THE DOWNFALL OF *AUER* DEFERENCE: VETERANS LAW AT THE FEDERAL CIRCUIT IN 2014

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INTRODUCTION

The 2014 veterans benefits case law of the U.S. Court of Appeals for the Federal Circuit mirrored a growing trend at the U.S. Supreme Court to question the well-established tradition of judicial deference to a federal agency's interpretation of its own regulations.[1] This

1. Previous articles include: Victoria Hadfield Moshiashwili, *Ending the Second "Splendid Isolation"? Veterans Law at the Federal Circuit in 2013*, 63 AM. U. L. REV. 1437

article examines the Federal Circuit's 2014 veterans benefits cases. Part I provides background and context for the issues raised by the Federal Circuit's 2014 cases. Part II surveys changes in the composition of the Federal Circuit during the past year. Part III reviews and summarizes the Federal Circuit's 2014 veterans law cases. Part IV discusses the court's recent willingness to question *Auer* deference and how that principle applies in the context of veterans law.

I. BACKGROUND TO THE FEDERAL CIRCUIT'S 2014 VETERANS LAW CASES

A. The Adjudication Process

The Federal Circuit reviews final decisions of the U.S. Court of Appeals for Veterans Claims ("Veterans Court"). These cases originate when there is a dispute at the agency level—at the Department of Veterans Affairs (VA)—after a claim has been submitted for benefits, usually at a VA regional office ("RO").[2] VA is unusual among federal agencies in that it has statutory duties to assist a veteran claimant in developing evidence supporting the claim.[3] Once the agency determines that all necessary evidentiary development is complete, it will adjudicate the claim.[4] The RO will issue a Rating Decision that informs the claimant of its decision and the underlying reasons.[5] The claimant can then submit a Notice of Disagreement, after which VA will prepare a Statement of the Case

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(2014) [hereinafter Moshiashwili, *Splendid Isolation*]; James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037 (2013) [hereinafter Ridgway, *Fresh Eyes*]; James D. Ridgway, *Changing Voices in a Familiar Conversation About Rules vs. Standards: Veterans Law at the Federal Circuit in 2011*, 61 AM. U. L. REV. 1175 (2012) [hereinafter Ridgway, *Changing Voices*]; Paul R. Gugliuzza, *Veterans Benefits in 2010: A New Dialogue Between the Supreme Court and the Federal Circuit*, 60 AM. U. L. REV. 1201 (2011); Miguel F. Eaton et al., *Ten Federal Circuit Cases from 2009 That Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155 (2010). Although no journal produces an annual review of veterans law at the Court of Appeals for Veterans Claims (CAVC) level, Michael Allen explored its caselaw from 2008 to 2010. *See* Michael P. Allen, *The Law of Veterans' Benefits 2008–2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1 (2011); Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483 (2007).

2. In 2014, there were fifty-six regional offices in the United States, Puerto Rico, and the Philippines. *About VBA*, VETERANS BENEFITS ADMIN., http://www.benefits.va.gov/BENEFITS/about.asp (last visited Apr. 23, 2015).

3. Gugliuzza, *supra* note 1, at 1204.

4. *See generally id.* at 1203–10 (detailing the procedure and determinations of the Veterans Benefits Administration's claim adjudication process).

5. *Id.* at 1205.

("SOC").[6] The SOC is supposed to provide the claimant with all the relevant law underlying the decision.[7] This additional procedural step was established to provide the claimant with the information needed to make an informed argument against the agency's decision because, traditionally, many claimants have been pro se. After receiving an SOC, the—presumably now better informed—claimant has two options: to ask for a de novo review of the claim at the RO level, by a more senior staff member; or, to perfect the appeal by filing a substantive appeal with the Board of Veterans' Appeals ("Board").[8]

The Board, which is part of VA, provides appellate review of RO-level decisions.[9] Like the rest of the agency, its workload has increased dramatically in the past few decades: it issued 34,028 decisions in 2000;[10] 39,076 decisions in 2006;[11] 49,127 decisions in 2010;[12] and 41,910 decisions in 2013.[13] One key difference between civil law and the law of veterans benefits is the fact that the Board—although it is an appellate body—has the statutory power to find facts de novo.[14] The Board's decisions "must account for the [persuasiveness of the] evidence . . . , analyze the credibility and

6. *See id.* at 1206 (informing that a Statement of the Case ("SOC") is issued when a veteran files a notice of disagreement with the Rating Decision).

7. 38 U.S.C. § 7105(d)(1)(B) (2012).

8. *Id.* § 7105(d).

9. *Id.* § 7101.

10. BD. OF VETERANS' APPEALS, FISCAL YEAR 2000 REPORT OF THE CHAIRMAN 33 (2000), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2000AR.pdf.

11. BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2006 2 (2007), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2006AR.pdf.

12. BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2010 3 (2011), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf.

13. BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT: FISCAL YEAR 2013 5 (2014), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf. In April 2013, the Board announced that it planned to hire 100 new attorneys. *See* Steve Vogel, *Veterans Face Another Backlog a Quarter-Million Appeal Disability Claims*, WASH. POST (Sept. 8, 2013), http://www.washingtonpost.com/politics/veterans-face-another-backlog-as-a-quarter-million-appeal-disability-claims/2013/09/10/0078154a-15ba-11e3-804b-d3a1a3a18f2c_story.html.

14. *See* 38 U.S.C. § 7104 (2012) (requiring that decisions be based on review of the entire records and that the decision must include findings of fact); Madden v. Gober, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (discussing that the Board must "analyze the credibility and probative value of evidence"); Owens v. Brown, 7 Vet. App. 429, 433 (1995) (same); 38 C.F.R. § 19.7 (2014) (reiterating the requirements of 38 U.S.C. § 7104).

probative value of all material evidence . . . , and provide the reasons for its rejection of any such evidence."[15]

B. Veterans Benefits Adjudication Is Unique Among Federal Benefits Schemes

Until 1988, agency decisions were subject to neither judicial review nor the restrictions of the Administrative Procedure Act[16] (APA), in part because the benefits that the agency administers were viewed as granted under a paternalistic charitable model, rather than obtained by demonstrating entitlement in an adversarial model.[17]

In 1988, Congress enacted the Veterans' Judicial Review Act,[18] establishing the Veterans Court[19] as an Article I court with judges appointed to serve fifteen-year terms.[20] The Veterans Court may decide cases by non-precedential, single-judge memorandum decisions; precedential three-judge panels, or full-court opinions.[21] The Veterans Court applies the "clearly erroneous" standard[22] to assess the Board's factual findings; a de novo standard[23] to

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15. Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

16. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, § 102, 102 Stat. 4105, 4106 (creating judicial review for veterans benefits decisions and to apply the Administrative Procedure Act to the VA); *see* Robert W. Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U. PA. L. REV. 621, 621–22 (1947) (demarcating which provisions of the APA do not apply to the VA).

17. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 251 (2010) [hereinafter Ridgway, *New Complexities*] (arguing that the debate between the paternalistic and adversarial models is a false dichotomy: "[i]t is paternalistic because claimants receive significant procedural assistance. It is also an entitlement system because claimants pursue non-discretionary benefits").

18. Pub. L. No. 100-687, 102 Stat. 4105 (1988).

19. The U.S. Court of Veterans Appeals was renamed the U.S. Court of Appeals for Veterans Claims by the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511(a), 112 Stat. 3315, 3341.

20. *See* 38 U.S.C. §§ 7251, 7253(c) (2012) (restating the codified language of the Veterans' Judicial Review Act of 1988).

21. *See id.* § 7254(b)–(d); Bethea v. Derwinski, 2 Vet. App. 252, 254 (1992) ("A single-judge disposition is not binding in another case before a single judge or a panel. It may be cited or relied upon, however, for any persuasiveness or reasoning it contains.").

22. Hood v. Shinseki, 23 Vet. App. 295, 299 (2009); *see also* Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990) (determining that the "clearly erroneous" standard is the same in the Veterans Court as it is in Article III courts: "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

23. 38 U.S.C. § 7261(a)(1)–(3) (granting the Veterans Court the to decide questions of law and define statutory and regulatory language); *see also* Lane v.

interpretations of statutes and regulations; and an "arbitrary, capricious, . . . abuse of discretion, or otherwise not in accordance with law" standard to its legal conclusions.[24] The Veterans Court also reviews Board decisions to determine whether an adequate statement of reasons or bases for the findings and conclusions supports the decision.[25]

The Veterans Court is the first stage in the veterans benefits system that is adversarial, because the claimant is challenging the Board's decision; generally, the VA adjudication procedure is supposed to be a non-adversarial and claimant-friendly forum.[26] Yet, only veterans and their dependents may appeal to the Veterans Court.[27] Thus, the court's substantive law tends to "act[] as a one-way ratchet" and the court typically issues holdings that favor veterans rather than the agency.[28] This necessary focus on procedure instead of factual development of cases—over which the Veterans Court has no jurisdiction—has the paradoxical effect of making the system more claimant-friendly, while causing severe delays in claims processing by establishing increasingly complex procedures to govern the adjudication process.[29]

Although only veterans may appeal a Board decision, both VA and the claimant have the right to appeal to the Federal Circuit if they are dissatisfied with a Veterans Court decision.[30] This is the first stage in the claims adjudication process when VA may appeal a decision.[31] However, the Federal Circuit may only review questions of law, such

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Principi, 339 F.3d 1331, 1338 (Fed. Cir. 2003) (requiring the Veterans Court to review de novo Board interpretation of a regulation); *cf.* Butts v. Brown, 5 Vet. App. 532, 539 (1993) (en banc) (holding that the Board's choice of a particular diagnostic code is subject to arbitrary and capricious standard of review because it is a "question of the application of the law to the facts and not a question of law").

24. 38 U.S.C. § 7261(a)(3)(A); *see also* Foster v. Derwinski, 1 Vet. App. 393, 394 (1991) (per curiam) (holding that failure to comment on a veteran's testimony at a hearing does not constitute an arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law decision).

25. 38 U.S.C. § 7104(d)(1).

26. Hodge v. West, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (citing to H.R. REP. NO. 100-963, at 13 (1988), which demonstrated Congress's intent to preserve a pro-claimant system).

27. 38 U.S.C. § 7252(a).

28. Ridgway, *New Complexities*, *supra* note 17, at 257.

29. *See* Ridgway, *Fresh Eyes*, *supra* note 1, at 1039, 1044–45 (explaining that since the record is rarely sufficient by the time attorneys become involved, remand back to the VA is necessary to submit new evidence).

30. 38 U.S.C. § 7292(a).

31. *See id.* (prohibiting the Secretary from seeking to review the Board's decisions).

as constitutional challenges and, less frequently, challenges under the APA to VA rulemaking.[32] The system was created to guarantee that those who had served in the military would receive the necessary treatment if injured.[33] An adversarial system would not have achieved that objective because "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them."[34]

Navigating the VA claims processing system can be complex and, as a result, it may be too difficult for many veterans to obtain the compensation to which they are entitled.[35] To support veterans who request benefits, Congress established that VA has "the affirmative duty to assist claimants by informing veterans of the benefits available to them and assisting them in developing claims they may have,"[36] including obtaining records under governmental control,[37] helping

32. *Id.* § 7292(d)(1).

33. *See* WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3–5 (3d ed. 2002) (describing the history of veterans benefits from thanks for Sir Francis Drake's defeat of the Spanish Armada to the present); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011) (detailing the history of veterans benefits from the earliest days of civilization to the present); *see also* Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 303, 308–09 (2004) (describing the origins of the modern veterans benefits).

34. Barrett v. Nicholson, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

35. DeLisio v. Shinseki, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring) ("There is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year."); Ridgway, *Fresh Eyes*, *supra* note 1, at 1044–45 (discussing complexity).

36. Jaquay v. Principi, 304 F.3d 1276, 1280 (Fed. Cir. 2002) (en banc) (noting that Congress enacted the Veterans Claims Assistance Act of 2000 "to reaffirm and clarify" the Secretary of Veterans Affairs' duty to assist veterans in obtaining benefits), *overruled on other grounds by* Hendersen v. Shinseki, 589 F.3d 1201 (2009), *rev'd*, 562 U.S. 428 (2011); *see also* Comer v. Peake, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009) (reaffirming VA's duty to assist veterans or those making claims on a veteran's behalf and determining that this duty is antecedent to guaranteeing that all issues are properly raised on appeal).

37. 38 U.S.C. § 5103A(a)(1) (2012); 38 C.F.R. § 3.159(c)(2) (2013).

the veteran to obtain private records,[38] and providing the veteran with a medical opinion if one is necessary to review and to assess the claim.[39]

VA's duty to assist allows it to read a plaintiff's pleadings "sympathetically" to "determine all potential claims raised by the evidence," no matter how those claims are identified in the application for benefits.[40] Furthermore, certain legal presumptions facilitate veterans' ability to demonstrate the validity of certain types of claims by eliminating the requirement that they submit evidence of a link between their disability and their military service.[41]

Veterans law uses a lower burden of proof[42] and radically different procedural standards than other areas of the law.[43] For example, a

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38. 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.159(c)(1); *see also* Loving v. Nicholson, 19 Vet. App. 96, 102 (2005) (holding that the duty to assist requires VA to "make reasonable efforts to assist a claimant in obtaining [relevant] evidence" (quoting 38 U.S.C. § 5103A(a)–(b)) (internal quotation marks omitted)).

39. 38 U.S.C. § 5103A(d); Green v. Derwinski, 1 Vet. App. 121, 124 (1991) (requiring a thorough medical examination that considers past medical records); *see also* McLendon v. Nicholson, 20 Vet. App. 79, 81–84 (2006) (discussing the four elements needed to trigger the duty).

40. Szemraj v. Principi, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting Cook v. Principi, 318 F.3d 1334, 1347 (Fed. Cir. 2002) (en banc)) (internal quotation marks omitted); *see also* Robinson v. Mansfield, 21 Vet. App. 545, 552 (2008) (mandating that the Board must consider any issue that is raised by the veteran or by the record), *aff'd sub nom.* Robinson v. Shinseki, 557 F.3d 1355 (Fed. Cir. 2009).

41. For example, veterans who served landside in Vietnam are generally presumed to have been exposed to Agent Orange and do not have to show individualized exposure to Agent Orange. 38 C.F.R. § 3.307(a)(6)(iii). In addition, certain disabilities are presumed to be caused by exposure to Agent Orange, thereby eliminating the need for a veteran who qualifies for the presumption to prove a causal connection between his military service and his disability. 38 U.S.C. § 1116(a); 38 C.F.R. §§ 3.307(a)(6), 3.309(e). Chronic diseases and certain tropical diseases can also be automatically service-connected. *See, e.g.*, 38 U.S.C. § 1101(3)–(4) (listing chronic and tropical diseases); *id.* § 1101(4) (tropical diseases); *id.* § 1133 (presumptions for tropical diseases); *see also* 38 C.F.R. § 3.307(a)(4) (presumption criteria for tropical diseases); *id.* § 3.309(a) (listing chronic diseases); *id.* § 3.309(b) (listing tropical diseases).

42. The "benefit of the doubt" doctrine is unique to veterans law, dictating that a claim will be granted if the evidence for and against the claim is in "relative equipoise" and will only be denied if a fair preponderance of the evidence is against the claim. *See* 38 U.S.C. § 5107(b) (explaining that when the evidence in favor of and against the claimant is approximately balanced, the VA should resolve the issue in favor of the claimant); 38 C.F.R. § 3.102 (stating that reasonable doubt must be resolved in favor of the claimant); Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990) (likening the benefit of the doubt rule to "the rule deeply embedded in sandlot baseball folklore that 'the tie goes to the runner'").

43. *See, e.g.*, James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 115–16 (2009) [hereinafter Ridgway, *Why So Many Remands?*] (elucidating

veteran can continue to submit information during the pendency of a claim and, if this is what transpires, the claim may be delayed while the RO reassesses and re-adjudicates in order to issue a revised decision to the veteran.[44] In addition, although a decision may be deemed "final" if a veteran neglects to appeal the decision within the prescribed time period, there are ways to challenge a decision—even decades after it issues—such as filing a motion alleging that the decision should be revised because it is the product of "clear and unmistakable error."[45] As a result, there is no such thing as finality in a veterans case.[46]

Although Congress established the veterans benefits adjudication system to be "claimant-friendly," the system has functioned inadequately for decades.[47] VA is a vast and extremely complicated bureaucracy that has expanded as a result of the incorporation of three separate agencies in the more than eighty years since its inception.[48] As a result, its current processes are often happenstances of history rather than the result of planning or strategizing.

Nowhere is this phenomenon clearer than in VA's disability compensation claims processing system, which is straining under its antiquated assumptions about the needs of veterans and collapsing

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that because veterans benefits cases arise years after the end of the veteran's military service, these cases typically have complicated factual scenarios, unlike other types of actions).

44. *Id.* at 126.

45. *Id.* at 128; *see* 38 C.F.R. § 20.1403 (delineating CUE).

46. *See* Ridgway, *Why So Many Remands?*, *supra* note 43, at 126 (suggesting that it could take years before the Board can rule on an appeal if the veteran continues to submit new evidence).

47. *See* U.S. GEN. ACCOUNTING OFFICE, B-118660, MANAGEMENT PRACTICES USED BY THE VETERANS ADMINISTRATION'S DENVER REGIONAL OFFICE IN ASSISTING VETERANS 6–9 (1974) (investigating complaints that the telephones were constantly busy, veterans' calls were being routed on a "haphazard" basis, and there were excessive delays in resolving problems); Duncan D. Hunter & Pete Hegseth, Editorial, *The VA Is Failing Veterans*, WASH. POST (Apr. 10, 2013), http://www.washingtonpost.com/opinions/the-va-is-failing-veterans/2013/04/10/0fd9e264-a1f9-11e2-82bc-511538ae90a4_story.html (recommending Secretary Shinseki resign so another appointee can resolve VA's struggle with slow claims processing).

48. *History—VA History*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.va.gov/about_va/vahistory.asp (last visited Apr. 23, 2014) (explaining that the Veteran's Bureau, the Bureau of Pensions in the Department of the Interior, and the National Home for Disabled Volunteer Soldiers and the National Cemetery Administration, are the three agencies that originally administered benefits to veterans and were consolidated into individual bureaus under VA).

under the strain of increasingly complex claims.[49] In addition to the burdens placed on the system, the laws and regulations that govern it are becoming increasingly complex.[50] This leads to frequent mistakes in adjudication, and claims decisions made across the system have a historically low accuracy rate.[51] This sub-par record leads to lost or improperly granted benefits, which in turn leads to a repeating

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49. *See, e.g.*, William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 339 (2004) [hereinafter Fox, *Deconstructing*] (explaining that veterans as a constituency are relatively weak, divided, and small, meaning there is little pressure from the public on the government to reform dysfunctional systems); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 224 (2001) (positing that recycled claims with limited judicial oversight causes interminable wait times for veterans); Reynolds Holding, *Insult to Injury*, LEGAL AFF. (Mar./Apr. 2005), http://www.legalaffairs.org/issues/March-April-2005/feature_holding_marapr05.msp (concluding that VA directives that conflict with laws and regulations, coupled with specialization that divides a single claim into multiple levels of review, has exacerbated the problem of unresolved claims); *see also An Examination of Poorly Performing U.S. Department of Veterans Affairs Regional Offices: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112 Cong. 44 (2011) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States) ("[M]ost people within [VA's claims processing system] want to do a good job. However, conditions beyond their individual control keep them from achieving consistently good work."). *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-562-T, VETERAN'S DISABILITY BENEFITS: PROCESSING OF CLAIMS CONTINUES TO PRESENT CHALLENGES 3 (2007) (explaining that several factors are continuing to create challenges for VA's claims, including increased claims filed by veterans of the Iraq and Afghanistan conflicts); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-749T, VETERANS' DISABILITY BENEFITS: CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT 3 (2005) (stating that VA's disability programs have not been updated to reflect the current state of science, medicine, technology, and labor market conditions); Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L.Q. 889, 895 (1989) (discussing the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)).

50. Ridgway, *Fresh Eyes*, *supra* note 1, at 1044–45, 1094.

51. *Adjudicating VA's Most Complex Disability Claims: Ensuring Quality, Accuracy and Consistency on Complicated Issues: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. On Veterans' Affairs*, 113 Cong. 44 (2013) [hereinafter *Complex Disability Claims Hearing*] (statement of Zach Hearn, Deputy Director for Claims, The American Legion) (noting that an independent review of 260 VA claims showed a 55 percent error rate, which differed from VA's reported 90 percent accuracy rate); U.S. GOV'T ACCOUNTABILITY OFFICE, B-118660, MANAGEMENT PRACTICES USED BY THE VETERANS ADMINISTRATION'S DENVER REGIONAL OFFICE IN ASSISTING VETERANS, 1, 6–8, 10 (1974) (detailing problems in the Denver VA regional office, such as lack of training for VA employees).

process of appeals and remands.[52] For example, even when benefits are awarded, the disabling condition may be evaluated as less severe than it is or the effective date on which compensation begins may be incorrectly calculated, leading to inadequate financial compensation.

C. Problems in the Veterans Benefits Adjudication System

Despite its noble purpose, VA has persistently failed to reduce its backlog of benefits claims.[53] The bases of this issue are multiple and systemic.[54] One problem is that some of the principles essential to

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52. *See Complex Disability Claims Hearing*, *supra* note 51, at 37–39 (statement of Ronald Abrams, National Veterans Legal Services Program) (finding that a significant source of error came from premature claim denials—before the VA adjudicator even attempted to assist the veteran in developing her claim).

53. *See* Hunter & Hegseth, *supra* note 47 (noting that a recent study showed that the average wait time for a claim to process is approximately one year, lagging by as much as 600 days in New York or Los Angeles).

