having resolved that issue adversely to Mr. Taylor in *Andrews v. Principi* . . . and (B) the court having recently declined to set aside the decision in *Andrews* in *Arellano v. McDonough*.").

341. Taylor v. McDonough, 3 F.4th at 1351.

342. *Id.* at 1356 (establishing that Mr. Taylor was an ammunitions records clerk in Vietnam, but he volunteered to participate in military experiments).

343. *Id.* at 1356–57.

344. *Id.* at 1356.

345. *Id.* at 1357.

346. *Id.* at 1359.

347. *Id.* (explaining Taylor's argument that he could not file for benefits due to the secrecy issues surrounding the project, and that he did receive a letter allowing him to file until 2006).

would render him ineligible for benefits.[348] This presented a quandary for Mr. Taylor: in order to file an adequate claim for disability benefits, Mr. Taylor needed to disclose his participation in the testing program.[349] This "Catch-22"—being unable to file for benefits without becoming ineligible for benefits—left Mr. Taylor unable to exercise his statutory right to request disability compensation.[350]

In 2006, thirty-seven years after the testing program, the DoD declassified the names of the test participants and instructed the participants to file for benefits.[351] The declassification allowed Mr. Taylor to file his aforementioned successful 2007 claim, in which VA granted a 2007 effective date.[352] Mr. Taylor requested that VA instead award an effective date of the day after his discharge due to the government conduct mentioned above, including the secrecy oath.[353]

Mr. Taylor asked the Veterans Court to apply the doctrine of equitable estoppel to prevent VA from asserting 38 U.S.C. § 5110 as a defense against his claim for an earlier effective date.[354] He indicated that, but for the oath of secrecy, he would have filed for benefits in 1971.[355] The Veterans Court denied his request because it interpreted its jurisdictional and scope of review statutes as excluding equitable estoppel as an available remedy.[356] Mr. Taylor then filed his appeal with the Federal Circuit.[357]

The now-vacated three-judge panel decision of the Federal Circuit found that the Veterans Court possessed the power to apply equitable estoppel.[358] It specifically found that the absence of an express statutory

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348. *Id.* at 1356.

349. *See* 38 U.S.C. §§ 1110, 1131 (providing that the United States will pay compensation to veterans for disabilities contracted in the line of duty or the aggravation of a preexisting injury, in times of both war and peace); *see also* Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004) (explaining that disability benefits requires a service connection—"a causal relationship between the present disability and the disease or injury incurred or aggravated during service").

350. *Taylor*, 3 F.4th at 1359.

351. *Id.* at 1358 ("In June 2006, the VA sent letters to Edgewood Arsenal testing program participants, including Mr. Taylor, notifying them that the 'DoD had given permission for those identified to disclose to health care providers information about their involvement . . . that affected their health.").

352. *Id.* at 1359.

353. *Id.* (arguing that his benefits "entitlement arose on September 7, 1971").

354. *Id.* at 1360.

355. *Id.* at 1359.

356. *Id.* at 1360.

357. *Id.* at 1356.

358. *Id.* at 1364.

grant of equitable power did not preclude the Veterans Court from exercising equitable authority to estop the Secretary from denying Mr. Taylor's requested earlier effective date.[359] The panel found that the claim filing requirement of § 5110 is not jurisdictional and, therefore, claim filing is subject to equitable considerations, such as waiver, forfeiture, and estoppel.[360] With regard to *Andrews* and equitable tolling concerns, the three-judge panel came to the opposite conclusion—that § 5110(b)(1) does function as a statute of limitations "because it limits the relief available to veterans seeking service-connected disability benefits."[361] However, the panel acknowledged that, being a panel and not the en banc court, it lacked the power to overrule *Andrews* and thus held that equitable tolling was not available to Mr. Taylor.[362]As it did in *Arellano*, the Federal Circuit's sua sponte rehearing en banc order requested briefing on discrete issues, which were decided in favor of the veteran in the panel decision.[363] The court ordered briefing on the issue of whether equitable estoppel, but not equitable tolling, could apply and whether the Appropriations Clause precluded relief, which would require the court to overrule an earlier case.[364] The court further directed the parties to address whether—in the absence of equitable relief—Mr. Taylor's constitutional right of access to the courts was violated and, if so, what the proper remedy would include.[365] The right to access question included inquiry into the proper tests for the analysis.[366]

Taylor presents an opportunity for the Federal Circuit to articulate very favorable law for veterans relating to the Veterans Court's power to provide equitable relief. In the panel's words, "[i]f equitable estoppel is ever to lie against the Government, it is here."[367] The uniqueness of Mr. Taylor's facts is such that a finding of equitable estoppel could occur without concern of opening floodgates.

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359. *Id.* at 1365.
360. *Id.* at 1366.
361. *Id.* at 1372.
362. *Id.*
363. Taylor v. McDonough, 4 F.4th 1381, 1381 (Fed. Cir. 2021) (per curiam).
364. *Id.*
365. *Id.* at 1382.
366. *Id.* ("If there is such a right of access, is the test for its violation whether the government has engaged in 'active interference' that is 'undue' . . . ? If not, what is the test?").
367. *Taylor*, 3 F.4th at 1374.

Hopefully, equitable estoppel will be a viable doctrine after the *Taylor* rehearing and the Supreme Court's decision in *Arellano*. Advocates must continue to advocate zealously in favor of the veteran where government conduct is over-reaching, unconscionable, or otherwise without any basis in law. Veterans advocates should keep in mind the constitutional right to access, as it may also provide powerful arguments.

VI. EFFECTIVE DATES

In addition to *Arellano* and *Taylor,* the Federal Circuit continued to explain the nuance of effective dates in four cases: *Kisor v. McDonough*;[368] *George v. McDonough*;[369] *Ortiz v. McDonough*;[370] and *Buffington v. McDonough*.[371] As noted above, effective dates are important to veterans because they mark the date on which the benefit is payable.[372] Because VA appeals can take many years, when a claim is finally granted, the veteran receives a retroactive payment back to the effective date.[373]

A. The Term "Relevant" is Unambiguous Under 38 C.F.R. § 3.156(c)

While not framed in the rubric of equity like *Arellano* and *Taylor*, *Kisor* touches upon fairness considerations, like those giving rise to equitable doctrines. In *Kisor*, the Federal Circuit declined both the opportunity to make a veteran-friendly interpretation of an arguably ambiguous statute, and further constricted the application of the pro-veteran canon in cases of interpretative ambiguity.[374] *Kisor* involved a veteran who disputed the effective date of his disability compensation claim.[375] Unlike the veterans in *Arellano* and *Taylor*, Mr. Kisor was not seeking an effective date prior to the date he filed his claim.[376] Instead, his challenge relied on a VA regulation that provided that when service

368. 995 F.3d 1316 (Fed. Cir. 2020).
369. 991 F.3d 1227 (Fed. Cir. 2021).
370. No. 19-0070, 2021 WL 4464357 (Vet. App. Sept. 30, 2021).
371. 7 F.4th 1361 (Fed. Cir. 2021).
372. *Getting an Earlier Effective Date for VA Disability Claims*, CHISHOLM CHISHOLM & KILPATRICK LTD, https://cck-law.com/veterans-law/earlier-va-effective-date-of-disability/#:~:text=An%20effective%20date%20is%20used,disability%20compensation%20or%20increased%20compensation [https://perma.cc/6XA7-LXZJ].
373. *Id.*
374. Kisor v. McDonough, 995 F.3d 1316, 1322, 1325–26 (Fed. Cir. 2020).
375. *Id.* at 1320.
376. *Id.* at 1318.

records were not considered in an initial review in which benefits were denied, but were later included in a subsequent review that resulted in an award, the effective date should be the date of the initial claim.[377] The court noted that "[38 C.F.R.] § 3.156(c) serves 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."[378]

Specifically, VA regulation 38 C.F.R. § 3.156(c)(1) provides that "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file 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."[379] The regulation further provides that "[a]n award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim."[380]

With regard to Mr. Kisor's claim, the record showed that in 1982, when he first filed his claim for PTSD, VA did not award him benefits due to a lack of diagnosis of PTSD by the evaluating physician.[381] At the time of this denial, the Regional Office had a psychiatric report that contained statements by Mr. Kisor that he participated in Operation Harvest Moon in Vietnam, but it did not have any service department records corroborating these statements.[382] In 2006, he asked that his claim be reopened, and, in 2007, VA awarded benefits for PTSD with an effective date of 2006.[383] In reviewing the reopened claim, the service department records substantiating the veteran's statements in the psychiatric report were in the possession of the Regional Office.[384]

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377. *See id.* at 1322–23 (discussing the different procedures through which a veteran can seek to revise a denial of a claim for disability benefits); *see also* 38 C.F.R § 3.156(c)(1) (2021) (outlining the impact of new evidence on the adjudication of claims).

