AREA SUMMARIES

REVIEW OF VETERANS LAW DECISIONS OF THE FEDERAL CIRCUIT, 2022–2023 EDITION

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*In 2022 to 2023, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") continued its conversation with the Court of Appeals for Veterans Claims ("Veterans Court"), Department of Veterans Affairs ("VA"), and veterans to help sculpt the jurisprudence coming from the youngest of the federal courts, the Veterans Court. The Federal Circuit's jurisprudence addressed ten main legal issues: class actions, petitions for writ of mandamus under the All Writs Act, defining standards of proof with the term "results from," the benefit of the doubt doctrine post-*Lynch*, education benefits, less than honorable discharges, the rating schedule, implicit denials, equitable tolling and estoppel, and prejudicial error post-*Tadlock.

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I. *SKAAR* AND LIMITATIONS ON CLASS ACTION IN THE VETERANS COURT

For thirty years, the Veterans Court held that it could not exercise class action authority due to certain jurisdictional limitations.[1] In 2017, that stasis was upended when the Federal Circuit ruled that the Veterans Court had the authority to hear class actions.[2] However, in the short amount of time since that holding, the Federal Circuit has significantly narrowed the Veterans Court's newfound authority. In *Skaar v. McDonough* (*Skaar II*),[3] the Federal Circuit held that class actions in non-All Writs Act cases were limited to claimants who had received Board decisions but not to similarly situated veterans who had not yet appealed to the Board.[4] For this reason, *Skaar II* is a tremendously significant case for considering whether class action in the veterans law context, which the Federal Circuit has construed more narrowly than in other contexts, will have any utility in helping veterans obtain the benefits they deserve.

The *Skaar II* litigation, involving Air Force personnel exposed to ionizing radiation during a cleanup operation in Palomares, Spain, has been ongoing since 2019.[5] *Skaar v. McDonough* (*Skaar III*),[6] decided January 17, 2023, was the latest installment in the case and addressed class certification of the claimants.[7]

In 1966, about 1,400 Air Force personnel, including Victor B. Skaar, participated in a cleanup effort after a B-52 Superfortress bomber collided in midair with a KC-135 refueling tanker that caused the bomber's payload, including four hydrogen bombs, to fall to the ground, detonating conventional (non-nuclear) explosives attached to

1. Monk v. Shulkin (*Monk II*), 855 F.3d 1312, 1320 (Fed. Cir. 2017).
2. *Id.*
3. 48 F.4th 1323 (Fed. Cir. 2022).
4. *Id.* at 1331–32.
5. *Id.* at 1325.
6. 57 F.4th 1015 (Fed. Cir. 2023) (per curiam).
7. *Id.* at 1016.

the bombs.[8] The resulting explosion spewed plutonium dust and material over miles of farmland and villages in Palomares, Spain.[9]

Before separating from the Air Force in 1982, Mr. Skaar learned that his white blood cell count was low.[10] Then, in 1998, Mr. Skaar developed leukopenia, "a blood disorder characterized by a decrease in white blood cell count."[11] Many other airmen involved in the Palomares cleanup operation had developed cancers or other illnesses related to ionizing radiation exposure.[12] Mr. Skaar filed a claim for his leukopenia that VA denied in February 2000 because it was not a radiogenic disease that VA recognized as related to a "radiation-risk activity."[13] Mr. Skaar appealed the decision, and the claim worked its way through multiple administrative appeals before reaching the Veterans Court.[14]

Skaar v. Wilkie (*Skaar I*),[15] decided on December 6, 2019, addressed Mr. Skaar's motion for class certification for similarly situated veterans who were present at the Palomares cleanup.[16] In a 6-3 decision, addressing only the class certification issue, the Veterans Court held that Mr. Skaar and his fellow airmen could be certified as a class to resolve claims related to the 1966 cleanup operation.[17] The Veterans Court held that, pursuant to its authority to entertain class action, its jurisdiction permitted inclusion of veterans in the class who: (1) received Board decisions, and either their 120-day appeal window had not expired or they had already appealed their claims to the Veterans Court (referred to as "present claimants"); (2) filed claims that remained pending before VA but had not yet reached the Board

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8. *Skaar II*, 48 F.4th at 1325–26; Skaar v. Wilkie (*Skaar I*), 32 Vet. App. 156, 167–68 (2019).

9. *Skaar I*, 32 Vet. App. at 168; *see also* Dave Philipps, *Legal Win Is Too Late for Many Who Got Cancer After Nuclear Clean-Up*, N.Y. TIMES (Feb. 11, 2020) https://www.nytimes.com/2020/02/11/us/palomares-air-force-nuclear.html [https://perma.cc/HP7Z-HKQN] (explaining how the conventional explosives on two of the bombs were triggered upon impact and scattered plutonium in farmlands).

10. Philipps, *supra* note 9.

11. *Skaar II*, 48 F.4th at 1326.

12. *See* Philipps, *supra* note 9 (demonstrating how shoveling plutonium-laced soil caused various types of cancer and other radiation-related illnesses in soldiers assigned to Palomares).

13. *Skaar I*, 32 Vet. App. at 168.

14. *Id.* at 166.

15. 32 Vet. App. 156 (2019).

16. *Id.* at 172.

17. *Id.*

(referred to as "present-future claimants"); and (3) had developed a radiogenic condition but had not yet filed a claim (referred to as "future-future claimants").[18] Further, the Veterans Court held that veterans whose claims had been denied but not timely appealed could not be included in the class.[19]

To determine the scope of claimants to include in the class, the Veterans Court relied on the Federal Circuit's decision in *Monk v. Shulkin* (*Monk II*),[20] which established class action authority for the Veterans Court.[21] In *Monk II*, the Federal Circuit challenged the Veterans Court's understanding of its own jurisdictional authority.[22] For thirty years, the Veterans Court had held that it could not exercise class action authority based on the court's jurisdictional statutes.[23] Those statutes limited its review to Board decisions, imposed notice of appeal requirements, and imposed fact-finding restrictions on the court that made class action authority problematic.[24] But the Federal Circuit disagreed with the Veterans Court's interpretation of its authority, arguing that the Veterans Court would not exceed its authority "if, for example, it certified a class that included veterans that had not yet received a Board decision or had not yet filed a notice appealing a Board decision."[25] The Federal Circuit explained that Congress had not intended to remove class action authority for veterans, citing legislative history to support its contention.[26] It also explained that the All Writs Act provided class action authority for the Veterans Court and that Congress had granted the Veterans Court broad discretion to craft rules of practice and procedure for its proceedings.[27]

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18. *Id.* at 172, 179–80.
19. *Id.* at 187–88.
20. 855 F.3d 1312 (Fed. Cir. 2017).
21. *Id.* at 1320–21 (holding that the Veterans Court had the authority to entertain class action even though it had disavowed that authority since its inception).
22. *Id.* at 1320.
23. *Id.*
24. *Id.* (citing Harrison v. Derwinski, 1 Vet. App. 438, 438 (1991)).
25. *Id.*
26. *Id.* at 1320 & n.4 (noting that the Congressional Budget Office estimate stated, "most challenges to regulations are class actions, involving large groups of beneficiaries or potential beneficiaries," which suggests that Congress intended for the Veterans Court to have class action authority (quoting H.R. Rep. No. 100-963, pt. 1, at 41–42 (1988))).
27. *Id.* at 1318.

Relying on *Monk II*, the Veterans Court decided it could include in the class veterans who had not received Board decisions or had not yet filed claims. The Veterans Court stated, "because Mr. Skaar, as class representative, has obtained a final Board decision pursuant to section 7252, the jurisdictional door has been opened, and we may use our other authorities, as explained in *Monk II*, to aggregate Mr. Skaar's claims with those of the remaining class members."[28]

However, the Federal Circuit disagreed. In *Skaar II*, decided September 8, 2022, the Federal Circuit reversed the Veterans Court and vacated class certification.[29] Noting that the Veterans Court misconstrued its decision in *Monk II*, the Federal Circuit held that the Veterans Court could not invoke class action authority unless it had jurisdiction over *each member of the class*.[30] As the Court explained, Congress limited the Veterans Court jurisdiction to review of VA "decisions," and by doing so, necessarily narrowed the Federal Circuit's authority to provide class relief to veterans who had exhausted their administrative appeal remedies (i.e., received a Board decision).[31] In a cursory manner, the Federal Circuit also held that 28 U.S.C. § 1367(a), a statute commonly understood to allow federal courts to resolve state law claims, provided additional authority for federal courts to hear class actions involving future claimants but that Congress had not conferred such authority on the Veterans Court.[32] The Federal Circuit vacated class certification and held that if the Veterans Court were to reconsider class action, it could not include veterans who had not yet received Board decisions and who had not yet filed claims.[33]

In *Skaar III*, decided January 17, 2023, a divided Federal Circuit (7-5) declined petitions for panel rehearing and rehearing en banc.[34] However, Judge Dyk, joined by judges Reyna, Stoll, Cunningham, and

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28. Skaar v. Wilkie (*Skaar I*), 32 Vet. App. 156, 181 (2019).

29. Skaar v. McDonough (*Skaar II*), 48 F.4th 1323, 1332–33 (Fed. Cir. 2022).

30. *Id.*

31. *Id.* at 1333.

32. *Id.* at 1334; *see also* 28 U.S.C. § 1367(a) (explaining the kinds of cases that federal courts have supplemental jurisdiction over). *But see* Adam S. Zimmerman, *Exhausting Government Class Actions*, U. CHI. L. REV. ONLINE ARCHIVE (Oct. 20, 2022), https://lawreviewblog.uchicago.edu/2022/10/20/zimmerman-exhausting-class-actions [https://perma.cc/36AN-AQKW] (arguing that no federal court has ever said that 28 U.S.C. 1367(a) provides a basis to review federal class actions against the government).

33. *Skaar II*, 48 F.4th at 1331, 1334.

34. Skaar v. McDonough (*Skaar III*), 57 F.4th 1015, 1016 (Fed. Cir. 2023) (per curiam).

Stark, authored a vigorous dissent arguing that the majority's decision in *Skaar II* effectively eliminated class action for veterans.[35] It is not surprising that Judges Dyk and Reyna disagreed so vehemently with this recent opinion, as they, along with Judge Newman, were part of the panel that greenlit class actions for claims delayed at the Board in *Monk II*.[36] In *Skaar III*, Judge Dyk first noted that limiting class action to veterans who received Board decisions would do nothing to alleviate the inefficiencies, substantial delays, and long backlogs in the VA system.[37] He further argued that the systemic issue plaguing 1,400 veterans was exactly the type of case that was appropriate for class action because the claims could be aggregated into a singular action.[38]

Second, he disagreed with *Skaar II*'s application of Supreme Court precedent examining class action authority in the Social Security context.[39] The Federal Circuit had cited *Weinberger v. Salfi*,[40] a U.S. Supreme Court case involving Social Security claimants, for the proposition that class certification could not include claimants who had not filed any claims with the Social Security agency.[41] But as Judge Dyk pointed out, *Weinberger* was quickly clarified in *Califano v. Yamasaki*,[42] another Social Security case that held only claimants who would never file a claim with the agency could be excluded from the class, but not potential future claimants.[43]

As for the Federal Circuit's contention that federal district courts rely on supplemental jurisdiction under 28 U.S.C. 1367(a) for class action authority, Judge Dyk succinctly noted that no federal court had ever relied on § 1367 in certifying class actions and that the distinction was meaningless for purposes of determining class action authority for the Veterans Court.[44] He noted that district courts have been certifying class action lawsuits involving potential future claimants long before

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35. *Id.* at 1017 (Dyk, J., dissenting). Judges Dyk, Reyna, and Newman voted in favor of class action in *Monk II*, though Judge Newman did not join his colleagues in their dissent in *Skaar III*. *Id.* at 1016.
36. 855 F.3d 1312, 1314 (2017).
37. *Skaar III*, 57 F.4th at 1016–17 (Dyk, J., dissenting).
38. *Id.* at 1021.
39. *Id.* at 1018–19.
40. 422 U.S. 749 (1975).
41. *Id.* at 753, 763–64.
42. 442 U.S. 682 (1979).
43. *Skaar III*, 57 F.4th at 1019 (Dyk, J., dissenting); *Califano*, 442 U.S. at 704, 706.
44. *Skaar III*, 57 F.4th at 1021.

passage of § 1367.[45] Indeed, the Veterans Justice Review Act[46] ("VJRA") and § 1367 were passed in 1988 and 1990, respectively, and district courts had regularly allowed for Administrative Procedure Act[47] ("APA") style review of aggregated VA decisions prior to the passage of those laws.[48] The VJRA provided more protections to veterans, not less, than claimants filing suit under the APA in other benefits systems, including the Social Security system.[49]

Finally, he argued, the All Writs Act provided authority for class action that was not limited by the Veterans Court's jurisdictional statutes.[50] As the Federal Circuit stated in *Monk II*, "the Veterans Court 'is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'"[51]

On June 20, 2023, the Supreme Court denied petition for certiorari, without comment, leaving the Federal Circuit's *Skaar II* ruling in place.[52] The Veterans Court will decide the merits of Mr. Skaar's claim and may reconsider the class action issue.[53] If the court reconsiders class action, it will be limited to certifying a class within the bounds of its jurisdiction. Pursuant to *Skaar II*, that class will exclude any claimants that have not received Board decisions (i.e., it would exclude past, present-future, and future-future claimants).[54] Given the relatively small number of potential claimants who were injured at

45. *Id.* at 1020.

46. Pub. L. No. 100-687, 102 Stat. 4105.

47. 5 U.S.C. §§ 551–59.

48. Petition for Writ of Certiorari at 16–17, Skaar v. McDonough (Skar II), 48 F.4th 1323 (Fed. Cir. 2023) (No. 22-815) (citing Nehmer v. Dep't of Veterans Aff., 494 F.3d 846, 864–65 (2007) (certifying, in the District Court for the Northern District of California, a class on behalf of thousands of Vietnam veterans who had been denied VA benefits for conditions related to herbicide exposure (e.g., Agent Orange) or who would be eligible to file a claim for benefits in the future).

49. *Id.* at 17.

50. *Skaar III*, 57 F.4th at 1018 (Dyk, J., dissenting).

51. Monk v. Shulkin (*Monk II*), 855 F.3d 1312, 1318 (2017) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943)).

52. Skaar v. McDonough (*Skaar II*), 48 F.4th 1323 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2637 (2023).

53. *Id.* at 1335.

54. *Id.* at 1334.

Palomares (1,400), this would forbode certification of a small class.[55] Indeed, this is the problem highlighted by the dissent in *Skaar III*.[56]

Fortunately for veterans, in response to *Skaar* Congress passed the PACT Act[57] to include claimants who were exposed to radiation in the Palomares, Spain, cleanup incident.[58] Veterans who participated in the cleanup will be presumed to have been exposed for benefits purposes, making it much easier for these veterans to obtain benefits for their injuries.[59]

For several reasons, class action is not the panacea that veterans had hoped would resolve the backlog of cases at VA, nor has it proved to be as substantial a tool as originally imagined for veterans to aggregate claims. First, although *Skaar II* makes clear that the All Writs Act provides statutory authority for the Veterans Court to exercise class action over veterans, including veterans who have not exhausted their administrative remedies, the Veterans Court has historically heard relatively few All Writs cases as compared to other types of appeals.[60] Second, although veterans who meet the Veterans Court's jurisdictional requirements may exercise their right to seek class certification, the pool of potential claimants for such suits is much smaller after *Skaar II*.[61] Finally, federal courts are split on whether they retain jurisdiction to hear general challenges to the constitutionality of statutes after the creation of the Veterans Court, making class actions in courts other than the Veterans Court a slim prospect for veterans.[62] While class action litigation for veterans is still evolving, the latest developments have put great constraints on such suits.

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55. *See id.* at 1335 (stating that the Veterans Court exceeded its jurisdiction by certifying a class that included veterans from Palomares who had not yet filed a claim).

56. *Skaar III*, 57 F.4th at 1021–22 (Dyk, J., dissenting).

57. Pub. L. No. 117-168, 136 Stat. 1759.

58. 38 U.S.C. § 1112(c)(3)(B)(vi); Pub. L. No. 117-168, 136 Stat. 1759 (naming this Act Honoring our PACT Act of 2022 in response to Palomares).

59. *See* 38 U.S.C. § 1112(c)(3)(B)(vi) (presuming any "onsite participation" exposed the veterans to thermonuclear radiation).

60. *Skaar II*, 48 F.4th at 1334); *see also* Godsey v. Wilkie, 31 Vet. App. 207, 225 (2019) (per curiam) (narrowing the settlement class to only those who had not begun an appeal); Michael P. Allen, *The Youngest Federal Court: The United States Court of Appeals for Veterans Claims*, ADMIN. & REGUL. L. NEWS, Spring 2018, at 4, 5 (finding the Veterans Court adjudicated 300 All Writs Act petitions in the previous fiscal year).

61. *Skaar II*, 48, F.4th at 1335.

62. *See* JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10376, AN ARMY OF MANY: VETERANS' BENEFITS CLASS ACTIONS IN THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Skaar is significant because it will limit the effectiveness of class actions for veterans in non-All Writs Act cases, and it will prevent many similarly situated veterans from challenging the same unlawful VA policies.[63] Of course, veterans can still bring challenges involving the processing of cases under the All Writs Act; however, as *Skaar* makes clear, only veterans with Board decisions can challenge the award of benefits through class action.[64] *Skaar* does not spell the end of class action for veterans, but it seriously hampers veterans' access to justice in cases affecting the provision of benefits.[65]

II. EXTRAORDINARY RELIEF THROUGH WRITS OF MANDAMUS

The Federal Circuit issued two major decisions regarding Writs of Mandamus. *Wolfe v. McDonough*[66] limits the ability of the court to intervene in agency decision-making.[67] *Cavaciuti v. McDonough*[68] limits attorney fees from the government when the government resolves the matter, causing the underlying writ to become moot.[69]

A. Background of Writs

28 U.S.C. § 1651, referred to as the "All Writs Act," provides that "(t)he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[70] One type of writ that may be issued is the writ of mandamus, which can compel action by a government employee or curb abuse of governmental discretion.[71] The Supreme Court has recognized that because writs are "among the most potent weapons in the judicial

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4 (2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10376 [https://perma.cc/6PZD-UM7E] (noting that a majority of federal courts believe that they retain jurisdiction to hear constitutional challenges to VA statutes after the creation of the CAVC, but not cases involving "the provision of benefits").

63. Zimmerman, *supra* note 32.

64. *Id.*

65. *See* Monk v. Shulkin (*Monk II*), 855 F.3d 1312, 1318–19 (Fed. Cir. 2017) (discussing class actions in the context of veteran benefits).

66. 28 F.4th 1348 (Fed. Cir. 2022).

67. *Id.* at 1250–51, 1357, 1360.

68. 75 F.4th 1363 (Fed. Cir. 2023).

69. *Id.* at 1366.

70. 28 U.S.C. § 1651(a).

71. U.S. Dep't of Just., Civ. Resource Manual § 215; *see, e.g.*, Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 380 (2004) (establishing that district courts have the authority to review separation-of-powers claims).

arsenal" their use should be limited to "extraordinary causes."[72] Because of the extraordinary nature of the writ, courts require three conditions be met before the issuance of a writ is appropriate:

> 1) "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires."[73]
>
> 2) "the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'"[74]
>
> 3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[75]

With regard to the Veterans Court's use of the writ of mandamus, Congress specifically granted the Veterans Court the power to "compel action of the Secretary [of Veterans Affairs] unlawfully withheld or unreasonably delayed."[76] The Veterans Court has held that its jurisdiction to issue a writ exists if "granting of the petitioner's petition would lead to a [Board] decision over which [we] would have jurisdiction [under 38 U.S.C. § 7252(a)]."[77] The cases in which the Veterans Court may issue a writ of mandamus need not *necessarily* lead to a Board decision, however:

> It is impossible for this court to predict what course petitioner's claim might follow in the future and there is nothing to be gained by engaging in such an exercise. For the resolution of the question at bar, it is sufficient to note only that the inadvertent or intentional administrative delay by the DVA [Department of Veterans Affairs] directly and adversely [a]ffects the potential and prospective appellate jurisdiction of this court. We hold, therefore, that this court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to entertain this petition in aid of its prospective appellate jurisdiction.[78]

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72. Will v. United States, 389 U.S. 90, 107 (quoting *Ex parte* Fahey, 332 U.S. 258, 260 (1947)).

73. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (quoting Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976)).

74. *Id.* at 380 (quoting *Kerr*, 426 U.S. at 403).

75. *Id.* at 381 (citing *Kerr*, 426 U.S. at 403).

76. 38 U.S.C. § 7261(a)(2).

77. Wolfe v. Wilkie, 32 Vet. App. 1, 23 (2019) (quoting *In re* Fee Agreement of Cox, 10 Vet. App. 361, 371 (1997)), *rev'd sub nom.* Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022).

78. Erspamer v. Derwinski, 1 Vet. App. 3, 9 (1990).

Historically, the Veterans Court has most often been called on by claimants in VA's benefits system to order VA to take action on claims waiting for long periods of time for a decision due to VA delay.[79]

B. Wolfe v. McDonough

Wolfe v. McDonough[80] is one of a handful of recent cases that find the courts reviewing decisions originating in the Veterans Health Administration.[81] While *Wolfe* is an interesting example of this fairly new trend, for purposes of this review, *Wolfe* also provides insight into the appropriateness of the Veterans Courts' issuance of writs of mandamus.