54. *See* Victoria Hadfield Moshiashwili & Aaron Hadfield Moshiashwili, Rearranging Deck Chairs on the Titanic: Lessons from the History of VA's Growing Disability Claims Backlog 2–3 (Oct. 31, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1952070 (finding that the VA has "several fundamental problems" at the root of its claims backlog, "includ[ing]: (1) the system that VA uses to assess the productivity of its employees; (2) the seriously disorganized state of many claims files; and (3) a few identifiable types of inherently difficult claims"). In addition to more claims being submitted and the historically poor accuracy rates at some ROs, the structure of the adjudication system itself is based on antiquated premises. For example, the diagnostic codes are based on decades old medical principles. James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 420–24 (2009) (noting that the forms used in medical evaluations were developed decades ago). Another problem that must be addressed is the need for VA to develop "new, robust evidence-gathering procedures." *Id.* at 405.

Other problems exist within the VA. In 2014, the Veterans Health Administration (VHA) was the subject of a Justice Department criminal investigation and additional investigations by the VA Inspector General and Congress after reports that numerous veterans died while waiting for care at VHA facilities in Phoenix, Arizona, and elsewhere. VA OFFICE OF INSPECTOR GEN., 14-02603-178, INTERIM REPORT: REVIEW OF PATIENT WAIT TIMES, SCHEDULING PRACTICES, AND ALLEGED PATIENT DEATHS AT THE PHOENIX HEALTH CARE SYSTEM 1 (2014). Although the benefits adjudication system was not part of this scandal, this distinction may have been lost on the general public. Over time, the public has become accustomed to hearing news stories about VA's inefficiency, and this incident further tarnished VA in the public's view. Eric Shinseki, who had been Secretary of VA since January 2009, resigned amid the scandal. *See Transcript: President Obama's Remarks on Resignation of Veterans Affairs Secretary Eric Shinseki*, WASH. POST (May 30, 2014), http://www.washingtonpost.com/politics/transcript-obamas-remarks-on-resignation-of-va-secretary-eric-shinseki/2014/05/30/92cd831a-e80c-11e3-afc6-a1dd9407abcf_story.html; Ashley Fantz, *Shinseki Couldn't Weather Firestorm Over Scandal that "Anguished" Him*, CNN (May 30, 2014, 2:34 PM), http://www.cnn.com/2014/05/23/us/shinseki-profile. In July

the veterans benefits system—that is, that the system should be pro-claimant and, as a result, fundamentally different from general legal principles—basically meant that the law of veterans benefits developed in relative isolation, even after the 1988 establishment of judicial review of veterans claims decisions.

Criticism of the VA's claims processing system, the Veterans Benefits Administration (VBA), continued in 2014. A July 2014 report from VA's Office of Inspector General reviewed the previous year's "Special Initiative To Process Rating Claims Pending Over 2 Years" and reported dismal results.[55] It concluded that the Special Initiative procedure—in which veterans received a provisional decision on claims that had been pending over two years, even if some evidence was outstanding—had actually been *less* effective than the existing procedures in granting benefits quickly and accurately.[56] However, it allowed VBA to remove these claims, which had been evaluated "provisionally" from its pending inventory, despite the fact that the claims still needed to be finalized.[57] The report concluded that "[t]his process misrepresented VBA's actual workload of pending claims and its progress toward eliminating the overall claims backlog."[58] After the VA provisionally assessed pending claims, the agency did not prioritize finalizing them, leading to an estimated 6,860 provisional ratings lacking final decision as of January 2014.[59] In addition, 32 percent of the claims reviewed by the Office of the Inspector General were processed inaccurately and, because the agency did not ensure that provisionally evaluated claims were

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2014, he was replaced by Robert A. McDonald, a U.S. Army veteran and the retired Chair, President, and CEO of Proctor & Gamble. *See* Julie Pace, *Obama Selects Former Procter and Gamble Executive Robert McDonald to Head Veterans Affairs*, U.S. NEWS (June 29, 2014, 4:04 PM), http://www.usnews.com/news/business/articles/2014/06/29/obama-picks-ex-p-g-head-to-lead-veterans-affairs.html; Office of Pub. & Intergovernmental Affairs, *The Honorable Robert A. McDonald*, U.S. DEP'T OF VETERANS AFF., http://www.va.gov/opa/bios/bio_mcdonald.asp (last visited Apr. 23, 2015).

55. VA OFFICE OF INSPECTOR GEN., 13-03699-209, REVIEW OF THE SPECIAL INITIATIVE TO PROCESS RATING CLAIMS PENDING OVER 2 YEARS i, 1–2 (2014) (detailing the VA's process of issuing provisional ratings for cases which required evidence and handling claims over two years old within 60 days).

56. *Id.* at 2 (explaining that although the Special Initiative provisional ratings process allowed VBA to deny claims more quickly than the existing process, it did not enable VBA to grant claims more quickly and delayed appeal rights for provisional ratings).

57. *Id.*

58. *Id.* at i.

59. *Id.*

identified and tracked properly, some veterans did not receive the finalized decisions.[60]

Despite the turmoil, VA seems to be standing behind the goal it established in 2010: that, by 2015, the agency will have eliminated the disability claims backlog and will be processing all claims with an accuracy rate of 98 percent within 125 days of applying for benefits.[61]

II. COMPOSITION OF THE FEDERAL CIRCUIT

In the three years preceding 2014, the composition of the Federal Circuit changed significantly after years of relative stability. In 2011, one judge left the court, two judges died, two assumed senior status, and three new judges were confirmed.[62] Between 2012 and 2013, two more judges assumed senior status.[63] In 2013, Judges Richard G. Taranto, Raymond T. Chen, and Todd M. Hughes were confirmed and began active service at the Federal Circuit.[64] Judge Chen authored his first veterans law decision in *Carroll v. McDonald*,[65] on September 24, 2014.[66] Judge Hughes authored three veterans law decisions in 2014.[67]

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60. *Id.*

61. *U.S. Department of Veterans Affairs FY 2012 Budget for the Veterans Benefits Administration, National Cemetery Administration, and Related Agencies: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 112 Cong. 27–28 (2011) (statement of Michael Walcoff, Acting Under Secretary for Benefits). However, it is currently far from meeting this target. *Id.* at 1–2 (statement of Rep. Jon Runyan, Chairman of the Subcommittee on Disability Assistance and Memorial Affairs for the Committee on Veterans Affairs).

62. Ridgway, *Changing Voices*, *supra* note 1, at 1177–80. In 2011, the Federal Circuit saw the retirement of Chief Judge Paul Michel, the deaths of Judge Daniel M. Friedman and Judge Glenn Archer, and the assumption of senior status by Judge Haldane Robert Mayer and Judge Arthur J. Gajarsa. *Id.* at 1177–79. New judges, including Judge Kathleen M. O'Malley, Judge Jimmie V. Reyna, and Judge Evan J. Wallach, with perspectives outside of veterans law, replaced several of these judges, who were veterans themselves. *Id.* at 1180.

63. Moshiashwili, *Splendid Isolation*, *supra* note 1, at 1447 (including Judges William Curtis Bryson and Richard Linn).

64. *See Raymond T. Chen, Circuit Judge*, U.S. CT. APP. FOR FED. CIR., http://www.cafc.uscourts.gov/judges/raymond-t-chen-circuit-judge.html (last visited Apr 23, 2015); *Richard G. Taranto, Circuit Judge*, U.S. CT. APP. FOR FED. CIR., http://www.cafc.uscourts.gov/judges/richard-g-taranto-circuit-judge.html (last visited Apr. 23, 2015); *Todd M. Hughes, Circuit Judge*, U.S. CT. APP. FOR FED. CIR., http://www.cafc.uscourts.gov/judges/todd-m-hughes-circuit-judge.html (last visited Apr. 23, 2015).

65. 767 F.3d 1368 (Fed. Cir. 2014).

66. *Id.* at 1368, 1370–72 (affirming the Veterans Court's decision that section 101(e) of the Veterans Benefits Act of 2003 confirms that the remarried widows of

In 2014, the only change in the court's composition occurred when Chief Judge Randall Rader stepped down as Chief in May and resigned from the court in June.[68] He was succeeded as Chief by Judge Sharon Prost on May 31, 2014.[69] President Obama's nominee to fill the vacant seat on the court is Kara Fernandez Stoll, a partner at Finnegan, Henderson, Farabow, Garrett & Dunner and former patent examiner who holds a degree in electrical engineering and previously served at the Federal Circuit as a law clerk to Judge Alvin Schall.[70]

III. THE 2014 VETERANS BENEFITS DECISIONS OF THE FEDERAL CIRCUIT

This Part considers the veterans law cases decided by the Federal Circuit in 2014. The court issued nineteen precedential decisions on veterans law in 2014,[71] a number comparable to the twenty-one

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veterans are eligible for, although not automatically entitled to, Dependency and Indemnity Compensation).

67. *See* Blubaugh v. McDonald, 773 F.3d 1310 (Fed. Cir. 2014) (naming the correct effective date for a veteran's award of disability rating); Robertson v. Gibson, 759 F.3d 1351 (Fed. Cir. 2014) (holding that VA may consider a service member's AWOL conviction to deny benefits, even when he had received a clemency discharge and presidential pardon), *cert. denied sub nom.* Robertson v. McDonald, 83 U.S.L.W. 3707 (2015); Bowers v. Shinseki, 748 F.3d 1351 (Fed. Cir.) (ruling that the presumption of a connection between military service and ALS did not apply to one service member), *cert. denied sub nom.* Bowers v. McDonald, 135 S. Ct. 339 (2014).

68. *Chief Judge Randall R. Rader to Step Down as Chief Judge on May 30, 2014*, U.S. CT. APPEALS FOR FED. CIR., http://www.cafc.uscourts.gov/2014/chief-judge-randall-r-rader-to-step-down-as-chief-judge-on-may-30-2014.html (last visited Apr. 23, 2015).

69. *Circuit Judge Sharon Prost Assumed the Position of Chief Judge of the Federal Circuit on May 31, 2014*, U.S. CT. APPEALS FOR FED. CIR., http://www.cafc.uscourts.gov/announcements/circuit-judge-sharon-prost-assumed-the-position-of-chief-judge-of-the-federal-circuit-on-may-31-2014.html (last visited Apr. 23, 2015).

70. Press Release, White House Office of the Press Sec'y, President Obama Nominates Two to Serve on the United States Courts of Appeals (Nov. 12, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/11/12/president-obama-nominates-two-serve-united-states-courts-appeals. Ms. Stoll was originally nominated to serve on the court on November 12, 2014. *Id.* On December 16, 2014, the nomination was returned to President Obama as a result of the adjournment of the Senate. 160 Cong. Rec. S6930, S6932 (daily ed. Dec. 16, 2014). On January 7, 2015, the President re-nominated her to the same position and the nomination is, at the time of this writing, currently pending before the United States Senate Committee on the Judiciary. Press Release, White House Office of the Press Sec'y, Presidential Nominations Sent to the Senate (Jan. 7, 2015), *available at* http://www.whitehouse.gov/the-press-office/2015/01/07/presidential-nominations-sent-senate.

71. The Federal Circuit also issued an opinion affirming a Veterans Court decision regarding attorney fee petitions under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2012). *See* Mason v. Shinseki, 743 F.3d 1370, 1371–72 (Fed. Cir. 2014) (holding that a statute requiring a notice of disagreement to be

precedential decisions issued in 2013, and significantly higher than the number of precedential decisions in 2012 and previous years.[72]

Federal law limits the Federal Circuit's review of Veterans Court decisions.[73] Under 38 U.S.C. § 7292, the Veterans Court has "exclusive jurisdiction" over challenges to statutes or regulations, as well as its own interpretations of those provisions, "to the extent presented and necessary to a decision."[74] Therefore, except for constitutional issues, the court may only review issues of law. It has no power to resolve any factual matters that arise in a case decided by the Veterans Court.[75] This Article will consider each case in the order in which VA would normally encounter these issues in processing a benefits claim.[76]

A. Eligibility for Benefits

Although claims for disability compensation often hinge on establishing a causal link between military service and a current disability, there are other threshold requirements for a successful claim, such as establishing veteran status.[77] Being a veteran for VA benefits purposes may or may not include individuals who served in the National Guard or on active or inactive duty for training, depending on the circumstances.[78] In addition, there are certain

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filed within 60 days of the date notice of an adverse decision is mailed regarding a simultaneously contested claim is applicable to attorney fee disputes). However, that case is not discussed here because it does not pertain to the law governing veterans benefits.

72. Moshiashwili, *Splendid Isolation*, *supra* note 1, at 1448. The Federal Circuit issued 16 precedential veterans law decisions in 2012, 11 in 2011, and 14 in 2010. Gugliuzza, *supra* note 1, at 1220–21 (2010 decisions); Ridgway, *Fresh Eyes*, *supra* note 1, at 1055 (2012 decisions); Ridgway, *Changing Voices*, *supra* note 1, at 1190 (2011 decisions).

73. 38 U.S.C. § 7292 (2012).

74. *Id.* § 7292(c).

75. *Id.*; *see* Forshey v. Principi, 284 F.3d 1335, 1345 (Fed. Cir. 2002) (holding that statutory history allows factual review only on a narrow standard that affords extreme deference to a Board of Veterans' Appeals factual determination).

76. *See, e.g.*, Moshiashwili, *Splendid Isolation*, *supra* note 1, at 1437–38 (indicating the order in which the article discussed the veterans law cases decided by the Federal Circuit in 2013).

77. *See, e.g.*, Collaro v. West, 136 F.3d 1304, 1308 (Fed. Cir. 1998) (noting that "status as a veteran, the existence of disability, a connection between the veteran's service and the disability, the degree of the disability, and the effective date of the disability" are the five elements of a claim for service-connected disability compensation).

78. *See, e.g.*, Bowers v. Shinseki, 748 F.3d 1351, 1351–52. (Fed. Cir. 2014) (holding that, generally, claimants are not entitled to evidentiary presumptions under either an active duty for training basis or reserve duty basis).

conditions that act as a bar to receiving VA benefits, such as a dishonorable discharge or an injury that was the result of the veteran's own willful misconduct.[79]

1. Veteran status and presumptive service connection

38 C.F.R. § 3.318, which VA promulgated in 2008, provides one of the exceptions designed to ease the evidentiary burden of establishing service connection after medical studies reported an association between active military service and amyotrophic lateral sclerosis (ALS).[80] The regulation provides that service connection will be granted if ALS manifests "at any time after discharge or release from active military, naval, or air service."[81] However, VA may not grant service connection "[i]f the veteran did not have active, continuous service of 90 days or more."[82]

In *Bowers v. Shinseki*,[83] the Federal Circuit affirmed the Veterans Court, which held that presumptive service connection for ALS, as provided in 38 C.F.R. § 3.318, requires "active military, naval, or air service" and was not applicable to the appellant, who served without incident in the Army National Guard.[84]

In *Bowers*, Wayne E. Bowers served in the Army National Guard from 1972 to 1978, including a continuous period of active duty for training from August 1972 to February 1973.[85] There was no evidence that he suffered a disease or injury during this time.[86] Over 30 years later, he was diagnosed with ALS and filed a claim with VA for disability compensation for ALS and related conditions.[87] The RO denied the claim, finding no evidence that Bowers developed ALS during his National Guard service or that his National Guard service aggravated his ALS.[88]

Mr. Bowers appealed to the Board, arguing that section 3.318 entitled him to presumptive service connection for ALS.[89] The Board

79. *See, e.g.*, 38 U.S.C. § 3011(a)(1)(A)(ii) (2012) (establishing that willful misconduct that leads to a discharge from active duty also precludes certain benefits, such as educational assistance).
80. 38 C.F.R. § 3.318(b) (2014).
81. *Id.* § 3.318(a).
82. *Id.* § 3.318(b)(3).
83. 748 F.3d 1351 (Fed. Cir. 2014).
84. *Id.* at 1351–52.
85. *Id.*
86. *Id.* at 1352.
87. *Id.*
88. *Id.*
89. *Id.*

denied service connection, explaining that reserve duty and active duty for training generally do not entitle a claimant to invoke the evidentiary presumptions that VA has established.[90] Therefore, he did not qualify as a "veteran" for the purposes of VA benefits.[91] Mr. Bowers appealed to the Veterans Court, which affirmed the Board in a single-judge memorandum decision.[92]

On appeal, the Federal Circuit affirmed the Veterans Court decision, holding that although the regulation did not refer to "veteran status" explicitly, it provided that presumptive service connection for ALS "applies after discharge or release from *active military, naval, or air service.*"[93] The court explained that this phrase is specifically defined by statute to include only individuals who served on active duty or on active duty for training when the individual was disabled or died from a disease or injury incurred or aggravated in the line of duty—neither of which applied to Mr. Bowers.[94] The court noted that this interpretation was also consistent with the general statutory scheme establishing veterans disability compensation—which uses the same definition—and that the plain language of the regulation repeats the statutory definitions.[95] Accordingly, the Federal Circuit affirmed the Veterans Court decision.[96]

2. Willful misconduct as a bar to benefits

Under 38 U.S.C. § 3011, certain veterans may receive educational assistance benefits when they are released from active duty for "a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty."[97] In *Martin v. McDonald*,[98] the Federal Circuit held that failure to complete a treatment program for alcohol abuse is not necessarily willful

90. *Id.*

91. *Id.* (holding that Mr. Bowers' failure to prove that he incurred ALS during his period of training for active duty meant that he was barred from asserting the required service connection).

92. Bowers v. Shinseki, 26 Vet. App. 201, 206–07 (2013). While the appeal was pending, Mr. Bowers died and his wife was substituted as the appellant. *See Bowers*, 748 F.3d at 1351.

93. *Bowers*, 748 F.3d at 1353.

94. *Id.*; *see* 38 U.S.C. § 101(24) (2012).

95. *Bowers*, 748 F.3d at 1353. *Compare* 38 U.S.C. § 101(24) (defining the term "active military service" in general), *with* 38 C.F.R. § 3.318 (2014) (applying the definition of active military service specifically in the ALS context).

96. *Bowers*, 748 F.3d at 1354.

97. 38 U.S.C. § 3011(a)(1)(A)(ii).

98. 761 F.3d 1366 (Fed. Cir. 2014).

misconduct that would bar a claimant from eligibility for VA educational assistance benefits.[99]

In *Martin*, the veteran, Grover Martin, was serving in the U.S. Army when he sought treatment for alcohol dependence.[100] Although he participated in a rehabilitation program, it was not successful.[101] He was honorably discharged and the official reason listed was "alcohol rehabilitation failure."[102] After leaving the military, Mr. Martin applied for, but was denied, educational assistance benefits.[103] He appealed to the Board, arguing that his discharge for alcohol rehabilitation failure was not the result of willful misconduct but rather the result of a physical or mental condition that interfered with the performance of his duties under 38 U.S.C. § 3011(a)(1)(A)(ii).[104] The Board denied the application by concluding that the record indicated the claimant was discharged for alcohol abuse, which it considered to be willful misconduct.[105] Mr. Martin appealed to the Veterans Court, which affirmed the Board's denial of benefits as not clearly erroneous.[106]

On appeal, the Federal Circuit concluded that it was legal error for the Veterans Court to affirm the Board's conclusion that the veteran's discharge for "alcohol rehabilitation failure" constituted "willful misconduct" under 38 U.S.C. § 3011(a)(1)(A)(ii), without considering the specific conduct at issue, whether that conduct was misconduct and, if so, whether the misconduct was willful.[107] The Federal Circuit held that "the correct rule of law requires factual determinations missing from the Board's decision (and perhaps further factual development), thus precluding the Veterans Court's affirmance of the Board's decision."[108] The court's analysis rested on the distinction between mental states and physical actions; it concluded that "an unsuccessful attempt at rehabilitation addresses

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99. *Id.* at 1372.
100. *Id.* at 1367.
101. *Id.*
102. *Id.*
103. *Id.* at 1367–68.
104. *Id.* at 1368.
105. *Id.* (citing 38 C.F.R. § 3.1(n) (2014)). "*Willful misconduct*... means an act involving conscious wrongdoing or known prohibited action.... It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n).
106. *Martin*, 761 F.3d at 1368.
107. *Id.* at 1369.
108. *Id.* (citing Hensley v. West, 212 F.3d 1255, 1263–64 (Fed. Cir. 2000)).

only a mental state, not misconduct, or willful misconduct."[109] The Federal Circuit found that "[u]ltimately, the question is a statutory one" and observed that Congress has indicated that alcohol abuse and willful misconduct are not always the same thing.[110] Accordingly, it vacated and remanded the Veterans Court decision.[111]

3. Effect of a presidential pardon on a bad conduct discharge

To be eligible for benefits, a claimant must not have been discharged from the military for bad conduct. In some circumstances, a former service member with a bad conduct discharge is able to get the nature of the discharge upgraded such that VA benefits are available. The effects of a presidential pardon on a bad conduct discharge have led to mixed results for veterans. For example, in *Robertson v. Gibson*,[112] the Federal Circuit held that a presidential pardon and upgraded clemency discharge did not preclude VA from denying disability compensation based on the veteran's absent without leave (AWOL) conviction that led to his original bad conduct discharge.[113]

Veterans are eligible for VA benefits only if they received a release or discharge "under conditions other than dishonorable."[114] However, there are multiple types of discharges, both administrative and punitive.[115] Therefore, although an "honorable" discharge establishes that a veteran is eligible for VA benefits,[116] when a veteran is discharged for bad conduct it is not always immediately clear whether a veteran is eligible for benefits if he or she did not receive a dishonorable discharge. In such circumstances, VA must determine whether a veteran's discharge was "under conditions other than dishonorable."[117]

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109. *Id.* at 1370.

110. *Id.* at 1371–72 (interpreting the disjunctive construction of three veterans disability statutes related to alcohol abuse and the exclusion of the phrase "or abuse of alcohol or drugs" from willful misconduct in the 1991 National Defense Reauthorization Act, Pub. L. 101-510, § 562(a)(1), 104 Stat. 1485, 1574 (Nov. 5, 1990), as evidence that Congress did not intend the two issues to be co-extensive (internal quotation marks omitted)).

111. *Id.* at 1372.

112. 759 F.3d 1351 (Fed. Cir. 2014), *cert. denied sub nom.* Robertson v. McDonald, 83 U.S.L.W. 3707 (2015).

113. *Id.* at 1359.

114. 38 C.F.R. § 3.12(a) (2014).

115. *See id.* § 3.12(b), (d)–(f) (delineating the various activities or behaviors that may result in discharges, including honorable, general, and dishonorable discharges).