378. *Kisor*, 995 F.3d at 1323 (citing Blubaugh v. McDonald, 773 F.3d 1310, 1313 (Fed. Cir. 2014)).

379. 38 C.F.R. § 3.156 (c)(1).

380. 38 C.F.R. § 3.156 (c)(3).

381. *Kisor*, 995 F.3d at 1319, 1321.

382. *Id.* at 1319 (providing details of Operation Harvest Moon—"he was on a search operation when his company came under attack . . . 'which resulted in 13 deaths in a large company'").

383. *Id.* at 1320.

384. *Id.*

Mr. Kisor filed a Notice of Disagreement challenging the effective date.[385] On appeal, the Board of Veterans' Appeals sua sponte assessed whether, under § 3.156(c)(3), the veteran was entitled to a 1982 effective date because the service department records in the file in 2006 were relevant to the original claim filed in 1982, and thus within the scope of the earlier effective date contemplated by § 3.156(c).[386] The Board determined the records were not relevant to the 1982 claim because they did not make a difference in the outcome—VA considered Mr. Kisor's service in Operation Harvest Moon since it was included in the psychiatric report, and VA did not dispute the truth of his involvement at the time.[387] Instead, the previous denial was based upon the lack of a PTSD diagnosis.

The Board's decision was upheld in both the Veterans Court and the Federal Circuit.[388] In *Kisor I*,[389] the Federal Circuit analyzed the Board's decision using the administrative law principle known as *Auer* deference, whereby the court defers to an agency's interpretation of its own ambiguous regulation if the interpretation is reasonable—instead of a de novo interpretation of the regulation.[390] In *Kisor I*, the court held that the regulation was ambiguous concerning the word "relevant" and that the agency's interpretation was reasonable.[391]The U.S. Supreme Court considered Mr. Kisor's case in *Kisor v. Wilkie*[392] (*Kisor II*), which was covered in depth in the last edition of this Area Summary.[393] The Supreme Court remanded the case to the Federal Circuit with instructions to determine if the regulation was indeed ambiguous.[394] The decision discussed herein, *Kisor III*, is the Federal Circuit's opinion

385. *Id.*
386. *Id.* at 1320–21.
387. *Id.* at 1318.
388. *Id.*
389. Kisor v. Shulkin, 869 F.3d 1360 (Fed. Cir. 2017), *cert. granted*, Kisor v. Wilkie, 139 S. Ct. 657 (2018), *vacated and remanded*, Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
390. *Id.* at 1367; *see also* Auer v. Robbins, 519 U.S. 452, 461–63 (1997) (examining the Secretary of Labor's interpretation of his own regulation and deciding the Secretary's interpretation was controlling unless plainly erroneous or inconsistent with the regulation).
391. *Kisor I*, 869 F.3d at 1368.
392. 139 S. Ct. 2400 (2019).
393. *See generally* Angela Drake et al., *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1343, 1350–54 (2020) (discussing *Kisor I* and *Kisor II* in detail).
394. *Kisor II*, 139 S. Ct. at 2423–24.

on remand from the Supreme Court on the issue of statutory interpretation.

Unfortunately for Mr. Kisor, the Federal Circuit decided the regulation was unambiguous on remand, even though it previously had found ambiguity in the word "relevant" and deferred to the agency.[395] The court held that "[t]o be relevant, a record must be relevant to the issue that was dispositive against the veteran in VA adjudication of the claim sought to be reconsidered and, in that way, bear on the outcome of the case."[396] The court keyed in on the language in § 3.156(c) that an effective date is retroactive to the previous claim if the award is "based all or in part on" the newly identified records.[397]

In addition to changing its view on whether the word "relevant" was ambiguous, the court rejected Mr. Kisor's contention that the pro-veteran canon should be taken into account when determining—in the first instance—if there is ambiguity.[398] The pro-veteran canon is one of statutory construction, requiring that interpretive doubt be resolved in the veteran's favor.[399]

In *Kisor III*, the Court found no interpretive doubt, even though it previously found the regulation ambiguous and despite the fact that both the veteran and VA proffered diametrically opposed and seemingly reasonable interpretations.[400] Yet, given its conclusion that there was no interpretive doubt, the Court had no reason to resort to any canons of statutory construction.[401]

This conclusion should concern veterans advocates. As Judge Reyna points out in dissent, the court has employed the pro-veteran canon in

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395. Kisor v. McDonough, 995 F.3d 1316, 1322 (Fed. Cir. 2020). Both the 2017 and 2020 decisions were before Alvin A. Schall and Evan J. Wallach, who were majority, and Jimmie V. Reyna who dissented in 2020 but not in 2017. Fun quote from the dissent: "Not to be left behind, the majority has decided to follow the VA and to adopt the agency's new belief that the very same text we initially declared ambiguous has sprung a lack of 'interpretive doubt.'" *Id.* at 1326.

396. *Id.* at 1322.

397. *Id.* at 1323–24.

398. *Id.* at 1325–26 ("[T]he canon does not apply unless 'interpretive doubt' is present . . . [and that] precondition is not satisfied where a sole reasonable meaning is identified through the use of ordinary textual analysis tools, before consideration of the pro-veteran canon.").

399. *See* Brown v. Gardner, 513 U.S. 115, 117–18 (1994) (establishing the rule that "interpretive doubt is to be resolved in the veteran's favor").

400. Kisor v. McDonough, 995 F.3d 1316, 1319, 1326 (Fed. Cir. 2020).

401. *Id.* at 1325–26.

many contexts, including when the plain text does not expressly exclude the veteran's interpretation, when a dictionary definition is inconsistent with the veteran's understanding, and when countervailing legislative history exists.[402] Judge Reyna explained that while the canon may not "be dispositive of a provision's meaning every time it is applied, [the court is] obligated to weigh it alongside the other tools of construction when the text itself gives us doubt."[403] At base, the issue between the majority and Judge Reyna is timing: when to resort to the pro-veteran canon. *Kisor III* instructs that it is unnecessary to use the canon unless there is interpretive doubt in the first instance, and Judge Reyna in dissent cautions that while the pro-veteran canon applies only to ambiguous statutes and cannot override plain text, the canon is not "a tool of last resort, subordinate to all others."[404] In strong words, Judge Reyna writes, "the pro-veteran canon is squarely rooted in the purpose of veterans' benefit provisions, which we are bound to consider and effectuate in every construction."[405]

B. Invalidated Regulations is Not a Basis for CUE

In *George*, VA denied the claims of two appellants, Kevin George and Michael Martin, several decades ago.[406] They both filed a motion for revision of those denials, alleging that VA had committed clear and unmistakable error (CUE).[407] VA originally denied Mr. George and Mr. Martin under the then-existing regulation 38 C.F.R. § 3.304(b).[408] Section 3.304(b) only required clear and unmistakable evidence to rebut the presumption of soundness, but did not require VA show clear and unmistakable evidence that the condition was not aggravated.[409]

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402. *Id.* at 1336–37 (Reyna, J., dissenting).

403. *Id.* at 1337 (citing Sursely v. Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009); Hudgens v. McDonald, 823 F.3d 630, 637 (2016); Nat'l Org. of Veterans' Advocs., Inc. v. Secretary, 260 F.3d 1365, 1377–78 (Fed. Cir. 2001)).

404. *Id.* at 1325, 1336.

405. *Id.* at 1337.

406. George v. McDonough, 991 F.3d 1227, 1229 (Fed. Cir. 2021), *cert. granted*, 142 S. Ct. 858 (2022).

407. *Id.* at 1229.

408. *Id.*; *see also* 38 C.F.R. § 3.304(b) (2003) ("The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service except . . . where clear and unmistakable (obvious or manifest) evidence demonstrates that *an injury or disease existed prior thereto.* Only such conditions as are recorded in examination reports are to be considered as noted." (emphasis added)).

409. 38 C.F.R. § 3.304(b).