Substantively at the heart of *Wolfe* is the decision of the Veterans Court concerning VA's interpretation of reimbursable costs for emergency medical treatment under 38 U.S.C. § 1725.[82] Specifically, Congress prohibited the reimbursement for "any copayment or similar payment that the veteran owes the third party or for which the veteran is responsible under a health-plan contract."[83]

In 2016, the Veterans Court issued a seminal decision, *Staab v. McDonald*,[84] regarding VA's interpretation of § 1725.[85] In *Staab*, the veteran suffered a stroke and heart attack and was taken to a local civilian hospital for treatment.[86] He underwent approximately $48,000 worth of treatment without VA's prior approval.[87] When Mr. Staab sought reimbursement for the portions of his treatment that were not covered by Medicare from VA, VA denied the reimbursement claim because Mr. Staab was also covered by Medicare—a third party insurer.[88] The Veterans Court determined that "Congress intended that veterans be reimbursed [aside from copayments] for the portion

79. *See, e.g.*, Martin v. O'Rourke, 891 F.3d 1338, 1341–42 (Fed. Cir. 2018) (detailing the role of the Veterans Court in hearing claims of unreasonable delay by VA).

80. 28 F.4th 1348, 1350 (Fed. Cir. 2022).

81. *Id.* at 1350–51.

82. 38 U.S.C. § 1725(c); *see Wolfe*, 28 F.4th. at 1350, 1353–54, 1358 (considering the application of the *Staab* decision to Ms. Wolfe's claims); Staab v. McDonald, 28 Vet. App. 50, 51 (2016) (introducing the varying statutory interpretations of § 1725 at issue in *Staab*).

83. 38 U.S.C. § 1725(c)(4)(D).

84. 28 Vet. App. 50 (2016).

85. *See id.* at 53–54 (outlining the central question in *Staab*).

86. *Id.* at 52.

87. *Id.*

88. *Id.*

of their emergency medical costs that is not covered by a third party insurer and for which they are otherwise personally liable."[89]

Based upon *Staab*, VA implemented a change to 38 C.F.R. § 17.1005(a)(5) which read at the time the appellant's claims in *Wolfe* were being considered: "VA will not reimburse a veteran under this section for any copayment, deductible, coinsurance, or similar payment that the veteran owes the third party or is obligated to pay under a health-plan contract."[90] The Veterans Court's decision in *Wolfe* reviewed VA's determination that deductibles and coinsurance payments are equivalent to "copayment or similar payments" under the statute and thus prohibited from reimbursement.[91] The Veterans Court found that equating deductibles and coinsurance to "copayment or similar payments" was contrary to the plain wording of the statute and violated the holding in *Staab*.[92]

In 2018, Amanda Wolfe received a VA Regional Office decision denying repayment of her $202.93 copayment and $2,354.41 coinsurance payment for a non-VA affiliated emergency room visit.[93] Ms. Wolfe filed an appeal of this decision to the Board of Veterans'

89. *Id.* at 55.

90. 38 C.F.R. § 17.1005(a)(5) (2018). The words coinsurance and copayments were added in this update to the regulation as fees that could not be reimbursed by VA. Reimbursement for Emergency Treatment, 83 Fed. Reg. 974, 976–77. (Jan. 9, 2018). In February 2023, this subsection of the regulation was revised to remove the word "coinsurance" from the regulation. 88 F.R. 10835 (2023).

91. Wolfe v. Wilkie, 32 Vet. App. 1, 16–17 (2019) *rev'd sub nom.* Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022).

92. *Id.* at 38.

93. McDonough, 28 F.4th at 1353.

Appeals.[94] While waiting for the Board to decide her case, Ms. Wolfe filed a mandamus petition to the Veterans Court.[95]

Ms. Wolfe's mandamus petition asked the Veterans Court to certify a class of veterans who will be, or have been, denied reimbursement of deductibles or coinsurance payments for emergency care.[96]

In response to Ms. Wolfe's mandamus petition, the Veterans Court:

- Certified the *Wolfe* class to include "[a]ll claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part, on the ground that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible."[97]
- Found that 38 C.F.R. § 17.1005(a)(5) was an invalid regulation because it misinterpreted 38 U.S.C. § 1725's "similar payments" language to include deductibles and coinsurance.[98]
- Invalidated all VA decisions regarding *Wolfe* class members and application of 38 C.F.R. § 17.1005(a)(5) and ordered readjudication of these claims.[99]
- Ordered VA to cease sending out letters that misstated VA's ability to reimburse for emergency care costs and ordered VA to file

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94. *Id.* For a discussion of the Veterans Court's adoption of case-or-controversy requirement from Article III of the U.S. Constitution see Mokal v. Derwinski, 1 Vet. App. 12, 14 (1990) ("We recognize that these courts adopted the case or controversy restraint based on sound policies and constitutional considerations, and while the Court of Veterans Appeals is not bound by the decisions of its sister Article I courts, we accord them great respect."); Bond v. Derwinski, 2 Vet. App. 376, 377 (1992) ("When there is no case or controversy, or when a once live case or controversy becomes moot, the court lacks jurisdiction."); and Cardona v. Shinseki, 26 Vet. App. 472, 474 (2014) ("Although not an Article III court, this Court has adopted the case-or-controversy requirement as a basis for exercising our exclusive jurisdiction in the veterans benefits arena, *see* 38 U.S.C. § 7252, including the requirement that a case be dismissed when it becomes moot during the course of the appeal.").

95. Wolfe v. Wilkie, 32 Vet. App. 1, 19 n.63 (2019) *rev'd sub nom.* Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022).

96. *Id.* at 23.

97. *Id.* at 41.

98. *See* 38 C.F.R. § 17.1005(a)(5) ("VA will not reimburse a veteran under this section for any copayment, deductible, or similar payment that the veteran owes the third party or is obligated to pay under a health-plan contract."); Wolfe v. Wilkie, 32 Vet. App. 1, 41 (2019) *rev'd sub nom.* Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022).

99. *See* 38 C.F.R. § 17.1005(a)(5) ("VA will not reimburse a veteran under this section for any copayment, deductible, or similar payment that the veteran owes the third party or is obligated to pay under a health-plan contract."); *Wolfe*, 32 Vet. App. at 41.

> with the Veterans Court a plan to inform veterans of the appropriate law regarding reimbursements.[100]

Before ordering this relief, the Veterans Court reviewed the three criteria necessary to justify the extraordinary step of issuing a writ in this case—namely that Ms. Wolfe had no other adequate means to obtain the relief, her right to the relief was clear and undisputable, and a writ was appropriate under the circumstances.[101]

The Veterans Court's invalidation of 38 C.F.R. § 17.1005(a)(5) established that Ms. Wolfe's right to the writ was "clear and undisputable."[102] In invalidating the regulation, the Veterans Court discussed at length the difference between copayments, deductibles, and coinsurance.[103] The Veterans Court found that in order for a non-reimbursable payment to be "'similar' to a copayment," that payment must be "similar in amount and [of] a fixed nature."[104] Finding that a deductible is not similar to a copayment because "though it is fixed, it is not a relatively small fee," the Veterans Court found that the regulation's inclusion of deductibles as an example of payments similar to a copayment was impermissible.[105]

The Veterans Court also determined that Ms. Wolfe lacked adequate alternative means to obtain relief, the second criterion. Ms. Wolfe's challenge in this case was to the validity of 38 C.F.R. § 17.1005(a)(5), a legal challenge the Board of Veterans' Appeals has no authority to decide.[106] Pursuing a Board decision in her case would be a "useless act," which in itself demonstrates Ms. Wolfe exhausted adequate alternative remedies.[107]

Finally, the Veterans Court determined that granting the remedies asked for in Ms. Wolfe's petition was warranted because it would allow the Veterans Court to "intervene now to prevent enormous bureaucratic waste that would result from VA's continued erroneous adjudications and communications."[108]

The Veterans Court also addressed three arguments from the Secretary that the Veterans Court lacked the jurisdiction to address

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100. *Id.*
101. *Id.* at 34.
102. *Id.* at 39.
103. *Id.* at 36–38.
104. *Id.* at 38.
105. *Id.* at 39.
106. *Id.*
107. *Id.* (quoting Erspamer v. Derwinski, 1 Vet. App. 3, 11 (1990)).
108. *Id.* at 40.

most of Ms. Wolfe's contentions in the vehicle of a mandamus petition. First, the Veterans Court determined that 38 U.S.C. § 7261 does not limit its actions to cases involving a final Board decision.[109] While the statute does allude in many places to Board decisions,[110] there is no requirement in the statute that a final Board decision is necessary for the Veterans Court to exercise jurisdiction. The Veterans Court also noted that reading § 7261 in that manner would ignore previous case law regarding writs of mandamus seeking relief from delay at the Board and Federal Circuit decisions regarding the authority of the Veterans Court in this regard.[111]

Second, the Veterans Court found that the power to invalidate regulations is not exclusive to the Federal Circuit.[112] The Secretary had argued against such a finding and specifically pointed to 38 U.S.C. § 7292(c) which says that the Federal Circuit "shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision."[113] The Veterans Court instead held that limiting the ability to invalidate regulations to the Federal Circuit alone would be contrary to § 7292(a). That section reads, in part, that, "after a decision of the U.S. Court of Appeals for Veterans Court is entered in a case, any party to the case may obtain a review of the decision . . . on a . . . statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision."[114]

Finally, the Veterans Court noted that removing the ability of the Veterans Court to review and invalidate regulations would ultimately

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109. *Id.* at 25.

110. *See* 38 U.S.C. § 7261(d) ("When a *final decision of the Board of Veterans' Appeals* is adverse to a party . . . the Court shall review only questions raised as to compliance with and the validity of the regulation." (emphasis added)).

111. *Wilkie*, 32 Vet. App. at 25–26; *see also* Monk v. Shulkin (*Monk II*), 855 F.3d 1312, 1319–20 (Fed. Cir. 2017) (discussing the authority of Veterans Courts under the All Writs Act); Martin v. O'Rourke, 891 F.3d 1338, 1348 (Fed. Cir. 2018) (adopting a standard for Veterans Courts to apply in considering mandamus petitions founded on unreasonable delay).

112. *Wilkie*, 32 Vet. App. at 26.

113. 38 U.S.C. § 7292(c).

114. § 7261(a)(3); *see Wilkie*, 32 Vet. App. at 26 ("7261(a)(3) . . . clearly provide[s] this Court with the power to invalidate VA regulations.").

limit relief for veterans.[115] Such a result would be contrary to a veteran-friendly system and at odds with the Federal Circuit's decision that the Veterans Court can hear class actions related to regulation challenges.[116]

A dissent, written by Veterans Court Judge Falvey, disagreed with the decision to issue a writ of mandamus in this matter.[117] The dissent discusses the combination of 38 U.S.C. § 7252, which grants the Veterans Court jurisdiction over final Board decisions, and 38 U.S.C. § 7261, which gives the Veterans Court the ability to "decide questions of law and compel unlawfully withheld secretarial action, among other things, in the context of reviewing final Board decisions."[118] For that reason, the dissent argues that writs of mandamus should only issue when the relief sought "has some sort of relationship to a final Board decision."[119] In the dissent's view, to issue the writ of mandamus would allow Ms. Wolfe to sidestep the normal appeals process entirely, which is not permitted by statute or caselaw and is a misuse of the writ process.[120] The dissent also found that Ms. Wolfe failed to meet the requirement that she have a clear and undisputable right to a writ because the issues of terms similar to copayments in the statute and regulation had not yet been decided by the Veterans Court.[121] The dissent noted that while Ms. Wolfe's interpretation of the statute may be correct, it is not "clearly and indisputably correct."[122] Finally, the dissent found that having the Board issue a decision in this case could help to develop the record factually for judicial review and noted that Ms. Wolfe herself planned to continue to pursue a Board decision in her case while applying for the writ of mandamus and had not argued her appeal was being unreasonably delayed.[123]

The Secretary appealed the Veterans Court's decision to issue a writ of mandamus in this matter to the Federal Circuit.[124] The Federal Circuit reversed the Veterans Court and found that mandamus was not

115. *See Wilkie*, 32 Vet. App. at 26–27 ("[N]othing indicates that Congress intended to remove an avenue for relief [from veterans].").
116. *Wilkie*, 32 Vet. App. at 26–27.
117. *Wilkie*, 32 Vet. App. at 41 (Falvey, J., dissenting).
118. *Id.* at 42.
119. *Id.*
120. *Id.* at 43–44.
121. *Id.* at 45.
122. *Id.*
123. *Id.* at 45–46.
124. Wolfe v. McDonough, 28 F.4th 1348, 1350 (Fed. Cir. 2022).

appropriate in Ms. Wolfe's case because she "did not have a clear and indisputable right with respect to deductibles and had other adequate legal remedies by appeal."[125]

In finding that Ms. Wolfe did not have a clear right to reimbursement, the Federal Circuit reviewed the regulation and found that deductibles are excluded from reimbursement, but coinsurance payments are not.[126] The result was reversing the Veterans Court's finding that the regulation's language as to the similarity of deductibles and copayments should be invalidated.[127] The court described the Veterans Court's decision as arguing that "'similar payments' was simply meant to include copayments" and found this to be "untenable."[128] This seems to be a misstatement of the Veterans Court's discussion of deductibles and why they are not similar to copayments. However, the Federal Circuit goes on to explain that deductibles, like copayments, are "fixed quantities which become known once insurance is purchased" as opposed to variable coinsurance payments veterans become aware of only after the expense of care is incurred.[129] The court also asserts that the legislative history supports including deductibles as excluded reimbursable expenses because VA, in testimonial responses to changes to the statute imposed by Congress in 2009, indicated it understood the bill to exclude copayments and deductibles.[130] Congress did not disabuse VA of this understanding at any point in the Congressional record.[131]

With regards to Ms. Wolfe's available alternative legal remedies, the Federal Circuit found that Ms. Wolfe had the option of waiting for a Board decision.[132] Despite the Veterans Court's finding that pursuing a Board decision in her case would be a useless act because the Board cannot invalidate a regulation, the Federal Circuit, echoing the

125. *Id.* at 1360.

126. *Id.* at 1354. The Federal Circuit's decision finding that coinsurance payments are not excludable led to the 2023 change in the regulation removing "coinsurance" from those payments similar to copayments and thus excludable. *Id.* at 1353.

127. *Id.* at 1354–57, 1360 (addressing the Veterans Court's findings regarding the similarity of deductibles and copayments and reversing).

128. *Id.* at 1355.

129. *Id.* at 1356.

130. *Id.*

131. *See id.* at 1356–57 (reviewing the legislative history of § 1725 regarding deductibles).

132. *Id.* at 1357–58.

dissent, pointed to its previous caselaw which rejected that reasoning.[133]

The Federal Circuit agreed with the Veterans Court that both courts are permitted to invalidate regulations but noted that the Federal Circuit under 38 U.S.C. § 502 possesses the unique ability to review the validity of a regulation outside of the specifics of Ms. Wolfe's case.[134] Had Ms. Wolfe pursued review of the regulation by the Federal Circuit under this statutory provision, the courts could have considered the validity of the regulation while the Board decision was pending and without resorting to extraordinary action through a writ.[135] She chose not to pursue this review.[136]

While there is some concern that this decision in *Wolfe* will limit the ability of the Veterans Court to issue writs, the holding in *Wolfe* truly seems to be a decision made on the specifics of the case and not a larger policy decision from the Federal Circuit that the Veterans Court is inappropriately granting writs.[137] Like other veterans, Ms. Wolfe must go through the appeals process, which includes a decision by the Board, to reach the Veterans Court—despite the fact that her appeal turns on the invalidation of a regulation.[138] Her attempt to certify a class through this petition to the court is further hampered by *Skaar II*, which was decided after *Wolfe*, and requires a Board decision for class members to be certified.[139] Additionally, for regulatory challenges, the Federal Circuit itself can be petitioned to review the regulation under

133. *Id.* at 1358 (holding that "[a] lack of agency power to provide a remedy concerning issues beyond its charter does not necessarily relieve a claimant from presenting those issues to an agency as part of a challenge to an agency decision" and discussing the necessity of enforcing the exhaustion doctrine allowing the agency to perform "functions within its special competence" such as record making and the ability "to correct its own errors" (quoting Ledford v. West, 136 F.3d 776, 780 (Fed. Cir. 1998))).

134. *Id.*

135. *Id.* at 1357–58.

136. *Id.* at 1353.

137. *See id.* at 1357–60 (holding that while Wolfe was likely to partially succeed against the agency on the merits, a writ of mandamus was an inappropriate substitute for the appeals process because she failed to prove there were no alternative remedies and that a writ of mandamus cannot be used to enforce stare decisis).

138. *Id.* at 1357–58.

139. Skaar v. McDonough (*Skaar II*), 48 F.4th 1323, 1325, 1331–32 (Fed. Cir. 2022).

its § 502 authority, without application to Ms. Wolfe's case specifically.[140]

While the holding in *Wolfe* is straightforward, there is some confusion about how the Federal Circuit chose to consider the issue of the validity of VA's regulations and deliver its decision. The Federal Circuit in *Wolfe* determined that a writ of mandamus in this case was an inappropriate vehicle for the Veterans Court to use to decide Ms. Wolfe's contentions, which included determining the validity of VA regulation 38 C.F.R. § 17.1005(a)(5).[141] The court reminded Ms. Wolfe that she could have petitioned under § 502 for review of the regulation but did not.[142] Then, inexplicably, the Federal Circuit decided the validity of VA's regulation based upon the same writ the Federal Circuit said the Veterans Court inappropriately issued.[143]

Generally, when interpreting *Wolfe* the Veterans Court has viewed the holding as forbidding the court to "resolve through a petition any matter that can be resolved through an appeal."[144] This does seem to be what the Federal Circuit wanted the Veterans Court to take away from *Wolfe*, but it appears to be a "do as we say, not as we do" philosophy of the use of the writ of mandamus.

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140. 38 U.S.C. § 502 (providing Department of Veterans' Affairs actions reviewable under 5 U.S.C. § 704 as reviewable only by the Federal Circuit); *Wolfe*, 28 F.4th at 1358 (stating the subject the writ of mandamus at issue "constitute[s] the very kind of non-case-specific review of the regulations that is vested exclusively in this court under § 502").

141. *Wolfe*, 28 F.4th at 1354, 1360; *see* C.F.R. § 17.1005(a)(5) (stating that VA will not reimburse copayment deductibles that the veteran owes a third party or is obligated to pay to a health plan).

142. *Wolfe*, 28 F.4th at 1358; *see* 38 U.S.C. § 502 (stating that any VA actions are reviewable by the Federal Circuit).

143. *Wolfe*, 28 F.4th at 1356–57.

144. Sorrentino v. McDonough, No. 23-3690, 2023 WL 4711483, at *2 (Vet. App. July 25, 2023); *see also* Wright v. McDonough, No. 23-0196, 2023 WL 4175143, at *6 (Vet. App. June 26, 2023) ("The Court's mandamus power does not expand its jurisdiction, and a writ of mandamus cannot dictate a particular outcome."); Vuksich v. McDonough, No. 23-3416, 2023 WL 4144980, at *1 (Vet. App. June 23, 2023) ("And finally, the All Writs Act should generally not be used to dictate substantive results such as the sweeping rule petitioner seeks the Court to impose."); Perry v. McDonough, No. 23-0372, 2023 WL 1778199, at *3 (Vet. App. Feb. 6, 2023) ("But a writ of mandamus cannot substitute for the appellate process.").

C. Cavaciuti v. McDonough

The second case the Federal Circuit decided involving writs, *Cavaciuti v. McDonough*,[145] concerned the ability of attorneys who represent claimants filing petitions for writs to the Veterans Court to obtain Equal Access to Justice Act ("EAJA") fees for their legal work.[146]

EAJA, 28 U.S.C. § 2412(d)(1)(A), awards attorneys' fees and expenses to a prevailing party in litigation against the United States where the position of the United States is not substantially justified.[147] The definition of a "prevailing party" in the context of proceedings at the Veterans Court has been contested for years and varies depending upon the posture of the matter before the court.[148] Quite often, a party need not obtain a final judgment in their favor to be considered a "prevailing party."[149] The "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties."[150]

Mr. Cavaciuti received a grant of benefits from the Board of Veterans' Appeals in 2020.[151] The Board remanded the case to the Regional Office to provide an effective date for Mr. Cavaciuti's disability rating.[152] Instead of implementing the Board's grant, the Regional Office denied the claim. Mr. Cavaciuti then filed a petition for a writ of mandamus to the Veterans Court in order to enforce the Board's order.[153] After the petition had been filed, VA awarded Mr. Cavaciuti his benefits and asked the Veterans Court to dismiss the petition as moot.[154] The Veterans Court dismissed the petition, and Mr.

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145. 75 F.4th 1363 (Fed. Cir. 2023).

146. *Id.* at 1365.

147. *See* 28 U.S.C. § 2412(d)(1)(A).

148. For more discussion of recent caselaw regarding the award of EAJA fees, please see Angela Drake, Yelena Duterte, & Stacey Rae Simcox, Area Summary, *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1343, 1390–91 (2020).

149. CRST Van Expedited, Inc. v. E.E.O.C., 578 U.S. 419, 421 (2016).

150. *Id.* (quoting Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989)).