116. *Id.* § 3.12(a), (e).

117. *Id.* § 3.12(a).

After the Vietnam War era, President Ford established a program for service members who had committed military absence offenses during the Vietnam War.[118] In exchange for completing a period of alternative service in the national interest, these veterans received two benefits: (1) they could upgrade their bad conduct discharges to neutral clemency discharges, and (2) they could receive a presidential pardon for the felony conviction they had received for violating military law.[119] Both of these alternatives were intended to improve employability for individual veterans, as well as to "'bind the Nation's wounds and to heal the scars of divisiveness' inflicted upon American society during the Vietnam War."[120]

While the program offered veterans a partial restoration of rights, it was designed to be limited in nature. The program was not intended to provide full amnesty for all applicants, but rather to offer veterans an opportunity for a moderate amount of clemency determined on a case-by-case basis by a newly established Presidential Clemency Board ("PCB").[121] Under this program, a presidential pardon would result in a partial restoration of rights, including the right to vote, hold trade licenses, and hold office.[122] Yet, such a pardon would "blot[] out neither the fact nor the record of [a felony] conviction."[123]

The other benefit available—an undesirable discharge upgraded to a clemency discharge—was also not a guarantee of eligibility for veterans benefits. It was a neutral discharge status that neither guaranteed nor precluded veterans' benefits, but rather allowed applicants to apply to VA and submit an appeal if their claims were denied.[124] In all cases, an applicant was free to request additional discharge status upgrades from the relevant military review board.[125]

The Federal Circuit addressed the effect of a presidential pardon on VA eligibility for benefits during its 2014 term. Mr. Robertson

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118. Proclamation No. 4313, 39 Fed. Reg. 33,293, 33,293–94 (Sept. 17, 1974). The program also covered civilians who had committed draft offenses when called up for service during the Vietnam War. *Id.* at 33,293–95.

119. *Id.* at 33,295.

120. Robertson v. Gibson, 759 F.3d 1351, 1353–54 (Fed. Cir. 2014) (quoting Proclamation No. 4313, 39 Fed. Reg. at 33,293), *cert. denied sub nom.* Robertson v. McDonald, 83 U.S.L.W. 3707 (2015).

121. *Id.* at 1353.

122. *Id.* (citing U.S. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT 186 (1975) [hereinafter PCB REPORT], available at http://catalog.hathitrust.org/Record/002482729).

123. *Id.* (citing PCB REPORT, *supra* note 122, at 186).

124. *Id.* at 1354 (citing PCB REPORT, *supra* note 122, at 13).

125. *Id.* (citing PCB REPORT, *supra* note 122, at 13).

volunteered to join the U.S. Army in July 1963.[126] During his military service, he suffered hearing loss in Germany and was sent back to the United States for treatment.[127] He was issued hearing aids and ordered to report for duty, but failed to appear.[128] He turned himself in after being AWOL for 39 days and was convicted and sentenced to three months of hard labor and partial pay forfeiture.[129]

Later in his military career, while Mr. Robertson was stationed in Thailand, he met a Thai woman named No Lee and conceived a child with her.[130] He reported that he requested permission to marry Ms. Lee and take her back to the United States, but his commanding officer denied the request and threatened to demote him and to confine him to a stockade.[131] The veteran again went AWOL and was caught by military police over ten months later.[132] During the intervening time, he claimed he had been living with the Lee family and teaching English at a Thai school so that he could support Ms. Lee and their child.[133] He was tried and convicted by a general court-martial, received a bad conduct discharge, and was sentenced to one year of hard labor with forfeiture of pay and allowances.[134]

In January 1974, before President Ford's clemency program was announced, Mr. Robertson filed a claim with VA for disability compensation for his hearing loss.[135] The claim was denied because "the circumstances surrounding his discharge from service precluded consideration for any VA benefit."[136] VA recommended that the veteran apply to the Army Board for Correction of Military Records (ABCMR) and request an upgraded discharge status.[137]

In November 1975, Mr. Robertson applied to participate in President Ford's clemency program.[138] He completed a period of alternative service, received a clemency discharge, and later received a "full pardon pursuant to an executive grant of conditional

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 1354–55.
130. *Id.* at 1355.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* (alterations omitted).
137. *Id.*
138. *Id.*

clemency . . . in furtherance of Presidential Proclamation 4313."[139] Mr. Robertson then reapplied for VA benefits, but his application was denied again based on "[t]he circumstances surrounding [his] discharge from service."[140] He did not appeal this decision, and it became final.[141] In 1978, he applied to the ABCMR for an upgrade in his discharge status but his request was also denied.[142]

In 1981, Mr. Robertson attempted to reopen his disability benefits claim with VA.[143] Although the agency obtained copies of his clemency discharge and presidential pardon, it continued to deny his claim, explaining that his "clemency discharge . . . ha[d] no effect on [its] previous decision."[144] Mr. Robertson tried to reopen his claim again numerous times over the next 25 years, always with the same result.[145] He did not appeal these decisions and they all became final.[146] In November 2007, he again requested that VA reopen his claim and, this time, he appealed the denial.[147]

Before the Board, Mr. Robertson argued that VA had committed a "clear and unmistakable error" (CUE) in 1974 when it denied his claim for benefits because his presidential pardon "blotted out" his AWOL conviction and bad conduct discharge.[148] The Board disagreed and denied the claim.[149] It found that "neither the Clemency Discharge nor Full Presidential Pardon changes the appellant's character of discharge, which is the pivotal issue at hand."[150] The Veterans Court also disagreed, explaining that a "broad" interpretation of the effect of a presidential pardon was based on a line of early U.S. Supreme Court cases that had since been overturned.[151] As a result, although the pardon had negated the

139. *Id.* (alteration in original).
140. *Id.* (alterations in original).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 1355–56.
148. *Id.* at 1356; *see* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (noting that a presidential pardon nullifies the offense that a recipient committed and relieves him of any penalty his might have incurred).
149. *Robertson*, 759 F.3d at 1356.
150. *Id.*
151. Robertson v. Shinseki, 26 Vet. App. 169, 176–79 (2013) (explaining that Robertson erroneously relied on the expansive scope of the presidential pardon outlined in *Ex parte Garland*, 71 U.S. 333 (1866), and *Young v. United States*, 97 U.S. 39 (1877), which were overturned in favor of the view that a pardon "does not eliminate

veteran's general court-martial conviction, VA was still free to consider the conduct that led to the conviction in the first place when assessing his eligibility for benefits.[152] Accordingly, the Veterans Court affirmed the Board's denial of benefits.[153]

On appeal to the Federal Circuit, Mr. Robertson presented the same arguments and asserted that the case was "about what it means to be pardoned."[154] In an opinion authored by Judge Hughes, the Federal Circuit rejected this formulation.[155] It stated that "[c]ontrary to Mr. Robertson's assertion, this case is not about what it means, generally, to be pardoned. This case is about what Mr. Robertson's specific pardon means in this specific context of veterans' benefits."[156] The court noted that there are multiple types of pardons and that, although Mr. Robertson relied heavily on the phrase "full pardon," the plain language of the pardon itself, along with the context of President Ford's program, led to the conclusion that VA was not precluded from considering the actions that led to the original bad conduct discharge.[157] Accordingly, it affirmed the Veterans Court decision.[158]

B. VA's Duty to Assist the Veteran

Several cases on the Federal Circuit's 2014 docket addressed VA's duty to assist veterans. One such duty includes the obligation to provide veterans with medical examinations for post-traumatic stress disorder (PTSD).[159] In *Sanchez-Navarro v. McDonald*,[160] the Federal Circuit addressed the correct interpretation of 38 C.F.R. § 3.304(f)(3), which, for certain veterans, provides that lay testimony alone may establish the occurrence of an in-service stressor.[161] The regulation provides, in relevant part, that a veteran's lay testimony is sufficient to establish an in-service PTSD stressor if

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the consideration of the conduct . . . that led to that conviction"), *aff'd sub nom.* Robertson v. Gibson, 759 F.3d 1351 (Fed. Cir. 2014), *cert. denied sub nom.* Robertson v. McDonald, 83 U.S.L.W. 3707 (2015).

152. *Id.* at 179.
153. *Id.* at 182.
154. *Robertson*, 759 F.3d at 1356.
155. *Id.* at 1357.
156. *Id.*
157. *Id.* at 1357.
158. *Id.* at 1359.
159. 38 C.F.R. 3.304(f) (2014).
160. 774 F.3d 1380 (Fed. Cir. 2014).
161. *Id.* at 1384–85.

> a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist of psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service . . . .[162]

Veteran Roberto Sanchez-Navarro served in the U.S. Army from May 1958 to March 1960, with service in the Korean demilitarized zone.[163] He reported that, shortly after he arrived in Korea, he was assigned to guard duty at night.[164] He could hear strange noises and was so frightened that he stayed up all night with his pistol and machine gun loaded and ready to shoot.[165] He also reported hearing gunshots and seeing many wounded soldiers while he was in Korea.[166] In 2005, he submitted a claim for service connection for PTSD, which the RO denied.[167] Ultimately, the Board found that 38 C.F.R. § 3.304(f) did not apply because Mr. Sanchez-Navarro had been diagnosed by a therapist and not VA or a VA-contracted psychiatrist or psychologist as required by the regulation.[168] In addition, the Board found that VA's duty to assist did not require it to provide Mr. Sanchez-Navarro with a medical examination "because 'none of [Mr. Sanchez-Navarro's] claimed stressor events ha[d] been sufficiently corroborated by credible supporting evidence and his account of having a continuity of PTSD symptom[s] since service [was] not deemed credible.'"[169] Mr. Sanchez-Navarro appealed, but the Veterans Court found that the duty to assist statute did not require VA to provide a medical examination and affirmed the Board's

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162. 38 C.F.R. § 3.304(f)(3).

163. *Sanchez-Navarro*, 774 F.3d at 1382.

164. Sanchez-Navarro v. Shinseki, No. 12-1645, 2013 WL 5496825, at *1 (Vet. App. Oct. 4, 2013), *vacated sub nom.* Sanchez-Navarro v. McDonald, 774 F.3d 1380 (Fed. Cir. 2014).

165. *Id.*

166. *Id.*

167. *Id.* Mr. Sanchez-Navarro appealed to the Board and then to the Veterans Court, which remanded to determine whether the revised version of 38 C.F.R. § 3.304(f) applied. *Id.* at *2.

168. *See id.* at *3; *see also* 38 C.F.R. § 3.304(f) (2014) (requiring medical evidence diagnosing the PTSD).

169. *Sanchez-Navarro*, 2013 WL 5496825, at *3 (first and fourth alterations in original).

decision that an exam was unnecessary "because the evidence of in-service stressor events was insufficient."[170]

On appeal to the Federal Circuit, Mr. Sanchez-Navarro argued that his claim was governed by 38 C.F.R. § 3.304(f)(3) because his claimed in-service stressors were "related to [his] fear of hostile military or terrorist activity."[171] He asserted that VA was therefore required to provide him with a medical examination because it was "necessary to make a decision on the claim."[172] He reasoned that such an examination would allow him to fulfill section 3.304(f)(3)'s criteria that a stressor may be established if a "*VA psychiatrist or psychologist* . . . confirms that the claimed stressor is adequate to support a diagnosis of [PTSD] and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary."[173]

The government agreed with Mr. Sanchez-Navarro's interpretation of the regulation with one key caveat: it asserted that a medical examination is only "necessary" under 38 U.S.C. § 5103A(d)(1) if the veteran's "claimed stressor is consistent with the places, types, and circumstances of the veteran's service."[174]

The Federal Circuit sided with the government and explained that, according to the regulation, Mr. Sanchez-Navarro was only entitled to a medical examination if his claimed stressor was consistent with the places, types, and circumstances of his service.[175] Judge Dyk, writing for the majority, concluded that the regulation was "clear on its face" and that "prior statements accompanying the publication of the regulation" supported the agency's interpretation.[176] He noted that, as a result, the court does not "need [to] decide whether [it] must defer to an agency's interpretation of a regulation that is offered for the first time at oral argument."[177] Judge Dyk explained that both the plain language of the regulation and the agency's statements when the regulation was promulgated contemplated that a medical examiner would only determine two criteria listed in the regulation: "(1) whether 'the claimed stressor is adequate to support' a diagnosis

170. *Id.* at *7.
171. Sanchez-Navarro v. McDonald, 774 F.3d 1380, 1382 (Fed. Cir. 2014) (quoting 38 C.F.R. § 3.304(f)(3)).
172. *Id.* at 1383 (quoting 38 U.S.C. § 5103A(d)(1) (2012)).
173. *Id.* (first two alterations in original) (quoting 38 C.F.R. § 3.304(f)(3)).
174. *Id.* (quoting 38 C.F.R. § 3.304(f)(3)).
175. *Id.*
176. *Id.*
177. *Id.*

of PTSD; and (2) whether the veteran's symptoms are related to the claimed stressor."[178] He further noted that the agency's comments at the time the regulation was promulgated also clearly stated that a VA adjudicator, not a medical examiner, would determine whether a claimed in-service stressor was consistent with the veteran's military service.[179]

However, Judge Dyk also noted that section 3.304(f)(3) was designed to provide "a more relaxed standard" for "credible supporting evidence" under which the credibility of a veteran's lay testimony would not be assessed as long as the three other conditions were met.[180] Accordingly, Judge Dyk concluded that the Veterans Court erred when it affirmed the Board's finding that the veteran's lay testimony was not credible without addressing whether the claimed PTSD stressor was consistent with the circumstances of the veteran's service.[181] Therefore, the Federal Circuit vacated the matter and remanded it for a determination as to this issue.[182]

Judge Lourie dissented, asserting that the majority erred in two respects.[183] First, he concluded that the majority's interpretation of section 3.304(f)(3) failed to follow the statutory rules for when a medical examination will be provided.[184] He explained that the statute required the agency to provide a medical examination "*when* such an examination or opinion is necessary to make a decision on the claim" but that another section of the statute clarified that "[a]n examination is only necessary '*if* the evidence of record' (1) contain[ed] 'competent evidence' of a current disability, and (2) 'indicate[d] that the disability . . . may be associated with the veteran's service."[185] Judge Lourie asserted that "[i]f the *if* criteria are not met, the *when* result does not come into play" and that, therefore, a medical examination is only "necessary to make a decision" when the record already contains such "competent evidence."[186] Judge Lourie also criticized the majority's analysis because, although section 3.304(f)(3) lessens a veteran's evidentiary burden, the Veterans Court considered the claim under this section and found that it did not

178. *Id.* at 1384 (citing 38 C.F.R. § 3.304(f)(3)).
179. *Id.*
180. *Id.* (referring to 38 C.F.R. § 3.304(f)'s introductory reference to the need for "credible supporting evidence").
181. *Id.*
182. *Id.*
183. *Id.* at 1385 (Lourie, J., dissenting).
184. *Id.*
185. *Id.* (quoting 38 U.S.C. § 5103A(d)(1), (d)(2)(A)–(B) (2012)).
186. *Id.*

apply.[187] Since Judge Lourie believed that the Veterans Court did not misinterpret section 3.04(f)(3), he would have affirmed this portion of the Veterans Court's decision.[188]

Sanchez-Navarro provides an example of a recent regulation that is not sufficiently clear. The entire point of the regulation is buried at the end of the sentence and it is not clear how the multiple criteria that precede it are supposed to interact. A redrafted version might look like this:

> Unless VA provides clear and convincing evidence to the contrary, a veteran's lay testimony alone may establish the occurrence of a claimed in-service PTSD stressor if the following conditions are met:
>
> (1) a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity; and
>
> (2) a VA (or VA-contracted) psychiatrist or psychologist confirms that the claimed stressor is (a) adequate to support a diagnosis of PTSD and (b) that the veteran's PTSD symptoms are related to the claimed stressor; and
>
> (3) a VA adjudicator confirms the claimed stressor is consistent with the places, types, and circumstances of the veteran's service.

Sanchez-Navarro provides an example of how vague regulations can promote confusion and lead to adjudication regarding the agency's intentions when it promulgated the rule. The proposed redraft—assuming it accurately reflects the intent—makes it clear how the elements relate to each other without creating any substantive changes in the law.

C. Service Connection

There are five aspects of a successful claim for service-connected disability compensation.[189] In addition to veteran status, as discussed above, a veteran must establish that he or she suffers from a current disability and that this disability is causally linked to military service.[190] The fourth and fifth aspects—evaluating how disabling the condition is and determining the effective date of compensation—will be addressed in later sections of this Article because they are considered

187. *Id.* at 1386.

188. *Id.*

189. *See* Collaro v. West, 136 F.3d 1304, 1308 (Fed. Cir. 1998); *see also* 38 U.S.C. §§ 1110, 1131.

190. 38 U.S.C. §§ 1110, 1131; *Collaro*, 136 F.3d at 1308.

"downstream" elements of the claim that are not raised until a causal linkage has been established.[191]

At least initially, most disability compensation claims turn on whether a veteran can establish that his or her current disability can be causally linked to military service. There are numerous ways that linkage may be proven. Establishing "direct" service connection generally requires medical—or, in certain circumstances, lay—evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability.[192]

"Secondary" service connection is awarded when a disability "is proximately due to or the result of a service-connected disease or injury."[193] Veterans may also receive compensation under 38 C.F.R. § 3.310(a) when a service-connected condition aggravates a non-service-connected condition and results in additional disability.[194] There are also regulations and presumptions that lower the evidentiary hurdles for specific groups of veterans.[195]

1. Definition of a disease incurred or aggravated during service

In *O'Bryan v. McDonald*,[196] the Federal Circuit deferred to the agency's interpretation—as expressed in two VA General Counsel opinion letters—that the statutory term "disease"—as opposed to a noncompensable "defect"—means a medical condition that is

191. Evans v. West, 12 Vet. App. 396, 399 (1999) (noting that effective date is a "downstream matter" to be addressed after the benefit has been awarded); *see also* Vargas-Gonzalez v. Principi, 15 Vet. App. 222, 228–29 (2001) ("[A] claimant's [notice of disagreement] cannot express disagreement with an issue that has not been decided.").

192. *See* Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (discussing the requirements for lay evidence in establishing a causal nexus); Hickson v. West, 12 Vet. App. 247, 253 (1999) (explaining the standard of review to be given medical evidence establishing a nexus between claimant's injury and service); Caluza v. Brown, 7 Vet. App. 498, 506 (1995) (detailing the evidentiary requirements for a claim to be considered well grounded), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996); 38 C.F.R. § 3.303(a), (d) (2012) (codifying evidentiary standards for evaluating whether injury or disease is connected to service).

193. 38 C.F.R. § 3.310(a).

194. *See* Libertine v. Brown, 9 Vet. App. 521, 522 (1996) (debating whether alcohol and drug abuse stemming from PTSD is secondary); Allen v. Brown, 7 Vet. App. 439, 448 (1995) (en banc) (determining that the scope of well-grounded secondary condition claims should be interpreted in the veteran's favor).

195. For example, those who served in Vietnam, those who suffer from certain listed chronic illnesses, those who served in combat, or were prisoners of war, or the victims of in-service personal assaults. *See supra* note 41.

196. 771 F.3d 1376 (Fed. Cir. 2014).

capable of progression.[197] 38 U.S.C. § 1110, which provides that veterans will be compensated if they have an injury or disease incurred or aggravated during service, does not define the term "disease."[198] Accordingly, VA promulgated a regulation providing that, for the purposes of providing VA benefits, "diseases or injuries" does not include "[c]ongenital or developmental defects."[199]

In this case, when Mr. O'Bryan entered the service no eye problems were recorded, and his discharge examination reported that he had 20/20 vision.[200] Within a year after his separation from service, he submitted a claim for disability compensation for Leber's optic atrophy (Leber's), asserting that he experienced blurred vision during service.[201] Within a year of discharge, he was legally blind due to Leber's.[202] One of the doctors who examined the veteran stated that Leber's is a condition that "implies fixed, unchanging subnormal vision and has no known effective treatment."[203] In its decision denying benefits, the RO found that Leber's was not a disease within the meaning of the statute and regulation, but rather a "hereditary disorder" characterized by "bilateral progressive optic atrophy."[204] In 1980, the Board affirmed the denial, explaining that Leber's was not a disease for VA benefits purposes "because such [a] disorder is congenital or developmental" and therefore could not have been incurred during or aggravated by service.[205] Mr. O'Bryan did not appeal this decision, and it became final.[206]

Several years later, Mr. O'Bryan challenged the decision, alleging that the Board had committed CUE.[207] The Board reviewed the 1980 decision and determined that it was not the product of CUE.[208] The Veterans Court affirmed the Board decision, acknowledging that the veteran's condition worsened over time but concluding that the Board did not err when it found no CUE in the 1980 decision.[209] Mr. O'Bryan appealed.

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197. *Id.* at 1381.
198. *See* 38 U.S.C. § 1110 (2012).
199. 38 C.F.R. § 3.303(c) (2014).
200. *O'Bryan*, 771 F.3d at 1377–78.
201. *Id.* at 1378.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* (alteration in original).
206. *See id.*
207. *Id.*
208. *Id.*
209. *Id.*

The Federal Circuit reviewed the statute and regulation at issue, but noted that "[d]eference to an agency's interpretation of its own regulation is warranted when the regulation is ambiguous," as long as the interpretation is not "plainly erroneous or inconsistent with the regulation."[210]

The court further explained that courts should defer to an agency's interpretation of its regulation even when the agency does not resort to formal rulemaking procedures insofar as the agency's interpretation exhibits a "fair and considered judgment on the matter."[211]

The Federal Circuit concluded that section 3.303(c)'s reference to "[c]ongenital or developmental defects" is ambiguous.[212] Accordingly, the court looked to two VA General Counsel opinions for guidance on how the agency had interpreted the regulation.[213] The first General Counsel opinion observed that the regulation's reference to "defect" could not include every "'imperfection, failure or absence' because that would remove all conditions from the scope of 'disease' in 38 U.S.C. § 1110."[214] The opinion explained that "defects" are "structural or inherent abnormalities or conditions which are more or less stationary in nature" and concluded that a "disease" must be a condition that is "capable of improving or deteriorating."[215] The other General Counsel opinion also focused on whether a condition could progress, and stated that the relevant issue was the point at which the claimant began to experience symptoms and if those symptoms "progresse[d] during service at a greater rate than normally expected."[216] The court observed that "the

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210. *Id.* at 1379; *see also* Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000) (explaining that when a regulation lacks ambiguity, no deference is given to an agency's differing interpretation); Auer v. Robbins, 519 U.S. 452, 461 (1997) (applying the requisite standards for plainly erroneous when determining the ambiguity of agency interpretations).