Years later in 2004, § 3.304(b) was invalidated by *Wagner v. Principi*.[410] In *Wagner*, the Federal Circuit held that the plain reading of 38 U.S.C. § 1111 requires VA to show (1) clear and unmistakable evidence for both a preexisting condition; and (2) a lack of aggravation to overcome the presumption of soundness.[411] Thus, the court in *Wagner* found § 3.304(b) invalid.[412]

Prior to the *Wagner* decision, the now invalid 38 C.F.R. § 3.304(b) was applied in Mr. George's case. When Mr. George entered the military, there was no mention of any psychiatric disorders.[413] A week into service, Mr. George suffered from a psychotic episode, and the military diagnosed him with schizophrenia.[414] Two months into his service, they found Mr. George unfit for duty and determined that his condition preexisted his service.[415] Although "the Board did not specifically cite the statutory presumption of soundness or the implementing regulation," in its 1977 decision, the Board relied on factors in § 3.304(b) when it denied Mr. George's claim, finding that his condition existed prior to his entering the military and was not aggravated by his service.[416] In 2014, Mr. George filed a CUE claim, asserting that the Board failed to correctly apply the plain reading of 38 U.S.C. § 1111.[417] In its 2016 decision, the Board found that the 1977 version of § 3.304(b) did not require clear and unmistakable evidence to rebut the presumption that the disability was not aggravated by service.[418] Mr. George appealed, and the Veterans Court determined "that permitting retroactive application of *Wagner*'s statutory interpretation would contravene the law on finality of judgments."[419]

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410. 370 F.3d 1089, 1093 (Fed. Cir. 2004).

411. *Id.* at 1097.

412. *See id.* at 1091, 1097 (explaining that the regulation required only the element of clear and unmistakable evidence but finding that the correct standard requires the second element of an aggravated pre-existing disability).

413. *George*, 991 F.3d at 1230.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*; *see also* 38 U.S.C. § 1111 ("[E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except . . . where clear and unmistakable evidence demonstrates that the injury or disease existed before . . . such service.").

418. *George*, 991 F.3d at 1231.

419. *Id.*

Similarly, when Mr. Martin entered the service, he "reported never having had asthma, shortness of breath, or hay fever."[420] His entrance physical reported that his lungs and chest were normal.[421] During his second period of service, he went to an allergy clinic for treatment.[422] During that visit, he reported "a childhood history of asthma."[423] When he exited service, the "separation examination did not report any asthma or related symptoms."[424] Shortly after service in 1969, Mr. Martin filed a claim for asthma.[425] The Regional Office denied the claim since it preexisted service and was not aggravated.[426] In July 2013, Mr. Martin requested revision of the 1970 decision based on CUE, since the Regional Office failed to apply both prongs of § 1111.[427] The Veterans Court also affirmed this decision relying upon its decision in *George*.[428]

The appellants appealed these decisions to the Federal Circuit, arguing that their CUE claims did not seek to retroactively apply a changed interpretation, but rather simply apply the statute as written.[429] The Federal Circuit, in Judge Chen's opinion, disagreed and emphasized the importance of VA's regulation that existed at the time.[430] The Federal Circuit clarified that the new interpretation of a statute by the court can only retroactively affect open decisions but cannot affect decisions that are already final.[431] Congress did not intend for changes in the law subsequent to the original adjudication to provide a basis for revising a final decision.[432] The Federal Circuit held that *Wagner* could not serve as the basis for an appellant's CUE

420. *Id.* at 1232 (internal quotations omitted).
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.* at 1232–33.
427. *Id.* at 1233; *see* 38 U.S.C. 1111 (presuming sound condition unless (1) clear and unmistakable evidence demonstrates that the veteran's injury or disease existed before acceptance and (2) the injury or disease was not aggravated the veteran's service).
428. *George*, 991 F.3d at 1233 (relying on the Board's finding that the regulation did not apply retroactively to final decisions).
429. *Id.* at 1234.
430. *Id.*
431. *Id.*
432. *See id.* ("Congress[] inten[ded] that 'changes in the law subsequent to the original adjudication . . . do not provide a basis for revising a finally decided case.'").

claim due to Congress's intent behind the CUE statute.[433] Accordingly, the Federal Circuit affirmed the Veterans Court decisions.[434]

This case reinforces the rarity of CUE in previous final decisions. VA and the Board cannot look to newly interpreted law or cases to determine whether CUE exists. Mr. George petitioned for certiorari and the Supreme Court granted certiorari for the October 2021 term.[435]

C. 38 C.F.R § 3.304(f)(3) is a Liberalizing Law Entitling Veterans to an Earlier Effective Date

In *Ortiz*, the Federal Circuit determined 38 C.F.R. § 3.304(f)(3) was a liberalizing regulation entitling the claimant to an extra year of benefits under § 3.114(a)(3).[436] Under § 3.114(a):

> [W]here . . . compensation . . . is awarded . . . pursuant to a liberalizing law or VA issue . . . a claim [] reviewed at the request of the claimant more than 1 year after the effective date of the law . . . , benefits may be authorized for a period of 1 year prior to the date of receipt.[437]

VA denied Mr. Ortiz's first claim for benefits for PTSD.[438] Mr. Ortiz filed to reopen his claim for PTSD in 2012 and did so under a 2010 change to § 3.304(f)(3).[439] The updated version of this regulation allowed a veteran's lay testimony to establish an in-service stressor,[440] so long as the stressor was related to the veteran's fear of hostile military or terrorist activity.[441] This regulation established an exception to the

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433. *Id.* at 1237.

434. *Id.*

435. George v. McDonough, 991 F.3d 1227 (Fed. Cir. 2021), *petition for cert. filed* (U.S. Aug. 13, 2021) (No. 21-234).

436. Ortiz v. McDonough, 6 F.4th 1267, 1269-70 (Fed. Cir. 2021); *see also* 38 C.F.R. 3.304 (2010) (describing the requirements for direct service connection for posttraumatic stress disorder).

437. 38 C.F.R. § 3.114 (2020).

438. *Ortiz*, 6 F.4th at 1273.

439. *Id. Compare* 38 C.F.R. § 3.304(f)(3) (2010) (PTSD stressor related to a prisoner-of-war experience), *with* 38 C.F.R. § 3.304(f)(3) (2011) (PTSD stressor related to fear of hostile military activity based on personal testimony).

440. As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. Shedden v. Principi, 381 F.3d 1163, 1166–67 (Fed. Cir. 2004).

441. *Ortiz*, 6 F.4th at 1274–75 (noting that Mr. Ortiz's diagnosis of PTSD based on fear was sufficient under the new evidentiary standard).

normal evidentiary burden to corroborate the PTSD stressor.[442] Because of this new regulation, Mr. Ortiz was awarded benefits back to when he first applied for them in 2012.[443] Mr. Ortiz requested an additional year of benefits under § 3.114(a)(3).[444]

The Board found that § 3.304(f)(3) is not a liberalizing rule, following the Veterans Court's decision in *Foreman v. Shulkin*.[445] In *Foreman*, the court defined "liberalizing" as a law that creates a new and different entitlement to service connection.[446] The Veterans Court determined that § 3.304(f) did not create a new entitlement to service connection, rather it merely relaxed the evidentiary standard.[447] The court found that § 3.304(f)(3) was procedural and not liberalizing for effective date purposes.[448] The Veterans Court in its memorandum decision also followed *Foreman* and affirmed the Board's decision.[449]

The question before the Federal Circuit was the meaning of the term "liberalizing" in § 3.114(a).[450] Judge Taranto first looked to the plain meaning of "liberalizing" and determined that it meant "to make policies or laws less strict."[451] The court found that the 2010 regulation change was a "prototypical example of a 'liberalizing' change resulting in an 'award.'"[452] Thus, the court found that § 3.304(f)(3) relaxed the veteran's affirmative responsibility in supporting his claim for benefits.[453]

The Secretary, however, relied on two prior cases, *Spencer v. Brown*[454] and *Routen v. West*,[455] to argue that the court should not apply the ordinary meaning of liberalizing.[456] In *Spencer*, the veteran applied for service connection for his multiple sclerosis, but VA denied his

442. *Id.* at 1274.
443. *Id.* at 1275.
444. *Id.* at 1269.
445. Foreman v. Shulkin, 29 Vet. App. 146 (2018); Ortiz v. Wilkie, No. 19-0070, 2020 WL 1173715, at *1 (Vet. App. Mar. 12, 2020) (citing *Foreman*, 29 Vet. App. 146), *rev'd sub nom. Ortiz*, 6 F.4th 1267.
446. *Foreman*, 29 Vet. App. at 151.
447. *Id.*
448. *Id.* at 152.
449. *Ortiz*, 6 F.4th at 1275.
450. *Id.*
451. *Id.* at 1276.
452. *Id.*
453. *Id.*
454. 17 F.3d 368 (Fed. Cir. 1994).
455. 142 F.3d 1434 (Fed. Cir. 1998).
456. *Ortiz*, 6 F.4th at 1277.