151. Cavaciuti v. McDonough, 75 F.4th 1363, 1365 (Fed. Cir. 2023).

152. *Id.* When a disability is determined to be service-connected, VA assigns a disability rating to that condition. Disability ratings can be found in Part 4 of Title 38 of the Code of Federal Regulations. The purpose of the rating is to compensate a veteran for the severity of the symptoms and how they would impact a person's employment. 38 C.F.R. §§ 4.40–4.150; U.S. DEPART. VETS. AFFAIRS, https://www.va.gov/disability/about-disability-ratings [https://perma.cc/6JU4-RPHJ].

153. *Cavaciuti*, 75 F.4th at 1365.

154. *Id.*

Cavaciuti filed an application for attorneys' fees under EAJA, claiming he was a prevailing party because "the Secretary acted inappropriately."[155]

In denying the application for attorneys' fees, the Veterans Court noted that no award or remand was granted by the court to resolve Mr. Cavaciuti's matter.[156] His matter at the court became moot when VA resolved his issue without court-ordered action. Because "[n]either the Court's order seeking a response [from VA to the petition for writ] nor the ultimate dismissal of his petition was a favorable determination on the merits,"[157] Mr. Cavaciuti could not be considered a prevailing party.[158]

On appeal, Mr. Cavaciuti argued that the Veterans Court should have considered: (1) whether Mr. Cavaciuti's requested relief was the basis for the dismissal order; (2) whether VA's newly-issued decision implementing the original rating was an admission of liability; (3) whether VA's new decision was voluntarily made or was the result of the filing of the writ petition; and (4) whether the dismissal order "materially changed the parties' legal relationship by requiring the government to provide . . . relief."[159] The Federal Circuit affirmed the Veterans Court, holding that "an award of a benefit by the agency alone, even if prompted by litigation, is insufficient without a judicial imprimatur."[160] In particular, the court focused on the lack of judicial review and decision on the merits of the parties' positions.[161] The court also noted that, based upon settlement discussions with Mr. Cavaciuti, VA's implementation of the Board decision was voluntary and thus no judicial action materially changed the legal relationship of the parties.[162]

One obvious impact of this decision will be that attorneys may be less likely to help claimants file writs for mandamus unless the attorney has an ongoing relationship with the client. VA's response to the writ of

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155. Cavaciuti v. McDonough, No. 20-8063(E), 2021 WL 6143705, at *2 (Vet. App. Dec. 30, 2021), *aff'd* by 75 F.4th 1363 (Fed. Cir. 2023).

156. *Id.* at *3.

157. *Id.*

158. *Id.*

159. *Cavaciuti*, 75 F.4th at 1366.

160. *Id.* at 1367–68 (first citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 601 (2001); and then citing Vaughn v. Principi, 336 F.3d 1351, 1357 (Fed. Cir. 2003)).

161. *Id.* at 1367.

162. *Id.*

mandamus in *Cavaciuti* is a common one.[163] VA has a well-known pattern of responding to petitions for writs of mandamus by resolving the underlying claim and rendering the petition moot.[164] In an era of massive delay at the Board, some private practitioners increasingly file petitions for writ in order to force VA to answer the Veterans Court's order for a response.[165] Once the case is reviewed by attorneys in VA's Office of General Counsel, the Office of General Counsel can more easily request the Board decide the case and clear up the issues rather than expend resources responding to the court. This results in a faster decision for a claimant and no need for VA to provide a substantive legal response to the Veterans Court on a now moot case.[166] This, of course, also means that the Veterans Court did not issue a ruling regarding the legal relationship of the parties. While this is good news for the veteran because it means his claim is adjudicated, it now prevents the attorney from being paid, since EAJA requires that there be a determination as to the prevailing party. Attorneys who continue to represent the veteran at the agency will still receive fees from the award of benefits and may consider the work at the Veterans Court part of the entire representation of the claimant. However, for attorneys engaged solely to help a claimant petition the Veterans Court,

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163. *See id.* at 1365 (discussing how, once Cavaciuti filed a petition for a writ of mandamus with the Veterans Court, VA successfully moved to stay the proceeding so the parties could discuss resolving the claim).

164. Numerous petitions for writs of mandamus over a two-year period (2022–2023) were rendered moot by VA action. *See, e.g.*, Gray v. McDonough, 36 Vet. App. 117, 118 (2023) (per curiam) (holding motion for writ moot following agency action); Green v. McDonough, No. 23-0111, 2023 WL 2495829, at *2 (Vet. App. July 10, 2023) (same); Donohoo v. McDonough, No. 23-0765, 2023 WL 4414456, at *1 (Vet. App. July 10, 2023) (same).

165. *See, e.g.*, Eric Gang, *How to Get VA to Take Action on Your Appeal*, VET. DISABILITY INFO (Jan. 18, 2015), https://www.veteransdisabilityinfo.com/blog/how-get-va-take-action-your-appeal [https://perma.cc/B4XK-5L3W] (suggesting that a writ of mandamus be filed primarily to spur action from VA, expecting it will be dismissed as moot); Chris Attig, *Another Tool: The Writ of Mandamus in VA Claims*, VET. L. Blog (June 16, 2015), https://www.veteranslawblog.org/writ-of-mandamus-in-va-claims [https://perma.cc/CB6T-ACJ6] (suggesting that even when a writ is denied, the veteran will likely still obtain the relief they seek).

166. One example of a large veterans law firm choosing to file writs is Chisholm, Chisholm & Kilpatrick. Bradley Hennings, *CCK Takes Legal Action Against the Department of Veterans Affairs*, CHISHOLM, CHISHOLM & KILPATRICK VET. L. BLOG (Nov. 20, 2023), https://cck-law.com/blog/cck-law-takes-legal-action-against-department-of-veterans-affairs [https://perma.cc/3UQR-MUSE].

Cavaciuti may mean working for free—something most attorneys do not have the luxury to do regularly.

D. Future of the All Writs Act at the Veterans Court

Of the two decisions in *Wolfe* and *Cavaciuti*, *Cavaciuti*'s disincentivizing of attorneys representing clients filing writs at the Veterans Court is likely to have the most impact. The confusion of *Wolfe*'s issuance on an invalid writ of mandamus seems to have been taken in stride by a majority of the Veterans Court's opinions and will hopefully not cause future confusion on the appropriate use of the All Writs Act.[167] *Cavaciuti*, on the other hand, will serve to make access to judicial review of VA decisions and processes more difficult for pro se veterans seeking legal help to approach the courts for writs of mandamus.[168] This could easily increase the delay the veteran experiences and create more pro se petitions for writ at the Veterans Court, which can take time and resources from court staff to shepherd through the process.

III. RESULTS FROM/OF IS A BUT FOR ANALYSIS

In 2022 and 2023, the Federal Circuit clarified the terms "resulted from," "resulting from," and "result of" in a series of statutes covering veterans' claims.[169] In *Long v. McDonough*,[170] the court applied the term "result of" under 38 C.F.R. § 3.310(a) when considering symptoms related to the treatment of a service-connected condition.[171] In the landmark decision *Spicer v. McDonough*,[172] the court defined the term "resulting from" under 38 U.S.C. § 1110, which provides compensation for service-connected injuries, in the context of a situation where the medication prescribed for a service-connected condition precludes

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167. *See* Wolfe v. McDonough, 28 F.4th 1348, 1357–58 (Fed. Cir. 2022) (holding that a writ of mandamus was an inappropriate vehicle for Ms. Wolfe's claims because she had other adequate remedies for appeal).

168. *See Cavaciuti*, 75 F.4th at 1367 (affirming the Veterans Court's denial of Cavaciuti's application for EAJA attorney fees and expenses when it dismissed his writ of mandamus petition as moot due to VA granting Cavaciuti TDIU status after he filed the writ of mandamus).

169. Spicer v. McDonough, 61 F.4th 1360, 1362 (Fed. Cir. 2023); Carter v. McDonough, 46 F.4th 1356, 1359 (Fed. Cir. 2022); Long v. McDonough, 38 F.4th 1063, 1065 (Fed. Cir. 2022).

170. 38 F.4th 1063 (Fed. Cir. 2022).

171. *Id.* at 1065–66.

172. 61 F.4th 1360 (Fed. Cir. 2023).

treatment for another health issue.[173] In *Spicer*, the court found that the plain meaning of the statute was clear, and the regulation was not necessary to determine the relationship between two conditions.[174] In *Carter v. McDonough*,[175] the court defined the term "result of" in the context of a disability relating to willful misconduct.[176] In each of the cases, the court instructs VA to apply "resulted from" very broadly and go beyond proximate cause in its application.[177]

A. Long v. McDonough

In the Air Force, Walter Long served as an air traffic control radar repairman.[178] During that time, he worked without hearing protection.[179] In 2009, Mr. Long filed for compensation for hearing loss and tinnitus.[180] He was granted a zero percent rating for hearing loss and ten percent rating for tinnitus.[181] Mr. Long appealed the decision, requesting that he receive an extraschedular rating, because the zero percent rating for hearing loss did not reflect his ear pain that is caused by his hearing aids.[182] Extraschedular ratings are available to veterans when the schedular rating criteria are inadequate to describe the symptoms or severity of the condition, and the disability is exceptional or unusual because of the marked interference with employment.[183]

The Veterans Court did not analyze Mr. Long's condition under extraschedular review, as it found no direct causal link between the pain and his hearing loss.[184] Mr. Long argued that his ear pain did not need to be directly caused by his service-connected condition.[185] Rather, he argued that under 38 C.F.R. § 3.310(a), the ear pain only

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173. *Id.* at 1361–62; *see* 38 U.S.C. § 1110 (describing the basic entitlement to compensation for veterans injured in the line of duty).
174. *Spicer*, 61 F.4th at 1364, 1366.
175. 46 F.4th 1356 (Fed. Cir. 2022).
176. *Id.* at 1359.
177. *Id.*; *Spicer*, 61 F.4th at 1364, 1366; *Long*, 38 F.4th at 1065–66.
178. *Long*, 38 F.4th at 1064.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. 38 C.F.R. § 3.321(b) (2019).
184. *Long*, 38 F.4th at 1064.
185. Long v. Wilkie, 33 Vet. App. 167, 171 (2020), *vacated and remanded sub nom.* Long v. McDonough, 38 F.4th 1063 (Fed. Cir. 2022).

has to be a result of the hearing loss which requires the use of hearing aids and not a direct cause of the hearing loss.[186]

In her opinion, Chief Judge Moore agreed with Mr. Long's assessment that the pain caused by wearing his hearing aids should have been analyzed under an extraschedular review.[187] The pain in his ears could have been caused by his hearing aids, which he used for his service-connected hearing loss condition.[188] The Federal Circuit Court analogized this to an amputee not receiving benefits for leg pain caused by the use of a prosthetic.[189] The Board and the Veterans Court erred when they failed to review Mr. Long's ear pain under the extraschedular analysis.[190]

B. Spicer v. McDonough

Luther Spicer was exposed to hazardous chemicals while he served in the Air Force from 1958–1959.[191] He was later diagnosed with leukemia, and VA recognized that condition as service-connected and granted him one hundred percent.[192] Separately, Mr. Spicer had to use a wheelchair due to arthritis in this knees.[193] Mr. Spicer sought treatment and was unable to get knee surgery because of the medication that he took to manage his leukemia.[194] Because he expected to take the leukemia medication for his entire life, his doctors would not perform the surgery.[195]

Mr. Spicer sought secondary service connection for his knee condition.[196] In addition to providing basic entitlement to compensation for injuries or diseases contracted in the line of duty, 38 U.S.C. § 1110 says the United States shall provide compensation for "aggravation of a preexisting" secondary condition.[197] The regulation provides that when a secondary condition is deemed "service

186. *Long*, 38 F.4th at 1065; 38 C.F.R. § 3.310(a) (2019).
187. *Long*, 38 F.4th at 1065.
188. *Id.* at 1064–65.
189. *Id.* at 1065.
190. *Id.*
191. Spicer v. McDonough, 61 F.4th 1360, 1361 (Fed. Cir. 2023).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See* 38 U.S.C. § 1110.

connected" then it is "proximately due to or the result of a service-connected disease or injury."[198]

The Regional Office and Board denied him service connection.[199] The Board explained that Mr. Spicer's inability to undergo knee surgery because of the side effects of his leukemia treatment was not contemplated by law as a secondary condition.[200] On appeal to the Veterans Court, Mr. Spicer argued that § 1110 only requires a worsening of functionality.[201] The Veterans Court reasoned that § 1110 included an etiological component, where service was the cause or origin of the disability.[202] In Judge Allen's dissent, he argued that the broad use of "resulting from" by Congress requires VA to determine whether one condition flowed from another.[203]

At the Federal Circuit, Judge Stoll began her analysis by looking at the statutory language of § 1110: "[f]or disability resulting from personal injury suffered or disease contracted in line of duty."[204] She reasoned that the plain language of "resulting from" has no qualifiers or context and should be seen as a but-for causation, which is broader than proximate cause.[205] The court found that worsening functionality can be compensated if the condition is not improving because of a service-connected condition.[206] Although the government raised concerns regarding the proper evaluation of these conditions, the court explains that speculation is baked into the but-for causation, and it will be up to VA to determine the proper evaluation.[207]

Since the Federal Circuit found that the plain language of the statute was clear, it found that the regulation § 3.310 was not necessary.[208] The court rejected VA's use of 38 C.F.R. § 3.310(b) in Mr. Spicer's case as being "inconsistent with 38 U.S.C. § 1110."[209]

198. 38 C.F.R. § 3.310 (2022).
199. *Spicer*, 61 F.4th at 1361.
200. *Id.* at 1361–62.
201. *Id.* at 1362.
202. *Id.*
203. *Id.*
204. *Id.* at 1363; 38 U.S.C. § 1110.
205. *Spicer*, 61 F.4th at 1364.
206. *Id.*
207. *Id.* at 1365–66.
208. *Id.* at 1366.
209. *Id.*

C. Carter v. McDonough

Thomas Carter served in the Marine Corps from 1979 to 1980.[210] While in service, Mr. Carter was involved in an incident with the military police.[211] According to the police report, Mr. Carter struck an officer before another struck him in the head with a night stick.[212] In 2009, Mr. Carter filed a claim for his traumatic brain injury.[213] The Board of Veterans' Appeals determined that "the only issue in dispute was whether Mr. Carter's in-service injury was the result of his own willful misconduct."[214] The Board also noted that the willful misconduct "will not be determinative unless it is the proximate cause of injury, disease or death."[215] It was found that the military police's use of force and Mr. Carter's head injury were probable consequences of striking the military police officer.[216]

Under 38 U.S.C. § 105(a) and § 1131, veterans are barred from receiving benefits for a disability if the disability is a result of the veteran's own willful misconduct.[217] Willful misconduct is defined as "an act involving conscious wrongdoing or known prohibited action."[218] It typically "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences."[219] The regulations further discuss that willful misconduct will not be determinative of benefits unless it is the proximate cause of the disability.[220]

Here, Mr. Carter argued that "result of" should not be interpreted to permit an injury resulting from the conduct of another person to be imputed upon the veteran.[221] Specifically, the decisions of another—here, the military police—should not fall into Mr. Carter's lap.[222] The statutory language prevents a veteran from receiving benefits if a

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210. Carter v. McDonough, 46 F.4th 1356, 1358 (Fed. Cir. 2022).
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* (citing 38 C.F.R. § 3.1(n)(3) (2022)).
216. *Id.*
217. 38 U.S.C. §§ 105(a), 1131.
218. 38 C.F.R. § 3.1(n).
219. *Id.*
220. *Id.*
221. *Carter*, 46 F.4th at 1359.
222. *Id.*

"disability is a *result of* the veteran's own willful misconduct."[223] VA defines willful misconduct as deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard for its probable consequences.[224] Further, willful misconduct will not be determinative unless it is a proximate cause of the disability.[225]

Judge Hughes looked to the regulation's requirement of proximate cause, explaining that proximate cause is not interrupted when there is an intervening act by others.[226] The Board understood that Mr. Carter's head injury resulted from the MP striking his head, which was a probable consequence of resisting arrest.[227] It appears that, although the statute uses the term "result of," the Federal Circuit looked to the regulatory language that uses proximate cause language to narrow the causal element.[228] Even though the term proximate cause is used in this case, the Federal Circuit still found that Mr. Carter's head injury was foreseeable based on his actions.[229]

After these cases, especially *Spicer*, veterans should consider how their service-connected conditions impact their lives. Veterans and their advocates should first look at what treatments the veterans are using—medicines, prosthetics, or aids. Veterans should consider how those treatments impact their bodies. Additionally, veterans should investigate whether their service-connected conditions have prevented them from seeking treatment for another condition. If they can connect these effects to service-related injuries, they may be eligible for compensation.

IV. THE BENEFIT OF THE DOUBT DOCTRINE POST-*LYNCH*

Once again, the Federal Circuit revisited the "benefit of the doubt" doctrine in a series of three decisions this past term. These decisions follow the court's 2021 consideration of the doctrine in *Lynch v. McDonough*,[230] which held that applying the benefit of the doubt doctrine is not limited to situations where evidence is in equipoise, but

223. *Id.* (emphasis added) (quoting 38 U.S.C. § 1311(a)).
224. *Id.*
225. *Id.*
226. *Id.* at 1359–60.
227. *Id.*
228. *Id.* (citing 38 C.F.R. § 3.1(n)(3)) (referencing the regulation's requirement that misconduct be the proximate cause).
229. *Id.* at 1361.
230. 21 F.4th 776 (Fed. Cir. 2021) (en banc).

includes situations where evidence is in "approximate balance."[231] While *Lynch* considered the meaning and application of the phrase "approximate balance,"[232] the most recent series of decisions considered how the Board must apply and explain its application of the benefit of the doubt doctrine and the requirements upon the Veterans Court when reviewing these Board decisions.[233] The focus of these appeals is primarily on the language in 38 U.S.C. § 7261 requiring the Veterans Court to "take due account" of the application of the doctrine.[234]

The benefit of the doubt doctrine has been an integral aspect of the adjudication of veterans benefits claims since the American Civil War—well before its codification in the Veterans Judicial Review Act ("VJRA") of 1988.[235] The benefit of the doubt rule is used to place a thumb on the scale for the veteran when weighing evidence regarding "service origin, the degree of disability, or any other point" material to a determination of her claim.[236] It is applied when the evidence gives rise to a "reasonable doubt" concerning the disability's connection to service.[237] VA's regulatory definition of reasonable doubt is "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."[238]

As codified in statute, 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 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.[239]

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231. *Id.* at 781.

232. Angela Drake, Yelena Duterte & Stacey-Rae Simcox, *Review of Veterans Law Decisions of the Federal Circuit, 2021 Edition*, 71 AM. U. L. REV. 1619, 1621, 1624–32 (2022).

233. Mattox v. McDonough, 56 F.4th 1369, 1378 (Fed. Cir. 2023); Roane v. McDonough, 64 F.4th 1306, 1311 (Fed. Cir. 2023); Bufkin v. McDonough, 75 F.4th 1368, 1371 (Fed. Cir. 2023).

234. *See* 38 U.S.C. § 7261.

235. Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990).

236. 38 C.F.R. § 3.102 (2001).

237. *Id.*

238. *Id.*

239. 38 U.S.C. § 5107(b).

The benefit of the doubt statute (38 U.S.C. § 5107) and implementing regulation (38 C.F.R. § 3.102) must be read in conjunction with the statute regarding the jurisdiction of the Veterans Court (38 U.S.C. § 7261) and its review of the benefit of the doubt.[240] It is the interplay of these three that is at the heart of the 2023 decisions from the Federal Circuit.[241]

The three appeals in *Mattox v. McDonough*,[242] *Roane v. McDonough*,[243] and *Bufkin v. McDonough*[244] were a concerted effort by the private bar to clarify how expansively the benefit of the doubt doctrine should be applied by the Veterans Court. The claimants in these cases argued that the Veterans Court was reading 38 U.S.C. § 5107's benefit of the doubt doctrine too narrowly.[245] They argue that the benefit of the doubt should be applied at every stage of evidence development and adjudication, and that the Veterans Court should sua sponte review each step of the adjudication in the record to ensure that this doctrine was applied as necessary.[246] Additionally, when reviewing the application of this doctrine, the Veterans Court should afford no deference to the Board's determination of when the benefit of the doubt doctrine applies or the outcome of applying it to the evidence.[247] A fourth decision, *Thornton v. McDonough*,[248] was issued by the Federal Circuit and relied entirely on the court's rationale in *Bufkin*, but did not add to the discussion of the benefit of the doubt doctrine.[249]

While these decisions do not break new ground in the application of the benefit of the doubt doctrine, they do flesh out the contours of its application in a post-*Lynch* world, not quite to the Veteran's advantage. Additionally, any time the Federal Circuit addresses one specific issue three times in a term, it seems appropriate to examine

240. *Id.* § 7261(b)(1).

241. *See* Bufkin v. McDonough, 75 F.4th 1368, 1371 (Fed. Cir. 2023) (first citing Mattox v. McDonough, 56 F.4th 1369, 1378 (Fed. Cir. 2023); and then citing Roane v. McDonough, 64 F.4th 1306, 1311 (Fed. Cir. 2023)) ("This case is another in a series challenging various aspects of the benefit of the doubt rule.").

242. 56 F.4th 1369 (Fed. Cir. 2023).

243. 64 F.4th 1306 (Fed. Cir. 2023).