211. *O'Bryan*, 771 F.3d at 1379 (quoting Thun v. Shinseki, 572 F.3d 1366, 1369 (Fed. Cir. 2009)).

212. *Id.*

213. *Id.*

214. *Id.* (citing Congenital/Developmental Conditions Under 38 C.F.R. § 3.303(c), Vet. Aff. Op. Gen. Couns. Prec. 82-90 (July 18, 1990) [hereinafter G.C. Prec. 82-90]).

215. G.C. Prec. 82-90.

216. Congenital/Developmental Conditions Under 38 C.F.R. § 3.303(c), Vet. Aff. Op. Gen. Couns. Prec. 67-90 (July 18, 1990) [hereinafter G.C. Prec. 67-90]. This opinion was previously issued on September 29, 1988, as General Counsel Opinion 8-88. *Id.* It was reissued, with the substance unchanged, as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. *Id.*

relevant legal question is whether the condition is *capable* of progression" and noted that this was logical because hereditary conditions capable of progression could be aggravated by military service.[217]

The Federal Circuit concluded that it was appropriate to defer to the agency's interpretation and held that a defect—which is not compensable—is a "static condition" that does not improve or deteriorate.[218] A disease, however—which is compensable if caused or aggravated by a veteran's military service—is a condition that is "capable of . . . progression."[219] Therefore, the court vacated and remanded the claim so the correct legal standard could be applied.[220]

2. Presumption of sound condition and aggravation

One of the reduced evidentiary burdens that VA provides for veterans seeking disability benefits is the presumption that a veteran was "in sound condition" upon enrolling for service, except as to conditions noted at the time.[221] VA can rebut the presumption by providing "clear and unmistakable evidence" that the condition pre-existed military service and was not aggravated by it.[222] In *Gilbert v. Shinseki*,[223] the Federal Circuit reaffirmed its decision in *Holton v. Shinseki*,[224] holding that the presumption of sound condition applies only to the second element of service connection—establishing the occurrence of an in-service injury or disease.[225]

Daniel R. Gilbert served in the U.S. Navy after a medical examination and medical history report revealed no psychiatric defects.[226] After his military service, he was diagnosed with, and treated for, major depression and alcohol abuse and dependence.[227] During treatment, Mr. Gilbert admitted he had experienced depression and thoughts of suicide throughout his life, that he had abused drugs and alcohol since he was a teenager, and that he had continued to abuse alcohol during his military service.[228] After he

217. *O'Bryan*, 771 F.3d at 1380.
218. *Id.* at 1381.
219. *Id.*
220. *Id.*
221. 38 U.S.C. § 1111 (2012).
222. *Id.*
223. 749 F.3d 1370 (Fed. Cir. 2014).
224. 557 F.3d 1362 (Fed. Cir. 2009).
225. *See Gilbert*, 749 F.3d at 1373 (upholding the decision reached in *Holton* regarding the proper applicability of the presumption of soundness).
226. *Id.* at 1371.
227. *Id.*
228. *Id.*

filed a claim for service-connected disability benefits, multiple examinations produced conflicting opinions about whether his psychiatric condition was connected to service.[229]

VA denied service connection and the Board affirmed the denial.[230] The Board explained that the presumption of sound condition applied because no psychiatric condition had been recorded when Mr. Gilbert entered military service.[231] As to whether VA rebutted the presumption, the Board found that VA had provided clear and unmistakable evidence that the veteran's depression and substance abuse had pre-existed service.[232] However, the Board found that VA had failed to establish that military service had not aggravated the veteran's psychiatric illness and, therefore, VA did not rebut the presumption of sound condition.[233]

Nonetheless, the Board denied service connection because it found that, although Mr. Gilbert's post-service psychiatric illness satisfied the first element of service connection and the presumption of sound condition established the second element, he had not established the third element: proving that his disability was causally linked to his service in the Navy.[234] The Veterans Court affirmed the Board decision and Mr. Gilbert appealed.[235]

Before the Federal Circuit, Mr. Gilbert argued that the presumption of sound condition relieved him of the burden to establish an in-service injury *and* to prove that such an injury was causally linked to his current disability.[236] The Federal Circuit rejected this argument as foreclosed by its decision in *Holton*, where it held that the presumption of sound condition relates to the second element of a service-connection claim—the occurrence of an in-service injury or disease.[237]

Mr. Gilbert attempted to distinguish *Holton* on the basis that he, unlike the veteran in *Holton*, had a medical condition that existed before his military service.[238] The Federal Circuit rejected this argument and reaffirmed that the presumption of sound condition does not relate to the third element of service connection—the

229. *Id.* at 1371–72.
230. *Id.* at 1372.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 1373 (quoting Holton v. Shinseki, 557 F.3d 1362, 1367 (Fed. Cir. 2009)).
238. *Id.*

requirement that the veteran establish a causal nexus between a current disability and military service.[239]

3. Compensation for Gulf War illnesses

As a general rule, pain alone does not constitute a "current . . . disability" for which VA may grant service connection.[240] Instead, to qualify a claimant for service-connected disability compensation, pain must limit the veteran's ability to function.[241] In *Mitchell v. Shinseki*,[242] the Veterans Court held that "although pain may cause a functional loss, pain *itself* does not constitute functional loss" for the purpose of VA benefits.[243]

Most compensation for disabilities arising from service is granted under 38 U.S.C. § 1110, which governs basic entitlement to compensation for disabilities suffered during military service. However, § 1117 provides that VA will pay disability benefits "to a Persian Gulf veteran with a qualifying chronic disability" if that disability manifested on active duty during service in the Persian Gulf.[244] The definition of a "qualifying chronic disability" includes a chronic disability resulting from "an undiagnosed illness," which may manifest as "muscle pain" and "joint pain."[245]

In *Joyner v. McDonald*,[246] veteran Tarell Joyner was treated twice for neck pain during his service in the U.S. Marine Corps in the Persian Gulf; however at his separation-from-service examination, his neck was described as "normal."[247] He later submitted a claim for disability compensation for chronic neck pain, among other problems.[248] The RO denied the claim and the Board affirmed the denial on the basis that Mr. Joyner did not have a currently diagnosed neck disability and therefore could not meet the first requirement for service connection.[249]

On appeal to the Veterans Court, Mr. Joyner argued that VA only analyzed his neck condition under 38 U.S.C. § 1110 and failed to consider whether, as a Gulf War veteran, he might be entitled to

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239. *Id.*
240. Sanchez-Benitez v. West, 13 Vet. App. 282, 285 (1999), *vacated in part sub nom.* Sanchez-Benitez v. Principi, 259 F.3d 1356 (Fed. Cir. 2001).
241. 38 C.F.R. § 4.40 (2012).
242. 25 Vet. App. 32 (2011).
243. *Id.* at 37.
244. 38 U.S.C. § 1117(a)(1) (2012).
245. *Id.* § 1117(a)(2)(A), (g)(4)–(5).
246. 766 F.3d 1393 (Fed. Cir. 2014).
247. *Id.* at 1394.
248. *Id.*
249. *Id.*

service connection under § 1117.[250] The Veterans Court assessed the claim under § 1117, but in a single-judge decision, it affirmed VA's denial of benefits reasoning that, under *Mitchell*, pain alone does not constitute a disability for the purpose of VA benefits.[251]

Mr. Joyner appealed to the Federal Circuit.[252] At oral argument, the government conceded that pain could constitute a disability under § 1117 because it could be the manifestation of an undiagnosed illness.[253] However, the government argued that any error in the Veterans Court decision was harmless.[254] The Federal Circuit disagreed, finding that "[t]he Veterans Court's pronouncement that pain 'does *not* constitute a disability' pervades its analysis."[255] In an opinion authored by Judge Moore, the court found that "the plain language of § 1117 makes clear that pain, such as muscle pain or joint pain, may establish an undiagnosed illness that causes a qualifying chronic disability."[256] The court noted that the implementing regulation also stated that "muscle pain" or "joint pain" could manifest an "undiagnosed illness."[257]

The government also argued that under § 1117, a veteran had "to demonstrate that a medical professional has eliminated all possible diagnoses before a veteran can be compensated for a disability stemming from an undiagnosed illness."[258]

The Federal Circuit rejected this argument in favor of a more limited reading of the statute, holding that a veteran did not need to undergo exhaustive medical testing to then be "'diagnosed' with an 'undiagnosed illness' after all possible medical conditions have been ruled out."[259] Instead, the court held that the statute and regulation only require an evaluation and VA could not make a diagnosis regarding the cause of the "qualifying chronic disability."[260] In support of this conclusion, Judge Moore noted that when VA promulgated the final version of section 3.317 in 1995, it explained

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250. *Id.*

251. Joyner v. Shinseki, No. 11-3700, 2013 WL 2157239, at *4 (Vet. App. May 20, 2013), *vacated and remanded by* 766 F.3d 1393 (Fed. Cir. 2014).

252. *Joyner*, 766 F.3d at 1394.

253. *Id.* at 1395.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* (citing 38 C.F.R. § 3.317(b)(4)–(5) (2014)).

258. *Id.*; *see also* 38 U.S.C. § 1117(a)(2) (2012) (implying that medical examination of undiagnosed illnesses is necessary).

259. *Joyner*, 766 F.3d at 1395.

260. *Id.*

that the regulation did not require that physicians test veteran claimants for every possible condition, using all available medical tests.[261] At that time, VA had made it clear that the statute and regulation required that "[p]hysicians should simply record all noted signs and reported symptoms, document all clinical findings, and provide a diagnosis where possible."[262] Accordingly, the Federal Circuit remanded Mr. Joyner's claim.[263]

4. Medical evidence required to sever service connection

Under section 3.105(d), service-connected benefits may be terminated if the agency later realizes that the grant was a mistake: the evidence must establish that it was a CUE, with the burden of proof on the agency.[264] The regulation states the severance may be based on a change in diagnosis, as long as the agency obtains a medical certification that, "in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous."[265] In *Stallworth v. Shinseki*,[266] the Federal Circuit held that a medical examiner did not have to use specific language when certifying that a previous award of service-connected benefits was clearly erroneous and should be severed.[267]

In 1975, Mr. Stallworth was awarded service-connected disability benefits for schizophrenia, which was evaluated as fifty percent disabling.[268] For 17 months, he was frequently admitted to inpatient psychiatric facilities, where medical professionals repeatedly concluded that he was not suffering from any mental condition.[269] Eventually, his treating physician concluded that Mr. Stallworth did not suffer from schizophrenia.[270] In 1977, four VA staff physicians at the Biloxi VA Medical Center provided a certification stating that there was no evidence Mr. Stallworth had a mental illness, that he was "fully responsible for his behavior," and that he was using "deceptive

261. *Id.*

262. *Id.* (quoting Compensation for Certain Undiagnosed Illnesses, 60 Fed. Reg. 6660, 6662 (Feb. 3, 1995) (codified at 38 C.F.R. pt. 3)).

263. *Id.* at 1395–96.

264. 38 C.F.R. § 3.105(d) (2014).

265. *Id.* In addition, the "certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion." *Id.*

266. 742 F.3d 980 (Fed. Cir. 2014).

267. *Id.* at 984.

268. *Id.* at 981.

269. *Id.*

270. *Id.*

practices" to manipulate transfers to various hospitals.[271] The physicians opined that the veteran's diagnosis of schizophrenia was "in error and mistakenly made," and that his in-service psychotic episode was the result of his admitted use of illegal drugs.[272] VA concluded that the award of benefits for schizophrenia was CUE and severed service connection.[273]

Mr. Stallworth attempted to have his benefits restored, which the RO denied.[274] He appealed and, in 1981, the Board affirmed the denial of restoration of service-connected benefits.[275] In 2010, after extensive adjudication including Mr. Stallworth's allegation that the severance of service connection was based on CUE, the Board concluded there was no CUE in the 1981 Board decision.[276] It determined that the four physicians who provided the severance certification had considered "all of the accumulated evidence," as required.[277]

Mr. Stallworth appealed the 2010 Board decision to the Veterans Court, asserting that the Board misinterpreted section 3.105(d).[278] He argued that the 1977 certification was inadequate to support severance because the diagnosis relied upon was clearly erroneous.[279] The Veterans Court limited its review to a determination of whether the 2010 Board decision correctly interpreted section 3.105(d) when it reviewed whether there was CUE in the 1981 Board decision.[280] It concluded that the 2010 Board, in finding no CUE in the 1981 Board decision, did not misapply or misinterpret section 3.105(d).[281] The Veterans Court affirmed the 2010 Board decision.[282]

On appeal, the Federal Circuit construed the veteran's argument as requiring the certification of changed diagnosis to "use magic words such as 'clearly erroneous' when providing an opinion pursuant to [section] 3.105(d)."[283] The court distinguished the case

271. *Id.* at 981–82.
272. *Id.* at 982.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. Stallworth v. Shinseki, No. 11-0952, 2012 WL 4882264, at *3 (Vet. App. Oct. 16, 2012), *aff'd*, 742 F.3d 980 (Fed. Cir. 2014).
280. *Id.*
281. *Id.* at *7.
282. *Id.*
283. *Stallworth*, 742 F.3d at 983.

on which the veteran relied, *Andino v. Nicholson*,[284] because in that case, the certification of changed diagnosis "was not based on a consideration of all the accumulated evidence," whereas in the case on appeal, the Board had explicitly found that all evidence was considered.[285] Regarding *Andino*, the Federal Circuit stated, "[w]e therefore held that service connection could not be severed based on a medical opinion that did not consider all accumulated evidence, but we did not require the use of any particular certifying language."[286] The court concluded that the plain language of the regulation required that a subsequent change in diagnosis did not need to use the specific language of the regulation to be a valid medical certification.[287] Accordingly, it affirmed the Veterans Court decision.[288]

D. Evaluating the Level of Compensation Provided

In 2014, the Federal Circuit issued two opinions involving disability evaluations, as compared to three in 2013, none in 2012, and three in 2011.[289] The government generally evaluates disability according to the criteria in VA's Schedule for Rating Disabilities ("Rating Schedule"), which is based on "average impairment in earning capacity."[290] If two evaluations are potentially applicable, "the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that [evaluation]. Otherwise, the lower [evaluation] will be assigned."[291] The Rating Schedule has hundreds of "diagnostic codes" detailing how to evaluate disabilities of every body part and physical system on a scale from 0 percent to 100 percent disabling.[292] When those codes are insufficient, there are also provisions for extra-schedular ratings and special monthly compensation to further tailor the monthly payments.[293] The Rating

284. 498 F.3d 1370 (Fed. Cir. 2007).
285. *Stallworth*, 742 F.3d at 983 (citing *Andino*, 498 F.3d at 1373).
286. *Id.*
287. *Id.* at 983–84.
288. *Id.* at 984.
289. *See* Moshiashwili, *Splendid Isolation*, *supra* note 1, at 1485; Ridgway, *Changing Voices*, *supra* note 1, at 1199. *See generally* Ridgway, *Fresh Eyes*, *supra* note 1 (discussing the Federal Circuit's veterans law cases in 2012, none of which involved disability evaluations).
290. 38 U.S.C. § 1155 (2012); 38 C.F.R. § 4.1 (2014).
291. 38 C.F.R. § 4.7.
292. 38 U.S.C. § 1155 (requiring that diagnostic codes be increased on ten percent increments); 38 C.F.R. § 4.1.
293. 38 C.F.R. § 3.321(b) (extra-schedular); *id.* § 3.350 (special monthly compensation).

Schedule and extra-schedular ratings illustrate how complex the VA regulatory scheme can be.

1. Extra-schedular evaluation of multiple service-connected disabilities

Although disability evaluations are generally based on "average impairment in earning capacity," in some unusual cases, VA's Rating Schedule does not adequately describe the veteran's disability picture. If the agency determines that this is the case and that the disabling condition also causes related problems such as "'marked interference with employment' or 'frequent periods of hospitalization,'" then VA will consider whether the veteran should be assigned an extra-schedular disability evaluation, "[t]o accord justice."[294] In *Johnson v. McDonald*,[295] the Federal Circuit held that VA must consider a veteran's disabilities both individually and collectively when determining whether that veteran is entitled to an extra-schedular evaluation.[296]

Marvin O. Johnson served on active duty in the U.S. Army from May 1970 to December 1971.[297] In 2008, he contacted VA to request an increase in his benefits, asserting that his service-connected disabilities had worsened and that he was entitled to a total disability evaluation based on individual employability (TDIU) because he was no longer able to work.[298] At that time, he was receiving service-connected disability benefits for several conditions, including rheumatic heart disease, assessed as ten percent disabling, and degenerative changes in both knees, each of which was evaluated as ten percent disabling.[299] The RO denied his claims and the Board affirmed the decision, finding that Mr. Johnson was not entitled to referral for extra-schedular consideration for either his knee conditions or his heart condition.[300]

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294. 38 C.F.R. § 3.321(b)(1). *But see* Thun v. Peake, 22 Vet. App. 111, 113, 116 (2008) (affirming denial of extra-schedular disability evaluation to veteran alleging that he would have progressed further and earned more at his job, if not for his PTSD), *aff'd on other grounds*, 572 F.3d 1366 (Fed. Cir. 2009). If the RO or the Board determines that the Rating Schedule does not adequately represent a veteran's more complex disability, it must refer the veteran's case to the Under Secretary for Benefits or the Director of Compensation, who determines whether to assign an extra-schedular rating. 38 C.F.R. § 3.321(b)(1).

295. 762 F.3d 1362 (Fed. Cir. 2014).

296. *Id.* at 1365.

297. Johnson v. Shinseki, 26 Vet. App. 237, 240 (2013) (en banc), *rev'd sub nom.* Johnson v. McDonald, 762 F.3d 1362 Fed. Cir. 2014).

298. *Id.*

299. *Id.*

300. *Id.*

On appeal to the Veterans Court, he argued that the plain language of section 3.321(b)(1) required VA to consider his disabling conditions both individually and collectively when determining whether to refer him for extra-schedular consideration.[301] The en banc Veterans Court affirmed the Board decision, concluding that the language of the regulation was ambiguous and that it was not clear "whether an extraschedular evaluation is to be awarded solely on a disability-by-disability basis or on the combined effect of a veteran's service-connected disabilities."[302] Therefore, the Veterans Court concluded that it was obliged, under *Auer v. Robbins*,[303] to defer to the agency's interpretation of the regulation.[304]

The decision was far from unanimous. Judge Moorman concurred with the result but wrote a separate opinion, emphatically stating that the plain language of the regulation "appears most easily construed to convey only one meaning—that a veteran's *collective* service-connected disabilities may be considered in determining whether referral for an extra-schedular rating is warranted."[305] However, Judge Moorman "reluctantly" recognized that Supreme Court precedent forced the court to accept the agency's "plausible, even though strained, alternative reading" and affirm the Board decision.[306]

Three Veterans Court judges dissented.[307] In a separate statement that was longer than the majority opinion, Chief Judge Kasold stated that the regulation at hand was not ambiguous.[308] He concluded that the plain language of section 3.321(b)(1) required VA to refer a veteran for extra-schedular consideration if the rating schedule provided inadequate compensation for service-connected disabilities, either collectively or individually.[309] Judge Davis also wrote a dissenting opinion, in which Judge Bartley joined, agreeing with Chief Judge Kasold but writing separately "to emphasize that [their] dissent [was] grounded in the conviction that the language of

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301. *Id.*

302. *Id.* at 243.

303. 519 U.S. 452 (1997).

304. *Johnson*, 26 Vet. App. at 243 (citing Smith v. Nicholson, 451 F.3d 1344, 1349 (Fed. Cir. 2006).

305. *Id.* at 248 (Moorman, J., concurring in the result).

306. *Id.* at 251.

307. *Id.* at 252 (Kasold, C.J., dissenting); *id.* at 265 (Davis, J., dissenting) (joined by Judge Bartley).

308. *Id.* at 254 (Kasold, C.J., dissenting). The majority opinion was only nine pages long, *id.* at 239–48 (majority opinion), while Judge Kasold's dissent was thirteen pages long, *id.* at 252–65 (Kasold, C.J., dissenting).

309. *Id.* at 255–57 (Kasold, C.J., dissenting).