claim.[457] Later, he reapplied and requested that VA reopen his claim because he had "new and material" evidence.[458] He also asked to have his claim considered under the VJRA, which was an intervening change in the law.[459] The Board and the Veterans Court rejected his claim since there was no new and material evidence to justify reopening the claim.[460] The Federal Circuit determined that the VJRA changes on which the veteran relied did not constitute a new basis of entitlement based on a change in law because they did not "*substantively* affect[] the nature" of the decided claim.[461] The court engaged in a statutory interpretation analysis to determine whether the VJRA was a "liberalizing" law, "i.e., one which brought about a substantive change in the law creating a new and different entitlement to a benefit."[462] However, the court only examined whether the VJRA was procedural or substantive change in the law, and it did not specifically define the term "liberalizing."[463]

Similarly in *Routen*, the veteran filed to reopen a claim and requested that VA look at his claim under a new regulatory change related to the Secretary's burden to rebut the presumption that the veteran's injury was aggravated during service.[464] The court found that the new regulation was only "procedural in nature" and was not substantive and thus, not "liberalizing."[465]

In *Ortiz*, the court found that § 3.304(f)(3) established a new basis of entitlement and was not procedural in nature.[466] The court looked

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457. *Spencer*, 17 F.3d at 370 (denying his claim there was insufficient evidence "that the disability was incurred in or aggravated by his service in the military").

458. *Id.* at 371.

459. *See id.* (relying on the VJRA, which was passed in 1988, to appeal his claim to the Board in 1990).

460. *Id.* at 371, 374.

461. *Id.* at 372–73.

462. *Id.* at 372.

463. *Id.*

464. Routen v. West, 142 F.3d 1434, 1438 (Fed. Cir. 1998); *see also* Aggravation of Preservice Disability, 57 Fed. Reg. 59296, 59296 (Dec. 15, 1992) (combining the wartime and peacetime standards to rebut the presumption of aggravation of a preservice injury by requiring VA to apply the clear and unmistakable evidentiary standard for both under 38 C.F.R. § 3.306(b)); 38 C.F.R. § 3.306(b) (1993) (codifying the 1992 regulatory change in the C.F.R.).

465. *See Routen*, 142 F.3d at 1441–42 (declaring that an "intervening change in law [must] create[] a new cause of action" for a veteran to reopen their claim).

466. Ortiz v. McDonough, 6 F.4th 1267, 1275 (Fed. Cir. 2021), *remanded to* No. 19-0070, 2021 WL 4464357 (Vet. App. Sept. 30, 2021).

to VA's "Final Rule" when adopting the 2010 regulation.[467] VA stated that the regulation "effectively 'eliminate[d]' an evidentiary 'requirement' when the specific preconditions were met."[468] Further, VA stated that it was "amending its adjudication regulations governing service connection for . . . [PTSD] by liberalizing in some cases the evidentiary standard for establishing the required in-service stressor."[469] The Veterans Court and VA have stated that this regulatory change was done for procedural reasons; however, the Federal Circuit was clear that a change to the law for efficiency does not change the nature of the substantive change.[470] Therefore, even though a regulation is created for procedural reasons, the law may still be "liberalizing" as it reduces the burden of proof on veteran claimants.[471]

This case not only opens the possibility that regulatory changes that lower evidentiary standards will be considered liberalizing, but also allows the liberalizing standard in § 3.114 to apply for earlier effective date purposes. In addition to the regulation impacting PTSD, VA and the courts have recognized that presumptions, like new Agent Orange presumptions, meet this liberalizing standard.[472] As advocates consider whether their clients are entitled to an earlier effective date, they must now consider whether the benefit was granted under a "liberalizing" standard as defined by *Ortiz*.[473]

D. Veterans Have an Affirmative Duty to Reapply for Benefits After a Subsequent Period of Service Under § 3.654(b)(2)

In *Buffington v. McDonough*,[474] the issue presented was whether 38 C.F.R. § 3.654(b)(2) was a permissible regulation under VA's statutory scheme.[475] Various statutes are important to understand the background of the Federal Circuit's analysis. First, 38 U.S.C. § 5101(a)(1)(A) requires

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467. *Id.* at 1282; *see also* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39843 (July 13, 2010).

468. *Ortiz*, 6 F.4th at 1282 (quoting 75 Fed. Reg. at 39843).

469. *Id.* at 1283.

470. *Id.* ("A substantive change can be made to achieve process benefits.").

471. *Id.* at 1270.

472. *Id.* at 1281.

473. *Id.* at 1270.

474. 7 F.4th 1361 (Fed. Cir. 2021).

475. *Id.* at 1363 (addressing the veteran's contention that the regulation conflicts with 38 U.S.C. § 5304(c)); *see also* 38 C.F.R. § 3.652(b) (2020); 38 U.S.C. § 5304(c) (2018).

a veteran to apply for disability benefits in order to receive them.[476] Second, under 38 U.S.C. § 5110, VA will set an effective date for those benefits.[477] Third, under 38 U.S.C. § 5304(c) and § 5112, VA may need to discontinue disability benefits if the veteran returns to active duty and will set an effective date for that discontinuance.[478] The question presented in *Buffington* was whether the Secretary can determine how compensation will recommence after a veteran is discharged from a subsequent period of service.[479]

In this case, Mr. Thomas Buffington served on active duty from 1992 to 2000.[480] When he left the service, Mr. Buffington was service connected for tinnitus.[481] Mr. Buffington returned to active duty in 2003.[482] Once Mr. Buffington resumed active service, VA stopped his compensation because, by statute, veterans cannot receive compensation benefits and active duty pay.[483] In 2004, Mr. Buffington completed his active period, but late that year he was reactivated until July 2005.[484] In 2009, Mr. Buffington sought to restart his benefits, and VA provided an effective date of 2008.[485] He appealed the effective date, requesting that the benefits begin when he was released from active duty service in 2005.[486] Mr. Buffington argued that the statutes obligate VA to pay compensation for service connected disabilities, set effective dates, and provide a limited exception for when payments are barred.[487] Furthermore, such compensation "runs parallel to the

476. *Buffington*, 7 F.4th at 1364; *see also* 38 U.S.C. § 5101(a)(1)(A) (2018) ("[A] specific claim . . . must be filed in order for benefits to be paid . . . .").

477. *Buffington*, 7 F.4th at 1364; *see also* 38 U.S.C. § 5110 (2018) ("[T]he effective date of an award based on an initial claim, or a supplemental claim, . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.").

478. 38 U.S.C. § 5304(c) ("[C]ompensation . . . on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.").

479. *Buffington*, 7 F.4th at 1364.

480. *Id.* at 1363.

481. *Id.*

482. *Id.*

483. *Id.*; *see* 38 U.S.C. § 5304(c).

484. *Buffington*, 7 F.4th at 1363.

485. *Id.*

486. *Id.* at 1363, 1365 (arguing that benefits "restart[] at discharge from active military service," which in this case was in 2005).

487. *Id.* at 1365.

period of service: stopping on re-entry to active military service and restarting at discharge from active military service."[488]

Writing for the majority, Chief Judge Moore found that the statutory language contained a gap because it did not explicitly explain how a veteran would recommence benefits after a subsequent period of service.[489] To fill the statutory gap, VA previously promulgated 38 C.F.R. § 3.654(b)(2), which provides that:

> [P]ayments . . . will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim.[490]

The Federal Circuit examined the agency's regulation and looked to whether the regulation was a "permissible construction of the statute" after determining there was indeed a clear gap in the statute.[491] The court found that this regulation was a reasonable gap-filling regulation.[492]

In her dissent, Judge O'Malley disagreed with the majority that there was any statutory gap, pointing to context that provided insight into congressional intent.[493] Under 38 U.S.C. §§ 1110 and 1131, VA will pay veterans compensation for their service-connected disabilities, and 38 U.S.C. § 5110(a) explains when the payments will start.[494] A pause of payments will occur when a veteran reenters active duty.[495] Judge O'Malley recognized that the statutes do not mention a recommencement date, but Congress's language only wanted payments to cease while a veteran was on active duty.[496] Furthermore, the dissent argues that Congress never intended for a veteran to lose

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488. *Id.*

489. *Id.* at 1364–65.

490. 38 C.F.R. § 3.654(b)(2) (2020).

491. *Buffington*, 7 F.4th at 1364 (quoting Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1983)).

492. *Id.* at 1367.