244. 75 F.4th 1368 (Fed. Cir. 2023).

245. *Mattox*, 56 F.4th at 1376–77; *Roane*, 64 F.4th at 1308; *Bufkin*, 75 F.4th at 1371.

246. *Bufkin*, 75 F.4th at 1372–73.

247. *Roane*, 64 F.4th at 1309; *Bufkin*, 75 F.4th at 1371, 1373.

248. No. 2021-2329, 2023 WL 5091653 (Fed. Cir. Aug. 9, 2023).

249. *Id.* at *2.

the subject in more detail. The decision in *Bufkin* is pending petition for certiorari to the Supreme Court.[250]

A. Mattox, Roane, *and* Bufkin

The first of the three decisions issued post-*Lynch* was *Mattox*, where the court considered how the Board should determine whether the benefit of the doubt doctrine applies.[251] In *Mattox*, the Board reviewed Mr. Mattox's claim for post-traumatic stress disorder ("PTSD") with two medical opinions in the record.[252] The first opinion was a private medical opinion provided by Mr. Mattox that stated he suffered from PTSD caused by an event during his service.[253] The second was a VA examination, which found that Mr. Mattox did not meet the threshold for a PTSD diagnosis.[254] The Board found that the private medical examination was deficient and had no probative value.[255] It chose to rely on the VA medical examination which the Board determined provided a "more vigorous rationale" for its medical conclusions regarding Mr. Mattox's condition.[256] While doing so, the Board found the benefit of the doubt doctrine was inapplicable in Mr. Mattox's case because the evidence was no longer in approximate balance when the "preponderance of the evidence" negated the PTSD claim.[257] Therefore, there was no need to give Mr. Mattox the advantage of weighing evidence in his favor because the threshold requirement that evidence be in "approximate balance" to apply the doctrine had not been met.[258]

On appeal at the Veterans Court, Mr. Mattox argued that the Board had failed to correctly apply 38 U.S.C. § 5107's benefit of the doubt doctrine.[259] The positive evidence for the service-connection of Mr. Mattox's PTSD (the private medical opinion) was one piece of evidence balanced by one negative piece of evidence (the VA examination).[260] Therefore, Mr. Mattox argued, the evidence was in

250. Petition for Writ of Certiorari, *Bufkin*, 75 F.4th 1368 (No. 23-713).
251. *Mattox*, 56 F.4th at 1371, 77.
252. *Id.* at 1371–72.
253. *Id.* at 1371.
254. *Id.*
255. *Id.* at 1372.
256. *Id.*
257. *Id.* at 1371.
258. *Id.* at 1372.
259. *Id.* at 1373.
260. *Id.*

approximate balance (or in this instance, in equipoise—equal, with one piece of evidence on each end of the scale).[261] Mr. Mattox argued that this would require the Board to apply the benefit of the doubt doctrine, give him the advantage in the weighing of the evidence, and resolve the claim in his favor.[262] The Veterans Court affirmed the Board's decision, disagreeing with Mr. Mattox's assertion that the evidence was in approximate balance merely because there was one piece of positive evidence on one side of the scale and one piece of negative evidence on the other.[263] The Veterans Court noted that the evidence could not have been in approximate balance because the positive evidence had less probative value (or no probative value in the Board's assessment) in this instance.[264] The Veterans Court summed up its judgment on the weighing of positive and negative evidence by commenting that "one does not assess the question under the benefit of the doubt doctrine merely by counting pieces of evidence. The doctrine considers the *quality* of the evidence, not merely the *quantity*."[265]

On appeal to the Federal Circuit, Mr. Mattox argued that the Veterans Court misinterpreted § 5107(b) in affirming the Board's decision.[266] The Federal Circuit summarized Mr. Mattox's arguments regarding the Board's determination of the applicability of the benefit of the doubt doctrine as follows:

> 1) The Board must identify which pieces of evidence in the record are positive, ie. "supports [] an award of the benefit sought . . . ."[267]
>
> 2) The Board must identify which pieces of evidence in the record are negative, ie. "adverse to an award of the benefit sought . . . ."[268]

Mr. Mattox advanced the argument that the Board should not consider the probative value of any evidence before determining whether the evidence is in approximate balance, requiring the Board to merely count the number of pieces of positive evidence on one side

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261. *See id.* at 1370.
262. *See id.* at 1373.
263. *Id.* at 1374.
264. *Id.*
265. Mattox v. McDonough, 34 Vet. App. 61, 75 (2019), *aff'd* F.4th 1369 (Fed. Cir. 2023).
266. Claimant-Appellant's Principal Brief at 14–27, Mattox v. McDonough, 56 F.4th 1369 (Fed. Cir. 2023) (No. 2021-2175) [hereinafter *Mattox* Brief].
267. *Mattox*, 56 F.4th at 1377.
268. *Id.*; *Mattox* Brief, *supra* note 266, at 24–26.

of the scale and the pieces of negative evidence on the other.[269] Mr. Mattox argued that for the Board to determine probative value, credibility of statements of the claimant, etc., at this point in the process would be adversarial to the claimant, which is antithetical to the non-adversarial nature of the adjudication process.[270]

The Federal Circuit agreed with Mr. Mattox that the Board is required to determine which pieces of evidence in the record are positive and which are negative, although the court declined to require the Board to make an exhaustive and explicit list of each type of evidence.[271] The Board in Mr. Mattox's case complied with the requirement to categorize each piece of evidence, explaining in its reasoning that there was one positive opinion and one negative opinion regarding Mr. Mattox's claim and discussing each.[272] However, the Federal Circuit disagreed with Mr. Mattox's position by holding that it was impermissible to consider the probative value of the evidence at this point in the adjudication to determine if the evidence was in approximate balance.[273] Relying on *Lynch* and other cases, the court found that the Board's determination of whether to apply the benefit of the doubt rule *requires* the Board to review the persuasiveness and probative nature of the evidence:

> "[E]vidence is not in 'approximate balance' . . . and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other." It goes without saying that it cannot be determined whether "the evidence persuasively favors one side or the other" without assigning probative value to the evidence.[274]

Because the Board found that the private medical opinion in Mr. Mattox's case lacked probative value, the evidence was not in approximate balance, and the Board correctly found that the benefit of the doubt doctrine was inapplicable in this instance.[275]

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269. Mr. Mattox also argued that the Board applied a "preponderance" standard to his claims, which is the incorrect standard. *Mattox* Brief at 3. The Court found that while the Board used the word "preponderance" in its explanation, that did not affect the Board's analysis of the claims. *Mattox*, 56 F.4th at 1379.

270. *Mattox* Brief, *supra* note 266, at 26.

271. *Mattox*, 56 F.4th at 1377–78.

272. *Id.* at 1378.

273. *Id.*

274. *Id.* at 1378 (internal citations omitted) (quoting Lynch v. McDonough, 21 F.4th 776, 781–82 (5th Cir. 2021)).

275. *Id.* at 1378–79.

Mattox also addressed a precedential issue relating to the application of the Appeals Improvement and Modernization Act[276] ("AMA") of 2017 to claims that were in process when the Act became effective on February 19, 2019.[277] While this decision does not affect a discussion of the benefit of the doubt doctrine, it would be remiss not to mention that the Federal Circuit in *Mattox* affirmed the Veterans Court decision that if the claimant received a decision on her claim before February 19, 2019, that claim is part of the "legacy" system and exempt from AMA requirements.[278] In Mr. Mattox's case, the issue regarded the more robust notice requirements of the AMA and if the Board decision he received in late 2019, after the implementation of the AMA in February 2019, entitled him to these new notice requirements.[279] The court disagreed and found that VA's regulations make it clear that any rating decision issued before the AMA's implementation date places the claim squarely in the legacy appeal system.[280] In Mr. Mattox's case, he received his initial notice of a decision in 2015, when the Regional Office mailed him the rating decision for his claims.[281]

In *Roane v. McDonough*, the Federal Circuit considered the Veterans Court's scope of review as described in 38 U.S.C. § 7261(b)(1) and its requirements regarding review of the application of 38 U.S.C. § 5107's benefit of the doubt standard.[282]

Mr. Roane's claim for total disability based on individual unemployability benefits was denied by the Board.[283] In the record, there was one VA examiner opinion that indicated Mr. Roane should be able to work in a light physical or sedentary position.[284] Mr. Roane also provided the Board with a private medical opinion indicating that he was unable to work, even in sedentary employment.[285] The Board found the private medical opinion to be "conclusory and lacking persuasive probative value."[286] While the Board's opinion did not

276. Pub. L. No. 115-55, 131 Stat. 1105.
277. *Mattox*, 56 F.4th at 1374; Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105.
278. *Mattox*, 56 F.4th at 1373–74; Veterans Appeals Improvement and Modernization Act of 2017 § 6.
279. *Mattox*, 56 F.4th at 1375–76.
280. *Id.*
281. *Id.* at 1375.
282. *Id.* at 1307.
283. *Id.*
284. *Id.*
285. *Id.* at 1307–08.
286. *Roane*, 64 F.4th at 1308 (internal quotations omitted).

specifically explain why the benefit of the doubt doctrine was inapplicable in Mr. Roane's case, the Veterans Court noted that the Board appropriately considered all evidence and found the private medical opinion lacking in probative value.[287] The Board described this situation as one where the "preponderance of the evidence" was against granting Mr. Roane's claims.[288] Thus, the Board's failure to apply the benefit of the doubt doctrine to Mr. Roane's claims was not in error because the triggering event of the evidence being in "approximate balance" had not occurred.[289]

On appeal to the Federal Circuit, Mr. Roane made two arguments.[290] The first was the argument made in *Mattox*: that § 5107(b) and 38 C.F.R. § 3.102 require the Board to specifically list which pieces of evidence it finds positive and negative and put them on each side of the scale—regardless of the probative value of the evidence—to determine if the benefit of the doubt doctrine is applicable.[291] The Federal Circuit relied upon its decision in *Mattox* to find the Veterans Court made no error in its determination that the Board correctly considered the probative nature of the evidence.[292]

The second argument Mr. Roane made dealt with the Veterans Court's standard of review in these matters under 38 U.S.C. § 7261.[293] The relevant portions of § 7261 follow:

> (a) In any action brought under this chapter, the Court of Appeals for Veterans Claims . . . shall—
>
> . . .
>
> (4) in the case of a finding of material fact adverse to the claimant . . . hold unlawful and set aside or reverse such finding *if the finding is clearly erroneous*.
>
> (b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

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287. Roane v. McDonough, No. 20-3293, 2021 WL 1521566, at *3 (Vet. App. Apr. 19, 2021), *aff'd* 64 F.4th 1306 (Fed. Cir. 2023).

288. *Id.* at *4.

289. *Id.*; 38 U.S.C. § 5107(b) (2018).

290. *Roane*, 64 F.4th at 1308–09.

291. *Id.* at 1308; 38 C.F.R. § 3.102 (2018); *see supra* text accompanying notes 266–70.

292. *Roane*, 64 F.4th at 1309.

293. *Id.*

> (1) take due account of the Secretary's application of section 5107(b) of this title; and
>
> (2) take due account of the rule of prejudicial error.
>
> (c) *In no event* shall findings of fact made by the Secretary or the Board of Veterans' Appeals be *subject to trial de novo* by the Court.[294]

Mr. Roane asserted that, for the Veterans Court to "take due account" of the Secretary's application of the benefit of the doubt standard under § 5107(b), the Veterans Court must conduct an "additional and independent" review which affords no deference to the Board or Secretary's application of the standard.[295] Mr. Roane went on to argue that any deference to the Board's decision regarding the application of § 5107(b) would render the Veterans Court's determination "meaningless."[296]

The Federal Circuit sharply disagreed with Mr. Roane's arguments and held that the Veterans Court is prohibited from making an independent and non-deferential review of the application of § 5107(b) by both § 7261(a)(4), which limits the Veterans Court to reviewing the Board's factual determinations under the "clearly erroneous" standard, and by subsection (c), which prevents de novo review of the facts.[297] Because the Veterans Court's review of the Board's factual determinations regarding the probative value of evidence is constrained by the statute, the Veterans Court appropriately deferred to the Board's determination that Mr. Roane's private medical opinion was less probative than the other evidence of record.[298] Thus, the Veterans Court appropriately reviewed the application of the benefit of the doubt doctrine through the lens of the Board's factual determinations regarding the probative value of the evidence.[299]

The last of the three cases, *Bufkin v. McDonough*, asked the Federal Circuit to again review the Veterans Court's understanding and application of 38 U.S.C. § 7261(b)(1) with regards to review of the Board's application of the benefit of the doubt doctrine.[300] Generally, Mr. Bufkin's argument to the Federal Circuit involved how broadly the

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294. *Id.* at 1309.
295. *Id.*
296. *Id.*; Brief of Appellant at 23, Roane v. McDonough, 64 F.4th 1306 (Fed. Cir. 2023) (No. 2021-2187).
297. *Roane*, 64 F.4th at 1309–10.
298. *Id.* at 1310–11.
299. *Id.*
300. *Id.* at 1369, 1371. *Bufkin v. McDonough*, 75 F.4th 1368, 1371 (Fed. Cir. 2023).

Veterans Court must search the record for the application of the benefit of the doubt in its review.[301]

Mr. Bufkin filed a claim for PTSD, which the Board denied.[302] There were medical records in the record indicating that Mr. Bufkin met the symptomatic criteria for PTSD but that the treating physician was unable to identify the stressor that caused the condition.[303] The record also contained a medical opinion that Mr. Bufkin suffered from PTSD in addition to anxiety.[304] Mr. Bufkin submitted a lay statement regarding his stressor at some point.[305] There were also two VA medical examinations which opined that Mr. Bufkin did not meet the diagnostic criteria for PTSD.[306]

The Board found that the positive medical evidence indicating that Mr. Bufkin suffered from PTSD was not supported by a clear rationale regarding its connection to his service.[307] The Board also found that one of the positive opinions failed to review pertinent military records that may have changed the medical professional's opinion, and, in another instance, the medical professional failed to address the diagnostic criteria of PTSD.[308] Instead, the Board found that the negative evidence, two medical opinions denying Mr. Bufkin suffered from PTSD, were more thorough and provided a more reasoned rationale that related to all of the military and medical evidence in the record.[309]

In its review of the Board's decision, the Veterans Court cited *Mattox* and found that the Board had appropriately explained its finding that the positive evidence was lacking in probative value.[310] The Veterans Court reviewed these factual findings under 38 U.S.C. § 7261(a)(4)'s standard and determined the Board's conclusion regarding the probative value was not clearly erroneous.[311] Thus, based upon the Board's finding that the negative evidence outweighed the positive

301. *Bufkin*, F.4th 1368 at 1371, 1373.
302. *Id.* at 1370.
303. *Id.*
304. *Id.* at 1370.
305. *Id.*
306. *Id.*; Names Redacted By Agency, No. 18-28 418A, 2020 WL 2052283, at *5 (Bd. Vet. App. Feb. 6, 2020), *aff'd* 75 F.4th 1368 (Fed. Cir. 2023).
307. Names Redacted by Agency, 2020 WL 2052283, at *5.
308. *Id.* at *6, *11.
309. *Id.* at *10–11.
310. Bufkin v. McDonough, No. 20-3886, 2021 WL 3163657, at *2, *5 (Vet. App. July 27, 2021), *aff'd* 75 F.4th 1368 (Fed. Cir. 2023).
311. *Id.* at *5 & n.47.

evidence, the Veterans Court held the evidence was not in an approximate balance, and thus the benefit of the doubt doctrine was inapplicable in deciding Mr. Bufkin's case.[312]

On appeal to the Federal Circuit, Mr. Bufkin had two primary arguments.[313] One argument was the same as in *Roane*, i.e., that the Veterans Court's review of the Board's determination regarding § 5107(b) should be non-deferential.[314] The Federal Circuit summarily dispensed with that concern, citing *Roane*.[315] The second argument was that § 7261(b)(1)'s mandate that the Veterans Court "take due account of the *Secretary's* application of [§] 5107(b)" requires the Veterans Court to review the application of the benefit of the doubt doctrine at every step in VA's adjudication of a claimant's claim, not merely its application in the Board's decision.[316] This more expansive review of the application was required because the Secretary takes action and makes decisions throughout the entire process, and the plain language of the statute does not limit the scope of review merely to the Board's final decision.[317]

The Federal Circuit, in a decision authored by Judge Hughes, spent time reviewing the plain language of the statute and other jurisdictional statutes to find that § 7261's mention of "the Secretary" includes the Board—the Secretary and Board are not two separate entities.[318] The court then went on to address whether the Veterans Court must review the entire record and determined that while the Veterans Court *may* review the entirety of the record to determine the appropriate application of § 5107(b), the Veterans Court is not *required* to do so.[319]

In its discussion of whether § 7261(b)(1) would require the Veterans Court to review the entire record, the court looked to § 7261(a), which limits the Veterans Court's jurisdiction by mandating that the Veterans

312. *Id.* at *5.
313. Bufkin v. McDonough, 75 F.4th 1368, 1371 (Fed. Cir. 2023).
314. *Id.* at 1373 (noting that § 7261(c) and § 7261(a) limit the scope of the Veterans Court's review by prohibiting de novo review of material facts, allowing the Veterans Court to only review facts under the clearly erroneous standard); *see supra* text accompanying notes 295–96.
315. *Bufkin*, 75 F.4th at 1373.
316. Claimant-Appellant's Principal Brief at 6–7, Bufkin v. McDonough, 75 F.4th 1368, 1371 (Fed. Cir. 2023) (No. 2022-1089) (emphasis added).
317. *Id.* at 3–4.
318. *Bufkin*, 75 F.4th at 1372.
319. *Id.* at 1372–73.

Court "shall decide" matters "when presented."[320] The court then went on to hold "[t]herefore, if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to sua sponte review the underlying facts and address the benefit of the doubt rule."[321] The court held that § 7261(b)(1) only requires the Veterans Court to review application of the benefit of the doubt rule by the Board and any review of the record is in light of the whether the Board's final determination regarding the doctrine's application was correct.[322] Thus, the decision of the Veterans Court was affirmed.[323]

The evolution of aspects of these cases is instructive in light of *Lynch*. In his concurrence/dissent in the *Lynch* case, Judge Reyna voiced concern that the Board does not, as a matter of course, clearly indicate when it has found evidence persuasive or unpersuasive:

> Where the evidence is close, but the Department of Veterans Affairs (VA) ultimately determines that the evidence "persuasively" forecloses a veteran's claim, the VA can make its determination without explaining that the case was in fact a close call. Put differently, if the VA internally recognizes the evidence is close but finds in the end that the evidence "persuasively" precludes the veteran's claim, the VA does not need to disclose that the evidence may have been "close." There is no requirement to do so, and the majority opinion does nothing to change this. This shields such determinations from meaningful appellate review under § 5107(b) . . . . In my view, the VA should be motivated, if not required, to include a statement and explanation in cases where it concludes the evidence is not in approximate balance but thought the case a close call. I would favor such a requirement to ensure that the question of whether the evidence is in approximate balance under § 5107(b) is meaningfully subject to appellate review in all cases.[324]

The Petitioner's argument in *Mattox* and *Roane* that the Board should be required to specifically explain why each piece of evidence is positive or negative asks the Federal Circuit to address Judge Reyna's concern squarely—a request the court denies by refusing to require the Board to explain its consideration of evidence in detail.[325] While it

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320. 38 U.S.C. § 7621(a); *Bufkin*, 75 F.4th at 1373.
321. *Bufkin*, 75 F.4th at 1373.
322. *Id.* at 1373.
323. *Id.* at 1374.
324. Lynch v. McDonough, 21 F.4th 776, 783 (Fed. Cir. 2023) (Reyna, J., concurring in part and dissenting in part).
325. Mattox v. McDonough, 56 F.4th 1369, 1377–78 (Fed. Cir. 2023).

is understandable that the Federal Circuit would hesitate to require the Board to do more work by listing every piece of evidence it considers, the Board adopting such a policy might help to limit remands from the Veterans Court back to the Board for the Board's failure to provide an adequate statement of reasons for its decision. Quite often, these remands occur because it appears the Board has failed to take into account positive evidence because the Board fails to discuss that evidence and why the evidence does not require a decision in the veteran's favor.[326] The Board has pointed to court remands as one of the primary reasons for its continued and ever-increasing delays in adjudicating claims.[327] If the Board were required to list and comment on all evidence, instances where the Board has overlooked evidence as opposed to disagreeing with the claimant about its probative value would be more obvious.

The Federal Circuit's decision that the Veterans Court should refrain from undertaking a non-deferential analysis of the record aligns with the court's reluctance to allow the Veterans Court to go on fact-finding expeditions in other situations. For example, the Federal Circuit decision in *Tadlock v. McDonough*[328] is a good example of the Federal Circuit drawing a line in the sand regarding expansion of the Veterans Court's powers in this regard.[329]

Regarding the *Bufkin* case specifically, the court's final holding does not require the Veterans Court to dig further into a case than a clearly erroneous review of the Board's factual determinations regarding the probative value of evidence and how that impacts the benefit of the doubt's application—at least not of its own volition.[330] Mr. Bufkin is currently filing a petition for certiorari to the Supreme Court and is

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326. David E. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decisions for Reasons and Bases vs. Clear Error*, 17 RICH. J.L. & PUB. INT. 681, 682 (2014).