[section] 3.321(b) unambiguously refute[d] the interpretation advanced by the [government]."[310]

On appeal, the Federal Circuit agreed with Mr. Johnson that "[t]he plain language of [section] 3.321(b)(1) provides for referral for extra-schedular consideration based on the collective impact of multiple disabilities."[311] The court relied on the regulation's use of the plural "evaluations" and "disabilities" in explaining that the regulation applies in the "exceptional case where the schedular *evaluations*" are inadequate to compensate a veteran for service-connected "disability *or disabilities.*"[312] It also noted that this reading was consistent with the language of the statute under which section 3.321(b)(1) was promulgated, which authorizes VA to establish "a schedule of ratings of reductions in earning capacity from specific injuries *or combination of injuries.*"[313]

The government argued that section 3.321(b)(1) dictates consideration of each disability separately because the problem of inadequate schedular evaluation for multiple disabilities is already covered by 38 C.F.R. § 4.16's provision for TDIU.[314] The court rejected this argument, noting that TDIU is only available when a veteran's disabilities combine to preclude employment, and described section 3.321(b)(1) as having a "gap-filling function[,] . . . account[ing] for situations in which a veteran's overall disability picture establishes something less than total unemployability, but where the collective impact of a veteran's disabilities are nonetheless inadequately represented."[315] Accordingly, the court reversed and remanded to the Veterans Court.[316]

Judge O'Malley wrote a separate opinion concurring with the majority's analysis and result, but noting that "if the regulation here were deemed sufficiently ambiguous to require application of *Auer* deference, I believe this is a case in which the wisdom of continued adherence to that principle should be reconsidered."[317] She observed that several Supreme Court Justices had expressed concern about the validity of deferring to an agency's interpretation of its regulations,

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310. *Id.* at 265 (Davis, J., dissenting).
311. Johnson v. McDonald, 762 F.3d 1362, 1365 (Fed. Cir. 2014).
312. *Id.* (emphasis added) (citing 38 C.F.R. § 3.321(b)(1) (2014)).
313. *Id.* (emphasis added) (quoting 38 U.S.C. § 1155 (2012)).
314. *Id.* at 1366.
315. *Id.*
316. *Id.*
317. *Id.* at 1366–67 (O'Malley, J., concurring) (citing Auer v. Robbins, 519 U.S. 452 (1997)).

and that the topic was even more problematic in the context of veterans benefits, where VA has a very different role as compared to other federal agencies.[318]

2. Evaluation of minor joint groups under diagnostic code 5003

In *Spicer v. Shinseki*,[319] the Federal Circuit considered whether a single minor joint could meet diagnostic code (DC) 5003's requirement that a "group of" minor joints experience limited motion from arthritis before a compensable disability evaluation could be assigned.[320]

Veteran Stephen R. Spicer served in the U.S. Navy from February 1984 to February 1987.[321] During service, he fractured his left little finger, which required surgery and eventually resulted in joint fusing of the finger.[322] Several decades after service, he was diagnosed with arthritis of the distal interphalangeal (DIP) joint in the left little finger.[323] The RO granted service connection but denied a compensable disability evaluation, and Mr. Spicer appealed.[324] The Board denied the claim, finding that Mr. Spicer did not meet the criteria for a compensable evaluation under DCs 5227 or 5230, although it conceded that his arthritis caused pain and limitation of motion.[325]

On appeal to the Veterans Court, Mr. Spicer argued that the Board erred when it failed to consider DC 5003, which assigns a 10 percent disability evaluation when arthritis affects "a major joint" or "a group of minor joints."[326] He argued that the regulation defining "groups of minor joints" did not specify that multiple minor joints be affected.[327] The Veterans Court rejected this interpretation of the regulation, concluding that (1) "the DIP joint is not a major joint or minor joint group for the purpose of [evaluating] disabilities from arthritis" and (2) the Board's failure to consider DC 5003 was

318. *Id.* at 1367.
319. 752 F.3d 1367 (Fed. Cir. 2014).
320. *Id.* at 1369 (interpreting 38 C.F.R. § 4.71a(5003) (2013)).
321. *Id.* at 1368.
322. *Id.* at 1369.
323. *Id.*
324. *Id.*
325. *Id.* (ruling out section 4.71a, diagnostic codes 5227 ("little finger, ankylosis of"), and 5230 ("little finger, limitation of motion")).
326. *Id.*
327. *Id.* (citing 38 C.F.R. § 4.45(f) (2014)).

harmless because it did not apply in this case.[328] Accordingly, it affirmed the Board's decision.[329]

Mr. Spicer appealed to the Federal Circuit, continuing to argue that arthritis in a single DIP joint can result in limitation of motion that affects "a *group* of minor joints" and thus it qualifies for a 10 percent evaluation under DC 5003.[330] He asserted that the regulation did not provide any guidance to VA about how to evaluate a disability that affects only one minor joint rather than a group of joints.[331] Furthermore, he argued that if the court found the regulation to be ambiguous, the benefit-of-the-doubt presumption required it to resolve any interpretive doubt in favor of the veteran and adopt his interpretation.[332] The government supported the Veterans Court's interpretation that DC 5003 unambiguously required limitation in more than one minor joint.[333]

The Federal Circuit rejected the Mr. Spicer's argument. It noted that section 4.45(f), which preceded DC 5003 in the rating schedule, provided:

> [f]or the purpose of rating disability from arthritis, . . . multiple involvements of the interphalangeal, metacarpal and carpal joints of the upper extremities, the interphalangeal, metatarsal and tarsal joints of the lower extremities, the cervical vertebrae, the dorsal vertebrae, and the lumbar vertebrae, are considered groups of minor joints . . . .[334]

Accordingly, it held that "[t]he plain language of DC 5003, read in view of section 4.45(f), makes clear that 'a minor joint group is affected' only when two or more joints suffer from limitation of motion."[335] The court also held that the regulation was not ambiguous and, therefore, it need not invoke "the Supreme Court's

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328. *Id.*

329. *Id.*

330. *Id.* at 1370 (emphasis added) (referencing 38 C.F.R. § 4.45(f)).

331. *Id.*

332. *Id.* at 1370; *see* Brown v. Gardner, 513 U.S. 115, 120 (1994) (ruling against the Government where the statutory text and "reasonable inferences from it" supported the veteran's position); *see also* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011) (affirming that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor" (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991))); Comer v. Peake, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (holding that "[t]he VA disability compensation system is not meant to be . . . a stratagem to deny compensation to a veteran who has a valid claim").

333. *Spicer*, 752 F.3d at 1370.

334. *Id.* (citing 38 C.F.R. § 4.45(f) (2013)).

335. *Id.* (citing Lockheed Corp. v. Widnall, 113 F.3d 1225, 1227 (Fed. Cir. 1997)).

mandate that 'interpretive doubt is to be resolved in the veteran's favor."[336] As a result, it affirmed the Veterans Court decision.[337]

Spicer is a good example of the results of a clear regulation. Both levels of agency decision-making and judicial review interpreted the regulations in the same way. The Federal Circuit relied on the plain language of the regulation, thereby avoiding the need to invoke complex, potentially conflicting canons of regulatory interpretation.[338]

3. Evaluating compensation paid when a veteran is incarcerated for a felony

When a veteran who is receiving service-connected disability compensation is incarcerated for a felony conviction for more than 60 days, VA is required by statute to reduce compensation payments to the 10 percent level, as of the 61st day of the veteran's incarceration.[339] In *Wilson v. Gibson*,[340] the Federal Circuit held that the Veterans Court correctly determined that calculation of reduction of compensation payments resulting from a veteran's incarceration starts on the date of conviction and not on the date that all post-conviction remedies are exhausted.[341]

The veteran in *Wilson*, John David Wilson, Jr., served honorably in the U.S. Navy and was later awarded benefits for several service-connected disabilities, evaluated as 70 percent disabling.[342] In June 2001, he was convicted of two felonies and in October 2001, he began to serve two concurrent life sentences.[343] Although Mr. Wilson notified VA in April 2000 that he was currently incarcerated, the agency was not informed about his felony convictions until February 2002.[344] Later that month, VA sent Mr. Wilson a letter notifying him that his compensation payments were being reduced from the 70 percent level to the 10 percent level, effective December 20, 2001, which was the sixty-first day after he started serving his life sentences.[345] Between December 20, 2001, and February 2002, when VA was informed that the veteran was serving life sentences for felony convictions, the agency mistakenly overpaid Mr. Wilson by

336. *Id.* at 1371 (quoting *Gardner*, 513 U.S. at 118).
337. *Id.*
338. *Id.* at 1370–71.
339. 38 U.S.C. §§ 1114 (2012) (listing compensation rates for 2012); *id.* § 5313(a)(1) (mandating decreased compensation to incarcerated felons).
340. 753 F.3d 1363 (Fed. Cir. 2014).
341. *Id.* at 1368.
342. *Id.* at 1364.
343. *Id.*
344. *Id.* at 1365.
345. *Id.*

$15,464.50.[346] VA sought repayment of this amount and the veteran applied for a waiver of overpayment, which was denied.[347]

Before the Veterans Court, Mr. Wilson argued that a conviction is final under § 5313(a)(1) only after a claimant has exhausted his attempts to obtain federal habeas corpus relief.[348] The Veterans Court rejected this argument and affirmed the Board's decision.[349] On appeal, the Federal Circuit agreed with the Veterans Court's statutory interpretation, holding that the plain language of the statute and its implementing regulation clearly required that a payment reduction was calculated based upon "conviction" and not "final conviction."[350] The court observed, "[w]hen Congress wants to trigger events upon a final conviction, it knows how to do so, and does so explicitly."[351] The court noted that the plain language of the statute mandated that reduction of compensation begin "'on the sixty-first day of such incarceration'" and not on "a date upon which a person had exhausted all available post-conviction avenues of relief."[352] Accordingly, the court affirmed the Veterans Court's interpretation of § 5313(a)(1) and rejected Mr. Wilson's argument that the overpayment was invalid.[353]

E. Effective Date of Service Connection

In general, an award of VA benefits has an effective date that is established based on the facts of the case, but—with very few exceptions—it cannot be earlier than the date the claimant applied for benefits.[354]

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346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.* at 1366–68 (citing 38 C.F.R. § 3.665(m) (2013)) (anticipating that if a conviction is overturned on appeal, VA must reimburse withheld benefits to the vindicated veteran).
351. *Id.* at 1367.
352. *Id.* (quoting 38 U.S.C. § 5313(a)(1) (2012)).
353. *Id.* at 1368. The Federal Circuit also dismissed Mr. Wilson's challenge to the Board's denial of a waiver of overpayment because the veteran did not challenge the legality of the statute but, instead, asked the court to reweigh the facts, which is beyond its jurisdiction. *Id.* (citing 38 U.S.C. § 7292(d)(2)). The court also dismissed the veteran's challenge to the Board's denial of his claim of entitlement to a TDIU evaluation, which was not on appeal to the Veterans Court and, therefore, not subject to review by the Federal Circuit. *Id.* (citing Guillory v. Shinseki, 669 F.3d 1314, 1320 (Fed. Cir. 2012)).
354. 38 U.S.C. § 5110(a).

1. Effective date in a claim for service connection for PTSD

To determine the effective date of claims reopened on the basis of newly-acquired service department records, VA regulations provide that such an award "is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim."[355] In *Young v. McDonald*,[356] the Federal Circuit held that lay evidence is insufficient to establish the effective date for service connection for post-traumatic stress disorder (PTSD) and that medical evidence is required to establish the PTSD diagnosis.[357] Like an original claim, "the effective date of an award [of benefits] based on . . . a claim reopened after [an earlier] final adjudication . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore."[358]

In this case, veteran Robert G. Young served in the U.S. Army as a combat engineer from October 1965 to August 1967, including a tour of duty in Vietnam.[359] In 1984, he submitted a claim for VA disability benefits for "anxiety," "bad nerves" and being "unable to adjust to society."[360] This was interpreted as a claim for service connection for PTSD, which was denied when the veteran failed to report for a VA medical examination.[361] In May 1989, a VA psychiatrist submitted a letter to the RO stating that Mr. Young had been under his care since March 1989 and that he was suffering from PTSD.[362] The claim was denied because there was no evidence of an in-service stressor that would have caused his PTSD.[363]

Mr. Young's attempts to reopen his claim were denied in 1992, 1993, 1995, and 1997.[364] Mr. Young's claim was finally reopened in 1998 based on newly-acquired service department records that established an in-service stressor adequate to support a diagnosis of PTSD.[365] VA awarded service connection for PTSD, which was evaluated as 100 percent disabling, and effective August 1992, the

355. 38 C.F.R. § 3.156(c)(3) (2014).
356. 766 F.3d 1348 (Fed. Cir. 2014).
357. *Id.* at 1353.
358. 38 U.S.C. § 5110(a).
359. *Young*, 766 F.3d at 1350.
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*

date the agency received the veteran's request to reopen the previously-denied claim.[366]

Mr. Young disagreed with the assigned effective date, arguing that service connection should have been granted from when he first submitted his claim in 1984.[367] On appeal, the Board concluded that the correct effective date was the later of (1) the date VA received the original claim in 1984, or (2) the date the veteran's entitlement to service connection arose.[368] The Board found that the veteran was not entitled to service connection for PTSD until March 1989, when his psychiatrist started treatment, because it was the earliest date the veteran was medically determined to be suffering from PTSD.[369] Accordingly, the Board assigned March 1989 as the effective date for service connection.[370]

On appeal, the Veterans Court affirmed the Board's decision, relying on 38 C.F.R. § 3.304(f), which provides that "[s]ervice connection for [PTSD] require[d] medical evidence diagnosing the condition."[371] The court concluded that Mr. Young's lay statements in 1984 were not relevant to determining the date entitlement to service connection for PTSD arose because the regulation clearly required a medical diagnosis.[372] In this case, the VA psychiatrist's letter evidencing PTSD treatment since March 1989 was the earliest available medical diagnosis.[373]

Mr. Young appealed, arguing that the regulation only dictates whether service connection for PTSD should be awarded, not when entitlement arises.[374] The Federal Circuit disagreed, observing that "VA has long required a medical diagnosis of PTSD to establish service connection, as it did when [the veteran] filed his claim in 1984."[375] The Federal Circuit noted that the regulation includes and

366. *Id.*

367. *Id.* at 1350–51. For clarity, procedural aspects of the veteran's argument that are not relevant here have been omitted from this summary.

368. *Id.* at 1351.

369. *Id.*

370. *Id.*

371. *Id.* (first alteration in original) (quoting 38 C.F.R. § 3.304(f) (2014)).

372. *Id.*

373. *Id.*

374. *Id.* at 1351–52. The veteran also argued that the Veterans Court should not have applied 38 C.F.R. § 3.304(f), which was first promulgated in 1993, to his claim, which arose in 1984. *Id.* at 1354 (citing Princess Cruises, Inc. v. United States, 397 F.3d 1358, 1364 (Fed. Cir. 2005)).

375. *Id.* at 1354.

defines the conditions for entitlement, which necessarily dictate the effective date.[376]

The court also noted and appeared to accept the government's concession that a retrospective diagnosis could be acceptable, but was not present in this case because the VA psychiatrist who diagnosed PTSD said nothing about the veteran's symptoms before March 1989.[377] The court observed that, apart from the requirements of section 3.304(f), precedent provides that lay evidence alone, without a retrospective medical diagnosis, is not sufficient to establish a diagnosis of PTSD.[378] Although simple and observable medical conditions—such as a broken leg—may be diagnosed by lay persons, PTSD falls into the category of disabilities that are complex and require medical diagnosis.[379] The court concluded that "38 C.F.R. § 3.304(f) requires a diagnosis of PTSD by a medical professional, and there is no question raised as to its validity."[380] Accordingly, it affirmed the Veterans Court decision.[381]

2. Effect of new and material evidence on finality under 38 C.F.R. § 3.156(b)

Although a denied claim will generally become final if not appealed, a veteran "may reopen a finally adjudicated claim by submitting new and material evidence."[382] The regulation also provides that if the veteran files a timely appeal and the agency receives new and material evidence before the appeal period ends, or before an appellate decision is issued, then such evidence will be considered as having been filed with the claim that was pending at the beginning of the appeal period.[383]

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376. *Id.* at 1352.

377. *Id.* at 1352–54; *see also* Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (allowing lay evidence of testimony to form the basis of a retrospective diagnosis of PTSD).

378. *Young*, 766 F.3d at 1352–54.

379. *Id.* at 1353.

380. *Id.*

381. *Id.* at 1355.

382. 38 C.F.R. § 3.156(a) (2014). The regulation provides the following definitions: "New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Id.* It also explains that "[n]ew and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." *Id.*

383. *Id.* § 3.156(b).

Two previous Federal Circuit cases are relevant to interpreting 38 C.F.R. § 3.156(b). First, in *Bond v. Shinseki*,[384] VA granted service connection for PTSD and, within a year, the veteran submitted additional medical records and requested an increased disability evaluation.[385] Instead of applying section 3.156(b) and determining whether the additional records were new and material evidence, VA considered Richard D. Bond's submission as a new claim and granted it with an effective date corresponding to when the additional records were submitted.[386]

On appeal, the Federal Circuit agreed with Mr. Bond that the effective date should have been the date of his initial claim.[387] It explained that VA's failure to make the section 3.156(b) determination as to whether the additional records were new and material evidence meant that the initial decision never became final—in other words, it remained pending until the section 3.156(b) determination was made.[388] The court held that section 3.156(b) requires VA to first consider whether new and material evidence is related to a previous claim, before categorizing it as a new claim.[389] It pointed out that VA's characterization of the veteran's additional evidence as a new claim "[did] not foreclose the possibility that [the submission] may have also contained new and material evidence pertaining to" the earlier claim.[390]

In the second case, *Williams v. Peake*,[391] VA denied service connection for a nervous condition without informing the veteran about its decision.[392] The claimant, Vernon D. Williams, later filed a second claim for a nervous condition, which VA also denied, but this time informed him of its decision.[393] Mr. Williams did not appeal that decision.[394] Fifteen years later, the claim was reopened and service connection was granted with an effective date based on the request to reopen.[395] Mr. Williams argued that the effective date should have been the date of the first claim because VA never informed him

384. 659 F.3d 1362 (Fed. Cir. 2011).
385. *Id.* at 1363.
386. *Id.* at 1363–64.
387. *Id.* at 1366–69.
388. *Id.* at 1367–69.
389. *Id.* at 1367–68.
390. *Id.* at 1368.
391. 521 F.3d 1348 (Fed. Cir. 2008).
392. *Id.* at 1349.
393. *Id.*
394. *Id.*
395. *Id.*

about the denial and, therefore, that claim remained pending.[396] The Veterans Court and the Federal Circuit both disagreed, explaining that the denial of the second claim, about which Mr. Williams was informed, terminated the pending status of the first claim.[397]

Both *Bond* and *Williams* informed the Federal Circuit's analysis in *Beraud v. McDonald*.[398] Leonard Beraud served in the U.S. Navy from July 1974 to July 1977, with additional service afterwards in the Naval Reserve.[399] In 1985, he submitted a claim for service connection for headaches based on an in-service head injury.[400] In November 1985, the RO sent him a letter explaining that it was having trouble finding his service medical records and asking him to identify his reserve units so it could obtain the information from them.[401]

Before Mr. Beraud could respond, VA denied the claim for lack of evidence, informing him of its decision on December 9, 1985.[402] A week later, on December 16, 1985, Mr. Beraud responded to the request for information, notifying VA as to the location of his missing service medical records.[403] VA never responded to this letter and apparently did not obtain the records.[404] Mr. Beraud did not appeal the December 1985 denial of his headache claim.[405]

Four years later, Mr. Beraud asked VA to reopen the headache claim.[406] In February 1990, the RO reopened the claim and denied it on the merits, finding that Mr. Beraud did not incur his headache disorder during his military service.[407] The RO did not refer to Mr. Beraud's December 1985 letter explaining how to locate his missing service medical records, nor did it refer to the missing records themselves.[408] Mr. Beraud did not appeal this denial, and it also became final.[409] The RO denied his claim on the merits in 1990 after

396. *Id.*
397. *Id.* at 1350–51.
398. 766 F.3d 1402 (Fed. Cir. 2014).
399. *Id.* at 1403.
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*; *see also* Beraud v. Shinseki, 26 Vet. App. 313, 322 (2013) (Bartley, J., dissenting) (noting that "the veteran's Naval Reserve medical records referenced in his 1985 submission appear to be yet unobtained"), *rev'd sub nom.* Beraud v. McDonald, 766 F.3d 1402 (Fed. Cir. 2014).
405. *Beraud*, 766 F.3d at 1403.
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*

he requested that his claim be reopened, which he did not appeal.[410] In 1992 and 2002, he requested that VA reopen the claim, but the RO denied both requests on the grounds that Mr. Beraud had not submitted sufficiently new and material evidence.[411]

In August 2004, Mr. Beraud submitted an informal claim for service connection for the same headache condition and, based on a medical opinion that referenced a 1975 in-service head injury, VA granted the claim.[412] The agency assigned an effective date of August 27, 2004, the date he submitted the informal claim.[413] Mr. Beraud appealed, arguing that the effective date should be in 1985, when he filed his original claim.[414] The Board disagreed, finding that the 1990 denial had extinguished the pendency of the 1985 submission because the two claims were identical.[415]

On appeal to the Veterans Court, Mr. Beraud argued that his 1985 claim had never become final because VA never obtained and assessed the missing medical records he had identified in his December 1985 letter.[416] He asserted that VA's failure to make the required determination under section 3.156(b) as to whether those records were new and material meant that the 1985 claim remained pending.[417] A divided panel of the Veterans Court affirmed the Board's decision.[418] Although the majority acknowledged the regulations and case law about pending unadjudicated claims, it relied on *Williams* and concluded that if the 1985 claim had been pending, it became final when VA notified the veteran in 1990 that it had denied his headache claim.[419] The Veterans Court explained that "the RO is presumed to have considered all the evidence of record at the time of its February 1990 decision, including the [veteran]'s December 1985 letter."[420] The majority stated further stated that its "holding does not deprive claimants of the opportunity

410. *Id.*
411. *Id.* at 1403–04.
412. *Id.* at 1404.
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.* (citing Williams v. Peake, 521 F.3d 1348, 1351 (Fed. Cir. 2008)).
420. *See* Beraud v. Shinseki, 26 Vet. App. 313, 320 n.4 (2013) (citing Gonzales v. West, 218 F.3d 1378, 1381 (Fed. Cir. 2000)), *rev'd sub nom.* Beraud v. McDonald, 766 F.3d 1402 (Fed. Cir. 2014).

to challenge VA's procedural failures; it merely restricts the method of doing so to a challenge to the subsequent adjudication."[421]

Judge Bartley dissented, opining that the majority "wrongly limit[ed] the effect of 38 C.F.R. § 3.156(b)" because the regulation mandates that a claim remains pending until VA actually *considers* whether the additional evidence is new and material.[422] In this case, it appeared that the missing records referenced in the veteran's 1985 letter had not been obtained in 1990—nor, as Judge Bartley noted—did it appear that the missing records had ever been obtained.[423] Judge Bartley concluded that the Veterans Court should remand the matter to the Board to determine whether section 3.156(b) applies because the veteran reasonably raised section 3.156(b) in his 1985 submission, but the Board did not address this section when it determined the veteran's effective date of benefits.[424]