493. *Id.* at 1368 (O'Malley, J., dissenting).

494. *Id.* at 1369 (citing 38 U.S.C. §§ 1110, 1131, 5110(a) (2018)) ("Congress knew how to set dates for commencement of benefits when it deemed it necessary to do so, and, when doing so, it always assured that benefits would commence sooner rather than later.").

495. *Id.* (citing 38 U.S.C. § 5304(c) (2018)).

496. *Id.* at 1369 (O'Malley, J., dissenting) ("The plain text of Title 38 [§ 5304(c)] indicates that Congress intended for veterans' benefits to discontinue during 'any period' of active service pay.").

his original effective date after returning to active duty.[497] The appellants have petitioned for certiorari at the Supreme Court.[498]

Veterans who receive VA benefits and are activated to military service must reapply for their benefits in order for VA to restart the benefits after discharge.[499] If done within a year, a veteran's effective date will go back to the date after leaving service.[500]

VII. THE FEDERAL CIRCUIT OVERTURNED THREE REGULATIONS ASSOCIATED WITH VA'S NEW APPEALS MODERNIZATION ACT

In *Military-Veterans Advocacy v. Secretary of Veterans Affairs*,[501] the Federal Circuit reviewed four petitions that challenged the validity of thirteen regulations associated with the Veterans Appeals Improvement and Modernization Act of 2017 (AMA).[502] Of the challenged regulations, the Federal Circuit found standing and overturned only three regulatory challenges.[503] The Federal Circuit dismissed the remaining ten challenges for lack of standing.[504] This Part will discuss the history of the AMA, the standing concerns on regulatory challenges, the overturned regulations, and the future of other AMA regulatory challenges.

A. Brief History of the AMA

In the former appeals process, now called the Legacy System, veterans were required to file a Notice of Disagreement (NOD) to appeal an unfavorable rating decision.[505] Veterans had one year to file this appeal from the date of the decision letter.[506] After the NOD was filed, VA would send an explanation of its decision called the Statement of the Case (SOC).[507] Before the AMA was passed, on average, VA took 500 days to issue an SOC after a veteran filed an

497. *Id.*
498. Petition for Writ of Certiorari, *Buffington*, 7 F.4th 1361 (No. 21-972).
499. *Buffington*, 7 F.4th at 1366–67.
500. *Id.* at 1367.
501. 7 F.4th 1110 (Fed. Cir. 2021).
502. *Id.* at 1117; Veterans Appeals Improvement and Modernization Act of 2017, Pub. L No. 115-55, 131 Stat. 1105; *see also* VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (implementing the AMA).
503. *Military-Veterans Advoc.*, 7 F.4th at 1117.
504. *Id.*
505. 38 U.S.C. § 7105(a) (2012).
506. *Id.* § 7105(b)(1).
507. 38 C.F.R. § 19.26 (2016).

NOD.[508] To appeal the SOC, a veteran would file a Form 9 within sixty days of the SOC.[509] Once VA received the Form 9, it would then certify the appeal to the Board.[510] On average, it would take 773 days for the Form 9 to be certified.[511] All of these actions occurred under the jurisdiction of the Regional Office.[512] On average, a veteran waited 1,273 days after issuance of a rating decision for their appeal to reach the Board.[513] Once at the Board, veterans waited an additional 568 days for a Board decision.[514] The process from the first decision to a final Board decision took 1,841 days, or a little over five years.[515] Throughout the Legacy Process, veterans could submit new evidence at any point and each decision was a de novo review.[516] Once a claim was final, a veteran could request to reopen the case with new and material evidence.[517]

In 2017, the AMA was introduced in Congress to expedite VA appeals processes and protect veterans' due process rights.[518] Congress acknowledged that the appeals process was broken.[519] The increased number of pending appeals and the length of time veterans waited for a decision forced Congress to act.[520] Congress's goal was to streamline the appeals process and finalize decisions in a shorter period of time.[521]

To streamline the process, Congress converted the linear appeals process into a process that included more choice for the veteran.[522] Instead of requiring an NOD after a rating decision, VA allowed three types of appeals: (1) supplemental claims; (2) higher-level review; and (3) an NOD directly to the Board.[523] The supplemental claim allows

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508. 2017 VA BD. OF VETERANS' APPEALS ANN. REP. 25, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2017AR.pdf [https://perma.cc/747G-9TZ3].

509. 38 C.F.R. §§ 20.202, 20.302(b)(1) (2016).

510. *Id.* § 19.35.

511. 2017 VA BD. OF VETERANS' APPEALS ANN. REP., *supra* note 508, at 25.

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

516. 38 C.F.R. § 20.800 (2016).

517. *Id.* § 3.156(a).

518. H.R. REP. NO. 115-135, at 2 (2017).

519. *Id.* at 5.

520. *See id.* (noting that veterans were waiting anywhere from three to five years, but if nothing changed, the wait time would likely increase to ten years).

521. *See id.* (intending to "reduce VA's appeals workload and help ensure that the process is both timely and fair").

522. *Id.* at 2 (giving veterans three procedural options).

523. 38 U.S.C. §§ 5104B, 5108, 7105 (2018).

the veteran to submit new and relevant evidence to substantiate their claim.[524] This type of appeal permits a veteran to have a hearing, including any new testimony that they would like to provide.[525] The Regional Office would continue to hold jurisdiction over the claim.[526] The second type, a higher-level review, restricts the veteran from submitting any additional information into the record.[527] However, this appeal allows the veteran to hold an informal conference with the adjudicator to discuss any legal argument based on the record.[528] The Regional Offices seek to process supplemental claims and higher-level reviews within 125 days.[529]

The last appellate choice is an NOD to the Board.[530] This option also allows the veteran to have a choice between a direct review lane, an evidence lane, and a hearing lane.[531] The direct review lane restricts the veteran to the evidence of record, and the Board will not consider any additional evidence.[532] The Board's goal is to complete these decisions within 365 days of the appeal.[533] The evidence lane allows a veteran to submit additional evidence within ninety days of the appeal.[534] The final lane gives veterans an opportunity for a hearing before the Board.[535] The last two lanes have no timeline goals, although they are likely to take longer than the direct review lane.[536]

Additionally, Congress removed the term "reopen" and allowed the veteran to seek re-adjudication through the supplemental claim lane after a final decision with new and relevant evidence.[537]

Because of these major changes to the appellate process, VA had to create additional regulations to help fill some of the gaps and change language in existing regulations to align with the new process.[538] Of the thirteen regulations that were challenged in *Military-Veterans Advocacy*,

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524. *Id.* § 5108.
525. 38 C.F.R. § 3.103(a), (d)(2) (2020).
526. *Id.* § 3.103(c)(2)(i).
527. 38 U.S.C. § 5104B(d).
528. 38 C.F.R. § 3.2601(h) (2020).
529. VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 147 (Jan. 18, 2019).
530. 38 U.S.C. § 7105 (2018).
531. *Id.* § 7105(b)(3).
532. *Id.*
533. 84 Fed. Reg. at 153.
534. 38 C.F.R. § 20.1305(a) (2021).
535. 84 Fed. Reg. at 145.
536. *See id.* at 153.
537. *Id.* at 144.
538. *Id.* at 166.

ten challenges were dismissed for lack of standing, and three regulations were overturned.[539]

B. Challenges to Standing

Relying on 38 U.S.C. § 502,[540] several veterans advocacy organizations—the Military-Veterans Advocacy (MVA), the National Organization of Veterans' Advocates (NOVA) with Paralyzed Veterans of America (PVA) intervening, Carpenter Chartered, and National Veterans Legal Services Program (NVLSP)—filed four petitions regarding various regulations related to the AMA.[541] Together, the petitioners challenged the validity of thirteen regulations.[542] NVLSP challenged 38 C.F.R. § 3.105(a)(1)(iv).[543] MVA also challenged § 3.105(a)(1)(iv) and additionally raised § 14.636(c)(1)(i) and § 20.202(c)(2).[544] NOVA and PVA's petition challenged § 3.155(b), § 3.156(b), § 3.2500(b), § 3.2500(d), and § 20.205(c).[545] Finally, Carpenter Chartered challenged ten regulations, four raised by others (§ 3.105(a)(1)(iv), § 3.2500(d)–(e), § 20.205(c), and § 14.636(c)(1)(i)) and "further raised six additional challenges, to: 38 C.F.R. § 3.1(p)(1)–(2), 38 C.F.R. § 3.103(c)(2), 38 C.F.R. § 3.151(c)(1)–(2), 38 C.F.R. § 14.636(c)(2)–(3), 38 C.F.R. § 20.202(a), and 38 C.F.R. § 20.800(e)."[546]

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539. Military-Veterans Advoc. v. Sec'y of Veterans Affs., 7 F.4th 1110, 1117 (Fed. Cir. 2021).