327. *See* James D. Ridgway & David S. Ames, *Misunderstanding* Chenery *and the Problem of Reasons-or-Bases Review*, 68 SYRACUSE L. REV. 303, 328 fig.12 (2018) (showing a correlation between a rising Board remand rate and the average days an appeal is pending); Testimony before the House Veterans Affairs Committee's Subcommittee on Disability Assistance and Memorial Affairs Oversight Hearing, 118th Cong. 4–5, 9 (2023), http://docs.house.gov/meetings/VR/VR09/20231129/116596/HHRG-118-VR09-Wstate-LiermannS-20231129.pdf [https://perma.cc/L8TN-383P] (statement of Shane Lierman, Deputy National Legislative Director, Disabled American Veterans).

328. 5 F.4th 1327 (Fed. Cir. 2021).

329. *Id.* at 1333–34, 40 (citing Congress's express limitation on the Veterans Court's ability to make factual findings in the first instance and holding that the Veterans Court exceeded its authority).

330. Bufkin v. McDonough, 75 F.4th 1368, 1372–73 (Fed. Cir. 2023).

joining his case to *Thornton v. McDonough* to appeal this assertion.[331] In *Thornton*, the veteran advanced the argument in *Bufkin* that the Veterans Court must do an "additional separate and independent" review of the record in order to "take due account" of the Secretary's application of the benefit of the doubt rule.[332] The Federal Circuit, in light of *Bufkin*, held that this was not required.[333]

> As the decision in *Bufkin* explains, the statutory command that the Veterans Court "take due account" of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261, and "if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to sua sponte review the underlying facts and address the benefit of the doubt rule."[334]

The impact of these three cases at the moment seems to be small. Ground was neither gained nor lost for how the courts currently review the record to apply the benefit of the doubt doctrine.[335] This of course could change depending on the Supreme Court's decision regarding the petition for certiorari in the *Bufkin* case; a development veterans law advocates should keep an eye on.

V. *CRANFORD*, *BOWLING*, *GROUNDS*: VA BENEFITS AND LESS-THAN-HONORABLE DISCHARGES

Military discharge characterizations continue to be a barrier to veterans obtaining benefits, regardless of whether the discharges were issued under courts-martial or administrative separation.[336] The Federal Circuit recently decided three cases involving veterans with

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331. No. 2021-2329, 2023 WL 5091653 (Fed. Cir. Aug. 9, 2023).

332. *Id.* at *1.

333. *Id.* at *2.

334. *Id.* (citing *Bufkin*, 75 F.4th at 1373–74).

335. *See, e.g.*, *id.* (upholding the precedential statutory interpretation of the benefit of the doubt rule).

336. Under the Uniform Code for Military Justice, commanders have broad discretion over whether and how to adjudicate misconduct ranging from non-punitive administrative measures to trial by court-martial. Trial by court-martial is similar to civilian criminal trial, though with various procedural differences, and a conviction that carries the risk of punitive discharge. Alternatively, a commander may initiate administrative action against a servicemember, up to and including involuntary discharge. *Military Justice Overview*, DEP'T OF DEF. VICTIM & WITNESS ASSISTANCE, https://vwac.defense.gov/military.aspx [https://perma.cc/W5K5-QUN3].

less-than-honorable discharges seeking VA benefits.[337] The cases, though unsuccessful for the veteran claimants, demonstrate novel approaches to challenging the denial of benefits for veterans with less-than-honorable discharges, including a challenge to VA's insanity provision.[338]

When a servicemember leaves the military, the military issues the servicemember a discharge certificate that includes a characterization of the servicemember's military service.[339] This is referred to as a servicemember's "character of service."[340] VA considers this characterization with other factors to determine a servicemember's eligibility for benefits.[341] There are five primary service characterizations: Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct, and Dishonorable.[342] The first three (Honorable, General, and Other Than

337. Cranford v. McDonough, 55 F.4th 1325 (Fed. Cir. 2022); Bowling v. McDonough, 38 F.4th 1051 (Fed. Cir. 2022); Grounds v. McDonough, 72 F.4th 1368 (Fed. Cir. 2023). "Less-than-honorable" is not itself a characterization of discharge, but rather a term used to collectively describe those administrative and punitive discharges which are not an Honorable discharge. *See generally* Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2206, 2211–13 (2021) (providing a general overview of the different types of administrative and punitive discharges and their distinctions).

338. *See, e.g.*, *Bowling*, 38 F.4th at 1053 (arguing unsuccessfully that the insanity-defining regulation was unconstitutionally vague).

339. *See* 10 U.S.C. § 1168 (mandating a discharge certificate or certificate of release from active duty as a prerequisite for discharge from active duty); U.S. DEP'T OF DEFENSE, INSTR. 1336.01, CERTIFICATE OF UNIFORMED SERVICE (DD FORM 214/5 SERIES) 3, 17 (2022) [hereinafter DODI 1336.01] ("[T]he DD Form 214 represents the discharge certificate or certificate of release from all active duty service [and] is the official record of separation and characterization of service.").

340. DODI 1336.01 17; *see also* U.S. DEP'T OF VETERANS AFFS., CLAIMS FOR VA BENEFITS & CHARACTER OF DISCHARGE (2014), https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf [https://perma.cc/9M2H-5LED] (outlining the factors that VA considers when determining the character of discharge for a service member including military service records, circumstances surrounding discharge, length of service, accomplishments during service, etc.).

341. DODI 1336.01 17. *Id.* Per DODI 1336.01, the discharge itself is not characterized, but the servicemember's service is, and the characterization is noted at the time of discharge. VA will then assess the characterization of service and other factors when determining the servicemember's eligibility for benefits.

342. DODI 1336.01 17.

Honorable) are administrative discharges.[343] The last two (Bad Conduct and Dishonorable) are awarded only as a result of conviction by a court-martial, which is a federal prosecution.[344]

Each branch of the military may provide the opportunity for a servicemember facing trial by court-martial to engage in plea bargaining with the government.[345] One path to plea bargaining is to allow the servicemember to request an administrative discharge from service instead of being court-martialed.[346] The benefit of this type of bargain for the servicemember is that federal conviction and discharge by court-martial are avoided. The benefit to the government is that the servicemember is released from service without the expense and effort of engaging in a trial for offenses that are either difficult to prove or not terribly serious.[347] These administrative discharges are referred to as "discharges in lieu of trial by court-martial."[348] The character of service normally appropriate for discharges in lieu of court-martial is the Other Than Honorable discharge (OTH), although a General discharge may be considered in limited circumstances.[349]

Normally, when veterans have received an OTH discharge from service and apply for VA benefits, VA must conduct a "character of discharge" (COD) review to determine if the veteran qualifies as a "veteran."[350] In these COD reviews, VA considers the circumstances around the veteran's discharge and makes a finding as to whether the conduct was "other than dishonorable."[351] If the conduct was dishonorable, the veteran is not eligible for VA benefits.[352] If the

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343. McClean, *supra* note 337, at 2212; *Types of Military Discharge & What They Mean for Veterans*, LAW FOR VETERANS (Jan. 5, 2024), https://lawforveterans.org/work/84-discharge-and-retirement/497-military-discharge [https://perma.cc/H8M4-EUQH].

344. *Id.*

345. *See* Jennifer K. Elsea & Jonathan M. Gaffney, CONG. RSCH SERV., *Military Courts-Martial Under the Military Justice Act of 2016* 20 (2020) (explaining the pretrial process for a court-martial hearing which includes preparing evidence, identifying witnesses, if needed, mental capacity evaluations, and often plea bargaining).

346. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 10-1(a) (Jun. 28, 2021) [hereinafter AR 635-200], https://milreg.com/File.aspx?id=35 [https://perma.cc/6GN9-6UDL].

347. *See* McClean, *supra* note 337, at 2215–16 (describing how speed, efficiency, and promotion of good order and discipline also favor administrative separation over viable alternatives like medical discharges).

348. AR 635-200, *supra* note 346, ch. 10.

349. *Id.* at para. 10-8(a).

350. 38 U.S.C. § 101(2); 38 C.F.R. § 3.12(a) (2022).

351. 38 C.F.R. § 3.12(a).

352. *Id.*

conduct was other than dishonorable, the veteran may be qualified for benefits. Congress has determined that there are certain situations when a veteran's discharge should be automatically considered a bar to benefits (i.e., issued under dishonorable conditions).[353]

Additionally, VA, under the Secretary's broad authority, has issued a list of circumstances leading to discharge that will always be considered dishonorable. This list of regulatory bars to benefits is found at 38 C.F.R. § 3.12(d). If the misconduct that led to a veteran's discharge is listed in § 3.12, VA is not required to conduct a COD review and, after making a formal determination that the veteran's conduct leading to separation bars them from benefits under the regulation, VA can then deny the veteran benefits.

Veterans who are barred from receiving benefits by statute or regulation and who do not obtain a favorable COD review can become eligible for benefits if they are determined to have been insane at the time of the conduct that bars their receipt of benefits.[354] VA's definition of insanity is broader than how the term is defined in criminal law, though VA has limited its application by interpreting the insanity regulation narrowly.[355]

The below cases involve veterans who were barred from receiving benefits but argued that they were entitled to benefits despite their discharge.

A. Cranford v. McDonough

The issue in *Cranford* was whether a discharge characterization of OTH imposed in lieu of a general court-martial was an "undesirable discharge" under 38 C.F.R. § 3.12(d)(1) and disqualifying for benefits.[356] The regulation directs that acceptance of an undesirable discharge to escape trial by general court-martial is considered to have been issued under dishonorable conditions.[357] The veteran challenged the notion that his OTH characterization was synonymous with an undesirable discharge and therefore disqualifying for benefits.[358]

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353. *See* 38 U.S.C. § 5303(a).

354. 38 C.F.R. § 3.12(b); *see also* 38 C.F.R. § 3.354(a) (2022) (defining insanity).

355. U.S. DEP'T OF VETERANS AFFS., OFF. OF GEN. COUNS., VA GENERAL COUNSEL PRECEDENTIAL OPINION NO. 20-97 (1997) [hereinafter VA OGC MEMO], https://www.va.gov/ogc/docs/1997/Prc20-97.pdf [https://perma.cc/4S5U-FSTJ].

356. Cranford v. McDonough, 55 F.4th 1325, 1327 (Fed. Cir. 2022).

357. 38 C.F.R. 3.12(d)(1).

358. *Cranford*, 55 F.4th at 1327.

In 2011, Mr. Cranford was charged with possession of "Spice," an unregulated substance but prohibited in the U.S. Army.[359] Cranford's command recommended that he be tried by a general court-martial.[360] In response, Mr. Cranford elected to enter into a plea bargain that permitted him to be administratively discharged from the military in lieu of a general court-martial.[361] In his written request, Mr. Cranford acknowledged that in requesting an administrative discharge instead of a court-martial he was avoiding the possibility of a bad conduct or dishonorable discharge that could be imposed by a general court-martial.[362] He also acknowledged that this particular type of discharge would be characterized as an OTH discharge, potentially barring him from receiving VA benefits.[363]

After receiving an OTH separation, Mr. Cranford filed a claim for VA benefits.[364] The VA regional office, and later the Board, denied the claim on the grounds that Mr. Cranford had been discharged under dishonorable conditions pursuant to 38 C.F.R. § 3.12(d)(1).[365] On appeal to the Veterans Court, Mr. Cranford argued that 38 C.F.R. § 3.12(d)(1) did not apply because he had received an "OTH" discharge instead of an "undesirable discharge."[366] The Veterans Court rejected his argument, finding that despite the military services' adoption of the term "OTH" discharge and abandonment of the term "undesirable discharge," an OTH discharge was still disqualifying under 38 C.F.R. § 3.12(d)(1).[367]

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359. *Id.* at 1326.

360. *Id.*

361. A general court-martial is equivalent to a felony-level court in the civilian system. The forum is reserved for the most serious offenses and may authorize the most serious punishments. *See generally Military Justice Overview*, *supra* note 336. Through plea-bargaining, a military prosecutor can offer that a service member receive an OTH discharge instead of being tried by a general court-martial with the potential to be found guilty and punished severely. *Id.*

362. *Cranford*, 55 F.4th at 1326.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 1327.

367. *Id.* The military services stopped using the term "undesirable discharge" in 1977, opting instead to use the term "other-than-honorable" discharge. The change resulted in three characterizations of discharge that are still used today: honorable, general, and OTH. *See* McClean, *supra* note 337, at 2262 n.348 (providing a history of the evolution of the three categories of undesirable discharges which are now honorable, general, and other-than-honorable).

The Federal Circuit affirmed. The court reasoned that 38 U.S.C. § 101(2) defines a veteran as a "person who served . . . and who was discharged or released therefrom under conditions other than dishonorable."[368] Apart from statutory bars, the Secretary has discretion to define what conditions fall within "conditions other than dishonorable."[369] VA properly used its discretion to promulgate 38 C.F.R. § 3.12(d)(1), which states that a discharge under dishonorable conditions includes "acceptance of an undesirable discharge to escape trial by general court-martial."[370]

The Federal Circuit rejected the argument that the military departments' shift in terminology from "undesirable" to "OTH" made 38 C.F.R. § 3.12(d)(1) inapplicable to Mr. Cranford.[371] The Federal Circuit pointed to VA's pending proposal to update its regulations to match the military regulations as evidence that the terms were synonymous, as well as VA's four-decade history of treating the terms the same.[372] The Federal Circuit also looked at the military's historical use of the term, finding that the military did not change the class of individuals to whom the term applied when it opted for the new term "Under Other Than Honorable Conditions."[373]

Judge Reyna concurred with the result but not with the majority's rationale.[374] He discussed the discriminatory history of "undesirable discharge" and its disproportionate use in stigmatizing less educated and minority servicemembers.[375] He also found favor with Cranford's argument that the term "undesirable" was an element of 38 C.F.R. § 3.12(d)(1) and stated that the parties should have fleshed out whether that element of the regulation applied to Mr. Cranford. He criticized the government for ignoring that issue and instead focusing only on the fact that Cranford had avoided a general court-martial by receiving an OTH discharge.[376] Nonetheless, Judge Reyna found that Mr. Cranford's plea bargain provided adequate notice to Mr. Cranford

368. *Cranford*, 55 F.4th at 1327 (citing 38 U.S.C. § 101(2)).
369. 38 U.S.C. § 501(a); Garvey v. Wilkie, 972 F.3d 1333, 1339–40 (Fed. Cir. 2020).
370. *Cranford*, 55 F.4th at 1327; 38 C.F.R. § 3.12(d)(1) (2022).
371. *Cranford*, 55 F.4th at 1329.
372. *Id.* at 1328.
373. *Id.* at 1329.
374. *Id.* at 1330 (Reyna, J., concurring).
375. *Id.*
376. *Id.* at 1331 (maintaining that § 3.12(d)(1) has two essential elements: (1) the acceptance of an *undesirable* discharge (2) to escape trial by court-martial and criticizing the majority for not satisfactorily resolving the former).

that acceptance of an OTH discharge could lead to a loss of VA benefits.[377] Thus, the loss of benefits result rested on the plea bargain rather than any conclusion that 38 C.F.R. § 3.12(d)(1) applies to an OTH discharge.

Until VA finalizes its proposed regulations,[378] veterans who received an Other Than Honorable Discharge in lieu of a general court martial are barred from benefits, unless they can show insanity.

B. Bowling v. McDonough

Another approach veterans have taken to overcome the less-than-honorable discharge barrier is to argue that, pursuant to 38 U.S.C. § 5303(b), they were insane at the time of the offense that served as a basis for their discharge and therefore they are not barred by statute or regulation.[379] Such an approach typically requires an expert, such as a VA or private healthcare provider, to opine that a veteran meets the definition of insanity under 38 C.F.R. § 3.354(a).[380] Generally, § 3.354(a) does not require that the person claiming insanity be mentally defective.[381] The standard as written is fairly broad and provides that a person may be considered insane for VA purposes when they behave in a way that is

> a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.[382]

Although the definition is broad on its face, VA has construed it narrowly. In a 1997 memo written in response to a remand decision from the Veterans Court, VA's Office of General Counsel opined on

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377. *Id.* at 1332.

378. In 2020, VA proposed new regulations regarding qualifying discharges. Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge 86 Fed. Reg. 172 (Sept. 9, 2021). VA has not finalized these proposed regulations yet. *Id.* A petition was filed at the Federal Circuit requesting that the court direct VA to finalize regulations pertaining to qualifying discharges. Petition for Writ of Mandamus, *In re* Swords to Plowshares, No. 2024-104 (Fed. Cir Feb. 5, 2024), *mandamus denied.* The Federal Circuit dismissed the petition but indicated that the Petitioners may seek mandamus if VA "fails to take final action by April 15, 2024." *Id.*

379. *See* 38 U.S.C. 5303(b); *see also* 38 C.F.R. § 3.12(b) (2022).

380. *See* 38 C.F.R. § 3.354(a) (2022).

381. *Id.*

382. *Id.*

several of the ambiguous terms and phrases in the insanity definition and ultimately narrowed the definition in several ways.[383] Most significantly, the memo directed VA adjudicators to make their own determinations based on the narrowed definitions provided in the VA OGC memo.[384] Claiming insanity to overcome a less-than-honorable discharge still poses challenges for veterans.[385]

In *Bowling v. McDonough*,[386] rather than hearing an applied challenge to the insanity regulation, the Veterans Court considered a pair of facial challenges to the regulation.[387] The veterans argued that the insanity definition deprived veterans of due process and was constitutionally void for vagueness.[388] The Veterans Court and the Federal Circuit ruled against the veterans but did not directly address whether the regulation resulted in arbitrary and inconsistent decisions, leaving the door open for veterans to raise similar challenges in the future.[389]

At the Veterans Court, the veterans raised three primary complaints, including that the insanity regulation (1) resulted in arbitrary and inconsistent outcomes; (2) created a risk of arbitrary and inconsistent decision making; and (3) failed to provide adequate notice to veterans as to the evidence needed to support a finding of insanity.[390] Rejecting these arguments, the court noted that the veterans had not identified a standard of review for the court to make a finding that the regulation violated due process.[391] Rather, the veterans asked the court to take judicial notice of "extrarecord evidence" that demonstrated the arbitrary and inconsistent decisions resulting from the regulation.[392] For example, the veterans asked the court to take judicial notice of statistics from a publication by veterans advocates, and asked the court to make inferences to establish the inconsistencies in the application

383. Caleb R. Stone, *Making the Best from a Mess: Mental Health, Misconduct, and the "Insanity Defense" in the VA Disability Compensation System*, 90 UMKC L. REV. 661, 668 (2022) (stating that VA OGC held that "personality disorders, minor episodes of disorderly conduct, and eccentricity do not fall within VA's definition of insanity").

384. VA OGC MEMO, *supra* note 355.

385. *E.g.*, Bowling v. McDonough, 33 Vet. App. 385, 398–400 (2021), *aff'd*, 38 F.4th 1051 (Fed Cir. 2022).

386. *Id.*

387. *Id.* at 388 (consolidating the appeals of Mr. Bowling and Mr. Appling).

388. *Id.* at 395.

389. *Id.* at 399–400; *Bowling*, 38 F.4th at 1060.

390. *Bowling*, 33 Vet. App. at 394.

391. *Id.* at 398.

392. *Id.* at 398–99.

of the insanity definition.[393] The court was not willing to make such inferences, stating that judicial notice required the court to establish facts not subject to reasonable dispute and prohibited the court from speculating about statistics.[394] On the notice issue, the court conceded that the regulation was "not a model of clarity," but stated that the veterans had not provided evidence to demonstrate that VA was incapable of applying the regulation or that veterans lacked adequate notice as to the evidence needed for a finding of insanity.[395] The court held that the veterans had not met the high burden required in facial challenges of showing that no set of circumstances existed under which the challenged action would be successful.[396] In short, the court was not willing to consider "wholly unsupported arguments" that were "legally undeveloped or [that] factually rest[ed] on speculation and extra-record evidence."[397]

On appeal to the Federal Circuit, the veterans abandoned their judicial notice argument, arguing instead that the Federal Circuit was required to consider the extrarecord material because it was "futile" to develop facts for a constitutional question that the Board lacked jurisdiction to decide.[398] In other words, the veterans wanted the Federal Circuit to excuse the veterans' failure to put the evidence in the record before the Board because the evidence was only ripe for consideration by the Veterans Court or the Federal Circuit. The Federal Circuit rejected that argument.[399] The court held that just because the Board did not have jurisdiction to invalidate a regulation did not mean the administrative appeals process was futile.[400] As a practical matter, the veterans should have presented evidence to the Board to develop the evidentiary record for later judicial review.[401] The court went on to hold that, without extrarecord evidence, the veterans had not established a prima facia case for constitutional vagueness. That is, they did not show why the elements of the insanity definition, such as, "prolonged deviation from . . . normal behavior," "diseases,"

393. *Id.* at 399.
394. *Id.* at 399–400.
395. *Id.* at 400.
396. *Id.*
397. *Id.* at 401.
398. Bowling v. McDonough, 38 F.4th 1051, 1057 (Fed. Cir. 2022).
399. *Id.* at 1058.
400. *Id.* at 1059 (first citing Ledford v. West, 136 F.3d 776, 780 (Fed. Cir. 1998); and then citing Wolfe v. McDonough, 28 F.4th 1348, 1358 (Fed. Cir. 2022)).
401. *Id.*

or causation, presented any unconstitutional uncertainties that would result in inconsistent decisions or prohibit veterans from establishing insanity.[402] The court further applied a longstanding principle of vagueness law holding that a person to whom a law is not vague as applied cannot assert facial vagueness.[403] The court held that since the regulation was not vague as applied to the veterans, the veterans were prohibited from raising a facial vagueness challenge.[404] Further, because the regulation required a focus on "all the evidence procurable relating to the period involved" for a particular claimant, the longstanding principle of vagueness law required an as-applied challenge or showing before a facial challenge could be made.[405]

Bowling is an important case because, while it left unanswered the question of whether the insanity regulation produces arbitrary or inconsistent outcomes, the Federal Circuit described a clear roadmap for challenging the insanity regulation. First, veterans must demonstrate that the regulation is vague as applied, in conjunction with a facial challenge.[406] Second, veterans must create a record to challenge the regulation prior to appealing to the court.[407] This includes introducing evidence showing arbitrary and inconsistent outcomes involving insanity adjudications, disagreement among adjudicators, or any other evidence demonstrating conflicting outcomes.[408] The record must demonstrate that the insanity definition fails to provide veterans with adequate notice to make a claim of insanity, perhaps through a showing of veterans' failed attempts for insanity consideration.[409] With the proper facts and evidentiary development, advocates could push the courts to truly test the constitutional bounds of the notoriously troublesome regulation and create a pathway to benefits for veterans with mental health issues.