On appeal to the Federal Circuit, Mr. Beraud asserted that, under *Bond*, his 1985 claim remained pending despite the 1990 decision because VA never determined whether the medical records identified in the December 1985 letter were new and material evidence under section 3.156(b).[425] VA responded that *Bond* did not apply in this case because it did not concern the effect of a subsequent final decision on a claim identical to a prior pending claim, and that *Bond* did not hold that VA's failure to make a section 3.156(b) determination negates the finality of an unappealed later decision.[426] Instead, the agency argued that *Williams* should trump *Bond* and control the outcome.[427]

The Federal Circuit disagreed with VA's reasoning, noting that *Williams* did "not involve the submission of new evidence within the one-year appeal period" or VA's duty to consider such evidence under section 3.156(b).[428] It explained that, in *Williams*, the agency's subsequent decision on an identical claim cured any prejudice because the veteran eventually "received the notice [and] . . . understood how his claim was ultimately resolved."[429] The Federal Circuit reasoned that, for Mr. Beraud, the 1990 decision cured the

421. *Id.* at 319.
422. *Id.* at 322 (Bartley, J., dissenting).
423. *Id.*
424. *Id.*
425. Beraud v. McDonald, 766 F.3d 1402, 1405 (Fed. Cir. 2014).
426. *Id.*
427. *Id.*
428. *Id.* at 1405–06.
429. *Id.* at 1406.

notice problem but did not repair VA's failure to make the new-and-material determination under section 3.156(b), an obligation the court described as "not optional."[430]

The court also rejected the agency's argument that the Veterans Court correctly presumed that the 1990 decision was based on all relevant evidence, including the missing medical records.[431] It reasoned that, based on *Bond*, the presumption did not apply when VA had not made the required section 3.156(b) determination.[432] Accordingly, it reversed and remanded the claim.[433]

Judge Lourie dissented, asserting that "*Williams* is not undermined by *Bond*, and *Williams* should control in this case."[434] He noted that "[a]lthough *Williams* did not concern finality in the context of [section] 3.156(b), there is no reason to limit *Williams* to cases involving notice errors, and our cases have not limited *Williams* in such a way."[435] He explained that *Bond*, unlike *Williams*, did not involve a pending claim that was later resolved by a later decision, and should not, therefore, control the result in this case.[436] Judge Lourie asserted that in cases such as this, the appropriate way for the veteran to challenge VA's failure to properly adjudicate a prior unappealed claim was to file a motion alleging CUE.[437] He expressed his concern that the majority's decision could force the agency "to reopen determinations that were closed by final decisions that were adjudicated on the merits."[438]

3. Consequences of newly discovered service records on effective date

In general, the effective date for an award of service-connected benefits is "the date of receipt of the claim or the date entitlement arose, whichever is the later."[439] This rule also applies to reopened claims, for which the effective date is the later of the date of receipt of the request to reopen or the "date entitlement arose."[440]

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430. *Id.*
431. *Id.*
432. *Id.* at 1406–07 (citing Bond v. Shinseki, 659 F.3d 1362, 1368 (Fed. Cir. 2011)).
433. *Id.* at 1407.
434. *Id.* (Lourie, J., dissenting).
435. *Id.* at 1408 (citing Charles v. Shinseki, 587 F.3d 1318, 1323 (Fed. Cir. 2009)).
436. *Id.*
437. *Id.* at 1408–09.
438. *Id.* at 1409.
439. 38 C.F.R. § 3.400 (2014); *see* 38 U.S.C. § 5110(a) (2012); Akers v. Shinseki, 673 F.3d 1352, 1357 (Fed. Cir. 2012).
440. 38 C.F.R. § 3.400(r).

However, an exception arises when, after a claim has been decided, newly-obtained relevant service department records are associated with the claims file.[441] In such a case, VA is required to reconsider the veteran's claim regardless of whether the evidence is determined to be "new and material."[442] "In other words, section 3.156(c) serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim."[443] If applicable, section 3.156(c) also establishes different effective dates in certain circumstances.[444]

In *Blubaugh v. McDonald*,[445] the Federal Circuit held that the effective date of service-connection for a reopened claim for PTSD was the date the veteran submitted the new and material evidence that led to reopening and granting his claim, not the earlier date on which he unsuccessfully tried to reopen the claim.[446] Daniel C. Blubaugh served in the U.S. Army from January 1964 to January 1966, including service in Vietnam.[447] In 1988, he claimed service connection for PTSD but was denied because his VA psychological examination did not result in a diagnosis of PTSD.[448] He did not appeal this decision, and it became final.[449]

In 1992, Mr. Blubaugh requested that VA reopen his claim for service connection for PTSD.[450] The agency obtained new evidence—a Department of the Army (DA) Form 20 that listed Vietnam service dates—and so it reopened the claim and provided Mr. Blubaugh with another examination.[451] This examination also did not result in a diagnosis of PTSD and VA denied the claim again.[452] It also noted that Mr. Blubaugh did not have a confirmed stressor event, which is another requirement for granting service connection for PTSD.[453]

On July 25, 2008, Mr. Blubaugh submitted a second request to reopen his claim.[454] For the first time, he submitted a statement

441. *Id.* § 3.156(c)(1).
442. *See id.* (referencing section 3.156(a)).
443. Blubaugh v. McDonald, 773 F.3d 1310, 1313 (Fed. Cir. 2014).
444. 38 C.F.R. §§ 3.156(c)(3)–(4).
445. 773 F.3d 1310 (Fed. Cir. 2014).
446. *Id.* at 1311.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.*

describing his experiences in Vietnam and his difficulties after service.[455] There was evidence of a medically-documented PTSD diagnosis, which had also been unavailable during the previous adjudications of the claim.[456] Based on this new information, the RO reopened the claim and adjudicated it on the merits, granting service connection for PTSD with an effective date of July 25, 2008.[457]

Mr. Blubaugh submitted a Notice of Disagreement, asserting he was entitled to an earlier effective date.[458] The RO continued the denial, explaining that the initial claim and the first request to reopen were not supported by a diagnosis of PTSD and, furthermore, did not include evidence of a confirmable stressor event.[459] Mr. Blubaugh appealed to the Board, which affirmed the RO decision.[460]

On appeal to the Veterans Court, Mr. Blubaugh argued that the Board should have applied 38 C.F.R. § 3.156(c) and reconsidered the claim when it obtained the DA Form 20 and associated it with his claims file for the first time.[461] The Veterans Court concluded that the regulation did not apply in this case because the DA Form 20 was already associated with the claims file before the 1993 decision.[462] VA's duty to reconsider the claim arose when the agency obtained the service record, not in 2008.[463] Accordingly, it affirmed the Board's decision.[464]

On appeal to the Federal Circuit, Mr. Blubaugh argued that, under section 3.156(c), VA was required to consider whether he was entitled to an effective date earlier than his request to reopen the claim because (1) VA made a decision on his claim without all the relevant records, and (2) it later granted the benefits requested, based in whole or in part on those records.[465] The Federal Circuit rejected this argument.[466] It explained that "[s]ubsection (c)(1) is a separate and distinct provision from subsections (c)(3) and (c)(4)," which permit earlier effective dates under certain circumstances.[467] The

455. *Id.*
456. *Id.*
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.* at 1312.
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.* at 1313–14.
466. *Id.* at 1314.
467. *Id.*

court noted that "[t]he language and overall structure" of this section of the regulation emphasizes "that [section] 3.156(c)(1) requires the VA to reconsider only the *merits* of a veteran's claim whenever it associates a relevant service department record with his claims file (provided that the service record was unavailable when the veteran's claim was filed)."[468] It concluded that VA was only required to consider an earlier effective date under subsections (c)(3) and (c)(4) if the agency's section 3.156(c)(1) reconsideration on the merits resulted in a grant of benefits.[469]

The court explained that, in this case, the relevant and newly-obtained evidence that required VA to reopen and reconsider the claim under 38 C.F.R. § 3.156(c)(1) was the DA Form 20 in 1993.[470] However, that evidence did not sufficiently support a grant of service connection: at the time of the 1993 decision, the veteran still did not have a PTSD diagnosis or a confirmable stressor event.[471] The claim was finally granted based on new and material evidence under 38 C.F.R. § 3.156(a)—a medical diagnosis of PTSD and new statements about a confirmable stressor—and not based on newly obtained service records under 38 C.F.R. § 3.156(c).[472]

The Federal Circuit concluded that VA did not have an obligation to reconsider the veteran's claim in light of his DA Form 20 because in 1993, the VA had reconsidered and again denied the veteran's claim despite having a newly associated service record.[473] Accordingly, it affirmed the decision of the Veterans Court.[474]

F. Procedure

As discussed in the Introduction and as noted in previous years,[475] veterans' benefits law is procedurally complex and it is therefore not surprising that many of the Veterans Court decisions reviewed by the Federal Circuit deal with procedural issues.[476]

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468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.* at 1315.
475. *See generally* Ridgway, *New Complexities*, *supra* note 17, at 252 (describing how the veterans' benefits system struggles to balance complexity and informality).
476. Ridgway, *Changing Voices*, *supra* note 1, at 1207 (observing the significance of procedure to the veterans benefits system based on the fact that while most of the Federal Circuit's published decisions in 2011 reviewed unpublished, single-judge

1. Equitable tolling of deadline to appeal to veterans court

a. Timing of equitable tolling

In *Checo v. Shinseki*,[477] the Federal Circuit addressed the criteria for pausing—tolling—the running of the period in which a Notice of Appeal ("NOA") must be submitted to the Veterans Court.[478] When a claimant files an untimely NOA, the Veterans Court may consider whether equitable tolling is warranted.[479] Generally, equitable tolling applies only where a claimant has been prevented from timely filing an NOA despite exercising due diligence.[480]

One example of a situation that warrants equitable tolling is extraordinary circumstances beyond a claimant's control.[481] The three-part test to determine whether a given situation constitutes "extraordinary circumstances" sufficient to justify equitable tolling, which was first outlined in *McCreary v. Nicholson*,[482] requires that: (1) "the extraordinary circumstances must be beyond the [veteran's] control"; (2) "the [veteran] must demonstrate that the untimely filing was a direct result of the extraordinary circumstances"; and (3) "the [veteran] must exercise 'due diligence' in preserving his [or her] appellate rights, meaning that a reasonably diligent [person], under the same circumstances, would not have filed an appeal within the 120-day judicial-appeal period."[483]

In *Checo*, the Board denied an increased evaluation for the veteran's service-connected spine condition on July 6, 2011.[484] The time limit to appeal to the Veterans Court is 120 days[485] but the veteran, Cerise Checo, was homeless when the decision was issued and did not receive notice of the Board's denial until October 6, 2011, 91 days into the 120-day appeal period.[486] She eventually filed a NOA with the Veterans Court on December 7, 2011, 33 days after the 120-day time limit had expired.[487] She explained that she had not

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Veterans Court decisions, its decisions in three of the four procedural-related cases resulted in opinions that divided the entire Veterans Court).

477. 748 F.3d 1373 (Fed. Cir. 2014).
478. *Id.* at 1375.
479. Bove v. Shinseki, 25 Vet. App. 136, 137, 140–41 (2011) (per curiam).
480. *Id.* at 140.
481. *Id.*
482. 19 Vet. App. 324 (2005), *aff'd on r'hg*, 20 Vet. App. 86 (2006).
483. *Id.* at 332.
484. Checo v. Shinseki, 748 F.3d 1373, 1375 (Fed. Cir. 2014).
485. 38 U.S.C. § 7266(a) (2012).
486. *Checo*, 748 F.3d at 1375.
487. *Id.*

received mail since 2009 because financial hardship left her homeless and residing in shelters and temporary housing.[488]

The matter was referred to a panel of the Veterans Court to determine, when a claimant demonstrates extraordinary circumstances, "(1) during what portion of the time to file a Notice of Appeal the appellant is required to demonstrate due diligence; and (2) if due diligence is shown, what portion of the time to file a Notice of Appeal is tolled"?[489]

The Veterans Court presumed that homelessness constituted an extraordinary circumstance in this case, and that Ms. Checo's homelessness was a circumstance beyond her control.[490] However, it concluded she had not explained how her homelessness directly caused her failure to file a timely NOA, nor had she demonstrated—or even alleged—diligence during any part of the period between when the Board issued its decision and when she filed her late NOA.[491] Accordingly, the Veterans Court dismissed the claim without evaluating the questions for which the panel had been formed.[492]

On appeal to the Federal Circuit, the veteran raised two arguments. First, she asserted that the Veterans Court's practice of raising timeliness issues sua sponte deprived the government of the opportunity to waive the right to challenge the time limit on the appeal period.[493] She supported this argument by (1) noting that the 120-day filing limit is a non-jurisdictional time limit and should, therefore, be waivable; (2) Congress could have expressly written that § 7266(a) was non-waivable but did not do so; (3) only the parties should "present issues" at the adversarial level of the Veterans Court, as opposed to the lower levels of adjudication within the pro-claimant VA system; and (4) the time for filing an appeal for judicial review of a Social Security decision is waivable and the two systems are analogous and should be treated similarly in this respect.[494]

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488. *Id.* at 1375–76.

489. Checo v. Shinseki, 26 Vet. App. 130, 131 (2013), *rev'd in part and vacated in part*, 748 F.3d 1373 (Fed. Cir. 2014).

490. *Id.* at 133.

491. *Id.* at 134–35.

492. *Id.* at 131.

493. *Checo*, 748 F.3d at 1376–77.

494. *Id.*; *see also* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1204–05 (2011); Eberhart v. United States, 546 U.S. 12, 19–21 (2005) ("[C]laim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them."); Bobbitt v. Principi, 17 Vet. App. 547, 552 (2004) ("[F]iling an appeal to this Court is not an action within the non-adversarial, manifestly pro-claimant veterans' benefits system. Rather, [it] . . . is the first step in

The Federal Circuit rejected these arguments, noting that there is no case law affirmatively prohibiting the Veterans Court from raising a non-jurisdictional limitation sua sponte and that the Supreme Court has permitted district courts to raise non-jurisdictional statute of limitations sua sponte.[495] The court also concluded that the Veterans Court acted within the "broad discretion" Congress had granted it when it required a claimant to file a NOA within a certain time.[496]

Ms. Checo also asserted that the Veterans Court erred in ruling that she was not entitled to equitable tolling.[497] The Federal Circuit restated the three-factor test established in *McCreary* and found, like the Veterans Court, that the veteran's homelessness during part of the appeal period satisfied the "extraordinary circumstance" element.[498] The court turned to the second element, stating:

> We begin our inquiry by considering for which period Ms. Checo needed to show such due diligence—during the entire 120-day appeal, during the period of extraordinary circumstances (i.e., ending on October 6, 2011[,] when she received a copy of the decision), during the period between the end of the extraordinary circumstances and the date of filing the NOA (i.e., between October 6, 2011[,] and December 7, 2011), or during some other period.[499]

The court relied on the Second Circuit's approach in *Harper v. Ercole*,[500] concluding that "due diligence must only be shown during the requested tolling period, which can occur at any time during the statutory period."[501] It explained that "a court may suspend the statute of limitations for the period of extraordinary circumstances and determine timeliness by reference to the total untolled period without requiring a further showing of diligence."[502]

The court adopted this approach, which it described as the "stop-clock" method because the 120-day appeal period stops during extraordinary circumstances and starts ticking again when the period

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an adversarial process challenging the Secretary's decision on benefits." (internal quotation marks and citations omitted)).

495. *Checo*, 748 F.3d at 1377.

496. *Id.*

497. *Id.* at 1378.

498. *Id.*

499. *Id.* at 1379 (footnotes omitted).

500. 648 F.3d 132 (2d Cir. 2011).

501. *Checo*, 748 F.3d at 1379. *Harper* held that tolling requirements must be satisfied throughout the period to be tolled. *Harper*, 648 F.3d at 136.

502. *Checo*, 748 F.3d at 1379 (quoting *Harper*, 648 F.3d at 139).

concludes.[503] This use of a "stop-clock approach" overruled the Veterans Court's previous application of *McCreary* that required a claimant who experienced extraordinary circumstances to show due diligence during the entire appeal period.[504] The Federal Circuit remanded the case to the Veterans Court to clarify an appropriate due diligence standard and apply it to the veteran's claim.[505]

As to the *McCreary* element of direct causation, the Federal Circuit concluded that the Veterans Court used the wrong legal standard because, under the stop-clock approach, Ms. Checo only needed to demonstrate that her homelessness caused her inability to file her NOA during the period she sought to be tolled, i.e., the 91 days of the appeal period during which she was homeless and unable to receive mail.[506] The court stated that "although Ms. Checo failed to explain why her homelessness caused a delay between October 6, 2011," when she began to receive mail again, "and the end of the appeal period, she did indeed explain why her homelessness caused a delay during the 91-day period."[507]

Judge Mayer agreed with the majority that the Veterans Court should have used the stop-clock approach and accepted Ms. Checo's NOA as timely filed, but dissented from the majority's conclusion that the Veterans Court had the authority to routinely raise, sua sponte, the matter of whether a claimant filed a timely NOA.[508] Judge Mayer asserted that the Supreme Court's decision in *Henderson ex rel. Henderson v. Shinseki*,[509] meant that the Veterans Court's practice of screening all NOAs for timeliness and requesting justification for late NOAs led to the Veterans Court raising an affirmative defense on behalf of one of the parties, in a serious departure from the governing principles of the adversary system.[510] Judge Mayer noted that the Veterans Court justified this practice by asserting that allowing VA to waive the 120-day time limit would "cede some control

503. *Id.*

504. *See id.* at 1379–80 (adopting the stop-clock approach with support from both parties).

505. *Id.* at 1381.

506. *Id.*

507. *Id.*

508. *Id.* at 1382 (Mayer, J., dissenting in part).

509. 131 S. Ct. 1197 (2011).

510. *Checo*, 748 F.3d at 1383; *cf.* Wood v. Milyard, 132 S. Ct 1826, 1833–34 (2012) (affirming that only in exceptional circumstances may an appellate court bring up procedural arguments "overlooked by the State in the District Court"); *Henderson*, 131 S. Ct. at 1203, 1206 (clarifying that the 120-day rule was an "important procedural rule" but not a jurisdictional prerequisite).

of the court's docket to the Secretary and permit arbitrary selection of which veteran's late filing he finds worthy of waiver, a process devoid of consistency, procedural regularity, and effective judicial review."[511] Judge Mayer described this rationale as "far-fetched" and factually unsupported because the government will usually have every incentive to timely raise a statute of limitations defense to resolve the case quickly, rather than making arbitrary decisions.[512]

b. Evidence supporting reconsideration of equitable tolling

Under Rule 35 of the Veterans Court's Rules of Practice and Procedure, an unsuccessful appellant can submit a motion requesting that the Veterans Court reconsider its decision.[513] This Rule specifies that such a motion should "state the points of law or fact that the party believes the Court has overlooked or misunderstood."[514]

The Federal Circuit addressed this rule in *Dixon v. Shinseki*,[515] where it found that equitable tolling was not precluded merely because the veteran filed an untimely notice of appeal.[516] The court held that the Veterans Court abused its discretion when it denied the veteran's motion for an extension of the 120-day deadline to file his appeal and concluded that enough unusual circumstances existed to avoid the bar on additional evidence to support his motion for reconsideration.[517]

In *Dixon*, a VA RO denied Mr. Dixon's claim for disability benefits and the Board affirmed that decision.[518] In May 2008, Mr. Dixon filed a pro se NOA to the Veterans Court, but he submitted it 60 days after that court's 120-day filing deadline had passed.[519] In August 2008, the Veterans Court dismissed the appeal, concluding that it did not have jurisdiction to consider the appeal because it was untimely filed.[520]

Three years later, the Supreme Court in *Henderson ex rel. Henderson v. Shinseki* held that the 120-day deadline was not a jurisdictional requirement, but a "claim-processing rule[]" subject to equitable

511. *Checo*, 748 F.3d at 1383 (quoting Bove v. Shinseki, 25 Vet. App. 136, 141 (2011) (per curiam)).
512. *Id.* at 1384.
513. U.S. VET. APP. R. 35.
514. U.S. VET. APP. R. 35(e)(1).
515. 741 F.3d 1367 (Fed. Cir. 2014).
516. *Id.* at 1375.
517. *Id.* at 1378–79.
518. *Id.* at 1370.
519. *Id.* (citing 38 U.S.C. § 7266(a) (2012)).
520. *Id.* at 1370–71.

tolling in appropriate circumstances.[521] Following this decision, the Veterans Court issued an order applicable to veterans like Mr. Dixon, whose appeals had been dismissed as untimely, allowing them to file motions to recall the dismissal of their appeals if equitable tolling applied.[522]

Mr. Dixon filed a pro se motion asserting that equitable tolling should be applied in his case because his disabilities, including PTSD and gastrointestinal and respiratory conditions, prevented him from timely filing his NOA.[523] He then filed a supplemental motion explaining that, during the appeal period, he believed he was dying and was experiencing numerous panic attacks.[524] He also submitted a letter from the VA psychiatrist who had been treating him since 2001 and who stated that the veteran had been "unable to attend [to] or focus on the appeal process" during the time he needed to submit his NOA.[525]

The Veterans Court acknowledged the VA psychiatrist's opinion but found that the veteran had not established that his "failure to timely file his [NOA] was 'the direct result' of his illnesses."[526] Accordingly, it denied the motion for equitable tolling.[527]

At this point, Mr. Dixon retained attorneys who "promptly" submitted a successful motion to extend the time to file a motion for reconsideration of the denial of equitable tolling.[528] The attorneys requested a copy of the veteran's claims file from VA, which refused to send a copy of the file but agreed to make it available for review at VA's RO in Denver, although not until three days before the motion for reconsideration was due.[529] On that date, a legal assistant working for the attorneys reviewed the claims file, although she alleged that she was not provided with enough time to thoroughly review the file

521. Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011).

522. Bove v. Shinseki, 25 Vet. App. 136, 140, 145–46 (2011) (per curiam).

523. *See Dixon*, 741 F.3d at 1371.

524. *Id.* (describing the veteran's panic attacks as stemming from his worry of his enlarged lymph nodes, which proved to be cancer soon after).

525. *Id.* (alteration in original) (acknowledging the veteran had PTSD while dealing with the appeals process).