540. 38 U.S.C. § 502 (subjecting VA rulemaking to direct judicial review by the Federal Circuit).

541. *Military-Veterans Advoc.*, 7 F.4th at 1117 & n.1.

542. *See id.* (raising rulemaking challenges under 38 U.S.C. § 502).

543. *Military-Veterans Advoc.*, 7 F.4th at 1120; *see also* 38 C.F.R. § 3.105(a)(1)(iv) (2019) (relating to the standard for considering errors related to changes in interpretation of statutes or regulation).

544. *Military-Veterans Advoc.*, 7 F.4th at 1120; *see also* 38 C.F.R. § 14.636(c)(1)(i) (relating to how agents and attorneys charge fees); § 20.202(c)(2) (relating to the process by which a claimant can modify information in a Notice of Disagreement).

545. *Military-Veterans Advoc.*, 7 F.4th at 1120; *see also* 38 C.F.R. § 3.155(b) (relating to "submitting an intent to file a claim" to VA); § 3.156(b) (relating to the consideration of new evidence for legacy claims that were not under the modernized system); § 3.2500(b), (d) (relating to the prohibition on entering concurrent avenues for reviewing decision and establishing the process for withdrawing from the process);); § 20.205(c) (relating to the effect of filing a withdrawal of appeal).

546. *Military-Veterans Advoc.*, 7 F.4th at 1120; *see also* 38 C.F.R. § 3.1(p)(1)–(2) (relating to the definition of initial claims and supplemental claims); § 3.103(c)(2) (relating to how VA treats evidence received after the agency issues a notice of decision); § 3.151(c)(1)–(2) (relating to how VA makes determinations for claims that

When considering associational standing, the court considers the *Hunt v. Washington State Apple Advertising Commission*[547] factors: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor relief requested requires the participation of individual members of the lawsuit."[548]The first prong is whether there are members who have standing to sue in their own right.[549] The Federal Circuit found that PVA had veteran members personally impacted by § 3.2500(b) and § 3.155.[550] However, PVA's challenge to § 20.202(c)(2) and § 3.156(b) failed to identify a member who had presented an injury that was actual or imminent.[551] Further, § 3.2500(d)–(e) and § 20.205(c) were related to potential future harms and not actual harms to current veterans.[552] MVA's challenge to § 3.105(a)(1)(iv) attempted to obtain standing through a veteran-member who challenged an adverse decision as clear and unmistakable error by relying on a change in interpretation of the law for Blue Water Veterans.[553] However, the Federal Circuit found this issue moot, since Congress had remedied the effective date issue for Blue Water Veterans.[554]

The several petitioners also argued that their attorney members have standing on their own.[555] The court looked to how the attorneys are adversely affected by these rules and found that the potential loss of attorney's fees was insufficient to create an Article III case or controversy.[556] The court, however, addressed MVA's challenge to

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encompass multiple issues); §§ 14.636(c)(2)–(3) (relating how agents and attorneys charge fees); § 20.202(a) (relating to Notice of Disagreements); § 20.800(e) (relating to the requirement to file new Notices of Disagreement after new adjudications after a remand).

547. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977).

548. *Military-Veterans Advoc.*, 7 F.4th at 1122–23 (citing Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)).

549. *Id.* at 1123.

550. *See id.* at 1124 (recognizing that the regulations adversely affected the supplemental claims of two veterans).

551. *See id.* (finding the challenges too vague because the PVA could not identify any particular veteran).

552. *See id.* (finding the challenges relating to these regulations were nothing more than "'some day' intentions" that did not identify "actual or imminent injury").

553. *Id.* at 1125.

554. *Id.*; *see also* Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23, 133 Stat. 966 (2019) (remedying the effective date issue).

555. *Military-Veterans Advoc.*, 7 F.4th at 1125.

556. *Id.* at 1125–28.

§ 14.636(c)(1)(i) separately.[557] The court found that this regulation "directly affects attorney's fees—by restricting fees for work performed on supplemental claims filed more than a year" later.[558] Additionally, MVA had a specific member who was personally denied fees of over $50,000 for work performed.[559] Finally, the court rejected Carpenter Chartered's petition because it found no injury in fact over the challenged rules.[560]

C. Overturned Regulations

Three challenged regulations survived standing, and the Federal Circuit overturned all three: 38 C.F.R. §§ 14.636(c)(1)(i), 3.2500(b), and 3.155.[561] All three challenges related to the supplemental claim lane.[562]

1. The Federal Circuit overturned § 14.636(c)(1)(i) because it was contrary to § 5904(c)(1)

First, § 14.636(c)(1)(i) limited when a veteran's representative may charge a fee for work on supplemental claims.[563] MVA's petition challenged this regulation specifically.[564] In this challenge, the Court first looked to the history and statutory framework of attorney's fees.[565]

Beginning in 1864, attorney's fees were strictly limited to ten dollars.[566] This ten dollar framework continued until Congress enacted the VJRA in 1988.[567] The VJRA only allowed attorney's fees after the

557. *See id.* at 1128 (finding sufficient facts to sustain standing).
558. *Id.*
559. *Id.*
560. *Id.* at 1132.
561. *Id.* at 1132–33, 1148.
562. *Id.* at 1133 (noting that the supplemental claim procedural lane "permit[s] a claimant to request readjudication of an initial claim based on 'new and relevant evidence'").
563. *Id.*; *see also* 38 C.F.R. § 14.636(c)(1)(ii) (2020) ("[A]ttorneys may charge claimants or appellants for representation provided after an agency of original jurisdiction has issued notice of an initial decision on the claim . . .").
564. *Military-Veterans Advoc.*, 7 F.4th at 1127–28.
565. *Id.* at 1135 (noting that Congress had changed the triggering event for charging attorney's fees three times in the past).
566. *Id.*
567. *Id.*

Board made its final decision on the case.[568] The Senate distinguished reopening from initial claims because the veteran's need for an attorney was greater.[569] In 2006, Congress allowed paid representation after an NOD was filed in the case.[570] Congress acknowledged the complexity of VA cases, and the need for representation by attorneys.[571]

The AMA shifted the timeframe, allowing attorney's fees to be collected after a claimant receives an initial decision.[572] Because the AMA allows for many different avenues of relief—including NOD, HLR, and supplemental claims—Congress had to shift the timeframe in which attorneys obtain their fees.[573]

Section 14.636 allowed attorneys to charge a fee for work performed after the Regional Office has issued an initial decision on the claim.[574] The agency, however, did not allow fees for supplemental claims that were outside of the appeals window.[575] Under the AMA, a claimant may file a supplemental claim under two separate circumstances.[576] Under 38 U.S.C. § 5104C(a), a supplemental claim can be filed within a year of a decision.[577] Under these supplemental claims, the claimant has continuously pursued the claim and is now submitting "new and relevant evidence" to support their claim.[578] Under continuously pursued supplemental claims, the claimant preserves their effective date to the date in which they originally began pursuing the claim.[579] For example, if the claimant filed an application in 2019 and continued to appeal through the various lanes—HLR, NOD, and now

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568. *Id.*; *see also* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108 (1988) ("[A] fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case.").

569. *Military-Veterans Advoc.*, 7 F.4th at 1136; Pub. L. No. 100-687, § 104, 102 Stat. at 4108.

570. *Military-Veterans Advoc.*, 7 F.4th at 1136; 38 U.S.C. § 5904(c)(1) (2006).

571. *Military-Veterans Advoc.*, 7 F.4th at 1136 (noting that Congress acknowledged that "the claims process has become very complex").

572. *Id.*; 38 U.S.C. § 5904(c)(1).

573. *Military-Veterans Advoc.*, 7 F.4th at 1136.

574. *Id.* at 1137; 38 C.F.R. § 14.636(c)(i).

575. *Military-Veterans Advoc.*, 7 F.4th at 1137; 38 C.F.R. § 14.636(c)(ii).

576. *Military-Veterans Advoc.*, 7 F.4th at 1137.

577. *Id.* at 1133.

578. *Id.*

579. *See id.* at 1134–35 (noting the difference between supplemental claims continuously pursued and those not).

a supplemental claim—once they are granted the benefit, it will go back to the 2019 filing date.