C. Grounds v. McDonough

In *Grounds v. McDonough*,[410] the Federal Circuit reaffirmed VA's authority to issue regulatory bars to benefits to supplement Congress's

402. *Id.* at 1054, 1060.
403. *Id.* at 1061.
404. *Id.* at 1062.
405. *Id.* (citing 38 C.F.R. § 3.354(b) (2022)).
406. *Id.*
407. *Id.*
408. *Id.* at 1061–62.
409. *Id.* at 1060.
410. 72 F.4th 1368, 1370–71 (Fed. Cir. 2023).

statutory bars.[411] Mr. Grounds argued that he was not barred by 38 U.S.C. § 5303(a) to receive VA benefits because he was not AWOL for 180 days and was not discharged pursuant to a court-martial.[412] The Federal Circuit agreed, but said Mr. Grounds was barred under 38 C.F.R. § 3.12(d)(4) because the misconduct leading to his discharge was willful and persistent.[413] Applying the doctrine of stare decisis, the court cited its analysis in *Garvey v. Wilkie*.[414] In *Garvey*, the court analyzed the statutory text and legislative history of 38 U.S.C. § 101(2), specifically the language, "under conditions other than dishonorable," and determined that VA's regulatory bars, including its classification of "willful and persistent misconduct" as dishonorable, were consistent with the language in 38 U.S.C. § 101(2).[415]

Grounds breaks no new ground because it simply reaffirms VA's authority to issue regulatory bars. However, any case involving an agency's interpretation of an ambiguous statute raises the specter of *Chevron U.S.A, Inc. v. Natural Resources Defense Council*.[416] In its 2024 term, the U.S. Supreme Court is scheduled to issue a decision in *Loper Bright Enterprises v. Raimondo*,[417] a federal fishery management case, that may determine the fate of *Chevron* and its impact on federal agencies, including VA.[418] For that reason, *Grounds* and any statutory interpretation case that may implicate *Chevron* could be viewed differently after the Supreme Court issues its decision in *Loper*.

Cranford, *Bowling*, and *Grounds* are a reminder that VA refuses to offer benefits to veterans with less-than-honorable discharges despite the fact that these veterans often suffer from untreated, undiagnosed, and significant mental health issues that are related to their service. It is unconscionable that the character of discharge remains a barrier to vulnerable veterans receiving the support they need. Fortunately, Judge Reyna's concurrence in *Cranford*, noting the discriminatory

411. *Id.* (first citing 38 U.S.C. § 5303(a); and then citing 38 C.F.R. § 3.12(d)(4)).
412. *Id.* at 1371.
413. *Id.* at 1370–71.
414. 972 F.3d 1333 (Fed. Cir. 2020); *Grounds*, 72 F.4th at 1370–71 (citing *Garvey*, 972 F.3d at 1334).
415. *Garvey*, 972 F.3d at 1334.
416. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (setting the test for when a court must defer to an agency's interpretation of a law or statute).
417. 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023) (No. 22-451).
418. *Id.* Oral arguments were held on January 17, 2024. Oral Argument, Loper Bright Enters. v. Raimondo, (No. 22-451), https://www.oyez.org/cases/2023/22-451 [https://perma.cc/KW72-J3F7].

history of administrative discharges,[419] as well as the Federal Circuit's undecided insanity issue in *Bowling*,[420] signal that there could be positive movement on these issues under the right factual circumstances.

VI. *RUDISILL* AND GI BILL BENEFITS FOR VETERANS WITH MULTIPLE PERIODS OF SERVICE

Rudisill v. McDonough[421] is a statutory interpretation case that has garnered a lot of attention because of its impact on more than one million veterans.[422] The issue in *Rudisill* was whether a veteran who has served two separate periods of qualifying service under the Montgomery GI Bill and the Post-9/11 GI Bill is entitled to receive a total of 48 months of education benefits between the two education programs without first exhausting the Montgomery GI Bill benefit.[423]

Mr. Rudisill served three periods of active-duty service between January 2000 and August 2011, first deploying to Iraq as an enlisted person and later to Iraq and Afghanistan as an officer.[424] In all, he served about eight years of active-duty service.[425] During that time, he used twenty-five months and fourteen days of his thirty-six-months of Montgomery education benefits (also known as Chapter 30) for his undergraduate education, which enabled him to return to the Middle East the second time as an officer.[426] At the end of his undergraduate education, he had ten months and sixteen days left of the Montgomery GI Bill.[427]

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419. Cranford v. McDonough, 55 F.4th 1325, 1330 (Fed. Cir. 2022) (Reyna, J., concurring).

420. Bowling v. McDonough, 38 F.4th 1051, 1055 (Fed. Cir. 2022).

421. 143 S. Ct. 2656 (2023).

422. Transcript of Oral Argument at 77, Rudisill v. McDonough, 2023 WL 9375565 (U.S. 2023) (No. 22-888) (providing the rebuttal argument of Mr. Tseytlin on behalf of the Petitioner).

423. *See Rudisill*, 55 F.4th at 887 (reversing the Veteran Court's finding that the educational assistance program does not apply to veterans with multiple years of service).

424. BO v. Wilkie, 31 Vet. App. 321, 326 (2019), *rev'd sub nom.* Rudisill v. McDonough, 55 F.4th 879 (Fed. Cir. 2022). At the Veterans Court, Mr. Rudisill filed the case as a sealed case, and he was only identified as BO in those proceedings. *Id.* at 323.

425. *Id.* at 326.

426. *Id.*

427. *Id.*

After leaving service in 2011, he applied for Post-9/11 GI Bill (also known as Chapter 33) benefits to attend graduate school, making an election for Chapter 33 "in lieu of" Chapter 30 benefits.[428] VA issued a certificate of eligibility for ten months and sixteen days of Post-9/11 benefits, an amount equal to the balance of Mr. Rudisill's Montgomery education benefits.[429]

Mr. Rudisill appealed to the Board, arguing that his multiple periods of service entitled him to the "full potential amount" of Post 9/11 education benefits, and that he was not limited by the unused portion of his Montgomery benefits.[430] The Board disagreed, arguing that Mr. Rudisill's election for Post-9/11 benefits in lieu of Montgomery benefits limited him to the unused balance of his Montgomery benefits.[431]

A split panel of the Veterans Court agreed with Mr. Rudisill, finding that the pertinent GI Bill statute, 38 U.S.C. § 3327, was ambiguous, and that veterans with separate periods of qualifying service were entitled to full benefits under both programs, subject to an aggregate 48-month cap on all benefits.[432] Under 38 U.S.C. § 3327, a veteran electing Post-9/11 benefits in lieu of Montgomery GI Bill benefits is limited to "the number of months of unused entitlement of the individual under chapter 30 of this title, as of the date of the election."[433] The Veterans Court held that the statute only applied to veterans with a single period of service, but that those who established eligibility under two separate periods of service would be subject to a forty-eight-month cap under 38 U.S.C. § 3695.[434]

An en banc panel of the Federal Circuit disagreed, reversing its own three-judge panel decision that had affirmed the Veterans Court decision.[435] The Federal Circuit held that veterans who elected to switch from the Montgomery GI Bill to the more generous Post-9/11 GI Bill must first exhaust their Montgomery GI Bill benefit, and only then could those veterans elect to use the additional twelve months of benefits under the Post-9/11 GI Bill.[436] But if a veteran elected Post-

428. *Id.* at 326–27.
429. *Id.* at 326.
430. Rudisill v. McDonough, 55 F.4th 879, 883 (Fed. Cir. 2022).
431. *Id.* at 888.
432. *BO*, 31 Vet. App. at 324.
433. 38 U.S.C. § 3327(d)(2)(A).
434. *Rudisill*, 55 F.4th at 883.
435. *Id.* at 881.
436. *Id.*

9/11 benefits without first exhausting their Montgomery GI Bill benefits, then they forfeited the additional twelve months of benefits earned under any additional periods of service.[437] The court's rationale rested on finding that 38 U.S.C. § 3327(d) was unambiguous—that any servicemember, regardless of their periods of service, may waive their full Post-9/11 benefits if they elected to switch without first exhausting their Montgomery GI Bill benefit.[438]

On June 26, 2023, the U.S. Supreme Court granted certiorari and oral argument was heard on November 8, 2023. During oral argument, Justice Roberts was perplexed as to why Congress would have intended the law to operate as VA suggested. In one hypothetical, he asked why a veteran who served two tours of duty, before and after 9/11, as Mr. Rudisill had, would be entitled to fewer benefits—only ten months and sixteen days of Post-9/11 GI Bill benefits—than a veteran who served only one tour of duty after 9/11, who would receive thirty-six months of Post-9/11 GI Bill benefits.[439] Justice Gorsuch also appeared sympathetic to Mr. Rudisill, questioning whether there were any historical examples of statutes requiring veterans to exhaust educational benefits under one program before exercising entitlement under a different program.[440]

In April 2024, the Supreme Court reversed the Federal Circuit in a 7-2 decision.[441] In the opinion of the Court, Justice Jackson began with the history of § 3327's coordinating provision, where a veteran's entitlement to Post-9/11 GI Bill benefits may have begun years after they completed their service.[442] Although the Post-9/11 GI Bill was implemented in 2009, entitlement was retroactive to veterans who served after September 11, 2001, meaning many veterans who were already out of service received this new GI Bill.[443] In the circumstance where a veteran had one period of entitlement during this overlapping period, they had the opportunity to elect which GI Bill they would like to use.[444]

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437. *Id.* at 887.
438. *Id.*
439. Transcript of Oral Argument at 48–49, Rudisill v. McDonough, 2023 WL 9375565 (U.S. 2023) (No. 22-888).
440. *Id.* at 30.
441. Rudisill v. McDonough, No. 22-888, slip op. at 18 (U.S. Apr. 16, 2024).
442. *Id.* at 1–2.
443. *Id.* at 2–5.
444. *Id.* at 5–6.

Following, the Court found that § 3327 did not apply to Mr. Rudisill's situation, as he had separate periods of entitlement and was not required to elect one and forfeit the other.[445] The text of the statute set out clear restrictions of concurrent receipt of benefits, but that did not require a veteran to forfeit benefits.[446] Rather, the opinion pointed to § 3322, titled "a bar to duplication."[447] The Court reiterated that Mr. Rudisill is not double dipping and not receiving duplicative benefits, rather he is receiving a benefit for separate periods of service.[448]

Although the Court found the statute to be unambiguous, Justice Jackson ended the opinion with a nod to the veterans canon, expressing that if there was any ambiguity in the statute, the canon would be in favor of Mr. Rudisill.[449] Justice Kavanaugh's concurrence laser focuses on the validity of the veterans canon.[450] He questions the origins of the veterans canon and whether there is value in the canon when the Supreme Court has never used it to change the outcome of a decision.[451] He encourages the Court to address this canon of statutory construction and whether there is a justification for a canon "that favors one group over another."[452] Ultimately, this decision is impactful because, according to the parties, between 30,000 and 1 million veterans will be affected by the Court's ruling, making the case a significant one for veterans with multiple service periods overlapping the two education benefits programs.[453] Furthermore, Justice Kavanaugh's attack on the veterans canon should not be overlooked. His call to action for the Court to scrutinize the canon's underpinnings is the canary in the coal mine that the canon may be targeted in future cases.

VII. INTERPRETING THE RATING SCHEDULE

The Federal Circuit issued several decisions involving VA's Schedule for Rating Disabilities and associated rating provisions, including *National Organization of Veterans' Advocates, Inc. (NOVA) v. Secretary of*

445. *Id.* at 7–8.
446. *Id.* at 8–13
447. *Id.* at 12.
448. *Id.* at 10–14.
449. *Id.* at 18.
450. *Id.* at 19–23 (Kavanaugh, J., concurring).
451. *Id.* at 2–4.
452. *Id.* at 23.
453. Transcript of Oral Argument at 77, Rudisill v. McDonough, 2023 WL 9375565 (U.S. 2023) (No. 22-888).

Veterans Affairs,[454] *Martinez-Bodon v. McDonough*,[455] and *Webb v. McDonough*.[456] The cases are significant because they expound and clarify three earlier decisions of significance: *Kisor v. Wilkie*,[457] *Saunders v. Wilkie*,[458] and *Stankevich v. Nicholson*.[459]

A. Kisor *and* NOVA v. Secretary of Veterans Affairs

The rating schedule lies "[a]t the heart of the government's scheme for awarding disability benefits to veterans".[460] After VA determines that a veteran's illness or injury is connected to service, VA assigns a diagnostic code (DC) that corresponds to a veteran's illness or injury and assigns a rating, from 0 percent to 100 percent, that determines the veteran's disability compensation.[461] The primary issue in *NOVA* involved DC 5055, a knee replacement code.[462] The language of DC 5055 provides the following:

> Prosthetic replacement of knee joint:
>
> For 1 year following implantation of prosthesis
>
> With chronic residuals consisting of severe painful motion or weakness in the affected extremity
>
> With intermediate degrees of residual weakness, pain or limitation of motion rate by analogy to diagnostic codes 5256, 5261, or 5262.[463]

In *Hudgens v. McDonald*,[464] the court held that DC 5055 was ambiguous as to whether it includes partial knee replacements.[465] Interestingly, twelve days before VA's brief was due in *Hudgens*, VA promulgated the "Knee Replacement Guidance" (Guidance) that was

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454. 48 F.4th 1307, 1310 (Fed. Cir. 2022) (interpreting a knee regulation).

455. 28 F.4th 1241, 1242 (Fed. Cir. 2022) (interpreting an undiagnosed mental disability).

456. 71 F.4th 1377 (Fed. Cir. 2023) (interpreting a closely related illness).

457. 139 S. Ct. 2400, 2408 (2019) (giving deference to agencies' reasonable readings of ambiguous regulations).

458. 886 F.3d 1356, 1368 (Fed. Cir. 2018) (holding that pain alone does not constitute a disability).

459. 19 Vet. App. 470, 471–72 (2006) (holding an undiagnosed illness may, under certain conditions, constitute a disability).

460. NOVA v. Sec'y of Veterans Affairs, 48 F.4th 1307, 1310 (Fed. Cir. 2022).

461. *See* 38 C.F.R. § 4.27 (establishing the use of diagnostic code numbers).

462. *NOVA*, 48 F.4th at 1310; 38 C.F.R. § 4.71a (2015).

463. 38 C.F.R. § 4.71a (2015).

464. 823 F.3d 630 (Fed. Cir. 2016).

465. *Id.* at 639–40.

subsequently at issue in *NOVA*.[466] The Guidance stated that DC 5055 applied to total and not partial knee replacements, and announced that an "explanatory note" would be added to DC 5055 to state the same.[467] The court refused to give *Auer* deference to the Guidance because it conflicted with VA's prior interpretation of DC 5055 and because it was a "*post hoc* rationalization" adopted to support VA's interpretation.[468] Thus, in *Hudgens*, the court concluded DC 5055 was ambiguous and remanded the case.[469] Several years after *Hudgens*, VA amended DC 5055 to make it applicable only to veterans with total knee replacements.[470] However, VA continued to use the Guidance to deny benefits to veterans with partial knee replacements who had applied for benefits under the original DC 5055.

NOVA involved a petition to set aside the Guidance that VA used to deny benefits to veterans with partial knee replacements under the original DC 5055.[471] Relying on the Supreme Court's decision in *Kisor*, a case that the Supreme Court had decided in the interim of *Hudgens* and *NOVA*, the Federal Circuit found that the Guidance was arbitrary and capricious and vacated it.[472] In *Kisor*, the Supreme Court upheld the practice of deferring to agencies' reasonable interpretations of ambiguous regulations known as *Auer* deference, but articulated the limits of such deference.[473] The Supreme Court reiterated that judicial deference requires genuine ambiguity, a finding that can only be reached after the exhaustion of all the traditional tools of construction.[474] Further, the interpretation must be a reasonable one that is within the "zone of ambiguity."[475] Even then, *Auer* deference is only applicable if a court determines that the character and context of the agency's interpretation is entitled to controlling weight.[476]

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466. *NOVA*, 48 F.4th at 1310 (citing Agency Interpretation of Prosthetic Replacement of a Joint, 80 Fed. Reg. 42,040 (July 16, 2015)) (providing VA's interpretation of DC 5055).

467. *Id.*

468. *Hudgens*, 823 F.3d at 639.

469. *Id.* at 639–40.

470. 38 C.F.R. § 4.71a.

471. *NOVA*, 48 F.4th at 1313. VA promulgated a new DC 5055 that explicitly applied to total knee replacements that became effective in February 2021. *Id.* at 1311.

472. *Id.* at 1313–14 (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019)).

473. *Kisor*, 139 S. Ct. at 2415.

474. *Id.*

475. *Id.* at 2416.

476. *Id.*

In *NOVA*, the Federal Circuit found that VA's Guidance failed to demonstrate it had controlling weight because it was not "authoritative."[477] That is, the court refused to find that the Guidance was authoritative because the "vast majority" of Board decisions had granted benefits under DC 5055 for partial knee replacements.[478] The court found that the Board decisions represented VA's interpretation and foreclosed the application of *Auer* deference to VA's Guidance.[479] Moreover, the Federal Circuit applied the pro-veteran canon of construction, finding that the veteran's interpretation was "permitted by the text of the regulation," and vacated VA's knee replacement Guidance.[480]

Taken together, *Kisor* and *NOVA* are essential cases for understanding the limits of *Auer* deference. Although *Auer* deference remains a potent agency tool, its use is limited to particular circumstances that will be scrutinized by the courts.

B. Saunders *and* Martinez-Bodon

In *Martinez-Bodon v. McDonough*, Mr. Martinez-Bodon unsuccessfully appealed to the Board and then the Veterans Court a claim for an undiagnosed mental health disability.[481] Though Mr. Martinez-Bodon had not been diagnosed with a mental health disability because his symptoms did not meet the requisite DSM-5 thresholds, he claimed that his mental health condition was secondary to his service-connected diabetes.[482] In arguing that this undiagnosed condition should be recognized by VA, Mr. Martinez-Bodon relied on the Federal Circuit's definition of "disability" in *Saunders v. Wilkie*.[483] In *Saunders*, the Federal Circuit reversed a Veterans Court decision denying service connection to a woman with bilateral knee pain but without an underlying diagnosis.[484] In that case, the Federal Circuit held that pain that reaches the level of a functional impairment of earning capacity,

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477. *NOVA*, 48 F.4th at 1315–17.
478. *Id.* at 1316–17.
479. *Id.* at 1316.
480. *Id.* at 1317 (quoting Sursely v. Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009)).
481. 28 F.4th 1241, 1242 (Fed. Cir. 2022).
482. *Id.* at 1243.
483. *Id.*; Saunders v. Wilkie, 886 F.3d 1356, 1368 (Fed. Cir. 2018) (defining "disability" as a "functional impairment of earning capacity").
484. *Saunders*, 886 F.3d at 1368.

without an identified disease or injury, could constitute a disability under 38 U.S.C. § 1110.[485]

Refusing to extend *Saunders* to Mr. Martinez-Bodon's situation, the Federal Circuit first noted that the veteran in *Saunders* did not have a recognized diagnosis that corresponded to a condition on the rating schedule.[486] This was not the case for Mr. Martinez-Bodon, who sought a rating under the rating schedule.[487] Turning to the rating schedule, the court found that 38 C.F.R. § 4.125(a) requires that a veteran must have a diagnosed mental disorder before a veteran can be rated under 38 C.F.R. § 4.130.[488]

The case establishes that an undiagnosed mental disorder, even one that may cause mental pain and anguish for the veteran that results in functional impairment, does not rise to the level of a disability because 38 C.F.R. § 4.125 and 38 C.F.R. § 4.130 specifically require the diagnosis of a mental disorder for the veteran to be rated.[489] In other words, the *Saunders* definition of "disability" for § 1110 purposes, defined as functional impairment rather than the underlying cause of the impairment, is distinct from the requirements that apply to veterans with mental health disorders because of the particular rating schedule regulations for those veterans.[490] This dichotomy is plainly inequitable and reinforces the stigma that mental health disabilities are not "real" disabilities and must be treated more skeptically than other disabilities. This is a dangerous schema for VA to impose and should continue to be challenged by veterans' advocates.