526. Dixon v. Shinseki, No. 08-1475, 2012 WL 3291861, at *1 (Vet. App. Aug. 14, 2012) (quoting Barrett v. Principi, 363 F.3d 1316, 1321 (Fed. Cir. 2004)), *rev'd*, 741 F.3d 1367 (Fed. Cir. 2014).

527. *Id.* at *2.

528. *Dixon*, 741 F.3d at 1371.

529. *Id.* at 1371–72.

and that VA would not provide her with copies in time to submit Mr. Dixon's motion.[530]

The veteran's attorneys also attempted to obtain an additional statement from the VA psychiatrist, clarifying his previous letter in support of equitable tolling.[531] However, VA contacted the veteran's attorney and told him that VA regulations did not permit the psychiatrist to sign the statement that had been prepared.[532]

The day before the motion for reconsideration was due at the Veterans Court, the veteran's attorneys requested a second extension of time.[533] They argued that a second extension was justified based on "extraordinary circumstances," explaining that VA had refused to timely provide documents and had prohibited the veteran's doctor from providing evidence supporting the motion for reconsideration.[534]

The Veterans Court denied the motion on the basis that the veteran did not have the right to submit documents from his claims file or a declaration from his psychiatrist supporting his motion for reconsideration.[535] The court relied on Rule 35(e)(1) of its Rules of Practice and Procedure, which stated that "a motion for reconsideration . . . must show that the Court has overlooked or misunderstood a point of law or fact."[536] The court explained that a motion for reconsideration "must be based on the record at the time of the decision."[537] Because the Veterans Court concluded that the veteran could not "augment[] the record," it determined that VA's actions preventing him from doing so did not justify a second extension of time.[538]

Mr. Dixon appealed to the Federal Circuit, arguing that the Veterans Court abused its discretion when it denied a second extension of time because VA had "actively obstructed" his efforts to

530. *Id.* at 1372 (explaining that the legal assistant also alleged she was monitored while inspecting the claims file).

531. *Id.* (offering his opinion that the veteran's illness directly resulted in his inability to file a timely appeal).

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.* at 1372–73.

536. *Id.* at 1372 (citing a non-precedential, single judge memorandum decision handed down on October 10, 2012); *see also* U.S. VET. APP. R. 35(e)(1) ("[A] motion for . . . reconsideration shall state the points of law or fact that the party believes the Court has overlooked or misunderstood.").

537. *Dixon*, 741 F.3d at 1373.

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

obtain supporting documents in his claims file.[539] The Federal Circuit agreed, citing its decision in *Barrett v. Nicholson*,[540] which held that VA had an affirmative obligation "to come forward with" relevant evidence "and to develop additional facts uniquely within [the agency's] competence" regarding a veteran's entitlement to equitable tolling.[541] The *Barrett* Court had explained that this was because VA usually has "superior access to a veteran's claim[s] file and the facts bearing on jurisdiction."[542]

The Federal Circuit concluded that, despite its broad discretion to interpret and apply its own rules, the Veterans Court had "no reasonable justification" for denying a second extension of time.[543] The Federal Circuit noted that VA had a history of obstructing access when veterans attempted to obtain VA medical records to support their disability benefits claims and concluded that denying an extension in such circumstances "serves only to reward delay and obstruction by [VA]."[544]

The Federal Circuit also held that "the Veterans Court erred to the extent that it concluded that Rule 35(e) imposes an absolute prohibition on the submission of clarifying evidence in support of reconsideration of an equitable tolling decision."[545] The court found that such a reading of the rule failed to follow the Veterans Court's own case law, which expressly permitted a veteran to submit clarifying evidence when necessary for "a full and fair consideration of . . . [an] equitable tolling request" which required analysis of all the relevant facts.[546] The court noted that the Supreme Court's *Henderson* decision had emphasized the unique, pro-claimant nature of the veterans benefits adjudication system, as compared to "ordinary civil ligation," and found that treating the 120-day filing deadline as jurisdiction would "clash sharply" with its Congressionally-designed solicitude.[547]

Therefore, because, in the equitable tolling context, the Veterans Court is required to make factual determinations and because the

539. *Id.*
540. 466 F.3d 1038 (Fed. Cir. 2006).
541. *Dixon*, 741 F.3d at 1373 (quoting *Barrett*, 466 F.3d at 1042).
542. *Barrett*, 466 F.3d at 1043.
543. *Dixon*, 741 F.3d at 1374.
544. *Id.* at 1373 (alteration in original) (internal quotation marks omitted).
545. *Id.* at 1375.
546. *Id.* (citing McCreary v. Nicholson, 20 Vet. App. 86, 91 (2006)).
547. *Id.* at 1376; *see also* Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011) (considering the contradictory nature a strict reading would have on beneficial veteran policies).

period relevant to equitable tolling occurs after the Board has issued the decision on appeal, the Federal Circuit held that "in certain circumstances, the introduction of clarifying evidence on [a] motion for reconsideration may be necessary to permit the [Veterans C]ourt to fully evaluate the factual predicate of a veteran's equitable tolling claim."[548]

Nonetheless, the Federal Circuit cautioned that new evidence should be introduced "only in limited circumstances."[549] The court stressed that "[n]othing in this opinion should be interpreted as departing—in cases outside of the equitable tolling context—from the[] long-established and salutary precepts" that motions for reconsideration should not permit litigants the opportunity for a "second bite at the apple" and a chance to submit new evidence or novel arguments.[550] However, the court concluded that Mr. Dixon's case did, in fact, present the unusual circumstances in which the submission of clarifying evidence was appropriate, and it reversed and remanded the Veterans Court decision.[551]

2. Effect of revising a prior decision on benefits for surviving spouses

A disabled veteran's surviving spouse may be eligible for accrued benefits that are "due and unpaid" to the veteran "under existing ratings or decisions."[552] In addition, a final decision by a RO or the Board may be collaterally attacked—even decades later—if a claimant establishes that there was CUE in the original decision.[553] The effect is retroactive: "[f]or the purpose of authorizing benefits," a decision revised on the basis of CUE "has the same effect as if the decision had been made on the date of the prior decision."[554] In *Rusick v. Gibson*,[555] the Federal Circuit held that the Veterans Court correctly interpreted the CUE statute and accrued benefits statute to affirm VA's denial of accrued benefits to the veteran's spouse.[556]

In *Rusick*, the veteran had service-connected conditions that were evaluated as 60 percent disabling from 1983 and 100 percent

548. *Dixon*, 741 F.3d at 1377 (citing Barrett v. Nicholson, 466 F.3d 1038, 1046 (Fed. Cir. 2006)).
549. *Id.* at 1378.
550. *Id.*
551. *See id.* at 1378–79.
552. 38 U.S.C. § 5121(a) (2012).
553. *Id.* § 5109A (initiating review of the original decision may be brought by the claimant or by the Secretary's own motion).
554. *Id.* § 5109A(b).
555. 760 F.3d 1342 (Fed. Cir. 2014).
556. *Id.* at 1347.

disabling from 1996 until his death in April 2000.[557] Shortly after his death, Mr. Rusick's surviving spouse filed a claim for survivor benefits and for accrued benefits, asserting that the 1983 rating decision was the product of CUE and should be revised.[558] She argued that the evidence in 1983 showed that her husband had been unemployable and, therefore, should have been evaluated as 100 percent disabled starting in 1983.[559] The Board agreed and determined that, as a result, Mrs. Rusick was eligible to receive dependency and indemnity compensation ("DIC") because her husband had been evaluated as totally disabled for 10 years or more immediately before his death, as required by the governing statute.[560]

The RO implemented this decision and awarded DIC, but found that Mrs. Rusick was not eligible for accrued benefits.[561] Mrs. Rusick appealed this decision to the Board, which held that the finding of CUE in the 1983 decision only had the "limited effect" of making Mrs. Rusick eligible for DIC.[562] If Mr. Rusick had filed a motion asserting CUE during his lifetime, the Board's finding of CUE in the 1983 decision would have made Mrs. Rusick eligible for accrued benefits.[563] However, the Board concluded that a surviving spouse's assertion of CUE after the veteran's death did not have the "further effect" of making the surviving spouse eligible for accrued benefits.[564]

The Veterans Court affirmed the Board's interpretation, rejecting Mrs. Rusick's argument that the retroactivity provision of the CUE

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557. *Id.* at 1343 (providing background that the 60 percent combined disabling rating was based on a 30 percent service-connected rating for the veteran's anxiety disorder and 40 percent rating for service-connected hearing loss).

558. *Id.* at 1343–44. Mrs. Rusick originally asserted entitlement to dependency and indemnity compensation ("DIC") and accrued benefits in May 2000, shortly after her veteran spouse died, but VA denied both claims and Mrs. Rusick did not appeal. *Id.* Six years later, in September 2006, she filed another claim for DIC and accrued benefits, this time asserting that the 1983 rating decision should be revised because it was the product of CUE. *Id.* at 1344.

559. *Id.* at 1344.

560. *Id.* (citing 38 U.S.C. § 1318(b) (2012)).

561. *Id.* If Mrs. Rusick were eligible for accrued benefits as a result of CUE in the 1983 rating decision, she would have been entitled to receive the increased amount of disability compensation that Mr. Rusick would have been entitled to receive between 1983 and 1996 if he had been originally evaluated as 100 percent disabled in 1983. *See id.*

562. *Id.*

563. *Id.*

564. *Id.*

statute converted the corrected 1983 rating decision into an "existing . . . decision" for purposes of the accrued benefits statute.[565]

On appeal, the Federal Circuit rejected Mrs. Rusick's argument concerning the effect of the CUE statute's retroactivity provision on the 1983 rating decision.[566] The court relied on its decision in *Jones v. West*,[567] which held that an accrued benefits claim submitted by a surviving spouse was "derivative" of the veteran's claim and found that the phrase "existing rating or decision" should be read narrowly.[568]

The court concluded it was also bound by its decision in *Haines v. West*,[569] which drew a clear distinction between § 5121, governing surviving spouses' rights, and § 5109A, providing a procedure for veterans to seek benefits that had been wrongly withheld.[570] *Haines* held that the CUE statute could not provide standing for a surviving spouse to file his or her own motion alleging CUE when the veteran had not filed such a motion during his or her lifetime.[571] Accordingly, the Federal Circuit held that the CUE statute's retroactivity provision did not apply to CUE determinations made pursuant to remedial schemes such as 38 C.F.R. § 3.22, which is designed to provide benefits to surviving spouses rather than directly to veterans.[572]

3. Eligibility for benefits as a surviving spouse

As noted earlier, when a veteran dies, his or her surviving spouse may be eligible for DIC.[573] However, until 2003, an individual who remarried was no longer considered a "surviving spouse" under the statute and therefore no longer eligible for DIC benefits.[574] In 2003, Congress enacted the Veterans Benefits Act of 2003, which amended the statute to authorize DIC benefits for surviving spouses who had

565. *Id.* (internal quotation marks omitted) (rationalizing its decision based on 38 U.S.C. § 5121 (the accrued benefits statute) and 38 U.S.C. § 5109A (the CUE statute)).

566. *Id.* at 1345–46.

567. 136 F.3d 1296 (Fed. Cir. 1998).

568. *See id.* at 1300 (citing Zevalkink v. Brown, 102 F.3d 1236, 1241 (Fed. Cir. 1996)); *see also Rusick*, 760 F.3d at 1345–46 (relying on *Jones* to preclude Mrs. Rusick's claim).

569. 154 F.3d 1298 (Fed. Cir. 1998).

570. *See Rusick*, 760 F.3d at 1345–46 (citing *Haines*, 154 F.3d at 1301–02).

571. *See Haines*, 154 F.3d at 1301 (basing the holding on the fact that the surviving spouse is not the disability benefits claimant).

572. *See Rusick*, 760 F.3d at 1346.

573. *See* 38 U.S.C. §§ 1310–1318 (2012) (containing the DIC subchapter).

574. *See* 38 U.S.C. § 103(d) (2000).

remarried after age 57.[575] The new version of the statute also provided that a surviving spouse who had remarried after age 57 *before* the law was amended could be eligible for DIC benefits, but only if that person applied to VA within a year after the statute was enacted.[576] This section of the Act essentially created a one-year window for surviving spouses over age 57 who had remarried before the law changed.[577]

Norma Carroll fell into this category.[578] She married veteran Glenn Dodson in 1949, and the couple remained married until Mr. Dodson died in 1992 from cardiac arrhythmia due to ALS.[579] At the time of his death, Mr. Dodson was not service connected for ALS.[580] After his death, Ms. Carroll was eligible to apply for DIC and to argue that he had died of service-related causes.[581] However, she did not submit such an application and became ineligible to apply for DIC when she remarried in 1994, at age 64.[582]

When the law changed in 2003, Ms. Carroll again became eligible to apply for DIC benefits until after the one-year window closed on December 16, 2004.[583] If she had applied for DIC at that time, she would still have needed to prove that her husband's death was

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575. *See* 38 U.S.C. § 103(d)(2)(B) (2012). Section 101(a) of the Act, which was codified at 38 U.S.C. § 103(d)(2)(B), provided that "[t]he remarriage after age 57 of the surviving spouse of a veteran shall not bar the furnishing of [certain benefits, including DIC] to such person as the surviving spouse of the veteran." *Id.* The House Committee Report accompanying the Act expressed concern that the existing statute discouraged older spouses from remarrying; the amendment sought to remove that disincentive. *See* H.R. REP. NO. 108-211, at 12 (2003), *reprinted in* 2004 U.S.C.C.A.N. 2312 (encompassing a threshold age of 55 years old, not 57).

576. Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 101(e), 117 Stat. 2651, 2653. The Veterans Court decision noted: "Although portions of the Act were codified in the United States Code, section 101(e) was not." Carroll v. Shinseki, No. 12-2585, 2013 WL 3751775, at *1 n.1 (Vet. App. July 18, 2013) (citation omitted) (non-precedential single judge memorandum decision), *aff'd sub nom.* Carrol v. McDonald, 767 F.3d 1368 (Fed. Cir. 2014). The court continued, "[S]ection 101(e) is nonetheless controlling, as the statutes at large are legal evidence of the laws." *Id.* (citing U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993)).

577. *Carroll*, 2013 WL 3751775, at *1–2.

578. Carroll v. McDonald, 767 F.3d 1368, 1369 (Fed. Cir. 2014).

579. *Id.*

580. *See id.* at 1370; *Carroll*, 2013 WL 3751775, at *2.

581. *Carroll*, 767 F.3d at 1369.

582. *Id.* (stating that remarrying removed her from the category of "surviving spouse" under 38 U.S.C. § 103).

583. *Id.* at 1370; *see supra* note 576 (referencing controlling uncodified law found in Public Law No. 108-183, § 101(e)(2003)).

connected to his military service by establishing the second and third prongs of the test: that her husband had suffered an injury or disease during service, and that it was causally linked to the disability that caused his death—in this case, ALS.[584]

In 2008, based on medical studies reporting an association between active military service and ALS, VA promulgated a regulation establishing presumptive service connection for ALS for any veteran who developed the disease at any time after service.[585] The following year, Ms. Carroll applied for DIC benefits as Mr. Dodson's surviving spouse.[586] The Board denied the claim, finding that VA could not recognize Ms. Carroll as a "surviving spouse" for the purpose of DIC benefits because although she had remarried before 2003 after attaining the age of 57, she had not applied for DIC benefits before December 16, 2004.[587] As a result, the Board concluded that Ms. Carroll did not meet the requirements established by the Veterans Benefits Act of 2003 and denied the claim.[588]

On appeal to the Veterans Court, Ms. Carroll argued that section 101(e) did not apply to her because that section only applied to surviving spouses "who would have been eligible for DIC in 2003 but for the fact that they remarried."[589] She asserted that section 101(e) was inapplicable in her case because she did not become "eligible" for benefits until 2008, when ALS became a presumptively service-connected condition.[590]

The Veterans Court disagreed and affirmed the Board,[591] relying on the Federal Circuit's holding in *Frederick v. Shinseki*.[592] In that decision, the Federal Circuit explained that section 101(e)'s one-year window applied to two categories of surviving spouses who remarried after age 57.[593] The first category comprised of those who—like the

584. *See* 38 C.F.R. § 4.124a (2004) (containing rating tables of illnesses). Prior to 2008, ALS could be a service-connected condition, although it was not presumptively service-connected. *See Carroll*, 767 F.3d at 1370.

585. 38 C.F.R. § 3.318 (2014); *see* Presumption of Service Connection for Amyotrophic Lateral Sclerosis, 73 Fed. Reg. 54,691, 54,691, 54,693 (Sept. 23, 2008) (to be codified at 38 C.F.R. pt. 3).

586. *Carroll*, 767 F.3d at 1370.

587. *Id.*

588. *Id.*

589. Carroll v. Shinseki, No. 12-2585, 2013 WL 3751775, at *2 (Vet. App. July 18, 2013), *aff'd sub nom.* Carrol v. McDonald, 767 F.3d 1368 (Fed. Cir. 2014).

590. *Id.*; *see also Carroll*, 767 F.3d at 1370.

591. *Carroll*, 2013 WL 3751775, at *2–3.

592. 684 F.3d 1263 (Fed. Cir. 2012).

593. *Id.* at 1266.

widow in *Frederick*—"previously applied for and received DIC benefits, and whose remarriage before the effective date of the Act destroyed their eligibility for DIC benefits."[594] The second category included those surviving spouses who—like Ms. Carroll—had never applied for DIC benefits after their veteran spouse died, but who lost eligibility for DIC benefits by remarrying before the effective date of the Act.[595] In *Frederick*, the Federal Circuit held that both categories of surviving spouses were required to apply for DIC benefits within the one-year window created by section 101(e).[596]

The Veterans Court observed that Ms. Carroll appeared to be "confus[ing] the concept of *eligibility [to apply] for* a benefit with that of *entitlement to* a benefit."[597] The Veterans Court explained that "[a]lthough [Ms. Carroll] is correct that she could not make use of the ALS presumption to establish *entitlement* to DIC benefits prior to September 23, 2008, she has not demonstrated that she was *ineligible* to submit an application for DIC benefits prior to that date."[598] The court further noted that Ms. Carroll could have applied for benefits on the basis of direct service connection of her veteran husband's death, which could have been granted "if the evidence supported such an award."[599] Accordingly, the court affirmed the Board's denial.[600]

On appeal to the Federal Circuit, Ms. Carroll reiterated her argument that she was not "'eligible for benefits' until 2008," after VA relaxed the evidentiary burden required to establish service connection for ALS.[601] The Federal Circuit agreed with the Veterans Court that Ms. Carroll's interpretation of the statute equated eligibility for benefits with entitlement to benefits.[602] The court noted that although some sections of Title 38 appear to use the words "eligibility" and "entitlement" interchangeably, there are other sections that clearly make a distinction between the two concepts.[603] Thus, the court was not persuaded that the two words were used interchangeably throughout all of Title 38.[604]

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594. *Id.*
595. *Id.*
596. *Id.* at 1273; *see* 38 C.F.R. § 3.55(a)(10)(ii) (2014) (implementing section 101(e)).
597. Carroll v. Shinseki, No. 12-2585, 2013, WL 3751775, at *2 (Vet. App. July 18, 2013), *aff'd sub nom.* Carrol v. McDonald, 767 F.3d 1368 (Fed. Cir. 2014).
598. *Id.*
599. *Id.*
600. *Id.* at *3.
601. Carroll v. McDonald, 767 F.3d 1368, 1371 (Fed. Cir. 2014).
602. *Id.*
603. *Id.* at 1371–72.
604. *Id.*

Furthermore, the Federal Circuit observed that section 103, the part of Title 38 covering marital status and its effect on DIC benefits—and the section that was amended in 2003—uses the two terms differently.[605] Accordingly, the court held that "[s]ection 101(e) . . . creat[ed] temporary eligibility for the class of surviving spouses who had previously been barred from seeking benefits due to remarriage."[606] The court concluded that Ms. Carroll was a member of that class and, therefore, her eligibility for DIC benefits ended on December 16, 2004, when the one-year filing window of section 101(e) closed.[607] Accordingly, it affirmed the Veterans Court decision.[608]

4. Ability to file multiple CUE motions attacking the same RO decision

In *Larson v. Shinseki*,[609] the Federal Circuit held that the Veterans Court erred when it concluded that Mr. Larson, a Vietnam War veteran, was only able to file one motion alleging CUE at the RO.[610] A final decision by a RO or the Board may be collaterally attacked, even decades later, if the appellant establishes there was CUE in the decision.[611] To establish CUE, a claimant must first demonstrate either that (1) "the correct facts, as they were known at the time, were not before the adjudicator," or (2) "the statutory or regulatory provisions extant at the time were incorrectly applied."[612] In such a case, the claimant must provide "some degree of specificity as to what the alleged error is and, unless it is the kind of error . . . that, if true, would be CUE on its face, persuasive reasons must be given as to why the result would have been *manifestly* different but for the alleged error."[613]

Mr. Larson was granted disability benefits in 1969 based on a gunshot wound in service that led to a 40% combined disability

605. *Id.* at 1372.
606. *Id.*
607. *Id.*
608. *Id.*
609. 744 F.3d 1317 (Fed. Cir. 2014).
610. *Id.* at 1319.
611. *See* Pirkl v. Shinseki, 718 F.3d 1379, 1384 (Fed. Cir. 2013) ("[A] rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of CUE has the same effect as if the decision had been made on the date of the prior decision." (quoting 38 U.S.C. § 5109A(b) (2012))); *see also* Disabled Am. Veterans v. Gober, 234 F.3d 682, 696–98 (Fed. Cir. 2000) (stating that a final decision by an RO may be attacked collaterally by a claim of CUE).
612. Willsey v. Peake, 535 F.3d 1368, 1371 (Fed. Cir. 2008) (citing Russell v. Principi, 3 Vet. App. 310, 313–14 (1992) (en banc)).
613. Fugo v. Brown, 6 Vet. App. 40, 44 (1993).

rating.[614] Almost 40 years later, in 2007, he submitted a motion to revise the 1969 decision on the basis that it contained CUE.[615] Specifically, he challenged the adjudicator's application of the diagnostic codes in effect when the case was decided.[616] The RO denied the motion, and Mr. Larson appealed to the Board.[617] After identifying two separate allegations of CUE in the appeal, the Board affirmed the RO, concluding that "the [v]eteran has not demonstrated that the law in effect during that time was incorrectly applied *or that the correct facts, as they were known at the time, were not before the adjudicators.*"[618]

Mr. Larson appealed to the Veterans Court, arguing that he had not asserted CUE based on the correct-facts prong of the test, and that the Board's use of this phrase in its conclusion would preclude him from being able to allege that error in the future.[619] He submitted a motion to the Veterans Court requesting that it modify the Board's decision by deleting the phrase about "correct facts."[620] The court dismissed the motion as moot and affirmed the entire Board decision, concluding, based on *Hillyard v. Shinseki*,[621] that the veteran had exhausted his one opportunity to raise any and all allegations of CUE as to that matter.[622]

On appeal, the Federal Circuit reversed the Veterans Court's dismissal of the motion to modify the Board decision.[623] The court noted that *Hillyard* interpreted the regulation that limits the number of times a claimant may challenge a *Board* decision based on an allegation of CUE.[624] However, a different regulation permits a claimant to challenge an *RO* decision based on an allegation of CUE, and the court's previous cases established that a new allegation of CUE in an RO decision could be raised "at any time."[625] The Federal

614. *Larson*, 744 F.3d at 1318.
615. *Id.*
616. *Id.*
617. *Id.*
618. *Id.* (emphasis added).
619. *Id.*
620. *Id.*
621. 24 Vet. App. 343 (2011), *aff'd*, 695 F.3d 1257 (Fed. Cir. 2012).
622. *Larson*, 744 F.3d at 1318. *Hillyard* held that veterans could not seek revision of a claim based on CUE since there was no CUE in the decision and decisions cannot be endlessly reviewed. *Hillyard*, 24 Vet. App. at 354.
623. *Larson*, 744 F.3d at 1319.
624. *Id.*
625. *Id.*; *see* Andrews v. Nicholson, 421 F.3d 1278, 1284 (Fed. Cir. 2005) (holding that when VA fails to liberally read a veteran's claim to raise all possible claims, the matter is corrected through a CUE motion); Andre v. Principi, 301 F.3d 1354, 1362

Circuit concluded that "[b]ecause [the veteran] only challenged the *legal* basis for the [RO]'s 1969 determination, and did not assert that the adjudicators did not have the correct facts before them at the time of the decision, [he] remains free to raise a 'correct facts' CUE claim in the future at the [RO]."[626] Accordingly, it reversed the Veterans Court's denial of the motion to modify the Board decision and remanded the matter so the merits could be considered.[627]

IV. THEMES RAISED BY THE FEDERAL CIRCUIT'S 2014 VETERANS LAW CASES

The Federal Circuit's 2014 veterans law cases mirror a trend of the Supreme Court to question the validity of judicial deference to agency regulatory interpretation.[628] The veterans law cases shed additional light on the issue because the agency at issue is VA.