Comparatively, § 5104C(b) allows claimants to file a supplemental claim with "new and relevant evidence," outside of the one-year appeals period.[580] However, under § 5104C(b), the claimant's effective date is the date of the new supplemental claim.[581] In this circumstance, § 14.636 did not allow attorneys to charge a fee for claimants.[582] VA argued that § 5104C(b) supplemental claims are separate claims for the purposes of attorney's fees and that reopened claims are "finally-decided claims based on new evidence."[583]

MVA argued that VA's regulation was contrary to § 5904(c)(1).[584] Congress provided that attorney's fees "may not be charged . . . for services . . . provided before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision . . . with respect to the case."[585] The Federal Circuit, in Judge Chen's opinion, agreed and found that § 14.636(c)(1)(i) contradicted the meaning of 5904(c)(1).[586] The court found that a supplemental claim under § 5104C(b) occurs after a notice of the Regional Office decision with respect to the case.[587] Both the supplemental claim and the original Regional Office decision are part of the same case, and, although there are different effective dates between § 5104C(a) and (b), both of these claims are treated the same for attorney's fees purposes.[588] Additionally, the court found that the statutes recite no other restrictions on attorney's fees.[589] Congress's language in § 5904(c)(1) permitted paid representation regardless of the review the claimant chose.[590] The Federal Circuit found that section 14.636(c)(1)(i) contradicted the ordinary meaning of § 5904(c)(1), and thus the court invalidated the provision.[591]

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580. *Id.* at 1133–34.
581. *Id.* at 1134–35.
582. *Id.* at 1137 ("[A] § 5104C(b) supplemental claim . . . [must] be first denied before paid representation is available.").
583. *Id.* at 1137–38.
584. *Id.* at 1135; *see also* 38 U.S.C. § 5904(c)(1).
585. *See* 38 U.S.C. § 5904(c)(1).
586. *Military-Veterans Advoc.*, 7 F.4th at 1138.
587. *Id.*
588. *Id.* at 1138–39.
589. *Id.* at 1138.
590. *Id.*
591. *Id.* at 1141.

Now that the court overturned § 14.636(c)(1)(i), attorneys can charge a contingency fee for their work on all supplemental claims.[592] This will allow veterans to obtain attorney representation more readily, and an attorney will have an incentive to take the case at the supplemental claim stage, regardless of when the veteran last received a decision.

2. The Federal Circuit invalidated § 3.2500(b) for contravening § 5104C's clear statutory text

Second, § 3.2500(b) barred the filing of a supplemental claim when adjudication of the same claim was pending before a federal court.[593] PVA challenged § 3.2500(b).[594] Here, the court found that PVA had standing because one of its members was barred from filing a supplemental claim while he had a pending appeal in federal court.[595]

Under § 3.2500(b), VA places "two restrictions on the use of administrative review."[596] First, a claimant cannot file for review under two different administrative appeals options.[597] PVA, however, only challenged the second restriction that a claimant may not file for administrative review while the claim is pending before a federal court.[598] The court acknowledged that this prohibition primarily affects claimants who filed an appeal from the Board but now have new and relevant evidence to submit a supplemental claim.[599] In its petition, PVA argued that the new restrictions were not contemplated in the statute.[600] Further, PVA argued, this restriction would force claimants to make a difficult choice between appellate review by the Federal Circuit and filing a supplemental claim, since the effective date protections only exist if a supplemental claim is filed after a Veterans Court decision, Board decision, or an agency of original jurisdiction (AOJ) decision.[601]

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592. *See id.* (allowing attorneys to charge a contingency fee).

593. *Id.*; *see also* 38 C.F.R. § 3.2500(b) ("While the adjudication of a specific benefit is pending on appeal before a federal court, a claimant may not file for administrative review of the claim . . . ." (emphasis omitted)).

594. *Military-Veterans Advoc.*, 7 F.4th at 1122, 1124.

595. *Id.* at 1124.

596. *Id.* at 1141; *see also* 38 C.F.R. § 3.2500(b).

597. *Military-Veterans Advoc.*, 7 F.4th at 1142.

598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.*

The Federal Circuit determined that it was the clear intent of Congress to allow administrative review and judicial review concurrently.[602] Congress knew how to bar two simultaneous forms of review but only chose to bar concurrent lanes of administrative review.[603] The court determined that "§ 3.2500(b) is invalid for contravening § 5104C's clear statutory text."[604]

Now that the court has overturned § 3.2500(b), claimants may be able to file both supplemental claims and appeal to a federal court without the fear of losing an effective date. This will give veterans a chance to both challenge a law and ensure that their effective date is preserved.

3. The Federal Circuit found § 3.155 invalid because it was arbitrary and capricious

Lastly, § 3.155 restricted the use of the intent-to-file framework for supplemental claims.[605] An intent-to-file framework allows a veteran to notify VA of their intentions to file a claim.[606] The intent to file would preserve the effective date, so long as the veteran filed the claim within a year.[607] PVA challenged the regulation, and the court found it had standing on behalf of one of its members.[608] A PVA member submitted an intent to file on July 24, 2018, and he believed he had a year to apply for benefits.[609] Because of § 3.155, the PVA member's intent to file did not hold his effective date, and he was only awarded back to the date of his supplemental claim.[610]

The regulation specifically states that an intent to file does not apply to supplemental claims.[611] PVA argued that § 3.155(b) is arbitrary and capricious because the "VA interprets 'virtually identical' statutory

602. *Id.* at 1144.
603. *Id.*
604. *Id.* at 1145.
605. *See id.* at 1145 n.18, 1146 (noting that "[u]nder the 'intent-to-file' framework, a claimant may signal a preliminary intent to apply for benefits" in three ways).
606. 38 C.F.R. § 3.155(b).
607. *Id.*
608. *See Military-Veterans Advoc.*, 7 F.4th at 1124 (finding the "veteran members suffered an injury in fact that is fairly traceable to the alleged shortcomings of the challenged regulations").
609. *Id.*
610. *Id.*
611. *Id.* at 1146.

language in § 5110(a)(1) and § 5110(a)(3) inconsistently."[612] § 5110(a)(1) states that an initial claim for benefits "shall not be earlier than the date of receipt of application therefor."[613] § 5110(a)(3) provides that the effective date of a supplemental claim "shall not be earlier than the date of receipt of the supplemental claim."[614] However, VA's regulations only allow for intent to file in § 5110(A)(1) new claims, but do not allow for intent to file in § 5110(a)(3) supplemental claims.[615] The Federal Circuit agreed with PVA and found that the regulation was arbitrary and capricious.[616] The court thus invalidated § 3.155(b).[617]

Since the court has overturned § 3.155(b), veterans will be able to establish or preserve an effective date by filing an intent to file before that of a supplemental claim. This mechanism may give veterans more time to collect their evidence to meet the new and relevant threshold. Additionally, many veterans who filed an intent to file before a supplemental claim may now be able to argue that the intent to file was valid, and their effective date should be earlier.

4. Future of other AMA regulatory challenges

Because of *National Organization of Veterans' Advocates, Inc.* (NOVA) *v. Secretary of Veterans Affairs*,[618] these regulations can now be challenged until 2025, within six years of the finalized regulations.[619] Each of these failed challenges has laid the groundwork for veterans and advocates to challenge other regulations directly through § 502 petitions or through appeals to the Veterans Court.

For instance, § 3.156(b) was challenged by NOVA and PVA, but the court dismissed the challenge due to lack of standing.[620] Under the Legacy System, § 3.156(b) required VA to readjudicate a claim when it received new evidence prior to the expiration of the appeal period.[621] Veterans in the AMA system do not get the benefit of constructive

612. *Id.*; *see also* 38 U.S.C. § 5110(a)(1), (3) (effective dates of a awards).
613. 38 U.S.C. § 5110(a)(3).
614. *See Military-Veterans Advoc.*, 7 F.4th at 1146.
615. *Id.*
616. *Id.* at 1147 (noting the contradictory nature of § 3.155 to other provisions of the regulation).
617. *Id.*
618. 981 F.3d 1360 (Fed. Cir. 2020) (en banc).
619. *Id.* at 1386.
620. *Military-Veterans Advoc.*, 7 F.4th at 1127.
621. 38 C.F.R. § 3.156(b).

receipt, like those in the Legacy System.[622] If a veteran submitted a document within a year of a rating decision but failed to affirmatively appeal, that veteran may have standing to either challenge the rule directly to the Federal Circuit or challenge the rule through the Board and Veterans Court in a later decision.[623] VA's new rule requires the veteran to affirmatively appeal, rather than allow that new document, forcing VA to reconsider the claim.[624] NOVA and PVA's petition has outlined how veterans can challenge this rule as arbitrary and capricious.[625]