C. Stankevich v. Nicholson *and* Webb v. McDonough

Webb v. McDonough[491] involved a rating by analogy.[492] Mr. Webb claimed service connection for erectile dysfunction ("ED"), a disorder that was not listed in VA's schedule of disability ratings at that time.[493] 38 C.F.R. § 4.20 provides for such a situation, instructing that such

485. *Id.*
486. *Martinez-Bodon*, 28 F.4th at 1243.
487. *Id.* at 1243–44.
488. *Id.* at 1244.
489. *Id.* at 1247.
490. *Id.* at 1243.
491. 71 F.4th 1377 (Fed. Cir. 2023).
492. *Id.* at 1378.
493. *Id.* at 1379. VA added ED to the rating schedule in 2021. *See* Schedule for Rating Disabilities; The Genitourinary Diseases and Conditions, 86 Fed. Reg. 54081, 54086 (Sept. 30, 2021).

diseases or injuries should be rated by analogy under a closely related disease.[494] In Mr. Webb's case, the Regional Office rated Mr. Webb's ED under DC 7522, which provides a single compensable disability rating of twenty percent rating for "[p]enis, deformity, with loss of erectile power."[495] The Regional Office rated Mr. Webb as noncompensable (zero percent) because Mr. Webb did not have a penile deformity.[496] The Board and the Veterans Court agreed.[497]

The Federal Circuit disagreed, finding that the Board and the Veterans Court had failed to substantively discuss 38 C.F.R. § 4.20 and two precedential Veterans Court decisions, *Lendenmann v. Principi*[498] and *Stankevich v. Nicholson*.[499] In *Lendenmann*, the Veterans Court articulated a three-factor test for determining when a veteran's disability is closely related to a disability listed on VA's schedule for rating disabilities.[500] Specifically, VA should consider the functions affected, anatomical location, and symptomatology of the veteran's condition as compared to the same factors under the analogous diagnostic code.[501] Subsequently, in *Stankevich*, the Veterans Court held that it was error for the Board to require a diagnosis of arthritis to rate a veteran suffering from undiagnosed joint pain by analogy using DC 5003, the code for arthritis.[502] There, the court said, strictly applying the criteria of the analogous diagnostic code was arbitrary and capricious because it made the analogous rating illusory—such a reading resulted in requiring the veteran to suffer from the analogous condition in order to receive a rating.[503] Relying on *Lendenmann* and *Stankevich*, the Federal Circuit vacated the Veterans Court's decision and directed VA to rate Mr. Webb analogously under DC 7522.[504] That is, the court directed VA to follow § 4.20, apply the three-factor test in *Lendenmann*, and dispense with any deformity requirement.[505]

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494. *Webb*, 71 F.4th at 1378–79 (citing 38 C.F.R. § 4.20 (2022)).
495. *Id.* at 1377–78 (quoting 38 C.F.R. § 4.115b, DC 7522 (2015)).
496. *Id.*
497. Webb v. McDonough, No. 20-8064, 2021 WL 3625395, at *1 (Vet. App. Aug. 17, 2021), *vacated*, 71 F.4th 1377 (Fed. Cir. 2023).
498. 3 Vet. App. 345 (1992).
499. 19 Vet. App. 470 (2006); *Webb*, 71 F.4th at 1381.
500. *Lendenmann*, 3 Vet. App. at 351.
501. *Webb*, 71 F.4th at 1379.
502. *Stankevich*, 19 Vet. App. at 472–73.
503. *Id.*
504. *Webb*, 71 F.4th at 1381–82.
505. *Id.*

In sum, *Webb* makes clear that 38 C.F.R. § 4.20 does not require a veteran to satisfy each criterion of an analogous rating.[506] It also affirms the three-factor test in *Lendemann* that requires VA to consider the functions affected, anatomical location, and symptomatology of the veteran's condition as compared to the same factors under the analogous diagnostic code when choosing an appropriate analogous rating.[507]

The Federal Circuit's recent decisions in *NOVA*, *Martinez-Bodon*, and *Webb* do important work in that they demonstrate the application of key issues decided in *Kisor* (*Auer* deference), *Saunders* (pain as disability), and *Stankevich* (analogous ratings). VA's interpretation and application of the rating schedule are at the heart of veterans' claims, and, for this reason, are often litigated. Familiarization with the rating schedule and its implementing authorities is critical to understanding and correcting errors involving disability ratings.

VIII. IMPLICIT DENIALS

In 2023, the Federal Circuit decided three precedential cases bearing on the scope of the implicit denial doctrine. The recent decisions in *Bean v. McDonough*,[508] *Pickett v. McDonough*,[509] and *Hampton v. McDonough*[510] demonstrate how the Federal Circuit has strengthened implicit denials. These cases provide insight into the future of the doctrine, including the potential impact of the AMA on implicit denials.[511]

A. Brief History of Implicit Denials

Over the last eighteen years, the courts have established the implicit denial doctrine.[512] The doctrine allows VA to deny veterans a benefit without explicit language denying that particular benefit.

The Federal Circuit first remarked on implicit denials in the 2006 decision *Deshotel v. Nicholson*.[513] In that case, Mr. Deshotel filed for

506. *Id.* at 1381.
507. *Id.* at 1379–80.
508. 66 F.4th 979 (Fed. Cir. 2023).
509. 64 F.4th 1342 (Fed. Cir. 2023).
510. 68 F.4th 1376 (Fed. Cir. 2023).
511. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105.
512. *See* Steele v. McDonough, No. 20-0032, 2023 WL 2153686, at *1–2 (Vet. App. Feb. 22, 2023) (discussing the application of the implicit denial doctrine).
513. 457 F.3d 1258, 1260 (Fed. Cir. 2006).

injuries related to a car accident, including a cerebral concussion, dislocated shoulder, and fractured clavicle.[514] VA granted him 20 percent for his shoulder injury but did not grant service connection for the head injury.[515] Fifteen years later, in 1984, Mr. Deshotel applied for residuals of his head injury and an increase for his back and shoulders.[516] In response to the application, VA ordered several examinations, including a psychiatric examination.[517] In 1985, VA granted 10 percent for post-traumatic headaches but did not explicitly address the psychiatric disability.[518] However, it was noted in the decision that there were no psychiatric symptoms.[519]

In 1999, Mr. Deshotel applied for depression.[520] VA granted the claim with the effective date of this new application.[521] Mr. Deshotel requested that the effective date go back to 1984, when the claim for his mental health condition was originally raised and not explicitly decided by VA.[522] The Federal Circuit considered whether the 1985 decision was a final decision as to the psychiatric claim.[523] The court found that even though the 1985 decision did not explicitly deny the psychiatric condition, VA is not required to do so.[524] Specifically, the court looked at whether the veteran should have understood that the claim was denied.[525] Mr. Deshotel should have appealed at the time or filed a CUE claim on the underlying decision.[526] Mr. Deshotel did neither, and the decision from 1985 was final.[527]

In 2009, *Adams v. Shinseki*[528] continued to shape the concept of implicit denials.[529] The Federal Circuit noted that to be an implicit denial it must be clear to a reasonable person that VA's decision expressly referring to one claim is intended to dispose of other claims

514. *Id.* at 1259.
515. *Id.*
516. *Id.*
517. *Id.*
518. *Id.* at 1259–60.
519. *Id.* at 1260.
520. *Id.*
521. *Id.*
522. *Id.*
523. *Id.* at 1261.
524. *Id.*
525. *Id.* at 1262.
526. *Id.*
527. *Id.*
528. 568 F.3d 956 (Fed. Cir. 2009).
529. *Id.* at 958.

as well.[530] Shortly after *Adams*, the Veterans Court took a new direction. In *Cogburn v. Shinseki*,[531] the Veterans Court established a list of factors that must be weighed to determine whether a claim was implicitly denied.[532] In *Cogburn*, the first factor is the specificity of the claims or relatedness of the claims.[533] For instance, if a veteran filed claims for PTSD and depression, VA may find these closely related because they are both mental health conditions. The second factor is the specificity of the adjudication.[534] For the second factor, it is important to consider whether the adjudication alludes to the pending claim in any way and whether it would be reasonable to infer that the other claim is denied.[535] The third factor is how close in time the claims were filed.[536] The final factor is whether the claimant is represented.[537] Considering all four factors will assist VA and the courts in determining whether a claim has been implicitly denied.

Past appellants have argued that the Due Process Clause of the Fifth Amendment is violated by the implicit denial doctrine.[538] Specifically, Cogburn argued that when VA does not expressly deny a claim, the veteran does not have the proper notice, as required by the Due Process Clause, to understand an appeal of the implied denial is necessary. This leads to veterans losing their rights to pursue claims continuously and can lead to lost benefits. Because of the informal and pro-claimant nature of the VA system, the Veterans Court has found that "the Due Process Clause did not require the same kinds of procedures that would be required in a more conventional, adversarial proceeding."[539] Although this appears to be counterintuitive, the courts have explained that the informality of the proceedings leave room for implicit denials.[540]

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530. *Id.* at 964.
531. Cogburn v. Shinseki, 24 Vet. App. 205 (2010).
532. *Id.* at 212.
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.* at 213.
537. *Id.*
538. *See, e.g.*, *id.* at 208.
539. *Id.* at 210 (discussing *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985)).
540. *See id.* at 210–12 (stating that Due Process concerns are lessened considering the pro-claimant nature of the VA system and that the implicit denial doctrine does not itself violate a claimant's Due Process rights).

Over the last two years, the Federal Circuit has reiterated its position on implicit denials in three cases: *Bean v. McDonough*, *Pickett v. McDonough*, and *Hampton v. McDonough*.

B. Bean v. McDonough

In *Bean v. McDonough*, the court determined that the Veterans Court had jurisdiction over a claim that was not explicitly adjudicated by the Board.[541] Mr. Bean originally filed for post-traumatic stress disorder (PTSD) in 1997.[542] The VA examination found that Mr. Bean had a diagnosis of major depressive disorder (MDD) and generalized anxiety, but did not have PTSD.[543] The 1997 decision denied Mr. Bean's claim for PTSD but did not make a mention of his diagnosed MDD or generalized anxiety.[544] As part of VA's duty to assist a veteran, VA must address all reasonably raised claims.[545] So, although Mr. Bean only filed for PTSD, VA had to adjudicate all other reasonably raised issues.[546]

In 2006, Mr. Bean filed for PTSD, MDD, and generalized anxiety.[547] In 2007, VA granted Mr. Bean 30 percent for PTSD, with an effective date of 2006, the date of the most recent application for benefits.[548] Mr. Bean appealed the rating and effective date, back to 1997.[549]

After a couple of appeals, in 2012, the Board granted Mr. Bean seventy percent back to 2006.[550] In this decision, the Board determined that it did not have jurisdiction over the 1997 effective date for MDD.[551] The Board instructed Mr. Bean to file a claim alleging clear and unmistakable error ("CUE") at the Regional Office if he believed that the July 1997 Regional Office decision was improperly decided.[552] The Board did not explain whether the 1997 MDD and generalized anxiety claims were still pending before the Regional Office, but the Regional

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541. Bean v. McDonough, 66 F.4th 979, 981 (Fed. Cir. 2023).
542. *Id.*
543. *Id.*
544. *Id.*
545. Bailey v. Wilkie, 33 Vet. App. 188, 203 (2021).
546. *Bean*, 66 F.4th at 988.
547. *Id.*
548. *Id.*
549. *Id.* at 981–82.
550. *Id.* at 982.
551. *Id.* at 982–83.
552. *Id.*

Office failed to adjudicate.[553] The Board simply stated that the question about Mr. Bean's MDD earlier effective date was not currently before the Board.[554]

Mr. Bean did not appeal this decision to the Veterans Court.[555] Rather, in 2012, Mr. Bean filed for an earlier effective date with the Regional Office, under the clear and unmistakable error theory and as an unadjudicated claim.[556] In the denial, the Regional Office found that Mr. Bean's

> prior claims for service connection for acquired psychiatric disorder to include generalized anxiety, major depression and/or [PTSD] became final on July 18, 1998 and October 7, 1999. There is no evidence of clear and unmistakable error and no evidence that a formal or informal claim was pending.[557]

Mr. Bean appealed to the Board, and the Board dismissed the appeal in its 2019 decision.[558] The Board focused on the fact that Mr. Bean did not appeal the 2012 Board Decision which could not be revisited in the absence of a motion for reconsideration or motion of CUE.[559] Mr. Bean appealed to the Veterans Court.[560] As his appeal before the Veterans Court was pending, Mr. Bean also filed a writ of mandamus requesting that the Regional Office issue a decision on his generalized anxiety and MDD claim which had been pending since 1997.[561] In response to the writ, VA informed the court that the Regional Office had issued a decision as to the unadjudicated MDD claim in April 2020.[562]

Rather than appealing the April 2020 Regional Office decision, Mr. Bean continued to pursue his claim before the Veterans Court, arguing that the Board failed to address the unadjudicated pending claims for generalized anxiety and MDD.[563] In a single judge opinion, the Veterans Court found that the Board erred when it failed to address

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553. *Id.* at 983.
554. *Id.*
555. *Id.*
556. *Id.*
557. *Id.* (citations omitted).
558. *Id.*
559. *Id.*
560. *Id.* at 984.
561. *Id.*
562. *Id.* It is common practice for the Secretary to moot petition for extraordinary relief to resolve the issue. *See* Cooper v. McDonough, No. 23-1090, 2023 WL 2661058, at *1 (Vet. App. Mar. 28, 2023) (stating the Petitioner filed a motion to dismiss contending the matter was moot because relief was granted outside of court).
563. *Bean*, 66 F.4th at 984.

Mr. Bean's contention regarding the unadjudicated pending claim.[564] The Veterans Court acknowledged that the unadjudicated claims were pending before the Board in 2019 and the Board erred in failing to consider them.[565]

The Secretary moved for reconsideration of the Veterans Court single judge opinion.[566] The Veterans Court granted the motion and, in a single judge opinion, concluded that it lacked jurisdiction over Mr. Bean's appeal.[567] The Veterans Court determined that the 2019 Board decision did not actually decide the issue in the decision on appeal, but only decided the effective date for PTSD.[568] The Veterans Court dismissed the case, as it did not have jurisdiction.[569]

Mr. Bean appealed to the Federal Circuit arguing that the court had jurisdiction as to whether the Board erred in failing to address the unadjudicated claims for generalized anxiety disorder and MDD.[570] Mr. Bean argued that the jurisdiction of the Veterans Court extends to matters properly raised before the Board, regardless of whether the Board expressly decided the issues.[571] The Secretary argued that the scope of Mr. Bean's claim and appeal are factual determinations and that the Federal Circuit does not have jurisdiction to review factual findings related to jurisdictional issues.[572]

In the decision by Judge Schall, the Federal Circuit found that it had jurisdiction to determine whether the Veterans Court correctly interpreted the legal requirements for jurisdiction under the Board's jurisdictional statute 38 U.S.C. § 7104 and the Veterans Court's jurisdictional statute 38 U.S.C. § 7252.[573] Under § 7104, Board decisions shall be based on the entire record in the proceedings and consideration of all evidence and material of record. Under § 7252, a prerequisite to Veterans Court jurisdiction is a decision of the Board.[574] The Federal Circuit held that the failure of the Board to consider a

564. *Id.* at 984–85.
565. *Id.* at 981, 984–85.
566. *Id.* at 985.
567. *Id.*
568. *Id.*
569. *Id.*
570. *Id.*
571. *Id.* at 986.
572. *Id.*
573. *Id.* at 987.
574. *Id.* at 988.

claim that was reasonably raised before it constitutes a decision of the Board that can be reviewed by the Veterans Court.[575]

Additionally, the Federal Circuit found that the Veterans Court misinterpreted the pertinent law of both the Federal Circuit and the Veterans Court regarding jurisdiction under 38 U.S.C. § 7252.[576] The Board's failure to decide a claim that is reasonably raised can constitute an implicit decision of the Board, which vests the Veterans Court with jurisdiction.[577] Here, Mr. Bean, following the Board's suggestion in 2012, requested that VA adjudicate the unadjudicated claims from 1997.[578] After being denied, he appealed that decision to the Board.[579] The Board's failure to adjudicate is an implicit decision by the Board that the court can review.[580]

When reviewing a decision by the Board, veterans and their advocates should be cognizant of whether claims have been reasonably raised to the Board and whether the decision by the Board implicitly denied those claims.[581] In the Authors' experience, the Board often fails to issue a decision on reasonably raised issues in the record and it is quite difficult to convince the Board to reconsider its decisions to fix the issue. The *Bean* decision allows veterans and their advocates to proactively pursue these issues at the Veterans Court and may be used to force the Board to revisit the issues on remand from the Veterans Court.[582] Under this ruling, when the Board has remanded a claim, it is possible that the Board decision is also implicitly denying the veteran reasonably raised issues. Thus, veterans may have another arrow in the quiver to obtain court review.[583]

On the other hand, this may require veterans and their advocates to appeal claims to the court to understand whether the Board has ruled on a particular issue and to understand the Board's reasons for

575. *Id.*
576. *Id.* at 989.
577. *Id.*
578. *Id.*
579. *Id.*
580. *Id.*
581. *See, e.g.*, *id.* at 989 ("As seen, that law is that the Board's failure to decide a claim clearly presented to it constitutes a 'decision' of the Board, which vests the Veterans Court with jurisdiction.").
582. *Id.* at 989–90.
583. *Id.*

denial.[584] Diligence is important when reviewing these decisions, as the appeals period may run, and the Board decision may become final as it was implicitly denied by the Board.

C. Implicit Denials and § 3.156(b)

In addition to *Bean*, the Federal Circuit, in *Pickett* and *Hampton*, looked to implicit denials and § 3.156(b) when new and material evidence is received by VA.[585] Before discussing *Pickett* and *Hampton*, the Federal Circuit's 2020 decision in *Lang v. Wilkie*[586] provides a lens through which to view legacy decisions[587] and the effect of evidence received during the appeal period on those decisions.[588]

Under § 3.156(b), when new and material evidence is received before an appeal is due or prior to the appellate decision if a timely appeal is filed, the evidence will be considered as having been filed in connection with the claim that is pending.[589] When a new piece of evidence is received, VA must make another decision to determine whether that evidence requires VA to re-adjudicate the claim.[590] In *Lang*, the Federal Circuit interpreted when evidence is received by VA broadly.[591] It found that the creation of medical records during the appellate period by VA Medical Centers is evidence received by VA.[592] After the new evidence is created and received, the claim will continue to be pending until VA makes another decision regarding that evidence.[593]

In *Pickett*,[594] David Pickett requested that he receive an earlier effective date for his Total Disability due to Unemployability (TDIU)

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584. *See id.* at 988 (stating that a decision of the Board, including denials of claims that were reasonably raised before the Board, is a "prerequisite to Veterans Court jurisdiction").

585. Pickett v. McDonough, 64 F.4th 1342 (Fed. Cir. 2023); Hampton v. McDonough, 68 F.4th 1376 (Fed. Cir. 2023).

586. 971 F.3d 1348 (Fed. Cir. 2020).

587. Legacy refers to the former procedural process, pre-2019. Congress overhauled the VA procedural process with the Appeals Modernization Act which provides veterans more appellate choices.

588. *Id.* at 1354.

589. *See* 38 C.F.R. § 3.156(b).

590. Angela Drake, Yelena Duterte & Stacey-Rae Simcox, *Review of Veterans Law Decisions of the Federal Circuit, 2020 Edition*, 70 AM. U. L. REV. 1381, 1428 (2021).

591. *Lang*, 971 F.3d at 1353.

592. *Id.* at 1354–55.

593. *Id.*

594. 64 F.4th 1342 (Fed. Cir. 2023).

rating based on § 3.156(b).[595] In 2004, Mr. Pickett filed for generalized anxiety disorder due to Agent Orange.[596] VA granted Mr. Pickett an award for PTSD. In 2010, VA also granted an award for coronary artery disease effective in 2004, as part of the *Nehmer* class action.[597] In 2011, Mr. Pickett appealed the coronary artery disease for an earlier effective date.[598] With this appeal, Mr. Pickett also filed a TDIU application.[599]

In a January 2013 decision, VA denied TDIU, as the coronary artery disease "does not prevent [him] from performing sedentary employment tasks."[600] He did not appeal that decision. In an April 2014 decision, VA again denied Mr. Pickett TDIU and proposed a reduction in his PTSD rating.[601] Mr. Pickett challenged the proposed reduction but did not challenge the TDIU denial.[602]

In 2017, Mr. Pickett filed a claim for TDIU and it was granted, with an effective date of January 2017, the date of the newest application.[603] In his appeal, Mr. Pickett argued that the 2004 claim was unadjudicated.[604] Specifically, Mr. Pickett argued that his submission of the TDIU form within one year of the 2010 decision kept the claim pending.[605] The Regional Office denied Mr. Pickett, explaining the 2013 and 2014 decisions denied entitlement and finalized the 2004 claim.[606] The Veterans Court found that the January 2013 decision listed the TDIU form, addressed entitlement, and denied TDIU on the merits. The Veterans Court found that the Regional Office treated the TDIU form as new and material evidence in relationship with the coronary artery disease claim.[607]

The question here was whether VA may comply with § 3.156(b) implicitly, rather than explicitly denying the claim under the § 3.156(b) analysis.[608] Meaning when VA receives new evidence during the pendency of an appeal period, must VA's next decision

595. *Id.* at 1344.
596. *Id.* at 1343.
597. *Id.*
598. *Id.*
599. *Id.*
600. *Id.* at 1344.
601. *Id.*
602. *Id.*
603. *Id.*
604. *Id.* at 1345–46.
605. *Id.* at 1346.
606. *Id.* at 1344.
607. *Id.* at 1347.
608. *Id.* at 1345.

acknowledge the receipt of new evidence during the pendency of the last claim and determine whether that evidence was new a material. Alternatively, can VA ignore the § 3.156(b) analysis and in doing so, implicitly deny the § 3.156(b) argument that the claim is still pending?