A. Validity of Auer *Deference*

Courts afford different levels of deference to agency regulations, depending on the circumstance. First, to determine if an agency action warrants deference, the regulation must be ambiguous: if the plain language indicates the meaning clearly, there is no need for judicial interpretation.[629] However, if a court determines that a regulation *is* ambiguous, then "[a]n agency's interpretation of its own regulation is controlling unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[630] This rule, was established by *Bowles v. Seminole Rock & Sand Co.*[631] in 1945,[632] was reiterated in 1997 in *Auer* and has become known as "*Auer* deference."[633]

However, some members of the U.S. Supreme Court have expressed interest in revisiting the validity of *Auer* deference. In

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(Fed. Cir. 2002) (ruling that a veteran may present a new allegation that the RO made a clear and unmistakable error at any time in the proceedings); 38 C.F.R. § 3.105(a) (2014) (stating previous determinations are final and binding unless there is proof of CUE).

626. *Larson*, 744 F.3d at 1319.

627. *Id.*

628. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part); Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., dissenting).

629. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

630. Thun v. Shinseki, 572 F.3d 1366, 1369 (Fed. Cir. 2009) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

631. 325 U.S. 410 (1945).

632. *Id.* at 415.

633. *Auer*, 519 U.S. at 461.

2011, Justice Scalia wrote a concurrence in *Talk America, Inc. v. Michigan Bell Telephone. Co.*,[634] stating that although he had, in the past, "uncritically accepted" the rule established in *Seminole Rock* and reiterated in *Auer*, he had more recently "become increasingly doubtful of its validity."[635] He observed that, although judicial deference to an agency's interpretation of its regulations seems to be a "natural corollary" of judicial deference to an agency's interpretation of its statutes, there is a fundamental distinction that violates constitutional principles.[636] He continued:

> [W]hen an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.[637]

While another doctrine involving court deference to an agency, "*Chevron* deference"[638] does not motivate Congress to enact vague rules knowing that an agency will have latitude in the future to interpret them as the agency might wish, *Auer* deference does have that effect.[639] Justice Scalia concluded that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."[640] The case at hand, Justice Scalia believed, was a good example of why *Auer* deference is inappropriate, because the agency in question had been intentionally abusing it: "[t]he seeming inappropriateness of *Auer* deference," he asserted, "is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts

634. 131 S. Ct. 2254 (2011).

635. *Id.* at 2266 (Scalia, J., concurring).

636. *Id.*

637. *Id.*

638. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). "*Chevron* deference" denotes a two-part test, first announced in *Chevron*, in which a court will defer to an agency's interpretation of a federal statute if "(1) the statute is ambiguous or does not address the question at issue, and (2) the agency's interpretation of the statute is reasonable." BLACK'S LAW DICTIONARY 270 (9th ed. 2009).

639. *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

640. *Id.*

to expand the statute beyond its text, and has repeatedly sought new means to the same ends."[641]

Two years later, Justice Scalia returned even more emphatically to the *Auer* deference issue in *Decker v. Northwest Environmental Defense Center*.[642] He scathingly noted that the agency in that case—the Environmental Protection Agency (EPA)—had argued for an "unnatural reading" of the regulation at issue despite the fact that "the agency has vividly illustrated that it can write a rule saying precisely what it means—by doing *just that* while these cases were being briefed."[643] He concluded: "Enough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'"[644]

Justice Roberts and Justice Alito, although concurring in the result of the case, joined the dissent in recognizing the concerns about agency deference, stating that "[t]he issue is a basic one going to the heart of administrative law" and that "[q]uestions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis."[645] The two Justices agreed that Justice Scalia's concurring opinion "raise[d] serious questions about the principle" and that "there is some interest in reconsidering those cases," but urged their dissenting colleague to "await a case in which the issue is properly raised and argued."[646] Even more recently, in the March 2015 case of *Perez v. Mortgage Bankers Association*,[647] Justices Alito, Scalia, and Thomas reiterated their objections to the principle of judicial deference to agency interpretations of regulations and indicated their desire to address the issue in the future.[648] Thus, it seems that it will only be a matter of time until the concerns about *Auer* deference are formally considered by the nation's highest court.

641. *Id.*
642. 133 S. Ct. 1326 (2013).
643. *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).
644. *Id.* (alteration in original).
645. *Id.* at 1338–39 (Roberts, C.J., concurring) (joined by Justice Alito).
646. *Id.*
647. 135 S. Ct. 1199 (2015).
648. *Id.* at 1210–11 (Alito, J., concurring in part); *id.* at 1211–13 (Scalia, J., concurring); *id.* at 1213–25 (Thomas, J., concurring).

B. VA is Unique Among Agencies in Ways that Affect Deference

For several reasons, the question of agency deference is more complex in the area of veterans law.[649] First, as noted earlier, VA is unique among agencies—even among agencies that administer government benefits or federal assistance programs—in having both procedural and substantive duties to assist its beneficiaries in processing their claims.[650] In its goals, operations, and procedures, VA is strikingly different from agencies that provide economic or industry regulation, such as the Securities and Exchange Commission, the Federal Reserve Board, or the Environmental Protection Agency.[651]

The question of agency deference is also complicated by the fact that, although veterans benefits are "a creature of statute," neither the Veterans Court nor the Federal Circuit have addressed the inherent tension between the two major interpretive doctrines that are applied to veterans benefits statutes.[652] The doctrine most familiar to general practitioners is that established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[653] which held that a court should defer to an agency's reasonable interpretation of a statute it administers.[654] In the context of the explicitly claimant-friendly veterans benefits system, however, both *Chevron* deference and *Auer* deference are often at odds with the presumption, established in *Gardner*, that interpretive doubt should be resolved in the veteran's favor.[655]

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649. Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with* Chevron, 61 AM. U. L. REV. 59, 61 (2011) (noting that VA law is different than other agencies because there is the unusual presumption in favor of the veteran that gives the claimant an interpretive role).

650. *See supra* notes 36–41 and accompanying text (describing VA's duty and responsibility while assisting claimants). Other benefits-administering agencies include the Social Security Administration (SSA), Employee Benefits Security Administration (EBSA), and U.S. Department of Labor.

651. *See supra* notes 17–25 and accompanying text (describing VAs uniqueness in comparison to other agencies, such as its different evidentiary and procedural standards).

652. *See* James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 398 (2014) [hereinafter Ridgway, *Less Adversarial*] (noting that both of these doctrines state how ambiguity should be resolved in veterans law cases, however, each doctrine usually points to opposite outcomes in cases when the claimant and VA Secretary are in disagreement).

653. 467 U.S. 837 (1984).

654. *Id.* at 865.

655. Brown v. Gardner, 513 U.S. 115, 117–18 (1994).

Another relevant difference is that judicial review of the agency is still comparatively new. In 1930, Congress consolidated the various programs that managed veterans benefits and created the Veterans Administration, which was later renamed the Department of Veterans Affairs.[656] However, VA operated for decades without judicial scrutiny and was not even subject to the requirements of the Administrative Procedures Act.[657] Until the Veterans Court was established in 1988, VA was the only administrative agency that operated virtually free of judicial oversight.[658] The agency had been promulgating regulations since 1930 without needing to be concerned about whether they would withstand judicial review, and the idea of judicial deference to the agency's interpretation was simply not an issue for most of its history.[659]

Finally, the regulations promulgated by the agency have been subject to ongoing criticism.[660] In his concurrence in *Johnson v. Shinseki*,[661] Judge Moorman noted that VA's confusing regulations were the source of many disputes before the court, and that if this problem were solved, then "veterans and their families, the courts, and VA will no longer need to defer to the 'intended meaning' of

656. *See History—VA History*, U.S. DEP'T VETERANS AFFAIRS, http://www.va.gov/about_va/vahistory.asp (last visited Apr. 23, 2015) (informing that the Veterans Administration was formed from the Veterans Bureau in 1930 before being named the Department of Veterans Affairs upon its elevation to a cabinet level position in 1989); *see also History*, U.S. CT. APP. FOR VETERANS CLAIMS, http://www.uscourts.cavc.gov/history.php (last visited Apr. 23, 2015) [hereinafter *CAVC History*] (mentioning that, before the Veterans Court was established, a veteran whose claim was denied by the Department of Veteran Affairs was not afforded any independent review of the Department's decision).

657. *See supra* note 17 and accompanying text (noting that not till 1988, the agency was not subject to judicial scrutiny nor subject to APA requirements because the benefits it administered were viewed as provided under a paternalistic charitable model and not an adversarial model).

658. *See supra* note 17 and accompanying text; *see also CAVC History*, *supra* note 656 (stressing that for decades, the House Committee of Veterans' Affairs had consistently resisted veterans and advocates efforts to alter the VA's position as the single Federal administrative agency not subject to judicial review).

659. *See supra* notes 17–25 and accompanying text (stating that the Veterans Court was given the discretion to decide cases by either non-precedential, single-judge memorandum decisions; precedential three-judge panels, or full-court opinions).

660. William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 ADMIN. L. REV. 407, 408–09 (2009) (describing the regulations as increasingly complex, difficult to understand, and ambiguous, and concluding that these problems have caused uncertainty in the process and resulted in expensive litigation).

661. 26 Vet. App. 237 (2013) (en banc), *rev'd*, 762 F.3d 1362 Fed. Cir. 2014).

regulations that were written and then modified decades before judicial review."[662] In 1991, in one of its earliest published decisions, the Veterans Court criticized VA's regulations as "a confusing tapestry," finding that the relevant regulations were "in some respects duplicative and in others apparently conflicting."[663] Ten years later, in May 2001, VA Secretary Anthony J. Principi instructed the agency to create a plan to review the regulations governing benefits and determine which ones needed to be updated or modified.[664] In October 2001, the VA Claims Processing Task Force recommended that the agency "[f]irst, rewrite and organize the [compensation and pension] [r]egulations in a logical and coherent manner."[665] The Secretary approved the recommendation, which led to the establishment of the VA Regulation Rewrite Project.[666] The Project's goal was to write regulations that people can read, understand, and apply.[667]

Since 2004, VA published numerous Notices of Public Rulemaking in the Federal Register to solicit public comments on the proposed new regulations and, in November 2013, the agency published a second Notice of Public Rulemaking proposing the entire set of rewritten regulations together for a second round of public comment.[668] However, at the same time, VA has stated that it "does not intend to publish a final rule in this rulemaking proceeding in the near future" because it needs to allocate its resources to its "priority goals of processing all disability claims within 125 days and

662. *Id.* at 252 (Moorman, J., concurring).

663. Hatlestad v. Derwinski, 1 Vet. App. 164, 167 (1991).

664. William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207, 208 (2004) (stating that VA intends "to rewrite these regulations in a logical, claimant-focused, and user-friendly format . . . to help veterans, their families, and VA personnel understand regulatory provisions that directly affect compensation and pension determinations").

665. *Id.* (citation omitted).

666. *Id.*

667. *Id.* (expressing that the goal was to rewrite the regulations in a more user-friendly format that would more easily help veterans and their family understand the provisions that directly affects their compensation and pension claims).

668. *See* VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71,042, 71,042 (proposed Nov. 27, 2013) (to be codified at 38 C.F.R. pts. 3, 5) ("The Department of Veterans Affairs (VA) proposes to reorganize and rewrite its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, veterans' representatives, and VA personnel in locating and understanding these regulations."). VA published twenty notices since 2004. *Id.*

increasing rating quality to 98 percent by the end of 2015."[669] The agency noted that, until these goals were met, it would continue to amend its regulations piecemeal, although it might "refer to" or "incorporate" the work of the Regulation Rewrite Project, "in whole or in part[,] depending on the nature of the amendments."[670]

In his concurrence in *Johnson v. Shinseki*, Judge Moorman noted that "VA's regulations generally are confusing, not well organized, and in dire need of reformulation."[671] He explained that these characteristics created the need for judicial interpretation, observing that VA's confusing regulations were the source of many disputes before the court, and that if this problem were solved, then "veterans and their families, the courts, and VA will no longer need to defer to the 'intended meaning' of regulations that were written and then modified decades before judicial review."[672]

C. *The Federal Circuit Raises Concerns about* Auer *Deference*

Judge Moorman's concurrence in *Johnson v. Shinseki*[673] foreshadows Judge O'Malley's concurrence in *Johnson v. McDonald*[674] and directly addresses the issue of *Auer* deference. For this reason, these concurrences are worth examining in some detail.

In his concurrence, Judge Moorman explicitly questioned whether VA should be afforded less judicial deference than other agencies.[675] He first stated that he agreed with the majority because of "the high degree of deference that the [Federal Circuit] . . . traditionally has shown for the Secretary's interpretation of his own regulatory words, even when the interpretation has first been advanced during litigation."[676] Judge Moorman believed that judicial deference to the agency's interpretation, which he described as "plausible, albeit not obvious," was the only reason remand was not required.[677] He continued: "In the absence of the Secretary's recently asserted interpretation, I would apply the simple principle that words have

669. *Id.* at 71,043.
670. *Id.*
671. Johnson v. Shinseki, 26 Vet. App. 237, 252 (2013) (en banc) (Moorman, J., concurring), *rev'd sub nom.* Johnson v. McDonald, 762 F.3d 1362 (Fed. Cir. 2014).
672. *Id.*
673. *Id.* at 237.
674. Johnson v. McDonald, 762 F.3d, 1362 (2014) (O'Malley, J., concurring).
675. *Johnson*, 26 Vet. App. at 248 (Moorman, J., concurring).
676. *Id.*
677. *Id.*

meaning. And, even in the law and regulations implementing the law, plain words should have plain meanings."[678]

Although he concurred in the result, Judge Moorman observed that, in contrast to the deference that courts afford to an agency's interpretation of its own statutes, veterans benefits statutes are also subject to the presumption that they should be read and applied in the veteran's favor[679] and that "[t]he VA disability compensation system is not meant to be . . . a stratagem to deny compensation to a veteran who has a valid claim."[680] Accordingly, he concluded:

> I question whether the judicial precedents for reviewing VA's regulations should always result in the same level of deference afforded to the interpretation of such regulations promulgated by agencies charged with regulating business practices, intellectual property, or international trade. After all, VA serves a purpose unique among Federal agencies, characterized by the legal duty to assist its claimants in perfecting their just claims, supported by legislation requiring that the benefit of the doubt must be given to such claimants, and further undergirded by a uniquely pro-veteran, nonadversarial agency process. Perhaps VA, as an agency whose mission statement is etched in stone at the Lincoln Memorial and was formulated as part of President Lincoln's Second Inaugural Address: "to care for him who shall have borne the battle and for his widow, and his orphan," should, in this case, be afforded a less strict level of judicial deference.[681]

In her concurrence in *Johnson v. McDonald*, Judge O'Malley elaborated upon the concerns about the appropriateness of *Auer* deference in the context of veterans law.[682] She first confirmed that she agreed with her colleagues' analysis and that she only wrote separately to note that, if the regulation at issue had been deemed ambiguous, she believed it would have been appropriate to reconsider whether the court should continue to apply *Auer* deference.[683] She echoed the concerns expressed in the concurrence in *Talk America*, stating that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This

678. *Id.* at 248–49.

679. *Id.* at 251 (citing Brown v. Gardner, 513 U.S. 115, 120 (1994)).

680. Comer v. Peake, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

681. *Johnson*, 26 Vet. App. at 251 (Moorman, J., concurring) (footnote omitted) (citation omitted) (citing Shinseki v. Sanders, 556 U.S. 396, 412 (2009)).

682. Johnson v. McDonald, 762 F.3d 1362, 1366–67 (2014) (O'Malley, J., concurring).

683. *Id.*

frustrates the notice and predictability purposes of rulemaking."[684] She also agreed that the "'beneficial effect'" of the efficiency created by *Auer* deference "cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[685]

However, Judge O'Malley also observed that the appropriateness of judicial deference to an agency's interpretation of its own regulation is more complicated when the agency in question is VA.[686] Because of the conflict between *Chevron* and *Gardner*, "[w]here there is a conflict between an agency's reasonable interpretation of an ambiguous regulation and a more veteran-friendly interpretation, it is unclear which interpretation controls."[687] Accordingly, she concluded that "the validity of *Auer* deference is questionable, both generally and specifically as it relates to veterans' benefit cases."[688]

CONCLUSION

Auer deference is powerful. First, the standard is relatively low: if a regulation is found to be ambiguous, courts will defer to an agency's interpretation of its own regulation as long as that interpretation is not "plainly erroneous or inconsistent with the regulation."[689] This standard remains in effect even when the agency's interpretation was announced without resort to formal steps, as long as the interpretation reflects the agency's fair and considered judgment on the matter.[690] Second, the deference is generous. The Federal Circuit noted in *O'Bryan* that courts "afford 'broad deference' to [an agency's] interpretations [of its regulations], even more so than an agency's construction of a statute."[691]

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684. *Id.* at 1367 (quoting Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)).

685. *Id.* (quoting Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part)).

686. *Id.*

687. *Id.*

688. *Id.* at 1368.

689. Thun v. Shinseki, 572 F.3d 1366, 1369 (2009); *see* O'Bryan v. McDonald, 771 F.3d 1376, 1379 (2014) (emphasizing that deference to an agency's interpretation of its own regulation is permitted when the regulation is ambiguous unless that interpretation is "plainly erroneous or inconsistent with the regulation"); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to a "plainly erroneous or inconsistent with the regulation" standard to determine if the government's interpretation of its own regulation, a salary-basis test, was controlling).

690. *Thun*, 572 F.3d at 1369 (citing *Auer*, 519 U.S. at 462–63).

691. *O'Bryan*, 771 F.3d at 1380 (citing Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005)).

The Veterans Court and the Federal Circuit arrived at the same conclusion in 2014: that *Auer* deference might make even less sense in the context of veterans law than in other areas. As Judge Moorman noted in his concurrence in *Johnson v. Shinseki*, the Supreme Court recently reiterated its concerns about *Auer* deference in *Decker* and *Talk America*, and then used the four-factor test established in *Skidmore v. Swift*[692] to determine what level of deference it would afford to an agency's interpretation of its own regulations.[693] The Supreme Court examined: (1) the "thoroughness evident in [the agency's] consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to control."[694]

Whether and how the Supreme Court chooses to handle *Auer* deference in the upcoming years may prove consequential, especially in the context of veterans law. On one hand, the complexity of the agency's procedures weighs in favor of greater judicial deference by the courts because the agency's expertise should create "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[695] On the other hand, VA's many problems with its regulations and the ongoing criticism of the agency's ability to meet its obligations to the nation's veterans provide an argument for less deference. Given that all levels of the judiciary have expressed interest in addressing this topic, it would not be surprising to see more cases addressing it in 2015.

692. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

693. Johnson v. Shinseki, 26 Vet. App. 237, 251 (2013) (en banc) (Moorman, J., concurring), *rev'd sub nom.* Johnson v. McDonald, 762 F.3d 1362 (Fed. Cir. 2014).

694. *Skidmore*, 323 U.S. at 140.

695. Ridgway, *Less Adversarial*, *supra* note 652, at 396 (quoting *Skidmore*, 323 U.S. at 140). The "expertise" rationale has been a long-standing explanation for why courts afford deference to agency interpretations. *Id.*