In another instance, § 20.202(a) was challenged by Carpenter Chartered, but the court also dismissed the claim due to lack of standing.[626] Section 20.202(a) requires that an appeal to the Board specifically identify the decision and issues with which the veteran disagrees.[627] *Carpenter Chartered* provided a framework to challenge the regulatory language as being plainly inconsistent with the statute.[628] 38 U.S.C. § 7105 states that notice of disagreements "shall identify the specific determination with which the claimant disagrees."[629] The regulation, on the other hand, requires that the NOD identify the specific decision and issue, or issues therein, with which the claimant disagrees.[630] Carpenter Chartered argued that the regulatory language was arbitrary and capricious and inconsistent with the statutory framework.[631] If the Board dismisses an NOD for a missing date or issue, the Board will likely dismiss the NOD based on the regulation. A veteran would likely be in the position to appeal that decision and challenge section 20.202(a) directly to the Veterans Court. Each of

622. *See* Reply Brief of Petitioner & Intervenor at 24–25, Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs., 981 F.3d 1360 (Fed. Cir. 2020) (No. 2020-1321) (articulating that constructive receipt treated evidence that was "received within one year following an initial decision . . . as though it was filed with the underlying claim").

623. *Id.* at 24.

624. *Id.* at 27.

625. *See id.* at 26–27 (arguing that the rule leads to absurd results and forces claimants to file supplemental claims).

626. Military-Veterans Advoc. v. Sec'y of Veterans Affs., 7 F.4th 1110, 1132 (Fed. Cir. 2021).

627. 38 C.F.R. § 20.202(a).

628. Petitioner's Brief at 45–47, Carpenter Chartered v. Sec'y of Veterans' Affs., No. 2019-1685, (Fed. Cir. Aug. 19, 2019).

629. 38 U.S.C. § 7105(b)(2)(A).

630. 38 C.F.R. § 20.202(a).

631. Petitioner's Brief, *supra* note 628, at 46–47.

these petitions will help future advocates as they decide whether, as well as how, to challenge the new AMA regulations.

VIII. *SMITH V. MCDONOUGH* AND REASONABLE EAJA FEES

This year, the Federal Circuit had the opportunity to resolve an issue regarding reasonable compensation for attorneys' work on veterans claims. As the number of veterans' cases represented by attorneys increases every year, the issue of attorney's fees will continue to be one to watch at the court.[632]

In *Smith v. McDonough*,[633] the Federal Circuit addressed compensation for initial review of a veteran's "record before the agency" (RBA) under the Equal Access to Justice Act (EAJA).[634] The EAJA statute awards a prevailing party in litigation against the United States fees and expenses, including attorney's fees, if the position of the United States against the party was not substantially justified.[635]

Mr. Smith received a decision granting him relief at the Veterans Court, and his attorney applied for attorney's fees worth $10,207.27, which included eighteen hours of review of the 9,389-page RBA.[636] The Secretary objected to the amount of time billed for an initial review of the case because Mr. Smith prevailed on only one of seven claims at the Veterans Court.[637] The Veterans Court limited the initial review of the case to six hours of billable time because "counsel's review of the RBA in this case 'presumably pertained to both the prevailing and nonprevailing [*sic*] issues.'"[638] The time the Veterans Court eliminated from the bill were the hours the Veterans Court believed the attorney likely spent reviewing the RBA's unsuccessful claims.[639] To support this decision, the Veterans Court relied on its 2013 decision in *Cline v. Shinseki*.[640] *Cline* involved an attorney's petition for paralegal time spent

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632. For example, in 2018, the number of attorney fee applications filed at the Veterans Court was 3,663. 2018 VET. APP. ANN. REP. 1. In 2019, that number rose to 5,948. 2019 VET. APP. ANN. REP. 1. In 2020, the number was 6,512. 2020 VET. APP. ANN. REP. 1. This trend has been growing since 2012.

633. 995 F.3d 1338 (Fed. Cir. 2021).

634. Equal Access to Justice Act, Pub. L. No. 96-481, § 201, 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C. § 504).

635. *Id.* § 203(a)(1).

636. *Smith*, 995 F.3d at 1341.

637. *Id.* at 1342.

638. *Id.* (alteration in original) (citation omitted).

639. *Id.*

640. 26 Vet. App. 325 (2013).

working on a case.[641] The Veterans Court in *Cline* noted that Mr. Cline's attorney did not seek attorney's fees for unsuccessful issues, but it appeared that the paralegal hours claimed were for both successful and unsuccessful issues; therefore, the court adjusted the fees so as not to award fees for "work spent solely on . . . unsuccessful claims."[642] Relying on this language, the Veterans Court held that "*Cline* clearly supports the notion that some reductions are appropriate for time spent reviewing and annotating the record with regard to nonprevailing issues."[643]

The Federal Circuit reversed this holding of the Veterans Court, finding that the Veterans Court had misinterpreted the EAJA statute.[644] Recognizing that attorneys reviewing a case for the first time have no appreciation for which claims will and will not succeed, the Federal Circuit acknowledged that an "educated guess" on behalf of the counsel requires research into the case.[645] This is undoubtedly true in veterans' cases because, for many veterans, the first time an attorney looks at their case is when they enter the adversarial arena of judicial review, having been represented by non-attorney Veterans Service Organizations before that.[646] Citing to the Supreme Court's decision in *Hensley v. Eckerhart*,[647] the court recognized that, while time spent working on unsuccessful claims may not be recovered by an attorney, "a lawsuit cannot be viewed as a series of discrete claims . . . [and courts] should focus on the significance of the overall relief obtained."[648]

In reversing the Veterans Court's decision regarding recovery for work spent in the initial stages of review, the Federal Circuit held that:

> the law requires that Mr. Smith's counsel be compensated for time that was necessarily expended on the initial review of the record, regardless of whether some of the claims that came from that review ultimately were found not to prevail, if that time was necessary for a successful appeal. Time spent reviewing the record is indispensable

641. *Id.* at 331.

642. *Id.* (quoting Vazquez-Flores v. Shinseki, 26 Vet. App. 9, 15 (2012)).

643. Smith v. Wilkie, No. 17-4391, 2019 WL 6258854, at *3 (Vet. App. Nov. 25, 2019), *rev'd in part*, Smith v. McDonough, 995 F.3d 1338 (Fed. Cir. 2021).

644. *Smith*, 995 F.3d at 1345–46 (observing that the law compensates counsel for time spent on the initial review whether or not the claims ultimately prevailed).

645. *Id.* at 1343.

646. *Id.* at 1345.

647. 461 U.S. 424, 435 (1983).

648. *Smith*, 995 F.3d at 1344 (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)).

> to pursuing any appeal, regardless of how many issues are ultimately appealed and regardless of the degree of success.[649]

Noting that the inquiry should focus on whether the time the attorney spent on the case was "reasonably expended," the Federal Circuit found that the attorney's careful reading and notetaking of the record while reviewing the RBA was a situation in which the time spent on successful and unsuccessful claims could not be differentiated.[650]

This holding is quite reassuring to attorneys representing veterans at the Veterans Court—particularly to those who have had no opportunity to represent the veteran previously. Many hours can be spent reviewing the RBA, which can range from a few hundred pages to upwards of several tens of thousands, to determine which of a veteran's claims have merit and which should be abandoned. Attorney compensation for an entire review of the record at this stage makes sense and will likely encourage a thorough review of a veteran's claims record for every potentially successful issue.

CONCLUSION

The Federal Circuit continues to establish important precedent in veterans benefit cases, focusing on congressional intent, equitable principles and the contours of the adjudicative system. Its decisions are not always unanimous, but always precedential, as the Federal Circuit has exclusive jurisdiction to hear veterans benefit cases.

Incredibly, the Supreme Court granted certiorari in not one—but two—of the Federal Circuit cases discussed in this Area Summary.[651] Veterans advocates eagerly await the Supreme Court's decisions in the *George* and *Arellano* cases discussed above.[652] Our nation's veterans benefit from the robust discussion found in Federal Circuit decisions inspired by zealous representation from veterans advocates. It is our hope this Area Summary assists the veterans legal community as it stays abreast of developments in the law.

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649. *Id.* at 1345.

650. *Id.* at 1345–46.

651. *See* George v. McDonough, 142 S. Ct. 858 (2022); Arellano v. McDonough, No. 21-432, 2022 WL 515866 (Feb. 22, 2022).

652. *See supra* Sections VI.B, V.A.