Mr. Pickett argued that VA must state that it received the evidence, whether it was new and material, and whether the evidence relates back to the original claim are necessary to indicate whether VA made the proper assessment under § 3.156(b).[609]

The Federal Circuit, in the decision by Judge Stoll, determined that § 3.156(b) does not require specific words.[610] Instead, implicit findings of whether new and material evidence was received during the pendency of the appeal are allowed as long as there is some indication that VA reviewed the evidence during that timeframe.[611]

Shortly after *Pickett*, the court decided *Hampton v. McDonough*.[612] Solena Hampton originally filed for migraines in 1997, which was originally granted at 10 percent but increased to 30 percent.[613] In 1999, Ms. Hampton filed for TDIU and was denied shortly after.[614] Within a year of the TDIU decision, she filed a claim for an increased rating for migraines.[615] VA and the Board denied the increased rating in 2000.[616]

In 2003, Ms. Hampton filed for TDIU which was granted effective 2003, the date of filing.[617] Ms. Hampton argued that her 1999 TDIU claim was still pending because she submitted a 1999 statement where her migraines had worsened and a May 1999 examination where she reported daily headaches.[618] After several appeals and remands, the Board found that Ms. Hampton's 1999 TDIU claim was not pending when she filed her 2003 claim for TDIU, because it was implicitly denied when VA denied Ms. Hampton her increased rating claim in the 2000 decision.[619]

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609. *Id.*
610. *Id.* at 1345–46.
611. *Id.* at 1347.
612. 68 F.4th 1376 (Fed. Cir. 2023).
613. *Id.* at 1377–78.
614. *Id.* at 1378.
615. *Id.*
616. *Id.*
617. *Id.*
618. *Id.*
619. *Id.* at 1379.

Judge Hughes followed the Federal Circuit's precedent in *Pickett*.[620] In *Hampton*, the Federal Circuit found that there was some indication VA considered the 1999 statement and examination in the 2000 increased rating claim for migraines and implicitly denied the TDIU claim.[621] Even though the Regional Office did not list Ms. Hampton's 1999 statement as evidence, the court found that the Regional Office considered the statement in support of her 1999 claim for an increased rating implicitly.[622] In denying the increased rating in 2000, the Board implicitly denied any higher rating including that of TDIU.[623]

Following *Pickett* and *Hampton*, it is important to note that subsequent decisions by VA may finalize a previous claim. Even when a subsequent decision does not seem to take into account new and material evidence when the previous claim was still pending, the avenue for an earlier effective date may be limited.

D. Implicit Denials and the Appeals Modernization Act

In *Bean*, *Pickett*, and *Hampton*, the cases were reviewed under the legacy statutory requirements.[624] Under the legacy statute, "in any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include (1) a statement of the reasons for the decision . . . ."[625] The case law that developed implicit denials has explained that implicit denials have met the requirements laid out in the legacy statutory scheme. However, in cases that are bound by the AMA, decisions must identify the issues adjudicated and elements not satisfied if a veteran is denied.[626] With these new notice requirements, identification of the issues may require more explicit indications of a decision, as the issues adjudicated must be provided on the face of the notice.

As veterans request earlier effective dates based on unadjudicated legacy claims before 2019, the issue of implicit denial in the legacy cases will still be quite important.

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620. *Id.* at 1380.
621. *Id.* at 1381.
622. *Id.*
623. *Id.*
624. *See* Bean v. McDonough, 66 F.4th 979, 989–90 (Fed. Cir. 2023) (explaining the interpretation of the Veterans Court's jurisdiction and notice requirement); Pickett v. McDonough, 64 F.4th 1342,1346–47 (Fed. Cir. 2023) (same); *Hampton*, 68 F.4th 1376, 1380–81 (Fed. Cir. 2023) (same).
625. 38 U.S.C. § 5104.
626. *Id.*

IX. EQUITABLE TOLLING & EQUITABLE ESTOPPEL

In 2023, the Supreme Court and the Federal Circuit investigated whether equitable tolling or equitable estoppel could apply to a veteran when they fail to apply for benefits due to extenuating circumstances.[627] In the 2021 edition of this Article, the Authors highlighted the arguments that the court may consider.[628] So not to rehash that article, this piece will provide an abbreviated history and focus on the Supreme Court's decision in *Arellano v. McDonough*[629] and the subsequent decision by the Federal Circuit in *Taylor v. McDonough*.[630]

A. Arellano v. McDonough

Adolfo Arellano served in the U.S. Navy from 1977 to 1981.[631] As a result of his service, he began suffering from severe mental health conditions, including post-traumatic stress disorder.[632] The severity of his condition left him unable to understand that he could file a claim with VA.[633] When he finally filed a claim for benefits 30 years later with the assistance of his brother, VA agreed that his mental health condition was related to his military service and that it was totally disabling.[634] As a result, VA began paying him disability benefits—but only as of the date he filed his claim in June 2011.[635] Mr. Arellano argued that the benefits should go back to 1981 when he was discharged from the service, under an equitable tolling analysis.[636]

In the 2021 decision by the Federal Circuit, the en banc court was split as to whether equitable tolling applied to § 5110(b)(1).[637] Judge Chen's opinion found that the statute does not have the features of a statute of limitations, where the presumption of equitable tolling

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627. Arellano v. McDonough, 143 S. Ct. 543, 543, 545 (2023); Taylor v. McDonough, 71 F.4th 909, 916 (Fed. Cir. 2023).
628. Drake et al., *supra* note 232, at 1633–34.
629. 143 S. Ct. 543 (2023).
630. 71 F.4th 909 (Fed. Cir. 2023).
631. *Arellano*, 143 S. Ct. at 547.
632. *Id.*
633. *Id.*
634. *Id.*; Arellano v. McDonough, 1 F.4th 1059, 1063 (Fed. Cir. 2021) (en banc) (Chen, J., concurring in the judgment) (per curiam); *Arellano*, 1 F.4th at 1099 (Dyk, J., concurring in the judgment).
635. *Arellano*, 143 S. Ct. at 547.
636. *Id.*
637. *Arellano*, 1 F.4th at 1061 (Chen, J., concurring in the judgment).

should be applied.[638] Further, Judge Chen found that even if it was a statute of limitations, Congress rebutted it with the language in § 5110.[639] Judge Dyk's opinion found that § 5110(b) was a statute of limitation, so the presumption of equitable tolling applies to the statute.[640] Judge Dyk explained that the presumption was not rebutted by the statutory language.[641] Although Judge Dyk found that the presumption applied, they did not find it was appropriate based on Mr. Arellano's circumstances.[642]

At the Supreme Court, Justice Barrett delivered the opinion of the unanimous court.[643] In the Court's decision, the Court does not focus its analysis on whether § 5110(b)(1) is a statute of limitations.[644] Rather, it looks at whether the statute rebuts the presumption of equitable tolling.[645] The Court found that Congress's language and structure of the statute clearly set out the parameters for which benefits would begin.[646] The statutory language states that the effective date of the award would not be earlier than the receipt of the application, unless provided otherwise.[647] Congress then set out sixteen exceptions that provide alternatives to the general rule, showing that Congress did not intend for equitable tolling to apply.[648] The Court determined that the number of exceptions "reflect[s] equitable considerations [and] heightens the structural inference."[649] The Court found that § 5110(b)(1) is not subject to equitable tolling, but also notes that it did "not address the applicability of other equitable doctrines, such as waiver, forfeiture, and estoppel."[650]

B. Taylor v. McDonough

After the Supreme Court ruled in *Arellano*, the Federal Circuit lifted its stay to decide *Taylor v. McDonough*.[651] Similar to Mr. Arellano, Bruce

638. *Id.*
639. *Id.*
640. *Id.* at 1086 (Dyk, J., concurring in the judgment).
641. *Id.* at 1092.
642. *Id.* at 1099.
643. Arellano v. McDonough, 143 S. Ct. 543, 546 (2023).
644. *Id.* at 547–48.
645. *Id.*
646. *Id.* at 548.
647. *Id.*
648. *Id.* at 549.
649. *Id.*
650. *Id.* at 552 & n.3.
651. Taylor v. McDonough, 71 F.4th 909, 916 (Fed. Cir. 2023) (en banc).

Taylor did not file for benefits when he was discharged from the service.[652] Mr. Taylor served from 1969 to 1971 and participated in a secret military program at the Edgewood Arsenal.[653] Because of the sensitivity of the program, Mr. Taylor was sworn to secrecy.[654] Mr. Taylor refrained from claiming any disability related to the Edgewood program, as he feared that he would be prosecuted.[655] In 2006, the government released Mr. Taylor and others from this secrecy regarding Edgewood Arsenal.[656]

In 2007, Mr. Taylor filed for benefits, which VA granted with an effective date of the date of filing.[657] He argued that the effective date should date back to his discharge date, under an equitable estoppel.[658] Judge Taranto's opinion for the Federal Circuit found that equitable estoppel was not available to Mr. Taylor due to Supreme Court precedent that does not allow equitable estoppel to award money from the public fisc.[659] The Federal Circuit instead determined that Mr. Taylor was entitled to an adjudication of benefits under the Constitution.[660] The court found that the government has denied Mr. Taylor his constitutional right to access the VA adjudication system to obtain rights to secure benefits.[661]

The government argued that the interference (the oath of secrecy) was not severe enough, the interference was justified, and there was no available remedy if Mr. Taylor succeeded.[662] The court rejected all three arguments.[663] In terms of severity, the court found that the threat of court martial was severe enough to interfere with Mr. Taylor's ability to file.[664] Although both parties agreed that the government may have been justified in demanding secrecy for national security purposes, the right of access to an adjudication for Mr. Taylor was not adequately tailored to serve that interest.[665] Finally, the court found that the

652. *Id.* at 916–17.
653. *Id.* at 916.
654. *Id.*
655. *Id.* at 916–17.
656. *Id.* at 917.
657. *Id.*
658. *Id.*
659. *Id.*
660. *Id.*
661. *Id.*
662. *Id.* at 935.
663. *Id.*
664. *Id.* at 936.
665. *Id.* at 939.

remedy would look to what would have happened had the government not interfered with his access.[666]

The Federal Circuit determined that the government actively interfered with Mr. Taylor's access to VA's exclusive jurisdiction as it prevented Mr. Taylor from filing a claim with VA.[667] The court found § 5110 was unconstitutional as applied to Mr. Taylor.[668]

C. Equitable Relief's Future

Based on *Arellano* and *Taylor*, the future of equitable relief by the courts seems uncertain. As *Arellano* discussed, the statute does not allow for equitable tolling, as the statutory scheme is structured to consider equitable alternatives already.[669] Additionally, *Taylor* foreclosed the opportunity for equitable estoppel, as it is barred by Supreme Court precedent that disallows equitable estoppel if it would impact the budget.[670] Although Mr. Taylor is eligible for benefits, his situation is likely very limited, as the government's interference with the VA system was clear.[671]

X. PREJUDICIAL ERROR: *SLAUGHTER V. MCDONOUGH*

When reviewing a Board of Veterans' Appeals decision, the Veterans Court is required to "take due account of the rule of prejudicial error."[672] This requirement acknowledges that mere error on VA's part is not enough to require a reversal or remand from the Veterans Court to correct a VA decision. VA's error must harm the claimant to be considered prejudicial.[673] Otherwise, the error is harmless. The Veterans Court's interpretation of prejudicial error is tied to the civil courts' harmless error standard found in Rule 61 of the Federal Rules of Civil Procedure.[674] The APA also directs that when reviewing agency actions "due account shall be taken of the rule of prejudicial error."[675]

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666. *Id.* at 942.
667. *Id.* at 939.
668. *Id.* at 945.
669. Arellano v. McDonough, 143 S. Ct. 543, 550 (2023).
670. *Taylor*, 71 F.4th at 917.
671. *Id.* at 945.
672. 38 U.S.C. § 7261(b)(2).
673. Mayfield v. Nicholson, 19 Vet. App. 103, 115 (2005), *rev'd on other grounds*, 444 F.3d 1328, 1332 (Fed. Cir. 2006).
674. *See* FED. R. CIV. P. 61 (setting the standard for reversible error as an error that affects a party's substantial rights).
675. 5 U.S.C. § 706.

The concept of prejudicial error has been explained in more detail in our previous articles for those interested in diving deeper into this issue.[676]

Most recently, the Federal Circuit addressed harmless error and prejudice in *Tadlock v. McDonough*[677] when the court delineated the limitations of the Veterans Court to conduct fact-finding when determining prejudice of an error.[678] In the past year, the court again considered harmless error in *Slaughter v. McDonough*,[679] which allowed the Federal Circuit to consider the specificity to which prejudice must be pled by a claimant appealing Board decisions to the Veterans Court.[680]

At the Veterans Court, Mr. Slaughter argued that the Board had inadequately rated a hand disability by failing to consider applying a different diagnostic code to the condition.[681] Mr. Slaughter's briefing to the Veterans Court never specifically mentions the word "prejudice" when discussing the Board's failure.[682] However, Mr. Slaughter's primary brief to the Veterans Court discussed why the Board should have considered the alternate diagnostic code, why its failure to do so was an error, and that a rating under the alternate diagnostic code allows for a fifty percent rating[683] as opposed to the diagnostic code applied to Mr. Slaughter's condition which provides for a forty percent rating.[684]

The Veterans Court on appeal acknowledged that its review of any Board decision must "take due account of the rule of prejudicial error."[685] Without addressing Mr. Slaughter's argument that the Board had erred in failing to apply the alternate diagnostic code, the Veterans

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676. *See* Drake, Duterte & Simcox, *supra* note 148, at 1347–48; *see also Mayfield*, 19 Vet. App. at 115 (providing deeper discussion of prejudicial error at the Veterans Court).

677. 5 F.4th 1327 (Fed. Cir. 2021).

678. *Id.* at 1334.

679. 29 F.4th 1351 (Fed. Cir. 2022).

680. *Id.* at 1355.

681. Slaughter v. Wilkie, No. 19-2524, 2020 WL 4781463, at *2 (Vet. App. Aug. 18, 2020), *aff'd but criticized sub nom.* Slaughter v. McDonough, 29 F.4th 1351 (Fed. Cir. 2022).

682. *Id.* at *4.

683. 38 C.F.R. § 4.124a (listing percentages under VASRD DC 8512).

684. Brief of Appellant at 2–5, Slaughter v. McDonough, 29 F.4th 1351 (Fed. Cir. 2022) (No. 2021-1367); 38 C.F.R. § 4.124a (listing percentages under VASRD DC 8516).

685. 38 U.S.C. § 7261(b)(2); *Slaughter*, 2020 WL 4781463, at *4.

Court—in a single judge opinion—found that even if one were to assume the Board had erred, Mr. Slaughter had failed to "allege that he was prejudiced by any such error."[686] The Veterans Court noted that Mr. Slaughter did not affirmatively assert that the Board would have found the alternate diagnostic code applied in his case; he merely argued that it should have been considered.[687] Additionally, the Veterans Court noted that Mr. Slaughter had failed to point to specific evidence in the record demonstrating he would have been entitled to a higher rating under his preferred diagnostic code.[688] Because the Veterans Court found Mr. Slaughter had failed to demonstrate that the Board's error was prejudicial, it affirmed the Board decision on that ground alone.[689]

On appeal, the Secretary cited to *Newhouse*, *inter alia*, arguing that the Federal Circuit's inability to review harmless error determinations by the Veterans Court was well-established and readily acknowledged by the court because these decisions are based upon "necessarily factual determinations."[690] The Federal Circuit strongly disagreed, citing to *Tadlock*.[691] The court explained that Mr. Slaughter's argument that the Veterans Court applied the wrong legal standard to his claims is a legal determination, well within the Federal Circuit's permitted review, that is reviewed without deference to the Veterans Court's decision.[692]

Regarding the legal standard for prejudice that the Veterans Court applied to Mr. Slaughter's claim, the Federal Circuit found that the Veterans Court erred by requiring Mr. Slaughter to plead prejudice with too much specificity.[693] The court noted that, while the burden was on Mr. Slaughter to demonstrate prejudice, the burden was not an "onerous" one.[694] In some instances, it is conceivable that the appealing claimant's mere allegation of an error is enough to allow the

686. *Slaughter*, 2020 WL 4781463, at *4.
687. *Id.*
688. *Id.*
689. *Id.*
690. Brief for Respondent-Appellee at 14, Slaughter v. McDonough, 29 F.4th 1351 (Fed. Cir. 2022) (No. 2021-1367) (citing Newhouse v. Nicholson, 497 F.3d 1298, 1302 (Fed. Cir. 2007)).
691. *Slaughter*, 29 F.4th at 1354–55 (citing Tadlock v. McDonough, 5 F.4th 1327, 1332–33 (Fed. Cir. 2021)).
692. *Id.* at 1355.
693. *Id.*
694. *Id.* (quoting Shinseki v. Sanders, 556 U.S. 396, 409–10 (2009)).

reviewing court to understand the prejudice by viewing the circumstances of the decision.[695] Reminding the Veterans Court of VA's special relationship with veterans and its veteran-friendly character, the court also noted that what might be harmless in one circumstance could be prejudicial in another veteran's case.[696] Merely reviewing Mr. Slaughter's allegation that the alternate diagnostic code could have led to an increase in his rating would have allowed the Veterans Court to deduce prejudice in the Board's failure to consider it.[697] By requiring Mr. Slaughter to specifically plead prejudice and point to evidence in the record demonstrating he would be entitled to a higher rating under the alternate diagnostic code, the Veterans Court "applied too rigid of a prejudicial error standard and placed too heavy a burden on Mr. Slaughter to show prejudice."[698]

Nevertheless, the Federal Circuit affirmed, concluding that the Board appropriately applied the diagnostic codes in Mr. Slaughter's case, rendering the misapplied standard harmless.[699]

The Federal Circuit's decision in *Slaughter* is impacting how the Veterans Court considers prejudicial error in a way that appears to be helpful to claimants. In just eighteen months since *Slaughter* was decided the Veterans Court has cited to its holding 100 times.[700] The vast majority of the cases citing *Slaughter* do so because the case holds that the Veterans Court "should look to the circumstances of the [individual] case when assessing prejudicial error."[701] In several instances, the Veterans Court notes that the claimant fails to provide an argument regarding prejudice, so the court does its own review to find prejudice rather than summarily dismiss the idea that prejudice may exist merely because the claimant fails to raise the argument.

For example, in *Sutton v. McDonough*,[702] the veteran argues that the Board ignored favorable evidence in the record when denying a

695. *Id.*
696. *Id.*
697. *Id.*
698. *Id.*
699. *Id.*
700. Westlaw Search conducted 4/12/2024.
701. *See, e.g.*, Gastin v. McDonough, No. 22-1256, 2023 WL 4940598, at *5 n.55 (Vet. App. Aug. 3, 2023) (holding that the Board of Veterans' Appeals did not err in its decision denying service connection for spinal disability); Williams v. McDonough, No. 21-7363, 2023 WL 4144968, at *4 (Vet. App. June 23, 2023) (holding no fair process violation).
702. No. 22-3472, 2023 WL 5123230 (Vet. App. Aug. 10, 2023).

disability rating increase.[703] The Veterans Court acknowledges that despite the veteran's failure to point to evidence in the record that would allow his disability rating to be increased, the court, with a citation to *Slaughter*, conducted its own review of the evidence: "And for what it's worth, our own review—limited as it may be by the lack of argument—does not lead us to think that it could have [led to an increase]."[704] Similarly, in *Cornelius v. McDonough*,[705] the Veterans Court acknowledges a lack of argument from the claimant concerning why the Board's failure to discuss the procedural history of a claim was prejudicial, so the court engages in its own inquiry to find error.[706] While *Slaughter's* requirement that the Veterans Court review the circumstances of the case itself to search for prejudicial error is a benefit to claimants overall, it is still incumbent on a good advocate to specifically argue any prejudicial error so that the Veterans Court does not have to spend valuable time searching for that prejudice.

XI. CONCLUSION

The Federal Circuit continues to establish important precedents in veterans benefit cases—providing more contour to the Veterans Court's jurisdiction, including class action jurisdiction, congressional intent, and the standard of proof. Based on the nature of these decisions and their impact on veterans law, the Federal Circuit will continue to revisit these issues in the future.

The Supreme Court continues to contribute to the evolution of this area of law, with its most recent grant of certiorari in *Rudisill*. Our Nation's veterans benefit from the robust discussion found in Federal Circuit decisions inspired by zealous representation from veteran advocates and advocates for VA. It is our hope this Area Summary assists the veteran legal community as it stays abreast of developments in the law.

703. *Id.* at *2.
704. *Id.*
705. No. 22-2951, 2023 WL 4940572 (Vet. App. Aug. 3, 2023).
706. *Id.* at *4.